

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

-----X	
ACE DECADE HOLDINGS LIMITED,	:
	:
Plaintiff,	: Index No. 653316/2015 (Bransten, J.)
	:
-v-	: Motion Sequence No. 001
	:
UBS AG,	: ORAL ARGUMENT REQUESTED
	:
Defendant.	:
-----X	

**PLAINTIFF ACE DECADE'S OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT**

David Boies
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200

Joshua I. Schiller
Qian A. Gao
David L. Simons
Christopher L. Martin, Jr.
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
Tel: (212) 446-2300

Attorneys for Ace Decade Holdings Ltd.

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	4
I. Background	4
II. UBS Advised Kwok and Yu to Invest Through an Intermediary to Avoid Disclosure Requirements But Concealed the Intermediary’s Close Ties to UBS.....	5
III. UBS Entered into an One-Sided Loan Agreement with Haixia Containing Terms Directly at Odds with UBS’s Representations to Ace Decade.	6
IV. While in New York, Ace Decade Relied Upon UBS’s Misrepresentations in Deciding to Make the Investment.....	7
V. Contrary to Its Representations to Ace Decade, UBS Demanded Immediate Repayment of the Loan and Sold Ace Decade’s Shares Without Giving Ace Decade Adequate Opportunity to Pay.	10
VI. UBS’s Fraudulent Conduct Caused Ace Decade to Lose Its \$500 Million Investment and Unjustly Enriched UBS.....	11
ARGUMENT	11
I. THIS COURT HAS JURISDICTION OVER UBS.	11
A. This Court Has Personal Jurisdiction over UBS under New York’s Long-Arm Statute.	12
1. UBS Has Transacted Business Within New York State.....	12
2. UBS Has Committed Tortious Acts in New York State.....	14
3. UBS Has Committed Tortious Acts Outside of New York Causing Injury to Ace Decade in New York.	15
B. Long-Arm Jurisdiction over UBS Is Consistent with Due Process.	17
C. UBS Is Subject to General Jurisdiction in New York.....	18
II. UBS FAILS TO ESTABLISH THAT NEW YORK IS AN INCONVENIENT FORUM.	18
A. Ace Decade and Its Representatives Are New York Residents, and UBS Has a New York Branch.	19
B. The Events Giving Rise to the Transaction Were in New York, and New York Has a Substantial Interest in Providing a Forum to Ace Decade.....	20
C. New York Law Applies Because UBS Has Failed to Demonstrate the Existence of an Actual Conflict Between New York and Hong Kong Law.....	20

D. Litigating in New York Would Not Unduly Burden UBS or Inconvenience the Court.	22
III. THE COMPLAINT’S ALLEGATIONS GO WELL BEYOND WHAT IS REQUIRED TO STATE A CLAIM.....	23
A. Ace Decade Has Adequately Pleaded the Existence of a “Special Relationship.”	23
B. Ace Decade Has Adequately Pleaded Reasonable Reliance.	25
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>511 W. 232nd Owners Corp. v. Jennifer Realty Co.</i> , 98 N.Y.2d 144 (2002)	23
<i>Am. Media, Inc. v. Bainbridge & Knight Labs., LLC</i> , 2016 WL 115890 (1st Dep’t Jan. 12, 2016).....	25
<i>Antone v. GM Motors Corp., Buick Motors Div.</i> , 64 N.Y.2d 20 (1984)	19
<i>Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.</i> , 62 N.Y.2d 65 (1984)	17
<i>Banco Nacional Ultramarino, S.A. v. Chan</i> , 169 Misc. 2d 182 (Sup. Ct. N.Y. Cnty. 1996), <i>aff’d</i> , 240 A.D.2d 253 (1st Dep’t 1997)	15
<i>Bauer Industries, Inc. v. Shannon Luminous Materials Co.</i> , 52 A.D.2d 897 (2d Dep’t 1976)	15
<i>Chatwal Hotels & Resorts LLC v. Dollywood Co.</i> , 90 F. Supp. 3d 97 (S.D.N.Y. 2015)	17
<i>Daimler AG v. Bauman</i> , 134 S. Ct. 746 (2014).....	18
<i>Davidoff v. Davidoff</i> , 2006 WL 1479558 (Sup. Ct. N.Y. Cnty. May 10, 2006).....	15
<i>Deutsche Bank Secs., Inc. v. Mont. Bd. of Invs.</i> , 7 N.Y.3d 65 (2006)	12, 13, 14
<i>EBC I, Inc. v. Goldman, Sachs & Co.</i> , 5 N.Y.3d 11 (2005)	24
<i>Elmaliach v. Bank of China Ltd.</i> , 110 A.D.3d 192 (1st Dep’t 2013)	18, 19, 20, 21
<i>Fischbarg v. Doucet</i> , 9 N.Y.3d 375 (2007)	12, 14
<i>Grimaldi v. Guinn</i> , 72 A.D.3d 37 (2d Dep’t 2010)	12

