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

WORMWOOD CAPITAL LLC, SPQR CAPITAL (CAYMAN) LIMITED, SABINE GRITTI, ANDREW PIZZO and ANTOINE VERGLAS,	Index No.: 656481/2020
Plaintiffs,	Justice Joel M. Cohen
v.	I.A.S. Part 53
KEVIN P. MULLEADY, AKEEL MITHANI, JORDAN WALKER and AVERILL L. POWERS,	**Mot. Seq. No. 001**
Defendants,	**ORAL ARGUMENT REQUESTED**
-and-	
PHOENIXUS AG,	
Nominal Defendant.	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Plaintiffs, shareholders of Nominal Defendant Phoenixus AG ("Phoenixus") suing derivatively on behalf of Phoenixus, submit this memorandum of law in opposition to (i) all Defendants' motion to dismiss based on *forum non conveniens*; and (ii) Phoenixus' and Defendant Walker's motion to dismiss for lack of personal jurisdiction.

PRELIMINARY STATEMENT

Contrary to Defendants' contrived position, this case is New York-centric and belongs in this Court, and Phoenixus and Walker are subject to jurisdiction here.

Phoenixus is a Swiss corporate shell that operates its pharmaceutical business through its wholly owned, New York City-based/New York State-registered subsidiary Vyera Pharmaceuticals LLC ("Vyera"). The Phoenixus and Vyera officers and directors named as defendants (the "Individual Defendants") have misused investors' capital, wasted corporate assets and disseminated false financial statements. They have done so in cahoots with the infamous, now-imprisoned "Pharma Bro" Martin Shkreli. Three of the four Individual Defendants, like Shkreli, are New Yorkers. Several of the Plaintiff-shareholders are New Yorkers. Vyera, *the vehicle* for the wrongdoing, is based in New York City.

Plaintiffs' claims thus arise from facts and circumstances inexorably linked with New York--in particular, Vyera's transacting business here. Plaintiffs allege that the Individual Defendants perpetrated their wrongdoing through their operational, financial-reporting and decision-making control over Vyera by conduct and decision-making occurring in New York.

The Individual Defendants, as alleged, held their control positions because Shkreli put them there, manipulating his share-ownership voting power to get them "elected" to the Phoenixus Board and named as Vyera officers. They then breached their fiduciary duties and caused waste of corporate assets, acting in concert with Shkreli to benefit themselves (and

Shkreli) at shareholder expense. Detailed factual allegations establish, directly and inferentially, that the locus of this conduct and the injury to Vyera were in New York.

Defendants nonetheless assert that this Court is the wrong forum. To Defendants, a Swiss court is better for achieving "substantial justice," the touchstone of *forum non conveniens*. But Defendants cannot meet their heavy burden to negate Plaintiffs' choice of New York in favor of Switzerland. (Point I.A). The applicability of Swiss law (Pt.I.B), the "suitability" of a Swiss forum plus balancing the New York *vs*. Swiss interests (Pt.I.C), and the "impediment" to gathering evidence from Switzerland (Pt.I.D) do not justify a Swiss forum. Rather, all the *forum non conveniens* factors weigh heavily for the Court's retaining jurisdiction. (Pt.I., *passim*). Likewise, the Court has personal jurisdiction over Phoenixus and Walker based on long arm jurisdiction. (Pt.II). Defendants' motion should be denied.[1]

FORUM-RELATED BACKGROUND

As they must, Defendants acknowledge that the Complaint's "[f]actual allegations. . .are taken as true" on this motion. (Defs. Mem. fn.2). The Complaint alleges that the Individual Defendants, conspiring among themselves and with Shkreli, used their Vyera/Phoenixus positions to corrupt these companies' governance and decision-making to their own advantage. Shkreli exercised his voting control to "elect" the Individual Defendants as his corporate patsies to Phoenixus' Board and install them as Vyera's management. Defendants Mulleady, Mithani and Powers are New York domiciliaries who work out of Vyera's headquarters at 600 Third Avenue. (Cmpl. ¶¶12, 13, 15, 20, 76(c)).

[1] Plaintiffs' Complaint (Exhibit A to the affidavit of Defendants' counsel) is referred to as "Cmpl. ¶__." Defendants' memorandum of law is "Defs. Mem." and the Affirmation of Defendants' expert Prof. Dr. Peter Nobel is "Nobel Aff. ¶__."

Plaintiffs' claims sound in breach of fiduciary duty (Cmpl.. ¶¶117, 145, 159-188) and corporate waste. (Cmpl.¶¶152-158). They stem from the "close relationships" among the Individual Defendants, Shkreli, Phoenixus and Vyera, and extensive factual allegations plead that these relationships were *corrupt.* (Cmpl.¶¶23-32["Phoenixus↔Vyera↔Shkreli"]; ¶¶33-66["Shkreli↔the Individual Defendants↔Vyera/Phoenixus"]). The Complaint alleges that improper decision-making and unlawful conduct occurred at Vyera, including illicit transactions with shadowy "variable interest entities," or "VIE's," and material financial misreporting to shareholders. (Cmpl. ¶¶67-97). The bottom line from well-pleaded factual allegations is that Shkreli controlled Phoenixus, in turn Phoenixus controlled Vyera, and the Individual Defendants thereby misused their corporate management and decision-making positions to perpetrate wrongdoing from New York. (Cmpl. ¶¶16(c),(e), 20(c), 24, 25, 33-36, 44).

