SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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NOREX PETROLEUM LIMTED,

Plaintiff,

- *against* -

LEONARD BLAVATNIK, VICTOR VEKSELBERG, SIMON KUKES, ACCESS INDUSTRIES, INC., ALFA GROUP CONSORTIUM, RENOVA, INC., OAO TYUMEN OIL COMPANY, TNK-BP LIMITED, and BP PLC,

Defendants.

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Index No: 650591/11
Motion Date: 7/27/15
Motion Seq. Nos: 013, 014, 015, 016, 017

BRANSTEN, J.

In this action, Plaintiff Norex Petroleum Limited ("Norex") asserts eight causes of action, including tort and quasi-contract claims, against Defendants Leonard Blavatnik, Victor Vekselberg, Simon Kukes, Access Industries, Inc. ("Access"), Alfa Group Consortium ("Alfa"), Renova, Inc. ("Renova"), OAO Tyumen Oil Company ("TNK"), TNK-BP Limited ("TNK-BP"), and BP PLC ("BP"). These claims stem from Defendants' alleged conspiracy to strip Norex of its controlling interest in a Russian oil company named ZAO Yugraneft ("Yugraneft"), which owns a valuable oil field in Western Siberia.

Defendants filed five motions to dismiss, which are consolidated herein for disposition. In motion 013, TNK and TNK-BP seek dismissal based on a lack of personal jurisdiction. In motion 014, Blavatnik, Vekselberg, Kukes, Access, Alfa, Renova, TNK and TNK-BP seek dismissal based on a failure to state a cause of action, forum non

conveniens, collateral estoppel, and statute of limitations grounds. In motion 015, Alfa seeks dismissal for lack of personal jurisdiction and because it not an entity that can be sued. In motion 016, BP seeks dismissal based upon a failure to state a cause of action and statute of limitations grounds. Finally, in motion 017, Kukes seeks dismissal based upon a lack of personal jurisdiction.

Norex opposes all five motions. For the reasons that follow, Defendants' motions are granted and the Amended Complaint is dismissed.

I. Background

Plaintiff contends that Defendants conspired to rob Norex of its controlling interest in a Russian oil company named ZAO Yugraneft ("Yugraneft"). Yugraneft owns an oil field in Western Siberia worth hundreds of millions of dollars.

Defendants allegedly relieved Norex of its controlling interest in Yugraneft by corrupting Russian court proceedings and government officials in an attempt to decrease Norex's ownership interest in and voting rights over Yugraneft (the "Know-How Case"), forging documents, and ultimately sending armed private militiamen carrying AK-47 assault rifles to storm Yugraneft's corporate offices and oil field in June 2001.

A. *The Parties*

Plaintiff Norex is a corporation organized under the laws of Cyprus. Norex maintains a representative office in Calgary, Canada. Its principal and chairman is Alex Rotzang, a Canadian national.

Defendant Leonard Blavatnik is alleged to be a Russian oligarch, among the world's wealthiest individuals with a net worth estimated around $7.5 billion. Blavatnik is a citizen of the United States and maintains a residence in New York County, New York.

Defendant Victor Vekselberg is also alleged to be a Russian oligarch, among the world's wealthiest individuals with a net worth of approximately $6.4 billion. Vekselberg is a resident of the United States and maintains a residence in New York County, New York.

Defendant Simon Kukes is a United States citizen and allegedly a resident of New York. Kukes was the President and Chief Executive Officer of Defendant TNK during the relevant time period.

Defendant Access Industries, Inc. is a company organized under the laws of the State of New York with a principal place of business in New York County, New York. Access was founded by Blavatnik, and is allegedly owned and controlled by him as well.

Defendant Renova, Inc. is organized under the laws of the State of New York with a principal place of business in New York County, New York. Renova is allegedly owned and controlled by its president, Vekselberg.

Defendant Alfa Group Consortium is an unincorporated association of various affiliated companies, formed by several Russian billionaire magnates. Alfa is alleged to regularly transact business in New York, including a variety of investment activities.

Defendant OAO Tyumen Oil Company is a company organized under the laws of the Russian Federation. It is believed to have been formerly known as "TNK" and under that former name was involved in the malfeasance alleged.

Defendant TNK-BP is a company organized under the laws of the British Virgin Islands. TNK-BP is a joint venture in which Defendant BP owns 50%, Defendants Access and Renova own 25%, and Defendant Alfa owns 25%.

BP PLC is a company organized under the laws of England. BP is an energy company which transacts business around the world, including in New York.

B. *The Joint Venture*

In 1991, Norex and nonparty Chernogorneft formed Yugraneft as part of a joint venture to develop an oil field in Western Siberia. Norex alleges that it contributed technology and capital totaling approximately $7 million. Chernogorneft agreed to contribute $800,000 in capital and rights to the oil field. As a result, Norex held a 60% interest in Yugraneft and Chernogorneft held a 40% interest.

According to the Amended Complaint, the venture was almost immediately profitable, paying millions of dollars of dividends by 1992. Notably, in March 1999, it was discovered that Chernogorneft failed to make some or all of its initial capital

contribution, such that Norex's ownership stake increased from 60% to 97.64% of Yugraneft.

C. *The Conspiracy*

In the late 1990s, following the collapse of the USSR, Defendants Blavatnik and Vekselberg allegedly plotted to gain control of various oil interests throughout Russia. In 1998, Defendants Blavatnik and Vekselberg, acting through their companies Access and Renova, and together with Defendant Alfa, allegedly forced nonparty Chernogorneft into bankruptcy, and thereafter assumed control of Chernogorneft's assets, including its interest in Yugraneft.

Norex alleges that Defendants were upset about the dilution of their interest in Yugraneft from 40% to 2.36%. Norex alleges that around this time it was discovered that Yugraneft's oil field had greater reserves than previously estimated.

D. *The Russian Court Action ("Know-How Case")*

On June 25, 2001, three days before a Yugraneft shareholders meeting, Defendants Access, Renova, Blavatnik, Vekselberg, Alfa, and Kukes allegedly caused TNK to file a complaint in a Russian court against Norex. In this complaint, TNK alleged that Norex's initial contribution of "technical 'know-how'" had been overvalued (the "Know-How Case."). TNK sought to have Norex's contribution revalued to reduce Norex's ownership percentage in Yugraneft.

Norex alleges that it was not properly served with process or a copy of the complaint in the Know-How Case. Notwithstanding the lack of service, the Russian court allegedly issued an *ex parte* ruling enjoining Norex from voting the majority of its shares at the upcoming shareholders' meeting and prohibiting Yugraneft from counting these shares at any other meetings that might occur. Norex also alleges that Defendants bribed certain of the Russian court officials involved to obtain this favorable ruling.

E. *The Takeover*

The Yugraneft shareholder meeting took place on June 28, 2001 with two court bailiffs in attendance to enforce the Know-How court's injunction. Norex alleges that because TNK had not yet registered its ownership of Yugraneft shares, it could not vote at that meeting. Norex alleges that it voted the portion of its shares that it was permitted to vote and re-elected Lyudmilla Kondrashina as Yugraneft's Director General.

The next day, according to Norex, TNK sent armed private soldiers to take control of Yugraneft's corporate offices. Following the takeover, Defendants began to allegedly divert funds from Yugraneft. On January 24, 2002, the Russian court entered a default judgment in the Know-How case and reduced Norex's equity interest in Yugraneft to 20%.

In 2003, Norex alleges that BP formed a joint company with TNK called TNK-BP, which assumed control over Yugraneft as one of its myriad oil assets. Since its

founding in 2003, TNK-BP has distributed more than $20 billion in dividends to its shareholders, none of which has been received by Norex.

F. *Prior Federal Action*

Norex commenced an action in the Southern District of New York on February 26, 2002, asserting various Racketeer Influenced and Corrupt Organizations Act ("RICO") claims ("Prior Federal Action"). In February 2004, the district court granted a motion to dismiss on forum non conveniens grounds. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 304 F. Supp. 2d 570 (S.D.N.Y. 2004). The Second Circuit reversed, holding that forum non conveniens dismissal requires available alternative fora and that because time to appeal the Know-How judgment in Russia had elapsed, Russia was not an available forum. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005).

In September 2007, the district court again dismissed the action, this time for lack of subject matter jurisdiction, holding that RICO lacked extraterritorial effect. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438 (S.D.N.Y. 2007). The Second Circuit affirmed, not because subject matter jurisdiction was lacking, but rather for failure to state a cause of action. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010). The decision was based on a recent United States Supreme Court case stating that a federal statute lacks extraterritorial reach absent a clear Congressional expression to the contrary. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

Norex filed a writ of certiorari to the Supreme Court and obtained a stay of dismissal pending its appeal. While the appeal was pending, Plaintiff commenced the instant action, and withdrew its writ of certiorari.

G. *Procedural History of the Instant Action*

Norex commenced this action on March 7, 2011 and filed the Amended Complaint on June 23, 2011. On September 7, 2012, this Court held, pursuant to CPLR § 202, that because Norex's principal place of business is in Alberta, Canada, the statute of limitations from Alberta applied. *See Norex Petroleum Ltd. v. Blavatnik*, No. 650591/2011, 2012 WL 8469759 (Sup. Ct. N.Y. Cnty., June 12, 2012). This Court held that CPLR § 202 required the Court to borrow not only Alberta's statute of limitations, but also Alberta's law that did not provide for a tolling of the statute of limitation for an action that was re-commenced in state court after a federal court dismissal. *Id.* Accordingly, this Court dismissed Norex's Amended Complaint as time-barred. *Id.*

The First Department affirmed, stating that Alberta "does not have a provision that would toll the limitations period in favor of a previously filed action." *See Norex Petroleum Ltd. v. Blavatnik*, 105 A.D.3d 659 (1st Dep't 2013). The First Department also held that the "[federal] dismissal [was] on the merits, which bars plaintiff from bringing the state claims that it alleges 'are based upon the same transaction or occurrence or series of transactions or occurrences it pled in its federal action.'" *Id.* at 660 (internal citation omitted).

The Court of Appeals reversed, finding that CPLR § 202 (and, by application, Alberta law) did not trump CPLR § 205(a)'s savings provision. *See Norex Petroleum Ltd. v. Blavatnik*, 23 N.Y.3d 665 (2014). That is, because the Prior Federal Action was timely under the borrowing statute (CPLR § 202), the current action before this Court "would have been timely commenced at the time of the commencement of the prior action" by virtue of the savings statute (CPLR § 205(a)). "Stated another way," the Court of Appeals found that "it is irrelevant that Alberta law does not have a savings statute similar to CPLR § 205(a) because at the point in time when Norex filed [this action] . . . , the borrowing statute's [CPLR § 202's] requirements had already been met." *Id.* at 679.

Notably, the Court of Appeals clearly set forth the scope of its holding as follows:

> We decide only that Norex's state court action, refiled pursuant to CPLR [§] 205(a), is not time-barred by CPLR [§] 202; we do not address and express no opinion about whether Norex's lawsuit fulfills other requirements of section 205(a). For purposes of discussion in this opinion, we simply assume that, within the meaning of section 205(a), Norex's federal action was not terminated on the merits, and Norex's state court action alleges claims "upon the same transaction or occurrence" as its federal predecessor. We appreciate that defendants contend that the termination of Norex's federal action constituted "a final judgment upon the merits" within the meaning of CPLR [§] 205(a). Upon remittal, Supreme Court must resolve this and any other issues raised by defendants in their motions to dismiss and not reached because the lawsuit was dismissed as untimely.

