UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOWA STUDENT LOAN LIQUIDITY CORPORATION, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

IKB DEUTSCHE INDUSTRIEBANK AG, IKB CREDIT ASSET MANAGEMENT GmbH, MOODY'S INVESTORS SERVICE, INC., MOODY'S INVESTORS SERVICE LIMITED, THE McGRAW HILL COMPANIES, INC. (d/b/a STANDARD & POOR'S RATINGS SERVICES), FITCH, INC., WINFRIED REINKE and STEFAN ORTSEIFEN,

Defendants.

Civil Action No. 1:09-CV-08822 (SAS)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT STEFAN ORTSEIFEN'S MOTION TO DISMISS

PHILLIPS LYTLE LLP
Attorneys for Defendant Stefan Ortseifen
3400 HSBC Center
Buffalo, New York 14203
Telephone No.: (716) 847-8400

Of Counsel:
Thomas S. Wiswall, Esq.
Craig R. Bucki, Esq.

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PRELIMINARY STATEMENT

Defendant Stefan Ortseifen submits this memorandum in further support of his motion to dismiss under Rules 12(b)(2) and 12(b)(6) and in reply to plaintiff's opposition papers. Mr. Ortseifen has not engaged in any conduct in New York State at any relevant time, and the complaint fails to allege any wrongful or jurisdictionally relevant conduct by Mr. Ortseifen, either in New York State or anywhere else.

The grounds of Mr. Ortseifen's motion to dismiss this action are essentially the same as the grounds of his earlier motion to dismiss the separate action, King County, Washington v. IKB Deutsche Industriebank AG, et al., Civil Action No. 09-CV-08387 (SAS) (the "King County action"), previously filed in this Court by the same plaintiff's counsel.[1]

As in the King County action, plaintiff's opposition here is based on nothing - no evidence, no allegations in its pleading, and no supporting legal authority. Rather than offer any substantive basis for its position, plaintiff here, like King County, relies on inflammatory rhetoric that is inconsistent with the case law it cites and the complaint it filed. Many of plaintiff's assertions about what the complaint alleges as to Mr. Ortseifen give no supporting references at all, and the rest cite complaint paragraphs that simply do not justify the stated assertions. As

[1] Plaintiff's complaint in this action is identical to the King County complaint, except for differences in the timing of service on Mr. Ortseifen, the identity of the plaintiff, and the states where plaintiff is located. Those differences, although few in number, are material. For example, because Mr. Ortseifen was not served with process in this action until after his motion to dismiss was filed in the King County action, that motion did not address this action and a new motion to dismiss this action was required. In addition, because plaintiff's opposition to Mr. Ortseifen's motion in the King County action was received before his motion to dismiss this action was filed, his motion papers here include evidence and authorities demonstrating the lack of merit in the arguments previously made by King County. Significantly, although the sequence of filings gave plaintiff here an opportunity to challenge Mr. Ortseifen's evidence and authorities, plaintiff's opposition here merely regurgitates the positions offered by King County and already rebutted by Mr. Ortseifen.

noted in Pension Committee of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC, ("Pension Committee") 446 F. Supp. 2d 163, 182 n.122 (S.D.N.Y. 2006), "a complaint may not be amended by briefs submitted in opposition to a motion to dismiss." Plaintiff must stand or fall with the allegations in its complaint.[2]

POINT I

THERE IS NO EVIDENCE (NOR ANY ALLEGATION IN THE COMPLAINT) THAT MR. ORTSEIFEN HAD ANY RELEVANT CONTACT WITH NEW YORK STATE

In support of his motion to dismiss, Mr. Ortseifen submitted an affirmation negating the existence of any contact with any person, entity, or transaction in New York State relating to Rhinebridge. Mr. Ortseifen's affirmation also negated the type of day-to-day participation in the Rhinebridge offering that would be required for any inference that he was an "insider" in that company or that transaction. Plaintiff's opposition does not put in issue any of the facts in Mr. Ortseifen's affirmation.[3] Although Luke Brooks, one of plaintiff's attorneys, submitted a declaration "in support of" plaintiff's opposition, neither that declaration, nor the exhibits attached to it, takes issue with the facts affirmed by Mr. Ortseifen.

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[2] With regard to statutory provisions, plaintiff's opposition relies only on CPLR 302(a)(1). Although the only legal theory referenced in the complaint is a tort theory, plaintiff implicitly concedes that jurisdiction cannot be grounded on CPLR 302(a)(2) or (3), which are the only two provisions that refer specifically to personal jurisdiction in tort actions.

[3] Plaintiff criticizes a few of Mr. Ortseifen's statements for having been made "on information and belief" (court doc. 85, p. 10) and suggests that those statements relate to matters that should be within his own personal knowledge. Contrary to plaintiff's suggestion, however, those statements relate to the actions of other persons and entities, which he did not personally witness. Plaintiff's comments serve only to undermine its own statements, all of which are alleged only by counsel and are thus necessarily limited to counsel's information and belief (at best).