ARGUMENT

POINT I

DEFENDANTS' *FORUM NON CONVENIENS* ARGUMENT FAILS

A. For *Forum Non Conveniens* Dismissal, Defendants Must Meet a "Heavy Burden" to Show That Multiple Factors, on Balance, Override Plaintiffs' Choice of This Court and Favor Another Forum

Defendants recognize that a *forum non conveniens* dismissal is committed to the Court's "broad discretion" and must be upheld "absent an improvident exercise of that discretion." (Defs. Mem.7); *see Islamic Republic of Iran v. Pahlavi,* 62 N.Y.2d 474, 478 (1984)("application of the doctrine of *forum non conveniens* is a matter of discretion to be exercised by the trial court" and is reviewed for "abuse[] [of] discretion"). Defendants also acknowledge that a *forum non conveniens* motion is determined on "a multifactor analysis." (Defs. Mem. 8). The trial court must "consider[] and balanc[e] the various competing factors [to decide] whether to retain jurisdiction or not." *Islamic Republic,* 62 N.Y.2d at 479.

"Relevant factors include [1] the burden on New York courts, [2] the potential hardship to the defendant, [3] the availability of an alternative forum, [4] the residence of the parties, and [5] the location where the cause of action arose." *Swaney v. Academy Bus Tours of New York, Inc.,*; *see Islamic Republic,* 62 N.Y.2d at 479 (identifying factors). "No one factor is controlling." *Id.*; *accord*, *Swaney,* 158 A.D.3d at 438.

The doctrine's hallmark "is its flexibility based upon the facts and circumstances of each case." *Islamic Republic,* 62 N.Y.2d at 479. The focus is whether there is, on balance, "a substantial nexus between this State and plaintiff's cause of the action." *Id.* at 483; *see Thor Gallery at South DeKalb, LLC v. Reliance Mediaworks (USA) Inc.,* 131 A.D.3d 431, 432 (1st Dep't 2015)(reversing *forum non conveniens* dismissal because "a substantial nexus to New York" existed). As codified, a *forum non conveniens* dismissal is warranted only on a finding "that in the interest of substantial justice the action should be heard in another forum." CPLR 327(a).

Significantly, "[t]he burden rests upon *the defendant* challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation." *Islamic Republic,* 62 N.Y.2d at 479 (emphasis added). The defendant must meet a "'heavy burden'. . .of establishing that plaintiff's selection of New York is not in the interest of substantial justice [and] [u]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Swaney,* 158 A.D.3d at 438. That balance must "strongly. . .favor. . .the defendant. . .even where the plaintiff is not a resident of New York." *Elmaliach v. Bank of China Ltd.,* 110 A.D.3d 192, 208 (1st Dep't 2013).

Defendants fail to meet their burden.

B. The Applicability of Swiss Law Deserves Little Weight

Fixating on one factor rather than the balancing analysis, Defendants claim that New York is an inconvenient forum because the "internal affairs doctrine" requires that Plaintiffs' claims be decided under Swiss law. (Defs. Mem. 1-3, 8-12; Nobel Aff., *passim*). Defendants say that the case is "plagued" with "thorny questions" of Swiss law that will impose "an unwarranted burden on this Court." (Defs. Mem. 8). Granted, foreign law is *a* factor that courts consider in the *forum non conveniens* calculus (and Plaintiffs do not dispute the applicability of Swiss law). But here the foreign-law factor merits little weight.

1. New York Courts Frequently Apply Foreign Law as Part of their Ordinary Judicial Function

As the First Department emphasized, deciding a case under another country's law is not "an unnecessary burden upon our judiciary since our courts are frequently called upon to apply the laws of foreign jurisdictions." *Intertec Contracting A/S v. Turner Steiner Int'l., S.A.,* 6 A.D.3d 1, 6 (1st Dep't 2004)(reversing *forum non conveniens* dismissal involving Sri Lanka law). The First Department often has held that applying foreign law counts for little in the *forum non conveniens* determination. *E.g., Pacific All. Asia Opportunity Fund L.P. v. Kwok Ho Wan,* 160 A.D.3d 452, 453 (1st Dep't 2018)(reversing *forum non conveniens* dismissal; "that Hong Kong law governs. . .is not dispositive"). Especially so, where--as here--the law of only one foreign country is at issue and "there has been no showing that it is in dispute." *Id.*[2]

[2] *Accord, Elmaliach,* 110 A.D.3d at 205 (trial court properly declined to dismiss even though "Israeli law should govern this action"); *Yoshida Printing Co., Ltd. v. Aiba,* 213 A.D.2d 275, 275 (1st Dep't 1995)(applying Japanese law does not "render[] New York an inconvenient forum"); *Anagnostou v. Stifel,* 204 A.D.2d 61, 62 (1st Dep't 1994)(court " will be fully capable of applying Greek law"); *Neumeier v. Kuehner,* 43 A.D.2d 109, 111 (1st Dep't 1973)("that the Ontario [law] will be applicable does not make the New York forum inconvenient.").

Applying another country's law to adjudicate cases is embedded in New York jurisprudence. It's part of the judicial function in New York. Defendants' assertion that doing so here would overly burden the Court misconceives the judicial function and diminishes the Court's capabilities.

Indeed, this Court recently applied foreign law in *City of Aventura Police Officers' Ret.Fund v. Arison,* 70 Misc. 3d 234 (Sup. Ct. N.Y. Cty. 2020), in deciding "novel questions as to whether, and under what circumstances, the shareholders of an English company may bring a derivative action in a New York court." *Id.* at 235.

2. Defendants Fail to Show That Applying Swiss Law Will be Difficult for This Court

Applying Swiss law here is inconsequential because, despite Defendants' *ipse dixit* of "thorny questions," they identify none. Prof. Dr. Nobel's affirmation is telling.

Defendants' expert offers broad explanations of Swiss corporations law, corporate governance, rights/duties involving directors and managers in Swiss corporations, and the remedies available in Swiss corporate litigation. (Nobel Aff., Point III, ¶¶1-5). But he pinpoints no difficult issues in applying this law to the facts here.