Id. at 668, n.3.

H. *Causes of Action Asserted in Amended Complaint*

Norex asserts eight causes of action in its Amended Complaint: (i) tortious interference with a contract; (ii) tortious interference with prospective business; (iii) conversion of Norex's interest in Yugraneft and dividends from Yugraneft; (iv) breach of fiduciary duty; (v) unjust enrichment; (vi) unjust enrichment in violation of Russian law; (vii) intentional tortious conduct in violation of Russian law; and (viii) money had and received.

II. Discussion

The five motions to dismiss before the Court raise various issues, which each will be addressed in turn.

A. *CPLR § 205(a) – "On the Merits"*

Defendants first seek dismissal based on the argument that the instant action is untimely. Defendants contend that CPLR § 205(a) does not apply to the instant action because the prior federal action was dismissed "on the merits."

The proper starting point for the analysis is the text of CPLR § 205(a):

> If an action is timely commenced and is terminated in any other manner than by . . . a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

The parties do not dispute that this action is based upon the same transaction or occurrence as the Prior Federal Action. Instead, Defendants argue that the Second Circuit dismissed the Prior Federal Action "on the merits." Norex does not dispute this assertion as to its federal claims, but argues instead that its Russian and state law causes of action were not dismissed "on the merits."

In support of their argument that the action was dismissed on the merits, Defendants cite *Yonkers Contracting Co. v. Port Authority Trans-Hudson Corp.*, 92 N.Y.2d 375 (1999). Defendants maintain that that a final judgment "on the merits" does not require the prior court to reach every claim that a plaintiff may have asserted in the prior action. In *Yonkers*, the Court of Appeals stated that "[t]he proviso in CPLR [§] 205(a) that the toll is inapplicable when the prior action was dismissed on the merits is essentially a corollary of the principle of res judicata that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Yonkers*, 92 N.Y.2d at 380.

However, *Yonkers* is factually inapposite to the case at bar in one key respect. Unlike here, in *Yonkers* both the "current" action and "prior" action were in state court. *Yonkers*, 92 N.Y.2d at 377-78. *Yonkers* therefore did not examine the key issue here—the interplay between a federal court decision whether to exercise supplemental jurisdiction under 28 U.S.C. § 1367 and CPLR § 205(a).

Supplemental jurisdiction (known as pendent jurisdiction at common law) is provided for by § 1367(a), which states "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). However, § 1367(c) provides that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c).

Norex argues that when a federal court dismisses federal claims without reaching state causes of action, the federal court has declined to exercise supplemental jurisdiction and the state law causes of action are not dismissed "on the merits." In support, Norex cites *McLearn v. Cowen & Co.*, 48 N.Y.2d 696, 698 (1979) ("*McLearn I*"), contending that *McLearn I* and "its progeny" govern the dispute and mandate that this action is timely filed. In *McLearn I*, the Court of Appeals held that res judicata bars state law claims that could have been brought in federal court unless there was a clear statement that the federal court did not exercise supplemental jurisdiction over the state law claims. *McLearn*, 48 N.Y.2d at 698 ("Although it is conceded that the common-law cause of action could have been considered only under the pendent jurisdiction of the Federal court and that the Federal court could have declined to exercise such jurisdiction, unless it is clear that the Federal court as a matter of discretion did decline or would have declined to exercise that jurisdiction, the State action is barred").

Subsequently, however, in *McLearn v. Cowen & Co.*, 60 N.Y.2d 686, 688 (1983) ("*McLearn II*"), the Court of Appeals reversed itself after the district court clarified that its judgment did not involve state law claims. The *McLearn II* court held that res judicata was not applicable "[i]nasmuch as it has now been made clear that the Federal dismissal did not include the State law cause of action . . . ." *McLearn II*, 60 N.Y.2d at 688.

As noted by Norex, there is a line of New York cases holding that when a federal court dismisses federal causes of action without reaching state claims, it has declined to exercise supplemental jurisdiction. Without supplemental jurisdiction, the dismissal is without prejudice to instituting the action in state court on state law grounds.

This line of cases includes *Creative Bath Products, Inc. v. Connecticut General Life Insurance Co.*, 173 A.D.2d 400, 401 (1st Dep't 1991), in which the court held that when a federal court dismisses on federal grounds, the state law claims survive. The First Department stated that "[t]he District Court, upon dismissing plaintiffs' RICO claim, noted that when a federal claim is dismissed prior to trial any pendent State claim should likewise be dismissed." *Id.* The First Department then stated its holding that "[i]t is clear that the federal court declined to exercise pendent jurisdiction over the State claims and that it made no determination on the merits with respect to those claims." *Id.* Accordingly, the state law claims brought by the plaintiff in *Creative Bath* could be re-filed. *Id.*

A year later, in *Lamontagne v. Board of Trustees of United Wire, Metal & Mach. Pension Fund*, 183 A.D.2d 424, 426 (1st Dep't 1992), the First Department reiterated its

holding. The court held that "[t]he rule in New York is that a dismissal of a pendent State action by a federal court is presumed to be *not* on the merits absent a clear indication to the contrary." *Id.* (emphasis added).

Here, Defendants argue that the Second Circuit made a clear indication to the contrary in dismissing Norex's claims. Defendants contend that the Second Circuit stated that "[w]e have considered the remainder of Norex's claims and find them without merit," where claims meant all federal, Russian, and state law claims. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

This argument is unpersuasive. As the Second Circuit noted, Norex did not appeal the dismissal of its Russian law claims. Therefore, the Second Circuit's reference to remainder of the "claims" more likely meant "arguments" than "causes of action." The Court therefore does not concludes that this statement by the Second Circuit was a "clear indication to the contrary" regarding the exercise of supplemental jurisdiction.

The rule is stated clearly in *Browning Ave. Realty Corp. v. Rubin*, 207 A.D.2d 263, 265 (1st Dep't 1994). In *Browning Ave Realty Corp.*, the First Department held that "[w]here the Federal court disposed of the case purely on Federal grounds, the Federal court necessarily 'declined to exercise jurisdiction over any accompanying claim based exclusively on State law, and . . . dismissed that claim without prejudice to its prosecution in the State courts.'" *Id.*

Defendants nonetheless emphasize an inapposite case, *Plummer v. City Council Speaker Christine Quinn*, No. 110813/2009, 2010 WL 2754082, at *6 (Sup. Ct. N.Y.

Cnty. June 24, 2010). There, the trial court held that dismissal of the federal action prevented the court from applying the CPLR § 205(a) toll. The *Plummer* court stated that "[a]s the dismissal of the federal action based on the summary judgment motion is a "final judgment on the merits," the toll provided under CPLR 205(a) does not apply." *Id.*

However, the *Plummer* case does not support Defendants' position. The critical distinction in *Plummer* is that the federal court granted summary judgment on state law claims. *See Plummer v. Quinn*, 326 F. App'x 571, 572 (2d Cir. 2009) ("Judge William H. Pauley, III, decid[ed] appellants' motion for summary judgment by granting in part as to appellee Viola Plummer's federal and New York State equal protection and due process claims"). If a federal court is granting summary judgment regarding state law claims before it, then it is necessarily exercising supplemental jurisdiction over the state law claims.

The instant case presents a key distinction—the federal court expressly declined jurisdiction. The district court stated that because it was dismissing all federal claims, it was expressly declining to exercise supplemental jurisdiction over Russian law claims actually brought. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 449 (S.D.N.Y. 2007) ("There being no other basis for the exercise of federal jurisdiction, the Court also declines to exercise supplemental jurisdiction of the Plaintiff's claims asserted under Russian law"). The federal courts did not exercise supplemental jurisdiction over the state law claims, and the decision to dismiss them was therefore not "on the merits."

Norex's state law claims therefore are not barred as having been dismissed "on the merits" under CPLR § 205(a).

The Court concludes that this statement by the district court is a sufficiently clear indication that, in addition the Russian Law claims, the district court was not exercising supplemental jurisdiction over any potential state law claims. Accordingly, the district court's dismissal was without prejudice to instituting the instant action in state court.

B. *CPLR § 205(a) – "Within Six Months"*

In addition to arguing that the Prior Federal Action was decided "on the merits," Defendants argue that Norex failed to file the instant action within six months of the termination of the prior action. Defendants contend that because Norex did not appeal the district court's dismissal of its Russian law claims, Norex's Russian law claims were not before Second Circuit. Accordingly, Defendants contend that those claims were dismissed by the district court in September 2007, which is the relevant date for CPLR § 205(a) purposes. As the instant action was not filed until 2011, Defendants argue that the claims that were supported by supplemental jurisdiction cannot be saved by the six-month grace period provided by CPLR § 205(a).

Notwithstanding Defendants' argument, under *Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511, the instant action was timely filed within six months of the dismissal of the prior action pursuant to CPLR § 205(a). In *Goldstein*, the plaintiff challenged the Atlantic Yards development project. The plaintiff first brought the action

in federal court, alleging violations of both the federal constitution and New York's Eminent Domain Proceedings Law. The district court dismissed the federal claims and then expressly declined supplemental jurisdiction over state law claims. Plaintiff only appealed the denial of the federal claims. *Goldstein v. Pataki*, 516 F.3d 50, 55 (2d Cir. 2008) ("In a ruling that is not challenged on appeal, the district court declined to retain supplemental jurisdiction over the state claim, dismissing it without prejudice.").

The Second Circuit affirmed dismissal of Goldstein's federal claims. Within six months of the Second Circuit's affirmance, Goldstein filed the state law claims in state court. The Second Department and Court of Appeals deemed the claims timely filed under CPLR § 205(a). *Goldstein v. New York State Urban Dev. Corp.*, 64 A.D.3d 168, 175 (2d Dep't 2009), *aff'd*, 13 N.Y.3d 511 ("Within six months after the Second Circuit affirmed the dismissal of the complaint in the federal action, the petitioners commenced this EDPL proceeding . . . . Furthermore, since the United States District Court declined to exercise jurisdiction over the supplemental state-law claim and dismissed it without prejudice, it is clear that the state-law claim was not adjudicated on the merits.").

The Court of Appeals in *Goldstein* stated that "[i]t is plain—indeed, expressly so—that the federal dismissal of petitioners' state law claim was not upon any of these grounds [listed in CPLR § 205(a)] and that the dismissal explicitly contemplated the refiling of the state law claim in state court. . . . It is also plain that the claim was, in fact, refiled in the Appellate Division within six months of the federal dismissal." *Goldstein*, 13 N.Y.3d at 520.

As in *Goldstein*, the district court here expressly declined to exercise supplemental jurisdiction over the non-federal claims. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 449 (S.D.N.Y. 2007) ("There being no other basis for the exercise of federal jurisdiction, the Court also declines to exercise supplemental jurisdiction of the Plaintiff's claims asserted under Russian law").