As this Court stated in Pension Committee, No. 05 Civ. 9016 (SAS), 2006 WL 708470, at *3 (S.D.N.Y. Mar. 20, 2006), "[a] plaintiff bears the burden of demonstrating that the court may exercise jurisdiction over each defendant . . . by making a prima facie showing that the defendant is subject to personal jurisdiction." Similarly, the U.S. Supreme Court has directed that "[e]ach defendant's contacts with the forum State must be assessed individually." Calder v. Jones, 465 U.S. 783, 790 (1984). In the instant case, there is no evidence of any sufficient contact between Mr. Ortseifen and New York State; there are no allegations in the complaint concerning any such contact; and no good faith basis would exist under Fed. R. Civ. P. 11(b) to support such unstated allegations if they had been pleaded.

Rather than dispute the facts submitted in support of the motion, or make a *prima facie* showing to demonstrate a basis for asserting jurisdiction over Mr. Ortseifen, plaintiff cites some cases in which defendants were subject to jurisdiction in New York without having been physically present here. However, the facts, allegations, and issues in each of the cases were materially different from those presented here.

In Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460 (1988), the individual defendant personally directed the transactions that were undertaken by his corporations in New York; he had met with the plaintiff; he was in frequent communication with the New York corporation concerning plaintiff's transaction; and he was the controlling shareholder of the Texas corporation that took plaintiff's funds. The court specifically found that the individual defendant was "a primary actor in the transaction with [plaintiff] in New York, not some corporate employee in Texas who played no part in it." (71 N.Y.2d at 470). The individual defendant's extensive direction over specific events in New York led the court to find that his activities here were purposeful and that he "transacted business in this State through an agent

[the New York corporation]" (Id. at 463). No such evidence (or even an allegation) has been offered here as to Mr. Ortseifen.

In Fischbarg v. Doucet, 9 N.Y.3d 375 (2007), the court asserted long-arm jurisdiction because "defendants established a substantial ongoing professional commitment between themselves and plaintiff [defendants' New York attorney], governed by the laws of our state." (9 N.Y.3d at 382-83). Nothing similar has been or could be said about Mr. Ortseifen and the plaintiff in this case. Moreover, with regard to a plaintiff's burden in response to a motion to dismiss, the court noted that "the plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction" (Id. at n. 5). Plaintiff here has not done so.

In Deutsche Bank Securities, Inc. v. Montana Board of Investments, 7 N.Y.3d 65 (2006), the defendant, unlike Mr. Ortseifen, was an institutional investor that had purchased hundreds of millions of dollars worth of securities from New York firms (including plaintiff). It exchanged emails with the plaintiff, first to offer, and then to cancel, a sale of $15 million in bonds. In OR.EN. Orobia Engineering S.R.L. v. Nacht, No. 97 Civ. 4912 SAS KNF, 1998 WL 730562, at *4 (S.D.N.Y. Oct. 19, 1998), the individual defendant "made visits twice yearly to New York trade shows at which he displayed [his corporation's] equipment, and at which he prominently displayed the [corporation's] logo." In Pension Committee, No. 05 Civ. 9016(SAS), 2006 WL 559811, at *7 (S.D.N.Y. Mar. 7, 2006), this Court asserted jurisdiction over a defendant that was "a large corporation, doing business internationally, maintaining direct contacts with New York, and selecting New York as the forum for the resolution of all disputes regarding the Funds [forming the basis of the action]." Again, nothing of the kind has been, or could properly be, alleged about Mr. Ortseifen here.

Similarly, in Taberna Capital Mgmt., LLC v. Dunmore, No. 08 Civ. 1817(JSR), 2008 WL 2139135 (S.D.N.Y. May 20, 2008), the two individual defendants acted on their own behalf, for their own personal benefit, and intentionally chose New York State as the place of incorporation for the corporation they then owned, controlled, and used to accomplish the fraudulent scheme directed at plaintiff. To support its findings, the court relied on documentary evidence, not blanket allegations like those in the complaint here. The plaintiff's evidence included an email by one individual defendant to the other about incorporating in New York, and also an agreement to which at least one of the individual defendants was a party (Id. at *2). Again, no such evidence connects Mr. Ortseifen to this jurisdiction.