Nobel also opines that Plaintiffs *can* bring derivative claims in a Swiss court. *(Id.,* Point III, ¶¶3, 6-7). He notes that "[i]f a shareholder brings an action for harm to the corporation, the proceeds of the lawsuit must go to the corporation." (Point III, ¶3). Plaintiffs have no quarrel with these views.

Significantly, Nobel explains that Phoenixus "hold[s] an American subsidiary, a Delaware LLC doing business in New York, called Vyera," which "was allowed" under Phoenixus' bylaws; *and* that "[u]nder Swiss law, the directors of a parent company are

. . .*responsible for the subsidiary*." *(Id.,* Point III, ¶8; emphasis added). Plaintiffs, again, accept this Swiss law principle--which is at the heart of their claims--and this Court surely can apply it.

Defendants nevertheless assert that the Swiss law "is complex." (Defs. Mem. 10). Yet their examples in no way show complexity beyond this Court's capability to analyze and apply it. For example, their expert's unremarkable observation that directors' duties, and the corresponding standard of care, are "set forth" in the Swiss Code (Defs. Mem. 10) does not mean the Court will be unable to understand that law. So too with the Swiss version of the "business judgment rule" and, as addressed below, with other supposedly differentiating attributes of Swiss law.

Defendants argue that Switzerland would "not enforce a New York court judgment imposing non-monetary relief on a Swiss corporation." (Defs. Mem. 11; *see* Nobel Aff. III.9). Even were this so, *Plaintiffs'* inability to enforce New York awarded relief *against Defendants* does not prejudice Defendants (but, rather, favors them). Moreover, Plaintiffs' expert Dr. Hoffmann-Nowotny explains that a Swiss court *can* recognize relief awarded by a foreign judgment even if that relief is unavailable under Swiss law. (Hoffmann-Nowotny Aff. ¶¶52-63).

A "what-if" illustrates the irrationality of Defendants' preference for Switzerland: if Plaintiffs were to sue in a Swiss court and be awarded money damages, they would have to domesticate their Swiss judgment in New York to enforce it here against the New York Individual Defendants. That cannot be deemed a better way of achieving "substantial justice" than suing in New York for a judgment that can readily be enforced here.

3. The Court Will Face Little Practical Difficulty in Applying Swiss Law Because New York Law is So Similar

Defendants' "unwarranted burden" argument collapses even further because the pertinent Swiss and New York laws are similar.

To show that similarity, Plaintiffs submit the expert testimony of Dr. Urs Hoffmann-Nowotny, a partner in the Swiss law firm Schellenberg Wittmer Ltd. We respectfully submit that Dr. Hoffmann-Nowotny is properly qualified as an expert on Swiss corporate law issues and can authoritatively compare and contrast Swiss and New York law. (Hoffmann-Nowotny Aff. ¶¶1-7 [qualifications]). Plaintiffs proffer his affirmation as admissible evidence for the Court's consideration.

Dr. Hoffmann-Nowotny explains how the Swiss law Defendants' expert addresses is similar in concept and application to analogous New York law. Given the similarities, the Court will not be "overburdened" by applying Swiss law. In particular,

- The nature of *a shareholders' action* under Swiss law is very similar to a derivative action under New York law; conceptually, there are no material differences (Hoffmann-Nowotny Aff. ¶¶18-21);
- In a Swiss shareholders' action, *the corporation is the beneficiary of a financial recovery*, as in a New York derivative action (*id*. ¶¶20-21);
- The *prerequisites for corporate officers' and directors' liability* in tort under Swiss law track the elements of liability under New York law (*id*. ¶¶22-28);
- The standard for evaluating *officers' and directors' duties of care* under Swiss law mirrors New York's (*id*. ¶¶24-28);
- The Swiss law standard applied when a court reviews *the business decisions made by Swiss board members* is very similar to the business judgment rule review under New York (and Delaware) law (*id*. ¶¶29-33); and
- *Joint and several liability*, *with a contribution-like defense*, under Swiss law is comparable to New York's (*id.* ¶¶38-41).

Dr. Hoffmann-Nowotny also explains that Noble's "differences" between Swiss and New York law are immaterial, or are differences that should not be hard to apply here. For example, the "discharge of board members" is insignificant because the effects are "only 'very limited' and 'overestimated.'" (Hoffmann-Nowotny Aff. ¶37). Importantly, even if the Court had to address it, a "discharge" would present no "thorny" questions beyond the Court's ken, since

Swiss "discharge" is conceptually akin to deciding the enforceability of a liability release under New York law.

After elucidating the comparisons, Hoffmann-Nowotny concludes that Swiss law presents no uncertain, complicated or problematic issues for adjudicating this case, and thus Swiss law will not unreasonably burden the Court. (*E.g*., Hoffmann-Nowotny Aff. ¶69).

C. Availability of a Litigation Forum in Switzerland, or Defendants' (Erroneous) Assertion that Plaintiffs' Causes of Action Arose There, Deserve Little Weight

1. New York has a Clear and Strong Interest in Adjudicating Plaintiffs' Claims

Defendants argue that the Swiss courts would afford "a suitable and available" alternative forum, and that a Swiss court would have a greater interest because the claims involve "injury to a Swiss corporation." (Defs. Mem. 13). Defendants again fail to back this up. Further, well pleaded factual allegations refute Defendants' position.