Finally, for purposes of supplemental jurisdiction, foreign law claims are treated the same as state law claims. *See Voda v. Cordis Corp.*, 476 F.3d 887, 894 (Fed. Cir. 2007). In *Voda*, the federal court held that "because the 'inherent powers' of state courts permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, § 1367 supplemental jurisdiction appears to include foreign law claims." *Voda*, 476 F.3d at 894 (citations omitted). Therefore, when the district court declined jurisdiction over the Russian law claims, it was similarly declining jurisdiction over the state law claims.

Accordingly, the Prior Federal Action did not dismiss the Russian law or state law claims on the merits, and the instant action was timely filed, within six months of dismissal of the prior action. The CPLR § 205(a) toll applies and the motions to dismiss based upon the statute of limitations are denied.

C. *BP's Motion to Dismiss*

1. Norex Did Not Abandon Its Claims

First, BP contends that Norex abandoned all but three of its claims against BP. In the original motion to dismiss this case, BP argues that Norex did not respond to BP's arguments on five of eight claims: (i) tortious interference with contract, (ii) tortious interference with prospective business relations, (iii) conversion, (iv) breach of fiduciary duties and (v) money had and received.

In its prior brief, Norex argued that BP is both liable for acts of its co-conspirators and independently is liable under various tort theories. Norex posited that BP's involvement in the conspiracy renders it liable for the acts of its co-conspirators—the same acts underlying all of Norex's tort claims. Norex supports this argument by noting that BP's counsel characterized Norex's Russian tort claims—including a claim for intentional tortious conduct—as "repetitive" of Norex's New York law claims.

Norex's conspiracy allegations encompassed the five claims BP labels as "abandonded." Thus, Norex has not abandoned these claims against BP. Norex argued that BP is a co-conspirator and that co-conspirators are liable for the acts of all conspirators, even acts completed prior to the defendant joining the conspiracy. Accordingly, Norex did not fail to address those causes of action as a basis of liability as to BP. BP's motion to dismiss on this ground is denied.

2. Failure to State a Claim (Unjust Enrichment and Russian Claims)

BP next seeks dismissal of the unjust enrichment and intentional tortious conduct claims asserted against it for failure to state a claim.

a. ***Unjust Enrichment under New York Law***

To plead unjust enrichment under New York law, Norex must allege that (i) BP was enriched, (ii) at its expense, and (iii) it is against equity and good conscience to permit BP to retain what Norex seeks to recover. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). In addition, a claim for unjust enrichment "will not be supported if the connection between the parties is too attenuated." *Id.*

Norex's New York law cause of action for unjust enrichment must be dismissed for two reasons.

First, Norex fails to allege that BP received a benefit at Norex's expense. This case is akin to *Levin v. Kitsis*, 82 A.D.3d 1051, 1053 (2d Dep't 2011). In *Levin*, the plaintiffs alleged that the defendants Oscar Kitsis and Ada Kitsis improperly assigned a mortgage interest to L'Esperanza, a corporation owned and controlled by their daughter, Anna Kitsis. *Id.* This allegation was sufficient to state a claim for unjust enrichment against L'Esperanaza. *Id.*

However, the unjust enrichment claim against Anna Kitsis was dismissed for failure to allege that she personally benefited, rather than her corporation, even though

"the plaintiffs alleged sufficient facts from which it may be inferred that Anna Kitsis knowingly participated in a fraudulent scheme to deprive the plaintiffs of their creditor rights." *Levin*, 82 A.D.3d at 1052.

Norex argues that BP actively participated in the conspiracy to deprive it of dividends from Yugraneft and that BP admitted that it was "intertwined with" Norex. However, as in *Levin*, Norex's allegation that BP knowingly participated in a fraudulent scheme is insufficient to state a cause of action for unjust enrichment. By gaining control of Yugraneft, TNK-BP was the party that was directly enriched as a result the alleged wrongful acts. BP only indirectly received the benefits through its ownership interest in TNK-BP, which is insufficient under *Levin*.

Second, Norex's cause of action for unjust enrichment under New York law should be dismissed for failure to allege a sufficient relationship between itself and BP. The holding of the Appellate Division in *Levin* comports with the requirement that there be a sufficient relationship between the parties to support unjust enrichment. In *Georgia Malone & Co. v. Rieder*, the Court of Appeals affirmed dismissal of an unjust enrichment claim, reasoning that "the relationship between [plaintiff] and [defendant] is too attenuated because they simply had no dealings with each other. . . . In particular, the complaint does not assert that [defendant] and [plaintiff] had any contact regarding the purchase transaction." *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 519 (2012).

Norex argues that BP stated in an internal email that it was "intertwined with" Norex. Norex also argues that BP was a knowing participant in the conspiracy. However, a rule that allowed mere awareness to establish a sufficiently close relationship "would require parties to probe the underlying relationships between the businesses with whom they contract and other entities tangentially involved but with whom they have no direct connection. This would impose a burdensome obligation in commercial transactions." *Georgia Malone*, 19 N.Y.3d at 519. The state of being "intertwined with" another company is not any sort of legally recognized relationship, and instead is a conclusory averment. Norex does not allege that it had any formal business interaction with BP during the pertinent time period. Under *Georgia Malone*, this is insufficient to state a claim for unjust enrichment.

Finally, BP persuasively argues that unjust enrichment cannot stand because the claim arises out of the Yugraneft shareholder agreement, and that the unjust enrichment claim is duplicative of its other causes of action. *See Ashwood Capital, Inc. v. OTG Mgmt.*, Inc., 99 A.D.3d 1, 10 (1st Dep't 2012) ("[a] written contract governing a particular subject matter [precludes] recovery on a theory of unjust enrichment for events arising out of that subject matter"); *Fallon v. McKeon*, 230 A.D.2d 629, 630 (1st Dep't 1996) (if an unjust enrichment claim is "indistinguishable from other . . . causes of action, [it is] therefore insufficient.").

b. ***Unjust Enrichment under Russian Law***

BP and Norex agree that there is no substantive difference between claims for unjust enrichment under New York and Russian law. Norex states that "this Court can simply apply New York law" to its Russian law unjust enrichment claim. *See* Pl.'s Opp. Br. at 65.

Accordingly, the Court dismisses the Russian law claim for unjust enrichment for the same reasons stated above dismissing the New York claim for unjust enrichment.

c. ***Intentional Tortious Conduct under Russian Law***

Norex argues that BP is liable for intentional tortious conduct under Russian law in two ways. First, Norex argues that under Article 1064 of the Russian Civil Code, BP is directly liable for "causing harm" to Norex. Second. Norex contends that BP is liable as a co-conspirator under Article 1080 of the Russian Civil Code.

According to Norex's expert, Article 1064 of the Russia legal code states that: "(1) [h]arm caused . . . to the property of a legal person shall be subject to compensation in full by the person who has caused the harm, and (2) [t]he person who has caused the harm is freed from compensation for the harm if he proves that the harm was caused not by his fault." *See* Affidavit of Peter B. Maggs ¶ 25.

Accepting Norex's argument as to the legal standard for liability under Russia's general tort statute, Norex has failed to state a cause of action. Norex cannot state a cause of action under Article 1064 because it does not allege that BP "caused the harm." Norex only alleges that BP knowingly joined the conspiracy after Norex had already lost its controlling interest in Yugraneft.

For a similar reason, Norex's claim for "conspiracy" liability under Russian law fails. According to Norex, under Article 1080 of the Civil Code, "[p]ersons who have jointly caused harm shall be liable jointly and severally to the victim." Again, without an allegation that BP "caused harm" to Norex, the cause of action fails. Therefore, Norex's cause of action for intentional tortious conduct against BP must be dismissed.

3. Failure to Plead Conspiracy

In the alternative, Norex seeks to salvage its unjust enrichment and intentional tortious conduct claims by arguing that even if BP is not directly liable for its own tortious conduct, it is liable for the torts of its purported co-conspirators.

In order "to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury."

Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 474 (1st Dep't 2010) (internal quotation omitted).

Norex argues that "the liability of defendant, as one of the conspirators, for the wrongful acts of his co-conspirators does not necessarily depend upon his active participation in the particular overt acts." *Nederlandsche Handel-Maatschappij N.V. v. Schreiber*, 17 A.D.2d 783, 783 (1st Dep't 1962) (internal citations omitted). Norex contends that by joining with TNK to create TNK-BP, BP acted in concert with the other defendants to deprive Norex of its rightful share of Yugraneft profits. *See* Am. Compl. ¶ 53.

Norex further contends that liability for joining a conspiracy "may include acts previously done by co-conspirators in pursuance of the conspiracy." *Epstein v. Haas Sec. Corp.*, 731 F. Supp. 1166, 1188 n.19 (S.D.N.Y. 1990) (quoting 20 N.Y. Jur. 2d Conspiracy-Civil Aspects § 10, at 12-13 (1982)).

Norex's fails to plead that BP was involved in a conspiracy. The *Epstein* case, relied upon by Norex, states that "every act and declaration of each member of the confederacy in pursuance of *the original concerted plan* is, in law, the act and declaration of them all." *Epstein v. Haas Sec. Corp.*, 731 F. Supp. 1166, 1188 n.19 (S.D.N.Y. 1990) (quoting 20 N.Y. Jur. 2d Conspiracy-Civil Aspects § 10, at 12-13 (1982)) (emphasis added).

Norex's allegations against BP fails because BP did not act in furtherance of the "original concerted plan," but rather joined several years afterwards. The Amended Complaint alleges that the "original concerted plan" was to deprive Norex of its majority ownership rights in Yugraneft. *See* Am. Compl. ¶ 40 ("The Billionaire Oligarchs and Alfa . . . determined that they would . . . divest Norex of its majority interest in Yugraneft . . . ."); Pl.'s Opp. Br. at 67 ("Norex's majority control over Yugraneft—the misappropriation of which constitutes Norex's core allegation of harm.").

This alleged plan to rob Norex of its ownership rights in Yugraneft had been fully accomplished before BP agreed to form TNK-BP. *See* Am. Compl. ¶ 51 ("the Russian court entered a default judgment against Norex on January 24, 2002, reducing Norex's equity interest in Yugraneft to 20%"); ¶ 53 ("since its *founding* in 2003, TNK-BP has distributed more than $20 billion") (emphasis added).

Norex does not allege that BP agreed to participate in the "original concerted plan," or that it committed any act in furtherance of the original plan, and therefore fails to sufficiently plead a conspiracy as to BP. *See Abacus Fed. Sav. Bank v. Lim*, 75 A.D.3d 472, 474 (1st Dep't 2010).

4. Failure to State a Cause of Action (Purportedly Abandoned Claims)

Assuming the application of New York law, Norex fails to state causes of action arising under New York law against BP without conspiracy liability. In its opposition,

Norex does not attempt to argue that it has plead any element of the remaining causes of action—tortious interference, conversion, breach of fiduciary duty, and money had and received—against BP. A plaintiff must allege each element as to each defendant individually, and Norex has failed to do so here. *See Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't 1981) (dismissing claims where "the first four causes of action are pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant").

a. ***Tortious Interference with Contract / Prospective Business***

BP seeks dismissal of Norex's two tortious interference claims on the grounds that Norex has failed to allege that BP procured any breach of the Yugraneft shareholder agreement or prevented any party from extending a contractual relationship to Norex.