In PDK Labs, Inc. v. Friedlander, 103 F.3d 1105 (2d Cir. 1997), the individual defendant used a New York attorney to make frequent written and oral communications to the plaintiff in New York, threatening infringement claims. Plaintiff's declaratory judgment action arose out of those direct contacts. CutCo Indus., Inc. v. Naughton, 806 F.2d 361 (2d Cir. 1986), and Druck Corp. v. Marco Fund, 102 F. App'x 192 (2d Cir. 2004), involved multiple visits to New York by the defendants. These cases also give no support to plaintiff here.[4]

[4] The desperation in plaintiff's argument is evident from its distortion of the plain meaning of ordinary terms. As CEO of IKB Bank, Mr. Ortseifen naturally received communications concerning activities of that bank and its subsidiaries. However, the existence of "communications" does not justify plaintiff's speculative implication that Mr. Ortseifen was engaged in day-to-day transactions involving Rhinebridge. Similarly, plaintiff's conclusion that Mr. Ortseifen "participated" and was "involved" in the alleged fraud, simply because he received communications referring to Rhinebridge, are further examples of plaintiff's tactic of relying on insinuation rather than information.

Plaintiff also disregards material distinctions among the many persons and entities named in the documents. Those documents show that the issuers of the notes were Rhinebridge PLC and Rhinebridge LLC; IKB CAM, London Branch, acted as manager under a contract with Rhinebridge; IKB Bank was the parent corporation of IKB CAM; Mr. Ortseifen was an executive at IKB Bank and had an advisory role at IKB CAM. Nevertheless, plaintiff's opposition seeks to attribute to Mr. Ortseifen whatever New York acts were allegedly done by

Although plaintiff relies on the "group pleading doctrine" in opposing Mr. Ortseifen's motion under Rule 12(b)(6), and implicitly relies on it to support jurisdiction as well, plaintiff does not cite any case that applied the group pleading doctrine to deny a motion to dismiss under Rule 12(b)(2). That doctrine is not sufficient to sustain plaintiff's burden to make a prima facie showing of jurisdiction over Mr. Ortseifen. See Royal Ahold N.V. Sec. & ERISA Litig., 351 F. Supp. 2d 334, 354 (D. Md. 2004) (rejecting plaintiffs' "attempts to establish minimum contacts by relying on conclusory allegations and Boonstra's status on the Royal Ahold Supervisory Board. . . . The plaintiffs include Boonstra in their broad group pleadings . . . but they fail to note a single specific act taken by Boonstra directed at the U.S."). In a detailed discussion of the group pleading doctrine, Judge Kaplan of this Court noted that the doctrine was intended "solely for pleading purposes" (In re BISYS Sec. Litig., 397 F. Supp. 2d 430, 440 (S.D.N.Y. 2005)). The group pleading doctrine is discussed in Mr. Ortseifen's initial motion papers (court doc. 80, at pp. 22-24).

POINT II

THE COMPLAINT FAILS TO STATE A CLAIM AGAINST MR. ORTSEIFEN

The complaint refers to Mr. Ortseifen by name in only two paragraphs, paragraph 19 and 130. Neither of those paragraphs purports to allege any basis for the assertion of jurisdiction over him, and neither purports to allege the elements of a claim for common law fraud (or anything else). To the extent that the remaining paragraphs of the complaint refer to Mr. Ortseifen, they do so only through the use of the composite terms "IKB" and "defendants." The practice of lumping defendants together has been consistently criticized in decisions of this

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any of those corporate entities. Again, however, nothing in plaintiff's complaint or in the record before the court supports that attempt to equate Mr. Ortseifen with those entities.

and other courts. This subject is discussed in Mr. Ortseifen's initial memorandum (court doc. 80) at pp. 8-10.

In its responding papers, plaintiff actually compounds the confusion created by its complaint. Ignoring the complaint's definition of "IKB" as a group consisting of four parties (Complaint, ¶ 20), the opposing memorandum re-defines the term "IKB" as the two-party combination of IKB Bank and/or IKB CAM, while a slightly different term, "IKB defendants," is defined as the four-party combination of those two corporate entities and/or Mr. Ortseifen and Winfried Reinke (Plaintiff's Brief, p. 2). Thus, according to plaintiff's alternating definitions, Mr. Ortseifen is included in the term "IKB" when it appears in plaintiff's complaint, but is not included in the same term when it appears in plaintiff's brief, but is included there under the different term, "IKB defendants." Plaintiff's story-line then switches back and forth between these terms in a rapid-fire succession that would make Abbott and Costello jealous (see, e.g., plaintiff's "summary of the complaint's allegations" at pp. 1-5 of its brief).

The complaint simply does not state what, if anything, plaintiff seeks to attribute to Mr. Ortseifen. Plaintiff's resort to composite terms ("IKB," "IKB defendants," "defendants") prevents any logical inference that Mr. Ortseifen engaged in any relevant transactions or other conduct, either in New York State or anywhere else. As a result, to the extent his name appears at all in plaintiff's opposition papers, those references are not accompanied by any citations to the record. Most importantly, Mr. Ortseifen's affirmation, uncontroverted by any evidence or even any specific allegations, shows that he did not engage in any conduct that would justify an assertion of jurisdiction or any claim against him.