As emphasized in *Islamic Republic* and its progeny, the alternative-forum consideration is rooted in a "substantial nexus" between a plaintiff's claims and New York *versus* the proposed foreign jurisdiction. *Here*:

- Plaintiffs Pizzo and Verglas are New York residents (Cmpl.¶¶10, 11);
- Defendants Mulleady, Mithani and Powers are New York residents and domiciliaries (Cmpl. ¶¶12, 13, 15); Powers is a member of the New York Bar, who "works out of Vyera's office in New York City" (Cmpl.¶44(e), 76(c));
- Nominal Defendant Phoenixus "is little more than a corporate shell"; "conducts little or no actual business activities at its [Swiss] place of business"; and "exists and. . .functioned as a 'parent' entity to direct and control the business operations of. . .Vyera," a Delaware limited liability company "with its principal place of business in New York at 600 Third Avenue" (Cmpl.¶¶2, 16(b), 16(c), 24);
- Vyera is "registered with the NYS Department of State as a foreign limited liability corporation doing business in New York" (Cmpl.¶21(a));
- "Vyera engaged in purposeful activities in New York State in connection with the transactions benefitting the Individual Defendants" (Cmpl. ¶20(b));

- "[T]he Individual Defendants exercised full control. . .over Vyera in connection with these transactions; [a]s a result, each of the Individual Defendants. . .was a primary actor in the transactions and related circumstances occurring in New York State that are the subject of this action" (Cmpl. ¶20(c),(d));

- Phoenixus "transact[ed] business within New York, through the Individual Defendants. . .acting as officers on behalf of Phoenixus' wholly-owned subsidiary Vyera" with respect to the claims asserted (Cmpl.¶21(a));

- Nonparty Shkreli, Phoenixus' founder who was extensively involved in the conduct giving rise to Plaintiffs' claims, "is a resident and domiciliary of New York State" (Cmpl.¶¶16(e), 26);

- The "variable interest entities," both alleged to be "vehicles for unlawfully diverting assets of Vyera and for other wrongdoing," purport to operate in New York City (Cmpl. ¶¶71, 73, 81); and

- Phoenixus' 2018 and 2019 certified financial statements, which included Vyera's financial reporting, were audited by the New York office of the public accounting firm Mayer Hoffman McCann CPAs, located in New York City (at 1065 Avenue of the Americas); and the audit was conducted in accordance with U.S. Generally Accepted Accounting Principles (Cmpl.¶¶85, 138; *see* https://www.-mhmcpa.com/about-us/locations/details/new-york-city [accounting firm's website]).

These circumstances and this conduct are New York focused, creating a substantial nexus to New York.

Plaintiffs' claims, therefore, are inescapably tied to New York. For example, the breach of fiduciary duty claim is that the Individual Defendants bear responsibility for false and misleading financial reporting "as principal officers of Vyera." (Cmpl.¶¶118, 120, 138, 142, 143(a)-(b), 145). The waste of corporate assets claim stems from improper transactions with the VIEs in which the Individual Defendants participated, again from New York as Vyera officers. (Cmpl.¶¶153-155). Likewise, the Individual Defendants "acted in concert," "participated," and "conspired" with Shkreli (Cmpl.¶166, 167, 170)--and all of them (except for Walker) resided in New York where they undoubtedly plotted their conduct.

Simply put, the Individual Defendants exploited their officer positions with Vyera and carried out their wrongdoing from New York. Predictably, Defendants make no showing that any of this malfeasance occurred in Switzerland.[3]

Further, Switzerland is not a suitable alternative forum because Plaintiffs would have no right to a trial by jury. (Hoffmann-Nowotny Aff. ¶¶50-51). "[T]he absence of a right to trial by jury in [a foreign country] is a significant consideration that weighs against dismissal for forum non conveniens." *Wilson v. Dantas,* 128 A.D.3d 176, 188 fn.9 (1st Dep't 2015), *aff'd,* 29 N.Y.3d 1051 (1st Dep't 2017). Loss of trial by jury is hardship to Plaintiffs, further compelling the conclusion that "[D]efendants have not established the existence of another forum which will best serve the ends of justice and the convenience of the parties." *Id*. at 188.

Dr. Hoffmann-Nowotny explains another aspect of Swiss law that reflects diminished Swiss interests. Jurisdiction in Swiss courts can be either "exclusive and mandatory" or "non-exclusive and non-mandatory." (Hoffmann-Nowotny Aff. ¶¶42-49). The former category "express[es] a particular interest in having relevant disputes dealt with before a Swiss court." (*Id.* ¶43). However, for claims against officers and directors, a Swiss court's jurisdiction is *non-exclusive/non-mandatory*, and Swiss law recognizes jurisdiction at the "habitual residence of the defendant." (*Id.* ¶¶46-47). As Dr. Hoffmann-Nowotny attests: "This demonstrates that Switzerland has no increased interest that director's and officers' liability claims concerning Swiss corporations are dealt with by Swiss courts," and "there is therefore no overriding interest

[3] Defendants say that some of the VIE transactions were "entered into" with a Phoenixus subsidiary other than Vyera. (Dascher Aff. ¶24). If so, the 2018 U.S. audited financials do not disclose it, instead stating that "Phoenixus has financed the VIEs' activities to date [and] Phoenixus is the primary beneficiary over both [VIEs]." (p. 7; *see* Cmpl. ¶¶87(a)-(c), 93(a), 97, 154). In any event, what matters is that the Individual Defendants and Shkreli orchestrated this improper transaction as New Yorkers.

in preventing a foreign court from assuming jurisdiction in a case as the present one, in which the members of the board of directors of a Swiss company are domiciled abroad." (*Id*. ¶¶45, 49).[4]

2. The Swiss Connections Defendants Invoke Deserve Little Weight

Undaunted, Defendants argue that "the bulk of the operative facts are anchored in Switzerland." (Defs. Mem. 13). Whatever supposedly occurred in Switzerland does not overcome the much stronger nexus of Plaintiffs' claims to New York.