Norex does not dispute this argument in its opposition brief. Therefore, the causes of action for tortious interference with contract and tortious interference with business relations against BP must be dismissed. *See Woods v. Design Ctr., LLC*, 42 A.D.3d 876, 878 (4th Dep't 2007) ("[D]efendant did not address in Supreme Court or on appeal the issue . . . . We therefore conclude, contrary to the view of our dissenting colleague, that defendant conceded" the issue).

b. ***Conversion***

Norex next alleges that Defendants converted Norex's hypothetical Yugraneft dividends. Nonetheless, Norex's cause of action for conversion must be dismissed, since Norex does not allege that there are any specifically identifiable proceeds that Defendants exercised dominion and control over, in the same manner as a specific chattel.

"Since the allegedly converted money is incapable of being described or identified in the same manner as a specific chattel it is not the proper subject of a conversion action." *310 Third Ave. Associates, Inc. v. Schaffer Food Serv. Co.*, 210 A.D.2d 207, 208 (2d Dep't 1994) (internal quotation omitted); *see Lemle v. Lemle*, 92 A.D.3d 494, 497 ("[to be] converted . . . money . . . must be specifically identifiable"). Further "the mere right to payment cannot be the basis for a cause of action alleging conversion since the essence of a conversion cause of action is the unauthorized dominion over the thing in question." *Daub v. Future Tech Enter., Inc.*, 65 A.D.3d 1004, 1006 (2d Dep't 2009) (internal quotation omitted).

Therefore, the cause of action for conversion against BP must be dismissed.

c. ***Breach of Fiduciary Duty***

A cause of action for breach of fiduciary duty must be plead with particularity. *See* CPLR 3016(b); *Dove v. L'Agence, Inc.*, 250 A.D.2d 435, 435 (1st Dep't 1998). Further,

a plaintiff must "plead facts giving rise to the fiduciary relationship." *Dove*, 250 A.D.2d at 435.

Here, Norex has plead neither "facts giving rise to the fiduciary relationship" nor facts with sufficient particularity detailing the breach of the fiduciary relationship. Norex pleads that BP "joined forces" with the other defendants and has "done everything in [its] power" to keep Yugraneft dividends from Norex. Am. Compl. ¶¶ 52-53. Norex also pleads that "Defendants" owed a Norex a fiduciary duty because of their control of CNG, Norex's co-owner in Yugraneft. Am. Compl. ¶ 71.

Norex alleges TNK controlled CNG, but never alleges that BP controlled CNG. *See* Am. Compl. ¶ 35 ("TNK . . . had assumed full control of CNG"). Without an allegation giving rise to a fiduciary duty, no cause of action for breach of fiduciary duty can stand. *See Dove v. L'Agence, Inc.*, 250 A.D.2d 435, 435 (1st Dep't 1998). Therefore, the cause of action for breach of fiduciary duty against BP must be dismissed.

d. ***Money Had and Received***

Norex premises its money had and received claim on the allegation that BP had indirectly received dividends from Yugraneft while BP knew about the alleged wrongs that had befallen Norex. A cause of action for money had and received is available when "(1) the defendant received money belonging to [the] plaintiff, (2) the defendant benefited from receipt of the money, and (3) under principles of equity and good

conscience, the defendant should not be permitted to keep the money." *Matter of Estate of Witbeck*, 245 A.D.2d 848, 850 (3d Dep't 1997).

BP argues that there is no allegation that BP engaged in any wrongful conduct and therefore it cannot be "against good conscience" to allow BP to keep dividends from TNK-BP. Norex does not dispute this argument in its opposition brief. Therefore, the cause of action for money had and received against BP must be dismissed. *See Woods v. Design Ctr., LLC*, 42 A.D.3d 876, 878 (4th Dep't 2007) ("[D]efendant did not address in Supreme Court or on appeal the issue . . . . We therefore conclude, contrary to the view of our dissenting colleague, that defendant conceded" the issue).

5. Timeliness of Prior Federal Action

Even if dismissal was not warranted for other reasons, BP argues that neither CPLR § 205(a) nor 28 U.S.C. § 1367(d) save Norex's claims because they were untimely when filed in the Prior Federal Action. Norex contends that "Norex knew in 2005 what i[t] knew in 2003—that BP had entered into a joint venture." BP Reply Br. at 15.

BP cites no evidence or authority for its assertion that Norex knew that BP entered into a joint venture in 2003. More importantly, the Court of Appeals has already held that the Prior Federal Action was timely, foreclosing BP's argument here. *Norex Petroleum Ltd. v. Blavatnik*, 23 N.Y.3d 665, 668 (2014 ("Norex says that it filed its federal complaint within weeks of the events that gave rise to its claims, thereby making its

federal action timely under 'any potentially applicable' statute of limitations, without tolling. Defendants do not gainsay this."). The Court of Appeals clearly stated that:

> We agree with Norex that, once it timely commenced its federal court action in New York, the borrowing statute's purpose to prevent forum shopping was fulfilled . . . *Because Norex's "prior" federal court action was timely* under the borrowing statute, the "new" action that it brought pursuant to the savings statute "would have been timely commenced at the time of commencement of the prior action" (CPLR 205[a]).

Norex, 23 N.Y.3d at 679 (emphasis added). Therefore, the fact that Norex's claims were timely filed in federal court is law of the case and this Court cannot disturb that holding. *See People v. Evans*, 94 N.Y.2d 499, 503 (2000) ("The term 'law of the case' . . . describe[s] the doctrine requiring a lower court, on remand, to follow the mandate of the higher court"). Therefore, this dismissal argument lacks merit.

D. *Failure to State a Cause of Action Against Non-BP Defendants*[1]

Like BP, the Non-BP Defendants seeks dismissal of the unjust enrichment and intentional tortious conduct claims asserted against them.

[1] The "Non-BP Defendants" are Blavatnik, Vekselberg, Kukes, Access, Alfa, Renova, TNK, and TNK-BP (collectively, "Non-BP Defendants").

1. Unjust Enrichment

As noted above, Russian and New York law are not in conflict regarding unjust enrichment. Therefore, this Court will apply New York law.

New York courts routinely dismiss unjust enrichment claims when they are merely duplicative of other causes of action. *See Fallon v. McKeon*, 230 A.D.2d 629, 630 (1st Dep't 1996). Claims are duplicative when they allege the same underlying conduct, seek redress for the same harm, and request identical damages. *See Fallon*, 230 A.D.2d at 630.

Here, Norex only alleges that "it is against equity and good conscience to permit Defendants to retain" the interest in Yugraneft and related dividends. *See* Am. Compl. ¶ 77. Norex makes no attempt to distinguish its unjust enrichment claim from its intentional tortious conduct claim. The cause of action for unjust enrichment arises out of the same conduct and harm, and requests identical damages. It is therefore duplicative and must be dismissed. *See Fallon*, 230 A.D.2d at 630.

2. Intentional Tortious Conduct

To state a claim for tortious conduct against the Non-BP Defendants under Russian Civil Code Article 1064, Norex must show (1) harm, (2) unlawful behavior, (3) causation, and (4) intent of the tortfeasor. *See* Affidavit of Dmitry Borisovich Dyakin

("Dyakin Aff.") ¶ 70. Further, Article 1080 provides joint liability for damages jointly inflicted by more than one person. *See* Dyakin Aff. ¶ 72.

Norex argues that "it is unlawful to bribe government officials, forge shareholder documents, and send armed militia to raid offices and oil fields." Further, Norex contends that as a result of Defendants' joint acts, Norex has lost its controlling interest in Yugraneft.

Defendants argue that Norex cannot allege any unlawful behavior because Russian courts have ruled in their favor regarding Yugraneft. Norex persuasively counters that Defendants cannot whitewash their actions by arguing that Russian courts approved all of Defendants' actions. Defendants' behavior cannot be considered "lawful" because courts allegedly corrupted by Defendants approved it.

Defendants also argue that claims of corruption in the Know-How case cannot satisfy the element of causation. Defendants contend that Norex could have appealed the rulings, and in any event that they were in accord with Russian law. This argument assumes that Defendants caused the harm, but that Norex could have undone that harm by appealing to other Russian courts. At the pleadings stage, accepting the allegations as true, Defendants have not met their burden of showing that their actions did not proximately cause Norex's harm.

Therefore, the Amended Complaint cannot be dismissed on the basis that it fails to state a cause of action for intentional tortious interference against the Non-BP Defendants under Russian law.[2]

E. *Personal Jurisdiction Over Non-Resident Defendants*

The Non-Resident Defendants are Kukes, Alfa, TNK, and TNK-BP (collectively, "Non-Resident Defendants"). The Non-Resident Defendants seek dismissal based upon this Court's lack of personal jurisdiction over them. These arguments are addressed by defendant below.

1. TNK and TNK-BP

In support of dismissal, TNK and TNK-BP argue that they lack minimum contacts with New York, that Norex has failed to plead conspiracy jurisdiction, that unjust enrichment cannot support conspiracy jurisdiction, and that there is no substantial connection between the conspiracy and New York. Their motion is granted.

[2] Nonetheless, the Amended Complaint is dismissed in its entirety as to these Defendants on comity, res judicata, forum non conveniens, and personal jurisdiction grounds. *See infra*.

a. ***No Minimum Contacts***

CPLR § 302(a)(2) permits New York Courts to assert jurisdiction over someone who "commits a tortious act within the state . . . through an agent." *See* CPLR § 302(a)(2). For jurisdictional purposes, a co-conspirator will be considered an agent of another co-conspirator for actions relating to the conspiracy. *See Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 17 (1st Dep't 1998).

To assert jurisdiction over foreign defendants under CPLR § 302(a)(2), Norex must plead that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant." *Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428 (1st Dep't 2013).

Importantly, in order for a court to exercise long-arm jurisdiction over a non-resident defendant, a plaintiff must further show that the non-resident defendant has sufficient "minimum contacts" with the New York "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (internal quotation omitted); *see Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428 (1st Dep't 2013) ("the existence of a

virtual office in New York creates sufficient 'minimum contacts' . . . [so as] not [to] violate traditional notions of fair play and substantial justice.") (internal citation omitted).

Here, the Court may not exercise personal jurisdiction over non-resident defendants TNK and TNK-BP because there are not sufficient minimum contacts between them and New York.

This action is akin to *Bluewaters Communications Holdings LLC v. Ecclestone*, 122 A.D.3d 426 (1st Dep't 2014), where money was allegedly wired through New York to pay bribes. In *Bluewaters*, the First Department determined that there were not sufficient connections with New York to support personal jurisdiction over non-resident defendants based upon using New York banks to pay a bribe. *Id.* at 427.