Because plaintiff seeks to state a fraud claim, the complaint must not only comply with the Rule 8(a)(2) requirement of "a short and plain statement of the claim showing that the

pleader is entitled to relief," but must also comply with Rule 9(b), which imposes the additional requirement that the claim be stated "with particularity." The complaint here complies with neither rule. "The primary purpose of Rule 9(b) is to afford defendant fair notice of the plaintiff's claim and the factual ground upon which it is based" (Ross v. Bolton, 904 F.2d 819, 823 (2d Cir. 1990)).

Plaintiff's arguments cannot be reconciled even with the court decisions cited in its own memorandum. The contention that those cases offer support to plaintiff's position here would be astonishing, if the same meritless contention had not already been floated up by King County.[5]

Given the patent insufficiency of the allegations in the complaint against Mr. Ortseifen and the undisputed evidence of his lack of contact with New York State, the assertion of jurisdiction over him in this action would make a mockery of the most fundamental principles of both jurisdiction and pleading. It would not merely be offensive to "our traditional conception of fair play and substantial justice" (Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)); it would be offensive to all who honor court precedent and respect the plain meaning of the English language.

[5] Equally baseless is plaintiff's waiver argument, which relies on opinions that addressed very different procedural contexts and legal issues. Where a complaint fails to allege the basic elements of a claim as to a particular defendant, that defendant is not required to go beyond pointing out the missing elements, and also anticipate and refute the meritless arguments later fabricated by plaintiff. Here, Mr. Ortseifen not only incorporated by reference the motions of the other defendants, which explained at length the complaint's multiple deficiencies, but he also revised his initial motion in light of King County's feigned misunderstanding of his positions.

POINT III

MR. ORTSEIFEN SHOULD NOT BE SUBJECTED TO EITHER DISCOVERY DEMANDS OR MORE PLEADINGS

Plaintiff's opposition repeatedly protests that it has not obtained discovery from Mr. Ortseifen and suggests that, if it were given free reign in discovery proceedings, it might conceivably find out information justifying its attempt to keep him in this lawsuit. Such speculative hopes do not suffice to subject Mr. Ortseifen to discovery proceedings.[6]

Mr. Ortseifen has demonstrated that there is no basis for the assertion of personal jurisdiction in this action (even though it is not his burden to do so). The facts recited in his affirmations are not subject to dispute. Plaintiff's complaint contains no contrary allegations. The documents attached to the Brooks declaration likewise do nothing to create any genuine issue about Mr. Ortseifen's lack of even minimal contacts with New York State. Unlike the cases on which plaintiff relies, this is not a case where conflicting evidence creates a material unresolved issue of fact. Indeed, plaintiff's argument is based on the premise that it does not even need to show that Mr. Ortseifen had any real contact with New York, and that it can conjure up a jurisdictional basis out of blanket accusations, inapplicable pleading presumptions, and brazen argumentation. Plaintiff has not established any justification for engaging in discovery on any issue.

[6] It is well settled that "the purpose of discovery is to find out additional facts about a well pleaded claim, not to find out whether such a claim exists" (Polar Int'l Brokerage Corp. v. Reeve, 108 F. Supp. 2d 225, 248 n.40 (S.D.N.Y. 2000), internal quotations omitted). "[T]he purpose of discovery is not to enable [plaintiff] to determine whether he has a viable claim" (Id.). A plaintiff "armed with nothing more than conclusions" cannot "unlock the doors of discovery" (Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 651 F. Supp. 2d at 170 (S.D.N.Y. 2009)).

Plaintiff's opposition also seeks to cure the defects in its complaint by requesting leave to amend. However, leave to amend is unwarranted when amendment would be futile. Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008); Polar Int'l Brokerage Corp. v. Reeve, 108 F. Supp. 2d 225, 249 (S.D.N.Y. 2000). In the instant case, there is no basis for the assertion of personal jurisdiction over Mr. Ortseifen. That lack of jurisdiction requires dismissal regardless of any amendment plaintiff could propose. If, hypothetically, plaintiff were able to state any non-frivolous claim against Mr. Ortseifen, that claim should be adjudicated by an appropriate court in Germany, not New York.

CONCLUSION

Based on the facts and principles discussed above and in Mr. Ortseifen's other motion papers, this action should be dismissed as against him.

Dated: Buffalo, New York
April 28, 2010

Respectfully submitted,

PHILLIPS LYTLE LLP

By _____/s/ Thomas S. Wiswall_____
Thomas S. Wiswall
Attorneys for Defendant Stefan Ortseifen
3400 HSBC Center
Buffalo, New York 14203-2887
Telephone No.: (716) 847-8400

Of Counsel:
Craig R. Bucki

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