For example, Defendants observe that Phoenixus issued financial statements audited by a Swiss auditor in Switzerland. (Defs. Mem. 14). True, but inconsequential. Defendants acknowledge that Phoenixus *also* "compiled. . .US GAAP consolidated financial statements for Phoenixus and its subsidiaries, audited by a U.S. firm." (Däscher Aff. ¶25). The Complaint pleads that the Individual Defendants participated in making the misrepresentations contained in *those U.S.-GAAP*-based financials audited by New York-based auditors. (*E.g.*, Cmpl. ¶¶85, 86-92, 138).

Defendants' reliance on the "election" of board members ostensibly at shareholders' annual general meetings in Switzerland misses the point. (Defs. Mem.15). As alleged, the board

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[4] Defendants' cases are distinguishable or irrelevant, particularly for the "greater interest" factor. For example, in *Bewers v. Am. Home Prods Corp.,* 99 A.D.2d 949, 950 (1st Dep't 1984), English plaintiffs sued for personal injuries due to taking defendants' "prescription only" medications; England had a greater interest than New York because the medications "were licensed, manufactured, marketed and distributed [in the UK]," and the issues concerned whether the medications "were appropriately tested and labeled. . .pursuant to [UK's] own regulatory scheme." In *Hart v. General Motors Corp.,* 129 A.D.2d 179, 186 (1st Dep't 1987), the court observed that "the 'internal affairs' rule is. . .only one aspect" of the *forum non conveniens* analysis, and the derivative action there "challeng[ed] the same transaction. . .being litigated in Delaware." In *Neuter, Ltd. v. Citibank, N.A.,* 239 A.D.2d 213 (1st Dep't 1997), the trades at issue "were recommended by defendant's Zurich branch and executed in Switzerland."

Defendants' "foreign law" factor cases are equally unpersuasive. *E.g., Estate of Kainer v. UBS AG,* 175 A.D.3d 403, 405 (1st Dep't 2019)(individual defendant lived abroad and issues concerned both "Swiss and French estate law" where the parties--unlike here--"dispute[d] the applicable foreign law").

elections were a "sham." (Cmpl. ¶¶5, 34, 57). Shkreli exercised his voting control to put his "lackeys" on the board (Cmpl. ¶¶2, 3, 5, 33, 34, 36, 39, 40, 57), thereby "enabling them to manipulate [Vyera and Phoenixus] to Shkreli's and their own ends." (Cmpl. ¶36). By doing so, "Shkreli, with the active participation of the Individual Defendants, had the further opportunity to divert Vyera's assets for the benefit of himself and the Individual Defendants." (Cmpl. ¶165). Plaintiffs' allegations that Shkreli manipulated the election of Phoenixus board members and misused Vyera's business in concert with the Individual Defendants closely track the government's allegations in its S.D.N.Y. enforcement action against Vyera, Phoenixus, Mulleady and Shkreli referred to in the Complaint. (*See, e.g.*, Cmpl. ¶¶31, 35, 45((f), 46(d)-(e), 106(d), 176).

This concerted unlawful conduct necessarily occurred in New York, where Shkreli, Mulleady, Mithani and Powers all live and worked. Their underlying communications, meetings, other conduct and agreements are at the crux of Plaintiffs' claims, creating a stronger nexus to New York than the perfunctory "elections" and "approvals" that happened at board meetings abroad.

The same holds true for the board's having "ratified" a loan agreement with one of the VIEs at a meeting in Switzerland. (Defs. Mem. 14). Plaintiffs assert that "the 'loans' made to the VIEs and the transfers of monies out of Vyera [were] done to enrich the Individual Defendants and Shkreli unlawfully, and constitutes improper self-dealing." (Cmpl. ¶168). Whether the board in Switzerland ostensibly signed off on the Individuals Defendants' wrongdoing after-the-fact does not supplant New York as the locus of the cause of action arising from self-dealing by New York residents.

Finally, Defendants' contention that Switzerland should be the preferred forum due to "alleged injury to a Swiss corporation" (Defs. Mem. 13) is contrived. Plaintiffs allege that "Vyera is the main operating subsidiary of Phoenixus in the United States"; that "Vyera's operations constitute [Phoenixus'] principal or sole 'business'"; and that Vyera and Phoenixus "operated as a common enterprise and as interrelated companies," with Phoenixus' board "control[ling] Vyera, which does not have its own board." (Cmpl. ¶¶24(c),(d), 25). The Individual Defendants' malfeasance harmed Vyera financially at the business's operating level. That wrongdoing caused more direct and tangible losses to Vyera in New York than the flow-through effect on Phoenixus' balance sheet that Defendants assert is harm "in Switzerland." *Actual injury* to both Vyera and Phoenixus centers on New York.[5]

D. Defendants' Supposed Evidence-Gathering "Constraints" Also are Mistaken and Do Not Favor Litigation Abroad

Defendants' argument that there would be "significant restrictions" on gathering evidence in Switzerland (Def. Mem. 16) is an incorrect and irrelevant diversion that does not support a Swiss forum over this Court.

The evidence in this case is mainly in New York. Three of the four defendants are in New York, Vyera is here, its documents and electronically stored information are accessible here, and the U.S. auditors are located in New York City. Other Vyera personnel, if called as nonparty witnesses, are likely in New York, or otherwise in the U.S. and readily subject to out-of-state deposition procedures. Other than a passing reference to "the statutory auditor" being in

[5] Defendants' contention that Phoenixus suffered injury in Switzerland is a transparent artifice. In the government enforcement action, Vyera "admits that Phoenixus AG has five direct employees." (Answer, Doc. 293, ¶8, Case 1:20-cv-00706-DLC). This confirms Plaintiffs' allegation that Phoenixus is merely a corporate shell parent for Vyera and that no injury occurred in Switzerland.