This is in contrast to the case relied upon by Norex, *Banco Nacional Ultramarino, S.A. v. Chan*, where money was sent to a New York bank account as part of a money laundering scheme. *Banco Nacional Ultramarino, S.A. v. Chan*, 169 Misc. 2d 182, 188 (Sup. Ct. N.Y. Cnty. Mar. 14, 1996) *aff'd sub nom. Banco Nacional Ultramarino, S.A. v. Moneycenter Trust Co.*, 240 A.D.2d 253 (1997) (affirmed without opinion). The tort alleged in *Chan* was conversion of stolen funds. *Id.* at 188. The stolen funds were actually brought into New York and deposited in a co-conspirator's New York bank account, and the co-conspirator exercised dominion over the funds in New York. *Id.*

Further, in *Chan*, the court held that the "minimum contacts" required by *International Shoe Co.* were satisfied because the defendant directed a co-conspirator to wire funds to its New York bank account. *Id.* at 187. The New York bank account was the conduit through which the fraudulent scheme advanced for two years and through which a number of transactions took place in furtherance of the nonresident defendants' business. *Id.* The court held that the foreign defendant "elect[ed] to utilize a New York banking institution and it admit[ted] that it directed [co-conspirator] Skymit to wire to its New York account the U.S. dollars it was purchasing from Skymit." *Id.*

This level of contact with New York is absent from the allegations in the instant case. The alleged jurisdictional co-conspirators here never directed any action towards the New York forum or utilized a New York bank account.

The necessity of a connection to New York can further be seen in *Reeves v. Phillips*, 54 A.D.2d 854 (1st Dep't 1976). In *Reeves*, a Texan co-conspirator was held to be subject to jurisdiction based on actions of co-conspirators because the Texan was on the board of directors that committed the alleged tortious act in New York. *Id.* at 855. Although the Texan co-conspirator was not present for the specific board meeting where the tortious act was committed, "it [wa]s not disputed that a board member at the meeting in New York telephoned the defendant and spoke with him concerning the response to be made to the take-over bid. The law firm of which defendant was a partner proceeded immediately to institute proceedings to impede the take-over, which proceedings were

ultimately unsuccessful." *Id.* In addition, the Texan co-conspirator had also traveled to New York for other board meetings. *Id.* In totality, the Texan co-conspirator satisfied the minimum contacts requirement and the tort had a substantial connection to New York. *Id.*

Here, there are no such admitted factual predicates for jurisdiction. The contacts with New York and the connection of the tort to New York are both more tenuous than in *Reeves* and *Chan*.

Norex contends that *American Broadcasting Companies v. Hernreich*, 40 A.D.2d 800, 800-01 (1st Dep't 1972), allows a court to exercise personal jurisdiction where bribes were "not consummated in New York" but where the defendant had committed acts in New York in furtherance of the conspiracy to commit bribery. Critically, however, the court in *American Broadcasting Companies* exercised personal jurisdiction over the non-resident defendant because he had visited New York numerous times to conduct business with the plaintiff. *See American Broadcasting Co.*, 40 A.D.2d at 801. The court concluded that the defendant was in fact doing business in New York, subjecting him to jurisdiction under CPLR § 302(a)(1). *See American Broadcasting Co.*, 40 A.D.2d at 801.

The level of contact in *American Broadcasting Companies*, which satisfied the minimum contacts test, was greater than the level of contact that TNK and TNK-BP had with New York. The only alleged connection in the instant action is the tortious conduct

of the New York resident co-conspirators. This alone does not satisfy the minimum contacts requirement.

b. ***No Conspiracy Jurisdiction***

Further, the Court concludes that Norex has failed to plead the requirements of conspiracy jurisdiction under CPLR § 302(a)(2).

Again, to assert jurisdiction over foreign defendants under CPLR § 302(a)(2), Norex must plead that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant." *See Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428 (1st Dep't 2013).

Norex argues that Defendants committed the following predicate torts: "conspiring to force Chernogorneft into a fraudulent bankruptcy, directing TNK to forge documents, wiring funds from New York banks in order to bribe and unduly influence Russian officials in the Know-How Case, and sending armed private militia men to storm Yugraneft's corporate offices and oil field." Norex contends that "[t]hose acts

undoubtedly inured to the financial benefit of all Defendants and were conducted with the knowledge and consent of TNK, Kukes, Alfa, and TNK-BP, warranting the inference that they were part of the conspiracy."

The Court holds that Norex has sufficiently alleged that the activities of the New York resident defendants inured to the benefit of the non-resident Defendants. However, benefit to the non-resident Defendants is all that Norex alleges. Norex does not allege that the co-conspirators in New York acted under the control or at the request of the non-resident Defendants. Norex also does not allege that the non-resident Defendants had an awareness of any effects in New York. Accordingly, in the absence of such a pleading, mandated by CPLR § 302(a)(2), this Court cannot exercise personal jurisdiction over Defendants TNK and TNK-BP. *See Lawati*, 102 A.D.3d at 428.

c. ***No Conspiracy Based Upon Unjust Enrichment***

In addition, to the extent that Norex asserts conspiracy jurisdiction based upon unjust enrichment, Norex's arguments fail. The cause of action for "unjust enrichment" cannot be asserted as the predicate tort for jurisdiction under CPLR 302§ (a)(2) or (3). As the Court of Appeals held in *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012), "[t]ypical cases [of unjust enrichment] are those in which the defendant, though guilty of no wrongdoing, has receive d money to which he or she is not entitled." The

Court of Appeals found that "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Id.*

The definition of unjust enrichment, as outlined in *Corsello*, conflicts with the theory of exercising jurisdiction over a co-conspirator. To be a co-conspirator, some level of participation in a wrongful act is required. *See Lawati*, 102 A.D.3d at 428. A party cannot be simultaneously be "guilty of no wrongdoing," while participating in a wrongful act.

d. ***No Substantial Connection with New York***

Finally, Norex fails to plead the "jurisdictionally requisite substantial connection between the alleged tortious conduct and New York." *De Capriles v. Lopez Lugo*, 293 A.D.2d 405, 406 (1st Dep't 2002). Defendants persuasively argue that "Norex only alleges that two defendants caused funds to be wired to Russia to support alleged acts in Russia as to a Russian company." Without any allegations as to any harm or benefit related to New York, there is no "substantial connection" between Norex's allegations and New York. *See De Capriles*, 293 A.D.2d at 406.

For the reasons stated above, TNK and TNK-BP's motion to dismiss is granted on personal jurisdiction grounds.

2. Alfa Consortium Group

In support of dismissal, Alfa argues that it is not a legal entity amenable to suit, that General Associations Law ("GAL") § 13 prohibits Alfa from being a proper party, that Alfa was not properly served under GAL § 13, and this Court lacks personal jurisdiction over Alfa. Alfa's motion is granted.

a. ***General Associations Law ("GAL") § 13***

First, Alfa argues that it is not a legal entity capable of being sued. An entity's capacity to be sued is determined by the law of the jurisdiction where the entity is organized or established. *See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 898 (S.D.N.Y. 1968), *aff'd*, 433 F.2d 686 (2d Cir. 1970) ("The legal existence, status, identity, and domicile of a foreign corporate entity or juristic personality . . . must be determined by the laws of the country where it has been created and continues to exist.").

According to Alfa's expert, and undisputed by Norex, Alfa does not have legal existence under Russian law. *See* Affidavit of Eliseev Nikolay Georgievich ¶¶ 10-11, 21, 25-27; Affidavit of Pavel Nazariyan ¶ 7. Because Alfa does not have a legal existence in Russia, it cannot be sued in New York. *See Roby v. Corp. of Lloyd's*, 796 F. Supp. 103 (S.D.N.Y. 1992), aff'd, 996 F.2d 1353 (2d Cir. 1993) (holding that because Lloyd's of

London lacked a legal existence under English law, it was not amenable to suit in New York).

Norex cites *Gross v. Cross*, 28 Misc. 2d 375, 376-77 (Sup. Ct., N.Y. Cnty. 1961), and *Rodier v. Fay*, 7 N.Y.S.2d 744, 745 (Sup. Ct., Bronx Cnty. Oct. 21, 1938), for the proposition that "a foreign unincorporated association can be sued pursuant to General Associations Law Section 13." However, neither of these decisions analyze whether the defendant entities were, in fact, unincorporated associations amenable to suit where they were located, but rather simply assumed that they were without discussion.

Next, even if Alfa could be sued as a foreign unincorporated association, it is not a proper party under GAL § 13. GAL § 13 requires that a suit be maintained "against the president or treasurer of such an association." Norex does not address its failure to name either Alfa's president or treasurer. *See Motor Haulage Co. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Truck Drivers & Chauffeurs Local No. 807*, 298 N.Y. 208, 212 (1948) ("In this State an action . . . may not be maintained . . . against an unincorporated association in its proper name").

Further, there is no allegation that Norex complied with the requirements of GAL § 13 regarding service. GAL § 13 requires service on either the president or treasurer of the unincorporated association. Here, the affidavit of service states that service was made

upon one Silke Kunter-Wilson in Gibraltar (NYSCEF Doc No. 25). The complaint does not allege that Ms. Kunter-Wislon is either president or treasurer of Alfa.

In addition, as the Court of Appeals recently reaffirmed, "New York . . . is said to be in the company of a small minority of states that cling to the common-law requirement that the complaint [brought against an unincorporated association] allege that all of the individual members of the union authorized or ratified the conduct at issue." *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 148 (2014). Here, Norex does not allege that all members of Defendant Alfa authorized or ratified the conduct at issue. Norex admits that it does not make these allegations, but contends that CPLR 3211(d) authorizes discovery on this point. However, because dismissal is required for other reasons, jurisdictional discovery is not warranted here.

b. ***Personal Jurisdiction***

Even assuming that Alfa's president or treasurer had been served, this Court still lacks jurisdiction over Alfa.

i. General Jurisdiction under CPLR § 301

First, there is no general jurisdiction under CPLR § 301 over Alfa based on "doing business" in New York. Norex argues that Alfa can be considered "doing business" within the meaning of CPLR § 301. Norex cites this Court's decision in *Bluewaters Communications Holdings, LLC*, which was decided in January 2014, without the benefit of the Supreme Court's *Daimler AG v. Bauman* decision. *See Bluewater*s, 2014 WL 220779 (Sup. Ct. N.Y. Cnty Jan. 16, 2014). In *Daimler*, the Supreme Court brought an end to "doing business" jurisdiction, holding that a corporation must be "at home" in a state in order to assert general jurisdiction over it. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014). The only kind of corporate activity that ordinarily will satisfy the general jurisdiction test is incorporation in the state or maintenance of a corporation's principal place of business in the state. *See Daimler*, 134 S. Ct. at 760 ("With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.") (internal quotation omitted).

Norex does not argue that Alfa is incorporated or headquartered in New York. Therefore, under *Daimler*, the facts alleged in the complaint do not support the exercise of general jurisdiction over Alfa. Further, Norex's allegations are not sufficient to support any form of general jurisdiction based upon some sort of parent-subsidiary relation. *See In re Aluminum Warehousing Antitrust Litig.*, 2015 WL 892255, at *10 (S.D.N.Y. Mar. 3, 2015) ("To find that the acts of the subsidiary are attributable to the parent, plaintiffs

would need to allege facts which support a disregard of corporate formalities. Instead, there is simply a website that touts the global reach of a family of companies. If this were the law, no doubt since Daimler's website has similar descriptions of its reach as an overall family of companies, the *Daimler* case would have been decided differently.").