<i>Hong Kong Fin. Ltd. (Singapore) v. Morgan Stanley</i> , 2014 WL 4650238 (Sup. Ct. N.Y. Cnty. 2014)	21, 22, 25
<i>Houbigant Inc. v. Deloitte & Touche LLP</i> , 303 A.D.2d 92 (1st Dep’t 2003)	23
<i>In re Hellas Telecommunications (Luxembourg) II SCA</i> , 524 B.R. 488 (Bankr. S.D.N.Y. 2015), <i>adhered to</i> , 526 B.R. 499 (Bankr. S.D.N.Y. 2015).....	18
<i>J.A.O. Acquisition Corp. v. Stavitsky</i> , 192 Misc. 2d 7 (Sup. Ct. N.Y. Cnty. 2001)	20
<i>Kimmell v. Schaefer</i> , 89 N.Y.2d 257 (1996)	24
<i>Kramer v. Vogl</i> , 17 N.Y.2d 27 (1966)	15
<i>LaMarca v. Pak-Mor Mfg. Co.</i> , 95 N.Y.2d 210 (2000)	16, 20
<i>Lau v. Mezei</i> , 2012 WL 3553092 (S.D.N.Y. Aug. 16, 2012).....	24
<i>Mazzocki v. State Farm Fire & Cas. Co.</i> , 170 Misc. 2d 70 (Sup. Ct. N.Y. Cnty. 1996)	19
<i>Mobile Training & Educ., Inc. v. Aviation Ground Sch. of Am.</i> , 2010 WL 3310257 (Sup. Ct. N.Y. Cnty. June 23, 2010).....	11, 12, 16, 17
<i>N. Valley Partners, LLC v. Jenkins</i> , 2009 WL 1058162 (Sup. Ct. N.Y. Cnty. Apr. 14, 2009).....	15
<i>Noval Williams Films LLC v. Branca</i> , 2015 WL 5164891 (S.D.N.Y. Sept. 3, 2015).....	17
<i>OrthoTec, LLC v. Healthpoint Capital, LLC</i> , 84 A.D.3d 702 (1st Dep’t 2011).	18
<i>Parke-Bernet Galleries, Inc. v. Franklyn</i> , 26 N.Y.2d 13 (1970)	14
<i>Paterno v. Laser Spine Institute</i> , 24 N.Y.3d 370 (2014)	13, 17
<i>People ex rel. Manila Elec. R.R. & Lighting Corp. v. Knapp</i> , 229 N.Y. 502 (1920)	19