Switzerland (which is of no consequence because the U.S. auditor is in Manhattan), Defendants identify no evidence in Switzerland that the parties will be unable to obtain.

Even if evidence is there, Switzerland is a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, so the parties, if necessary, can use its procedures to seek evidence. Plaintiffs' expert confirms this (Hoffmann-Nowotny Aff. ¶¶64-68), and Defendants' expert says only that using the Hague Convention "entails significant amounts of time in ordinary cases." (Nobel Aff. ¶10 p.13). Not only documents, but also pretrial depositions, are possible. (Hoffmann-Nowotny Aff. ¶67).

Prof. Dr. Nobel misstates the effect of Switzerland's blocking law, Article 271 of the Swiss Criminal Code, as considered by U.S. courts. Recently in *EFG Bank AG v. AXA Equitable Life Ins. Co.,* 2018 WL 1918627 (S.D.N.Y. Apr. 20, 2018), Judge Furman, based on a thorough analysis of Swiss law, ruled that Article 271 does not bar production of a Swiss party's documents where the party would not face *criminal* sanctions for failing to comply, and where the discovery sought only required the "collection and transfer of one's own information." *Id*. at *2. That followed, based on Swiss decisional law, because "*voluntary* production of documents by a private party" is permitted, and "'voluntary' is defined broadly to include the production of discovery so long as the party faces only procedural consequences rather than criminal sanctions" for not producing. *Id*. Defendants' Swiss law expert in *EFG Bank*, like Nobel, failed to cite any Swiss precedent finding a person had violated Article 271 by voluntarily producing documents in a U.S. litigation. *Id*.[6]

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[6] Instead, Nobel refers to a Swiss Federal Supreme Court case (footnote 13 of his affirmation) to assert that taking discovery in Switzerland for proceedings abroad can be criminal. A U.S. court addressed that Swiss case in *Microsoft Corp. v. Weidmann Elec. Tech. Inc.,* 2016 WL 7165949 (D. Vt. Dec. 7, 2016), emphasizing the extreme conduct that led to that conviction--an attorney questioned Swiss witnesses for an Australian case "without approval

Similarly to the other factors, Defendants fail to carry their burden on the location-of-evidence factor for a *forum non conveniens* dismissal.

POINT II

THE COURT HAS PERSONAL JURISDICTION OVER BOTH WALKER AND PHOENIXUS

Plaintiffs need make only "a sufficient start" to show that personal jurisdiction exists over a defendant on this motion to dismiss, demonstrating "their position not to be frivolous." *Peterson v. Spartan Indus., Inc.,* 33 N.Y.2d 463, 467 (1974). Plaintiffs more than meet that standard.

A. The Court Can Exercise Long Arm Personal Jurisdiction Over Walker

Walker asserts that "there are no allegations tying any alleged wrongdoing by [him] to the State." (Defs. Mem. 22). To the contrary, the Complaint's allegations make (at least) a "sufficient start" to establishing long arm jurisdiction on both conspiracy-based "agency" and "transacting business" under CPLR §302(a).

1. Walker is Tied to Wrongdoing in New York as a *Co-Conspirator*

"[A]cts committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under CPLR 302(a)(2)." *Chrysler Cap. Corp. v. Century Power Corp.,* 778 F.Supp. 1260, 1266 (S.D.N.Y. 1991). This follows because Section 302(a) authorizes personal jurisdiction over a non-

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from any Swiss authority," thereby "'undertak[ing] acts for a foreign state that are reserved to an authority or an official.'" *Id.* at *13. Doing so is illegal in Switzerland, "unless"--in Nobel's words--"procedures pursuant to the Hague Convention. . .are used." (Nobel Aff. p.13). The parties here need simply follow the Hague Convention to gather evidence in Switzerland without usurping the function of official authorities.

Defendants' other case, *Dentsply Sirona Inc. v. Edge Endo, LLC,*2019 WL 4451033 (D.N.M. Sept. 17, 2019)(Defs. Mem. 16), is inconsequential. There a New Mexico federal court *approved* a protocol under the Hague Convention to allow a nonparty to be deposed in Switzerland. *Id.* at *1, 3.

domiciliary who acts "through an agent." *Id*. ("Courts have defined 'agent' broadly to include . . .a defendant's co-conspirators"); *Sea Trade Maritime Corp. v. Coutsodontis,* 2012 WL 3594288, at *7 (S.D.N.Y. Aug. 16, 2012)("co-conspirators may be considered 'agents' for establishing personal jurisdiction under Section 302(a).").

Personal jurisdiction based on conspiracy is met simply on (1) "a prima facie showing of conspiracy"; and (2) "[allegations of] specific facts warranting the inference that the defendant was a member of the conspiracy." *Sea Trade,* 2012 WL 3594288, at *7. Importantly, "[w]hen considering whether plaintiffs have made a prima facie showing, great leeway should be allowed the pleader, since by the nature of the conspiracy, the details may not be readily known at the time of the pleading." *Id*.

Walker "conspired" in a "scheme to benefit [the Individual Defendants] and Shkreli." (Cmpl.¶167; *see* ¶¶166, 170, 173). His and the others' specific acts in furtherance of the conspiracy and scheme include: (i) "structuring" the VIEs for an improper purpose; (ii) "making 'loans'" without a valid business purpose and fair consideration; (iii) "making transfers" of monies wrongfully; and (iv) "converting" debt obligations of the VIEs into equity interests. (Cmpl.¶167(a)-(e)). Walker also "participated" as a "director. . .of Phoenixus" in the issuance and preparation of false and misleading financial reporting, and "provided information" for the preparation. (Cmpl.¶¶106(a), 139). As set forth, the conduct occurred and affected Vyera in New York. A prima facie case of a conspiracy run out of New York is well pleaded.