Also unavailing is Norex's allegation, in a footnote, that Alfa has recently engaged in a real estate venture in the United States. This allegation has no explicit connection to New York. As noted above, under *Daimler*, this connection is not sufficient to hold that Alfa is amenable to general jurisdiction in New York.

ii. Long-Arm Jurisdiction under CPLR § 302(a)(2)

Next, Norex contends that this Court may exercise long-arm jurisdiction pursuant to CPLR § 301(a)(2) arising out of tortious conduct of Alfa's New York resident co-conspirators. However, as noted above, the Court holds that Norex has failed to plead the requirements of conspiracy jurisdiction under CPLR § 302(a)(2).

Norex sufficiently alleges that the activities of the New York resident defendants inured to the benefit of the non-resident Defendants, but not that the co-conspirators in New York acted under the control or at the request of the non-resident Defendants. Norex also does not allege that the nonresident Defendants had an awareness of any effects in

New York. Accordingly, this Court cannot exercise personal jurisdiction over Alfa based on co-conspirator jurisdiction.

iii. Long-Arm Jurisdiction under CPLR § 302(a)(1)

Next, Norex argues that jurisdiction over Alfa is proper based upon CPLR § 302(a)(1) because Alfa transacts business within New York and Norex's claims "may arise out of transactions that occurred in New York." According to Norex, it has made a "sufficient start" in showing that Alfa transacts business in New York such that jurisdictional discovery is warranted.

Norex relies on *HBK Master Fund L.P. v. Troika Dialog USA, Inc.*, where the First Department held that "Plaintiffs made a 'sufficient start' in demonstrating that the Russian defendants were doing business in New York through their direct or indirect subsidiaries." 85 A.D.3d 665, 666 (1st Dep't 2011). However, this one sentence does not indicate what evidence was provided to be considered a sufficient start.

Other cases that have detailed the requisite showing demanded more than the simple allegations presented by Norex here. For example, in *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 467 (1974), the plaintiffs produced records indicating that the defendant had stated that the New York Fire Department approved the use of its

product. Further records demonstrated that the defendant had applied for several permits and received permission to sell and store some of its products in New York. *Peterson*, 33 N.Y.2d at 467.

In *Goel v. Ramachandran*, 111 A.D.3d 783, 788 (2d Dep't 2013), the Second Department held that plaintiffs made a sufficient start where "there was evidence of a close parent-subsidiary connection." The plaintiff in *Goel* "submitted evidence indicating a degree of financial interdependency," an "overlap of executive personnel," and that the New York entity had represented that the foreign entity was "the headquarters" and "main trading office" of the worldwide enterprise. *Id.*

Here, Norex presents no evidence that Alfa actually owns or controls any of the purportedly related entities, such as Storm LLC or Alforma Capital Markets. Norex has failed to make a "sufficient start" showing that Alfa may be subject to New York jurisdiction.

Moreover, as addressed above, the claims against Alfa must be dismissed for failure to comply with General Associations Law Section 13, and for a lack of jurisdiction. Therefore, even if Norex had complied with General Associations Law Section 13, it has not made a "sufficient showing" warranting jurisdictional discovery.

3. Simon Kukes

Defendant Simon Kukes was the President and Chief Executive Officer of Defendant TNK during the time period relevant to this alleged harms that befell Norex. Norex alleges that Kukes was a resident of New York at the time Norex commenced the Prior Federal Action. Therefore, according to Norex, this Court has jurisdiction over Kukes as a New York resident.

In support of dismissal, Defendant Kukes argues that he was not a New York resident when Norex commenced the instant action, and this Court therefore lacks personal jurisdiction over him. Kukes's motion is granted.

First, as noted above, Norex has failed to plead proper conspiracy jurisdiction. The same reasoning applicable to TNK, TNK-BP, and Alfa applies to Kukes.

Second, there is no personal jurisdiction over Kukes as a New York domiciliary. Norex does not allege that Kukes was a New York domiciliary as of March 7, 2011 when the instant action was commenced. Accordingly, the Court lacks personal jurisdiction over him. *See Keane v. Kamin*, 94 N.Y.2d 263, 266 (1999) ("New York's courts lacked a jurisdictional basis [because] . . . Defendants were not domiciled in New York at the time plaintiff commenced her action").

Norex argues that CPLR § 205(a) excuses the requirement of personal jurisdiction over a defendant for the newly-filed action, as long as personal jurisdiction existed for the

original action. However, Norex offers no legal support or reasoning for this contention. The parties do not cite, nor has the Court's research revealed, a case where this issue was raised. The Court finds no persuasive reason to deviate from the requirement that a party be a New York domiciliary at the time an action is commenced in order to exercise jurisdiction over them as a New York domiciliary. Accordingly, the Amended Complaint, is so far as it is asserted against Kukes, must be dismissed.

F. *Collateral Estoppel*

In order for collateral estoppel to apply, "the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and [] the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985)

Defendants contend that Norex's claims are subject to collateral estoppel because the Second Circuit already held that the alleged conspiracy lacked a sufficient connection to the United States. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) ("The slim contacts with the United States alleged by Norex are insufficient to support extraterritorial application of the RICO statute.").

Defendants reason that just as the Second Circuit held that RICO lacked extra-territorial jurisdiction, the New York Court of Appeals has likewise held that New York statutes lack extra-territorial jurisdiction. *See Global Reins. Corp.-U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722 (2012). Further, Defendants argue that although Norex does not assert any statutory claims, there is no difference in the extra-territorial reach of New York statutes and New York common law.

Defendants' argument in favor of collateral estoppel on this issue is unavailing. Defendants cite no case law in favor of its proposition that common law is limited by territorial reach. Instead, New York courts have historically found that there is no territorial limit to New York common law causes of action, as there is with federal and state statutes. *See* Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 Geo. L.J. 301, 335 (2014) ("[for] cases involving tort injuries sustained in foreign countries, [New York] courts ordinarily permitted such actions to proceed if they were based on the common law but not if they were based instead on a cause of action created by state statute (such as a wrongful death statute).").

For example, in *Whitford v. Panama Railroad Co.*, 23 N.Y. 465, 468 (1861), the Court of Appeals dismissed a statutory wrongful death action based on an accident in the country of "New Granada." The Court of Appeals held that dismissal was warranted because the estate's right to recovery depended on a New York statute that was inconsistent with the common law rule terminating causes of action upon the victim's

death. *Whitford*, 23 N.Y. at 468. Although the rule regarding the extra-territoriality of New York's wrongful death statute has since been changed, the extra-territoriality of the common law was not. *See Farber v. Smolack*, 20 N.Y.2d 198, 204 (1967).

Similarly, in *McDonald v. Mallory*, 77 N.Y. 548, 551 (1879), the Court of Appeals stated that "[a]ctions for injuries to the person committed abroad are sustained . . . upon the presumption that the right to compensation for such injuries is recognized by laws of all countries," *i.e.*, the common law. The Court of Appeals contrasted the common law with statutory law, stating that the "presumption cannot apply where the wrong complained of is not one of those thus universally recognized as a ground of action, but is one for which redress is given only by statute." *McDonald*, 77 N.Y. at 551.

The Fourth Department stated the premise in *Kiefer v. Grand Trunk Railway Co.*, 12 A.D. 28, 30 (4th Dep't 1896), noting that if a cause of action is "unknown to the common law," then "it is now settled beyond controversy that such an action may not be maintained under the statute law of this state to recover damages for the death of a person occasioned by a wrongful act committed in another state or country . . . ."

Finally, in *Crowley v. Panama Railroad Co.*, 30 Barb. 99, 107 (N.Y. Sup. Ct. Sept. 5, 1859), the Supreme Court held that "the statutes of one state have no force . . . beyond the territorial limits of the state . . . [but] the courts in all civilized states do, more

or less, take cognizance of causes of action arising in other states and countries, in respect to persons within their jurisdiction."

Defendants offer no contrary case law or reasoning to overturn the rule stated in these cases. Accordingly, New York common law, unlike certain statutes, applies to extraterritorial acts and collateral estoppel is not applicable.

G. *Comity and Res Judicata*

Defendants argue that the instant action is barred by the related doctrines of res judicata and comity arising from the Know-How case. According to Defendants, if this Court grants comity to the Russian court's judgment in the Know-How case, Norex's claims will be barred by res judicata. *See Ionescu v. Brancoveanu*, 246 A.D.2d 414, 416 (1st Dep't 1998) ("So long as jurisdiction has been obtained, a defendant's default in the rendering [court] will not nullify the res judicata effect of the judgment"); *Robbins v. Growney*, 229 A.D.2d 356, 357 (1st Dep't 1996) ("The doctrine of res judicata is applicable to a judgment taken by default which has not been vacated").

The Know-How case was the 2001 Russian court case in which TNK alleged that Norex's initial contribution of "technical know-how" had been overvalued. After several postponements, Norex defaulted and the Russian court granted TNK's request to revalue

Norex's contribution and reduce Norex's ownership percentage in Yugraneft from 60% to 20%.

"[U]nder New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *See Matter of Hunter*, 4 N.Y.3d 260, 269 (2005) (internal quotation omitted). Norex does not contest that the causes of action asserted in the instant case arise out of the same transaction or series of transactions as the Know-How case. As Norex states, "[t]he Russian case that deprived Norex of its majority control over Yugraneft was the Know-How Case," and the misappropriation of "Norex's majority control over Yugraneft . . . constitutes Norex's core allegation of harm." *See* Pl.'s Opp. Br. at 67.

Norex makes three arguments against the res judicata effect of the Know-How case. First, Norex posits that a foreign court judgment, even if granted comity, cannot bar an action based upon res judicata. Second, Norex argues that the Second Circuit already held that the Know-How case cannot be granted comity, and therefore Defendants are collaterally estopped from re-litigating the same issue here. Third, Norex contends that it was not properly served with process and that the Know-How judgment therefore cannot be granted comity. The Court will consider each argument in turn, beginning with whether the doctrine of res judicata is applicable to a foreign judgment to which comity is extended.

1. Interplay of Comity and Res Judicata

Norex contends that even if comity is afforded to the Know-How case, res judicata would not apply to bar this action. According to Norex, New York distinguishes between judgments rendered by sister states and those rendered by foreign countries.

Norex contends that the cases relied upon by Defendants do not deal with res judicata upon granting comity. Norex contends that *Ionescu v. Brancoveanu*, 246 A.D.2d 414 (1st Dep't 1998), is distinguishable because this case involves a sister state judgment, not one of a foreign nation. Similarly, Norex distinguishes *Robbins v. Growney*, 229 A.D.2d 356 (1st Dep't 1996), because the prior judgment was rendered within the same state. Ultimately, Norex only argues that *Ionescu* and *Robbins* are inapposite because they do not involve foreign country judgments. However, Norex fails to cite contrary case law or provide any reasoning as to why this is significant.

Norex does not discuss *Icahn v Lions Gate Entertainment Corp*, No. 651076/2013, 31 Misc. 3d 1205(A) at *8 (Sup. Ct. N.Y. Cnty. March 30, 2011) (Sherwood, J.), in which the court expressly held that once a foreign judgment is granted comity, it has preclusive effect as to all claims that could have been brought based upon res judicata. Indeed, the holding in *Icahn* comports with the Court of Appeals's holding in *Greschler v. Greschler*, 51 N.Y.2d 368 (1980), which involved a divorce decree issued in the Dominican Republic. Once the foreign divorce judgment was extended comity, "[it]

ha[d] an 'overriding effect' on any subsequent action seeking alimony . . . ." *Id.* at 376. In *Greschler*, the Court of Appeals held that the subject of alimony should not have been reached by the courts below because "the doctrine of comity . . . is the equivalent of full faith and credit given by the courts to judgments of our sister States." *Id.* at 376. Norex's argument that the res judicata effect based upon the doctrine of comity differs from the res judicata effect based on a judgment from a sister state is therefore unavailing.