<i>Portanova v. Trump Taj Mahal Assocs.</i> , 270 A.D.2d 757 (3d Dep’t 2000), appeal denied, 95 N.Y.2d 765 (2000).....	21
<i>Providence Washington Ins. Co. v. Squier Corp.</i> , 31 A.D.2d 514 (1st Dep’t 1968)	19
<i>Shareholder Rep. Servs. LLC v. Sandoz</i> , 2015 WL 1209358 (Sup. Ct. N.Y. Cnty. Mar. 16, 2015)	21
<i>SNS Bank, N.V. v. Citibank, N.A.</i> , 7 A.D.3d 352 (1st Dep’t 2004)	21
<i>Sondik v. Kimmel</i> , 131 A.D.3d 1041 (2d Dep’t 2015)	21
<i>Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc.</i> , 131 A.D.3d 431 (1st Dep’t 2015)	19
<i>Travelers Indem. Co. v. Inoue</i> , 111 A.D.2d 686 (1st Dep’t 1985)	12, 15
<i>U.S. Express Leasing, Inc. v. Elite Tech. (N.Y.), Inc.</i> , 87 A.D.3d 494 (1st Dep’t 2011)	23
<i>UBS AG v. Rep. of Croatia</i> , 14-cv-08316 (S.D.N.Y.).....	22
<i>UBS Sec. LLC, et al. v. Highland Cap. Mgmt., L.P.</i> , No. 650752/2010 (Sup. Ct. N.Y. Cnty.)	23
<i>Walden v. Fiore</i> , 134 S. Ct. 1115 (2014).....	17
<i>Yoshida Printing Co., Ltd. v. Aiba</i> , 213 A.D. 2d 275 (1st Dep’t 1995)	22

Statutes

CPLR § 3016.....	24
CPLR § 302.....	passim

PRELIMINARY STATEMENT

This is a case about misrepresentations made by UBS AG (“UBS”) that UBS directed toward Ace Decade Holdings Limited (“Ace Decade”) and its representatives in New York, that were relied upon by Ace Decade in New York, and that led to Ace Decade’s injury in New York. As such, this case belongs squarely in this Court.

UBS made misrepresentations to Ace Decade, Kwok Ho Wan (an agent of Ace Decade and longtime UBS client), and Yu Yong (the Director and sole shareholder of Ace Decade) (“Ace Decade’s representatives”) while they were residing and working in New York. In May 2015, while in New York and relying upon UBS’s misrepresentations, Ace Decade made an investment in a private placement of new shares of a company. UBS advised Ace Decade’s representatives to invest through an intermediary, rather than directly through Ace Decade, in order to avoid disclosure requirements. The intermediary Ace Decade used to enter into the investment was recommended by UBS. UBS told Ace Decade’s representatives that this intermediary would be independent of UBS and would protect Ace Decade’s interests, but concealed that the intermediary had close ties to UBS.

Also in reliance upon UBS’s misrepresentations, Ace Decade invested \$500 million and obtained financing from UBS to purchase additional shares. Because Ace Decade followed UBS’s advice to invest through an intermediary, it was that intermediary—and not Ace Decade—that entered into a loan agreement with UBS. The loan agreement entered into by UBS and the intermediary UBS recommended was one-sided and contained terms that were directly contradictory to representations made by UBS to Ace Decade.

In July 2015, two months after Ace Decade made the investment, UBS demanded a prepayment of \$200 million on the loan in less than 24 hours because short term price fluctuation

limits in the loan agreement had been triggered. The trigger and the short time to make the payment were among the conditions UBS had told Ace Decade would not be in the agreement. In addition, in order to induce Ace Decade to enter into the agreement, UBS had told Ace Decade's representatives that if there ever were any prepayment demand, UBS would work cooperatively with Ace Decade to allow it sufficient time to meet any payment obligations and that UBS would not sell off Ace Decade's shares of the company without giving it adequate time to pay. Despite having made these representations to Ace Decade in New York on numerous occasions, UBS ignored Ace Decade's entreaties for additional time to make the payment and sold all of Ace Decade's shares at a 20% discount, causing it to lose its \$500 million investment.