The same allegations show that Walker was a member of this conspiracy. He knew that his co-conspirators (as New York residents working out of Vyera's New York office) took actions in New York, causing harm to Vyera in New York (where it's headquartered). And Walker was a beneficiary of the conspiracy with the others. (Cmpl. ¶¶20, 109, 165, 167).

The Complaint further alleges a cover-up. Walker, as one of the Individual Defendants, "took affirmative actions" in "concert with Shkreli" to conceal the "illicit transfers, payments and diversions" of assets, as well as "facts concerning the VIEs in order to conceal improper dealings with them." (Cmpl. ¶¶106(b), 170). Logically and plausibly, that "further specific information about this unlawful conduct is in the Individual Defendants and Shkreli's exclusive knowledge and possession." (Cmpl. ¶171). More granularity is not required, nor could it be expected.

Walker now *misreads* the Complaint. Shkreli and the Individuals Defendants--including Walker--misused *Vyera,* as Phoenixus' operating subsidiary for their unlawful purposes. That conduct and the injury were New York focused. Walker (and the others) "coopted Vyera to act as his agent for his own benefit," and "Walker was a primary actor in the transactions and related circumstances occurring in New York State." (Cmpl. ¶20(a),(d)). At this pre-discovery stage, Plaintiffs make a prima facie showing of conspiracy, and Walker's participation and acts in furtherance of it.

Mulleady, Mithani, Powers and Shkreli's actions in New York are therefore attributable to Walker for long-arm jurisdiction based on agency/conspiracy. *See In re Sumitomo Copper Litig.,* 120 F.Supp.2d 328, 333 (S.D.N.Y. 2000)(personal jurisdiction existed over out-of-state defendants because Defendant "Global [Minerals and Metals Corporation]. . .and others were members of a conspiracy, and. . .Global committed tortious acts in New York in furtherance of that conspiracy").

Exercising *in personam* jurisdiction over Walker comports with Constitutional due process (the second stage of analysis). *See Licci v. Lebanese Canadian Bank, SAL,* 732 F.3d 161, 169-174 (2d Cir. 2013)(discussing due process requirements for personal jurisdiction). The

quality and nature of Walker's contacts with New York, in their totality, were substantial. Aside from actively participating in Board meetings and corporate governance, Walker agreed to be a director of Phoenixus, whose operating subsidiary (Vyera) is headquartered in New York, transacts business in New York and conducted governance functions here. Walker "purposefully availed [him]self of the privilege of doing business in the forum and could foresee being haled into court [here]." *Id.* at 170.

Walker cannot avoid jurisdiction based on the "reasonableness" factors for due process. *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 568 (2d Cir. 1996)(enumerating reasonable factors). These factors do not overcome jurisdiction unless the defendant "present[s] a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Licci,* 732 F.3d at 173; *see Metro. Life,* 84 F.3d at 575("dismissals resulting from the application of the reasonableness test should be few and far between").

Among the reasonableness factors, New York is Plaintiffs' chosen forum for obtaining convenient and effective relief. New York has a strong interest in adjudicating this dispute, California (Walker's residence) has none, and other federalism interests are inapplicable. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.,* 141 S.Ct. 1017, 1025 (2021)("The law of specific jurisdiction thus seeks to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy."). Any burden on Walker in defending himself in New York is insubstantial. He is represented by a major New York City law firm; remote proceedings and communications are prevalent; and, most importantly, he *chose* to be a director in a foreign company whose business operated out of New York. "The exercise of personal jurisdiction over [Walker] would not offend principles of fair play and substantial justice." *Licci,* 732 F.3d at 174.

2. Walker Also is Subject to "Transacting-Business" Long-Arm Jurisdiction

The "transacts any business within the state" prong of long-arm jurisdiction (CPLR §302(a)(1)) is a "single act statute." *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.,* 7 N.Y.3d 65, 71 (2006). "[P]roof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Id*.

Walker and Phoenixus' legal counsel acknowledge that Walker "participated by phone" in at least "a single in-person Board meeting held in New York" in 2020. (Däscher Aff. ¶15; Defs. Mem. 4 fn.3). Other Board meetings were held remotely, five "hosted from New York." (Däscher Aff. ¶16; Defs. Mem. 4 fn.3). Walker attests that he "attended Phoenixus Board meetings by telephone" in 2018 and 2019 (Walker Aff. ¶9), and the logical inference (since he identifies the meetings he did attend personally in Switzerland, *see* Walker Aff. ¶8), is that he participated by telephone in multiple New York-hosted remote Board meetings. What occurred during these Board meetings must await discovery.

These contacts suffice for personal jurisdiction. In *Parke-Bernet Galleries, Inc. v. Franklyn,* 26 N.Y.2d 13 (1970), the Court held that a defendant who participated from California via "an open telephone line" in bidding at an art auction conducted in New York City was subject to long-arm jurisdiction. *Id*. at 15. "[D]efendant, although never actually present" in New York, was communicating "over an open telephone line and was an active participant in an auction held here." *Id*. By his "direct and personal involvement. . .the defendant. . .projected himself into the auction room." *Id*. at 17. His "active participation. . .amounted to the sustained and substantial transaction of business here. . .[and he thereby] purposefully availed himself of the privilege of conducting activities within New York." *Id*. at 18.

Walker is no different than the *Parke-Bernet Galleries* defendant. He actively participated in at least one New York Board meeting and "projected himself" into the Board room. By participating in the governance involving a New York company, likely with respect to matters arising from Plaintiffs' claims, Walker purposefully took advantage of the privilege of conducting activities here. That makes him subject to long-arm jurisdiction.