Accordingly, to the extent comity is granted to the Know-How case judgment, it would provide a basis to dismiss this action under the doctrine of res judicata.

2. Collateral Estoppel Does Not Bar Defendants' Comity Argument

Norex next argues that Defendants are collaterally estopped from arguing that the Know-How judgment should be granted comity. According to Norex, the Second Circuit held that "the default judgment cannot be given preclusive effect by an American court . . . ." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 160 (2d Cir. 2005).

Norex's argument is unavailing for two reasons. First, the district court considered the Know-How case in the context of granting the motion for forum non conveniens dismissal, not as a matter of comity. The Second Circuit stated that "[o]n the present record" the Know-How case could not be given preclusive effect because the

jurisdictional challenge and determination of comity had not be considered by the district court. See *Norex*, 416 F.3d at 160. Conversely, the parties here have briefed the issue and submitted extensive expert reports.

Second, the Second Circuit stated that "the parties remain free to pursue this matter further on remand." *Norex*, 416 F.3d at 162. This does not satisfy the elements of collateral estoppel, which require that "the identical issue necessarily must have been decided in the prior action . . . ." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985). The issue remained unresolved in the Prior Federal Action.

3. Proper Service in the Know-How Case

Norex argues that Know-How case cannot be granted comity because the Russian court did not have personal jurisdiction over it. The only basis asserted for a lack of personal jurisdiction over Norex by the Russian court is improper service of the commencement documents.[3]

[3] As an initial matter, Norex has litigated numerous prior cases in Russian courts concerning its ownership rights in Yugraneft, so it is hard to see a basis to contest jurisdiction other than improper service. *See* Pl.'s Omnibus Opp. Br. at 67 n.51 ("The so-called TNK-NV I decision recognized Norex's 60% ownership interest in Yugraneft; the so-called TNK-NV II decision recognized the Norex-controlled management of Yugraneft; the so-called Shareholders Meeting Litig. decision also recognized that Norex's properly registered shares gave it majority control over Yugraneft; the so-called Chernogorneft Bankr. Sale Litig. III and IV decisions recognized Norex's majority control over Yugraneft; and the two cases relating to Norex's right of first

Norex's argument regarding improper service is unavailing. TNK served Norex via DHL on December 10 and December 27, 2001. S*ee* Dyakin Aff. ¶ 51, Ex. 38 at 3, 5. The convention governing service between Russia and Cyprus in effect when TNK commenced the Know-How case was the 1954 Hague Service Convention. *See* Karabelnikov Reply Aff. ¶ 33. Article 6 of the 1954 Hague Service Convention allowed for service by postal channels such as DHL in the absence of signatory's objection. *See* Karabelnikov Reply Aff. ¶¶ 33-34, Ex. 14 at 3 (1954 Hague Service Convention). Cyprus had not objected. *Id.* Indeed, Russian courts have held service by DHL in mid-2001 to be proper. *See* Dyakin Aff. Ex. 44 (Ruling of the Supreme Commercial Court holding that "notice was sent to the address specified by the claimant, through the mailing service ZAO DHL International. . . . Such manner of notification of parties involved in the case does not contradict Russian legislation").

Further, on December 1, 2001, Russia adopted the 1965 Hague Service Convention, which Norex does not dispute allows for service of process via postal channels such as DHL. *See* Dyakin Aff. ¶ 46. TNK served two separate notices on Norex after December 1, 2001, informing Norex of its obligation to appear. *See* Karabelnikov Reply Aff. ¶ 26, Ex. 9 (failure to serve a "statement of claim" is not a breach of due process if notice of a hearing is provided).

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refusal to buy Yugraneft shares from Chernogorneft also recognized Norex's majority control over Yugraneft.").

In addition, proof of service to foreign litigants by DHL is accepted by Russia's commercial courts. *See* Karabelnikov Reply Aff. ¶ 31, Ex. 13 (commentary contrasting Russian mail service with DHL notices and stating DHL is accepted as proof of service); Dyakin Aff. ¶ 51 (Under Russian law, mere denial of receipt is insufficient to rebut proof of service by DHL). Accordingly, Norex was properly served in the Know-How case under Russian law.

Finally, Norex indisputably had actual notice of the Know-How case proceedings. *See* Am. Compl. ¶ 46 ("[A]t the June 28[, 2001 Yugraneft] shareholders' meeting . . . Norex voted the shares the Know-How court had not enjoined, which the [Know-How] court bailiffs in attendance certified"); Dyakin Aff. Ex. 29 (letter from Norex to Know-How court, stating "we are requesting that notification be sent regarding the time and place of the hearings, as well as other documents on the case in the aforementioned procedure to the address . . . [in] Cyprus."); Ex. 37 (statement from Norex's attorney requesting review of Know-How docket).

Therefore, because Norex was properly served in the Know-How case, the judgment is entitled to comity and the action is dismissed based upon the doctrine of res judicata.

4. Allegations of Fraud

Norex also argues that the Know-How decision is not entitled to comity because it was the product of fraud. *See CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 296 A.D.2d 81, 97 (1st Dep't 2002) (holding that comity is only appropriate where there were "proceedings conducted under a system that provides impartial tribunals and procedures compatible with due process").

Norex contends that it has adduced substantial evidence that the default judgment was obtained through manipulation of the Russian court. *See Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi*, 10 N.Y.3d 243, 247 (2008) (holding that comity is not "a matter of absolute obligation" and need not be applied when repugnant to public policy).

As numerous other courts have held, the Russian court system cannot be said to be so corrupt as to deprive litigants of their due process rights. *See Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 706 (S.D.N.Y. 2003) (discussing Russia, stating that "[t]he 'alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record.") (internal quotation omitted); *Pavlov v. Bank of New York Co.*, 135 F. Supp. 2d 426, 430 (S.D.N.Y. 2001) *vacated on other grounds*, 25 F. App'x 70 (2d Cir. 2002) (rejecting argument that the "Russian legal system is corrupt and riddled with political influence"); *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d

415, 420 (S.D.N.Y. 2000) (holding that "Russia's arbitration tribunals will afford foreign litigants a fair trial to vindicate their claims.").

Norex chose to invest in a Russian entity and should not be heard to complain about the Russian legal system to an American court. *See RIGroup LLC v. Trefonisco Mgmt. Ltd.*, 949 F. Supp. 2d 546, 555 (S.D.N.Y. 2013), *aff'd*, 559 F. App'x 58 (2d Cir. 2014) ("There is, to put it mildly, 'substantial temerity to the claim that the forum where a party has chosen to transact business . . . is inadequate.'").

Further, Norex has highlighted the various favorable rulings it obtained litigating in Russia. *See* Pl.'s Opp. Br. at 67 n.51 (citing favorable rulings in the "TNK-NV I decision[,] . . . [the] TNK-NV II decision[,] . . . [the] Shareholders Meeting Litig. decision[,] . . . [and the] Chernogorneft Bankr. Sale Litig. III and IV [decisions].").

Therefore, the Russian Know-How decision will not be denied comity on the basis that is the product of "a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 296 A.D.2d 81, 88-92 (1st Dep't 2002), *aff'd*, 100 N.Y.2d 215 (2003).

Accordingly, the Know-How judgment is granted comity, and the instant action is dismissed on the grounds of comity and res judicata.

H. *Forum Non Conveniens*

Defendants next argue that dismal is warranted on forum non conveniens grounds.

1. Standard for Forum Non Conveniens Motion

Forum non conveniens, as stated in CPLR 327(a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-479 (1984).

When deciding a forum non conveniens motion, New York courts consider "the burden on New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transaction at issue in the litigation, with no one factor controlling." *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013). Courts also consider "the location of potential witnesses and documents and the potential applicability of foreign law." *Elmaliach*, 110 A.D.3d at 208.

"Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Anagnostou v. Stifel*, 204 A.D.2d 61, 61 (1st Dep't 1994). This is true even where the plaintiff is not a resident of New York. *See OrthoTec, LLC v. Healthpoint Capital, LLC*, 84 A.D.3d 702, 703 (1st Dep't 2011).

2. Collateral Estoppel as to Forum Non Coveniens Analysis

Norex contends that Defendants cannot seek dismissal based on forum non conveniens because of collateral estoppel. According to Norex, the Second Circuit already decided that forum non conveniens dismissal is not warranted.

In order for collateral estoppel to apply, "the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and [] the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985)

Norex's argument fails because the issues are not identical. Federal law requires that no alternate forum be available. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 160 (2d Cir. 2005). New York law contains no such requirement. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-479 (1984). That distinction is pertinent here because the Second Circuit denied the forum non conveniens motion due to the lack of an alternate forum. Because New York does not require an alternate forum, the issues cannot be considered identical, and collateral estoppel does not apply to the forum non coveniens analysis as a whole.

3. Unavailable Alternate Forum

Norex contends that even if Defendants are not collaterally estopped from arguing forum non coveniens as a whole, Defendants may nevertheless be collaterally estopped from arguing that Russia is an available alternate forum. Defendants argue that New York law differs from federal law as to which party had the burden to show that a forum is unavailable, and therefore collateral estoppel cannot apply.

Defendants note that on a motion to dismiss for forum non conveniens, federal courts place the burden on the defendant to show the availability of an alternate forum. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 160 (2d Cir. 2005) ("defendants failed to carry their burden to demonstrate that Russia affords plaintiff a presently available adequate alternative forum"). In contrast, under *Islamic Republic of Iran v. Pahlavi*, Defendants argue that New York courts place the burden on plaintiffs to demonstrate the lack of an adequate alternative forum. *Pahlavi*, 62 N.Y.2d 474, 483 (1984) ("Plaintiff has failed to establish that no alternative forum exists").

However, as discussed by the First Department in *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 26 A.D.3d 286, 287 (1st Dep't 2006), the interpretation that *Pahlavi* shifted the burden to plaintiffs to show the unavailability of an alternate forum is incorrect. The First Department held that "[t]he motion court, in stating that a nonresident bears the burden of showing special circumstances that warrant retention of jurisdiction,

incorrectly shifted this burden." *Id.* The court clarified that this interpretation is "a plain misreading of the Court of Appeals holding in *Pahlavi*[, which] says nothing about shifting the burden where a nonresident plaintiff is involved." *Id.*

Defendants further argue that under New York law, a plaintiff cannot defeat a forum non conveniens motion by missing a statute of limitations. Defendants contend that Norex could have appealed the Know-How case in Russia, but that it let the applicable time limit expire. Defendants rely on *NWG Invs. Inc. v. Fronteer Gold Inc.*, 40 Misc. 3d 1230(A), 2013 WL 4482713, at *8 (Sup. Ct. N.Y. Cnty. Aug. 21, 2013), for the proposition that a plaintiff cannot "bootstrap himself into a New York court by missing the statute of limitations in the proper forum." *NWG Invs. Inc.*, 40 Misc. 3d 1230(A), 2013 WL 4482713, at *8 (quoting *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497 (S.D.N.Y. April 11, 1985)). Defendants' argument fails because *NWG* quotes only *Castillo*, a federal case. The fact that *NWG* relied on a federal case shows that New York law and federal law are identical and collateral estoppel therefore applies.