* * *

At a minimum, on both agency/conspiracy and transacting business, Plaintiffs are entitled to jurisdictional discovery. *HBK Master Fund L.P. v. Troika Dialog USA, Inc.,* 85 A.D.3d 665, 666 (1st Dep't 2011)("'sufficient start' warrant[ed] further discovery on the issue of personal jurisdiction").

B. <u>The Court Can Exercise Personal Jurisdiction Over Phoenixus</u>

Defendants' argument that Phoenixus is not subject to personal jurisdiction, and that the entire case should be dismissed because it is an "indispensable party" (Defs. Mem. 19-22), is without merit.

Phoenixus is *the beneficiary* of any financial recovery from the case. That's the essence of a derivative action, which is predicated on a corporation's unwillingness to bring the claims for itself. Indeed, Phoenixus does not challenge Plaintiffs' allegations that it would have been futile to make a pre-suit demand to sue. (Cmpl. ¶¶103-116).

It is blackletter law that "a corporation is usually a passive litigant in a stockholder's derivative action. . . .[T]he corporation is merely a nominal party defendant, being in reality the plaintiff." 15 N.Y. Jur. 2d Business Relationships § 1209. The corporation generally is deemed "an indispensable party [because] [t]he theory is that the corporation cannot be bound [to a judgment] unless it is a party." *Id.* As explained in this court long ago:

> The management, the board of directors, may take a position antagonistic to a claim asserted on behalf of the corporation. That antagonistic position gives a stockholder the right to take the matter out of the hands of the management and to bring his action in a representative capacity on behalf of the corporation. *The corporation itself can take no position in a derivative stockholder's suit which is fundamentally antagonistic to the claim asserted on its behalf.*

Chaplin v. Selznick, 186 Misc. 66, 68-69 (Sup. Ct. N.Y. Cty. 1945)(emphasis added). *See Monahan v. Kenny,* 248 A.D. 159, 160 (1st Dep't 1936)(granting motion in derivative action to vacate judgment *against* company: "The corporation was merely a nominal party defendant to the action. It was in reality a plaintiff.").

Here, however, Phoenixus is far from passive. It seeks dismissal of claims against its present and former management, *aligning itself* with the Individual Defendants and *arguing against* their being held liable. And Phoenixus' counsel also represents the Individual Defendants. Something is rotten in Denmark.

In any event, long arm jurisdiction exists over Phoenixus based on agency. "[W]here . . .two corporations have common ownership and are interrelated, they may have an agency relationship for jurisdictional purposes. . . .[T]he subsidiary and parent can. . .have an agency relationship because they are engaged in a common business enterprise. . .[and] the subsidiary does all the business the parent could do were it here by its own officials." *Yousef v. Al Jazeera Media Network,* 2018 WL 1665239, at *9 (S.D.N.Y. Mar. 22, 2018). Jurisdictional contacts of a New York subsidiary can be imputed to the foreign parent where "the alleged agent acts for the benefit of, and with the knowledge and consent of, the non-resident principal, and over which that principal exercises some control." *In re Welspun Litig.,* 2019 WL 2174089, at *7 (S.D.N.Y. May 20, 2019). And personal jurisdiction from agency is determined on "the realities of the relationship in question rather than the formalities of agency law." *Id.*

Phoenixus owned and controlled Vyera (which has no separate board), the two "operated as a common enterprise and as interrelated companies," and "Vyera's operations constitute the principal or sole 'business' of Phoenixus." (Cmpl. ¶24(b),(c),(d), ¶25). Vyera, as Phoenixus' agent, transacted business and committed tortious acts (through the Individual Defendants) in New York that are the source of Plaintiffs' claims. (Cmpl. ¶21).

The Complaint is replete with Vyera's actions: Vyera, through Mulleady, communicated with Shkreli to further an anticompetitive scheme involving a major product (Cmpl. ¶¶45(f), 46(e)); Vyera, though the Individual Defendants, reported its 2018 and 2019 financial performance as part of Phoenixus' (false and misleading) U.S. financial statements (Cmpl. ¶¶121-136); and the Individual Defendants controlled information for the financials "by virtue of" their positions with Phoenixus "and Vyera." (Cmpl. ¶¶139-142). Vyera acted as Phoenixus' agent in New York on matters that underlie Plaintiffs' claims.

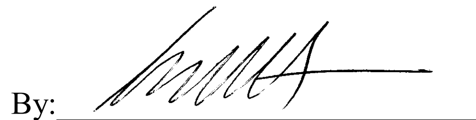
In a seminal personal jurisdiction case, the Supreme emphasized that "[a]gency relationships. . .may be relevant to the existence of *specific* jurisdiction. . . .As such, a corporation can purposefully avail itself of a forum by directing its agents. . .to take action there. *Daimler AG v. Bauman,* 571 U.S. 117, 135, fn.13 (2014). That is precisely what Phoenixus did here. As the First Department emphasized post-*Daimler,* "[t]he commission of some single or occasional acts of an agent in a state may be enough to subject a corporation to specific jurisdiction in that state with respect to suits relating to that in-state activity." *In re Estate of Stettiner,* 148 A.D.3d 184, 192 (1st Dep't 2017) (citing *Daimler*). Vyera's New York acts were extensive, subjecting Phoenixus to this Court's jurisdiction.

CONCLUSION

The Court should deny Defendants' motion to dismiss the complaint.

Dated: New York, New York
April 19, 2021

KISHNER MILLER HIMES P.C.



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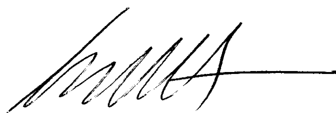

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