In addition, *Castillo* has been criticized on this exact issue. *See Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903, 909 (S.D.N.Y. 1986) ("*Castillo*'s reasoning is based on the unstated premise that the court lacked jurisdiction in the first place, an incorrect premise for any forum non conveniens inquiry."). Even more pertinent than *Crimson Semiconductor, Inc.*'s criticism, the Second Circuit's decision in the Prior Federal Action specifically stated that "an adequate forum does not exist if a statute of

limitations bars the bringing of a case in a foreign forum that would be timely in the United States." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 151 (2d Cir. 2005) (quotation omitted). Therefore, *Castillo*'s reasoning on the point relied up by *NWG* is no longer valid, and this Court declines to extend *NWG*'s reasoning.

The Court holds that New York law is in accord with federal law regarding the availability of an adequate alternate forum and the issues can be considered identical. As the Second Circuit held that Russia was not an adequate alternate forum, Defendants are collaterally estopped from arguing that Russia is an adequate alternate forum. *See Norex*, 416 F.3d at 160 ("defendants failed to carry their burden to demonstrate that Russia affords plaintiff a presently available adequate alternative forum").

Further, if this Court were to consider the availability of Russia as an alternate forum, the same conclusion would be reached for the same reasons stated by the Second Circuit. *Norex*, 416 F.3d at 159 ("Expert opinions from both sides reveal that Russian courts would likely deem the core issues underlying plaintiff's claims largely precluded by the Know–How Case. . . . [D]efendants have not shown that such a prosecution [arising from alleged fraud in the Know-How case] is pending or even likely.").

That is not the end of the analysis, however, as the Second Circuit found the lack of an alternate forum dispositive and explicitly declined to consider the remaining forum non conveniens factors. *Norex*, 416 F.3d at 160 ("the motion to dismiss on forum non

conveniens grounds should have been denied without consideration of the third step of analysis"). Because, as noted above, New York law differs from federal law on the dispositive nature of an unavailable alternate forum, the remaining factors must be considered.

4. Residence of the Parties

Norex argues that Blavatnik and Vekselberg are New York residents and that Access and Renova are New York companies. Norex also argues that BP does significant business in New York, and therefore the "residence of the parties" factor should weigh in favor of this Court retaining this case.

However, Norex does not attempt to argue that any of the Defendants that allegedly committed the actual tortious acts are residents of New York. Importantly, Norex is also not a resident of New York. Therefore, this factor weighs in favor of dismissal. *See Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984).

5. Location of the Events Giving Rise to the Transaction at Issue

Norex argues that this case arises from conduct orchestrated from New York by New York residents. Norex contends that in *Elmaliach v. Bank of China, Ltd.,* 110 A.D.3d 192, 196 (1st Dep't 2013), the court found a sufficient nexus to New York where there were wire transfers processed through the New York branch of the defendant bank. In *Elmaliach*, the defendant was the bank that "helped to facilitate the transfer of millions of dollars between [terrorist groups] outside Israel and their operatives inside Israel." *Elmaliach*, 110.A.D.3d at 195. The asserted causes of action were based on statutes "prohibiting the provision of material support to terrorist organizations." *Elmaliach*, 110.A.D.3d at 196. The causes of action (providing support to terrorists) were based on events (the actual wiring of money) that occurred in New York.

Here, in contrast, the events that Norex allege caused its harm occurred in Russia. *See* Am. Compl. ¶ 57 ("Defendants bribed Russian officials, threatened Rotzang and Yugraneft officers, forged documents, [and] engaged in the armed seizure of Yugraneft's field offices"). The harm suffered was the loss of a controlling interest in a Russian company. *See* Am. Compl. ¶ 57. The Court holds that the location of the events giving rise to the transaction at issue occurred outside of New York. *See Fin. & Trading Ltd. v. Rhodia S.A.*, 28 A.D.3d 346, 347 (1st Dep't 2006) ("the purported meetings [in New York] do not suffice to create a substantial nexus with New York in that the underlying transaction occurred primarily in a foreign jurisdiction").

This case is similar to *Globalvest Mgmt. Co. L.P. v. Citibank, N.A.*, 7 Misc. 3d 1023(A), at *6 (Sup. Ct. N.Y. Cnty. May 12, 2005) (Fried, J.), where the plaintiff alleged that the New York defendant "participated in and directed" the tortious conduct underlying the suit. Justice Fried held that directing the tortious conduct from New York was "irrelevant for the purposes of the forum non conveniens analysis, given the fact that the sole tortious act alleged . . . occurred in Brazil." *Id.*

Here, the alleged connection to New York is that some Defendants "participated in and directed" the tortious conduct that occurred in Russia, which is an insufficient connection with New York.

6. Location of Potential Witnesses and Documents and Hardship

Norex contends that the majority of the key witnesses and defendants are in New York. The only necessary witnesses, according to Norex, are the New York resident Defendants and BP. However, as noted above, the events giving rise to Norex's harm all occurred in Russia.

The only relevant documents cited by Norex that BP will produce concern general allegations that TNK was "notorious." *See* Ostrager Aff. Ex. T (BP 1999 Background Report on TNK) at BP-1528; Black Aff., Ex. 39 (Email from Sam Bennett to others

within BP (Feb. 27, 2002)) at BP-220. The relevant act by the New York residents was allegedly wiring money to Russia. The recipients of that money and the trail of how it may have been used in a bribery scheme are beyond the subpoena power of this Court. The purported militia men that violently took over Yugraneft are similarly located in Russia, beyond the subpoena power of this Court, as are purported co-conspirators German Khan, Mikhail Fridman, and others. *See Nicholson v. Pfizer, Inc.*, 278 A.D.2d 143, 143 (1st Dep't 2000) (key witnesses were "beyond the reach of New York's subpoena power").

In addition, the fact that key witnesses are located overseas places great hardship on both Norex to prove its case, but also on Defendants to bring witnesses and documents across the glove to New York. *See Globalvest Mgmt. Co. L.P. v. Citibank*, N.A., 7 Misc. 3d 1023(A), at *6 (Sup. Ct. N.Y. Cnty. May 12, 2005) (Fried, J.) ("The likely inability of Citibank to compel these critical witnesses to testify in New York (or the cost of bringing willing witnesses) will unfairly prejudice Citibank's ability to defend against Globalvest's charges"). This factor weighs heavily in favor of dismissal.

7. Potential Applicability of Foreign Law

The law of the forum, New York, determines the choice of law. *See Padula v. Lilarn Properties Corp.*, 84 N.Y.2d 519, 521 (1994). The initial query is "whether there

is an actual conflict between the laws of the jurisdictions involved." *In re Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 223 (1993).

Norex argues that its Russian law claims are "repetitive" of the claims asserted under New York law and New York law should be applied. This argument is countered by the extensive expert reports covering Russian law submitted by both sides.

While all sides agree that the standard for unjust enrichment is identical under both New York and Russian law, the same cannot be said for the tortious interference claim. Norex argues that the various specific torts alleged under New York law all fall within the penumbra of Russia's cause of action for intentional tortious interference. However, this argument inverts the standard under a choice of law analysis. The issue is not whether Russian law accommodates New York claims, but whether Russian law substantively conflicts with New York law. *See Harbinger Capital Partners Master Fund I v. Wachovia Capital Markets*, 27 Misc.3d 1236(A), at *9, 2010 WL 2431613 (Sup.Ct. N.Y. Cty. May 10, 2010) (quoting *Int'l Bus. Mach. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir.2004)). There is no cause of action in New York for "intentional tortious interference," and the parties' Russian law experts agree that there are no individual torts under Russian law. Accordingly, Defendants, as the party asserting the conflict, have carried their burden to show that there is a conflict of these laws.

When tortious conduct is alleged, New York courts conduct an interest analysis to determine which jurisdiction has the greater interest in having its law applied. *See Padula v. Liarn Props. Corp.*, 84 N.Y.2d 519, 521 (1994). To determine which jurisdiction has the greater interest, courts evaluate the facts or contacts that relate to the purpose of the particular law in conflict. *See Schultz v. Boy Scouts*, 65 N.Y.2d 189, 197 (1985). Two separate inquiries are required: (1) what are the significant contacts and in which jurisdiction are they located; and, (2) whether the purpose of the law is to regulate conduct or allocate loss. *See Padula*, 84 N.Y.2d at 521.

As noted above, the Court has determined the locus of the tortious conduct to be Russia. The parties do not dispute that the law at issue is conduct-regulating.

Further, in cases where the parties have different domiciles, "the usually governing law will be that of the place where the [incident] occurred, unless displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system." *See Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 73-74 (1993) (quotations omitted). Norex does not argue that displacing the normal rule would advance the relevant substantive law purposes. Therefore, the law of locus of the incident at issue, Russia, will apply.

Therefore, Norex's New York tort claims will be evaluated under the rubric of Russian law's cause of action for intentional tortious conduct.

While Norex correctly argues that New York courts can apply foreign law, the fact that foreign law is at issue weighs in favor of dismissal. *Shin-Etsu Chem. Co. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 178 (1st Dep't 2004) ("The applicability of foreign law is an important consideration in determining a forum non conveniens motion.")

8. No Substantial Connection

The Second Circuit also found Norex's allegations lacked a substantial connection to the United States. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010)) ("It is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States.") (emphasis in original). Therefore, balancing all the relevant factors, Defendants have carried their burden to show that New York in an inconvenient forum because it lacks a substantial connection to this action, warranting dismissal. *See Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 138-39 (2014) (dismissing for forum non conveniens where "no relevant conduct apart from the execution of fund transfers occurred in New York"); *Chawafaty v. Chase Manhattan Bank, N.A.*, 288 A.D.2d 58, 58 (1st Dep't 2001) (dismissing for forum non conveniens because "[t]his action lacks a substantial connection to New York").

The Court has considered the parties' remaining arguments and finds them unavailing.

(Order of the Court appears on the following page.)

III. Conclusion

The Complaint is dismissed in its entirety on comity, forum non conveniens, and res judicata grounds. Even if not dismissed on the aforementioned grounds, the claims against BP would be dismissed for failure to state a claim. The Non-BP Defendants' motion to dismiss, as based upon a failure to state a cause of action in Russian law, would be granted as to unjust enrichment, and the motions to dismiss based upon a lack of personal jurisdiction would be granted as to TNK, TNK-BP, Alfa, and Kukes.

However, for the benefit of the parties, the Court notes that the motions to dismiss would not be granted based upon the statute of limitations. CPLR § 205(a) applies to this action, tolling the statute of limitations. Further, the motions would not be granted to the extent they sought dismissal for collateral estoppel based upon the Second Circuit's finding of no substantial connection to the United States.

Accordingly, for the foregoing reasons, it is

ORDERED that Defendants' motions to dismiss are granted, and the Amended Complaint is dismissed with prejudice, and with costs and disbursement to defendants as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
August 25, 2015

E N T E R

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Hon. Eileen Bransten, J.S.C.