In order to escape this Court's jurisdiction, UBS attempts to obscure its New York contacts by reframing the case as one in which Ace Decade and its representatives moved to New York after UBS completed its tortious acts. However, the relevant acts—UBS's misrepresentations and Ace Decade's reliance and injury—occurred while Ace Decade was in New York. Indeed, Ace Decade relied upon UBS's misrepresentations, many of which UBS made after Ace Decade and its representatives moved to New York in January 2015, in deciding to make its investment in May 2015.

This Court should deny UBS's motion to dismiss for lack of jurisdiction on the following grounds. *First*, this Court has jurisdiction over UBS under CPLR § 302(a)(1) because this cause of action arises from a transaction that UBS induced Ace Decade to make in May 2015, months after Ace Decade, Kwok, and Yu moved to New York. *Second*, this Court has jurisdiction under CPLR § 302(a)(2) because UBS made misrepresentations to Ace Decade and its representatives over several months while they were in New York. *Third*, this Court has jurisdiction under CPLR § 302(a)(3) because UBS's tortious acts injured Ace Decade in New York. CPLR

§ 302(a)(3)'s other requirements are satisfied because UBS regularly does business in New York, should reasonably expect its acts to have consequences in New York, and derives substantial revenue from interstate and international commerce. Moreover, this Court's exercise of personal jurisdiction over UBS is consistent with due process because UBS's substantial and purposeful contacts with New York far exceed the "minimum contacts" required. UBS's operations in New York through two of its "main offices worldwide" additionally subject it to general jurisdiction in New York.¹

UBS also has failed to meet its heavy burden of establishing that New York is an inconvenient forum for this action. Many factors weigh against dismissal on grounds of *forum non conveniens*, including that Ace Decade and its representatives are New York residents, UBS operates a branch in New York, the events giving rise to the transaction at issue occurred in New York, and Ace Decade was injured in New York.

UBS's merits arguments fare no better because they ignore the relevant allegations in the Complaint and raise factual issues ill-suited for resolution on a motion to dismiss.

The allegations in the Complaint that Ace Decade relied upon UBS's statements that it was knowledgeable and experienced in advising investors with respect to similar investments and that

¹ In January 2016, Ace Decade filed letters with the Court seeking limited discovery into UBS's jurisdictional assertions and New York contacts. (Jan. 15, 2016 and Jan. 29, 2016 Letters from D. Boies to Hon. Eileen Bransten, Docket Nos. 19-20, 22.) Argument on Ace Decade's application is scheduled for February 8, 2016. Should the Court deny Ace Decade's request for limited discovery, Ace Decade, in the alternative, hereby renews its request for jurisdictional discovery on the basis that the affidavits of Kwok and Yu in support of Ace Decade's opposition to UBS's motion to dismiss have more than "set forth a sufficient start" to show that "facts may exist to exercise personal jurisdiction over" UBS, and thus that jurisdictional discovery is warranted. *Lis v. Rosen*, 2013 WL 1154935, at *16 (Sup. Ct. N.Y. Cnty. Mar. 19, 2013) (Bransten, J.); *see also Int'l Pub'g Concepts, LLC v. Locatelli*, 2015 WL 321852, at *2 (Sup. Ct. N.Y. Cnty. Jan. 15, 2015) (Bransten, J.) ("a plaintiff may provide, and the court can consider, sworn affidavits to remedy any defects in the complaint and preserve a possibly inartful pleading that may contain a potentially meritorious claim").

Ace Decade followed UBS's advice regarding how to structure the investment and the means by which to finance the investment are more than sufficient to plead the existence of a special relationship. Moreover, UBS's argument that Ace Decade failed to plead reasonable reliance on UBS's oral misrepresentations when the written agreement included terms that conflicted with those misrepresentations ignores the fact that, as orchestrated by UBS, Ace Decade was not a party to the written agreement.

STATEMENT OF FACTS

I. Background

Kwok's longstanding relationship with UBS began in 2010 when he first began discussing potential investments with UBS. (Feb. 18, 2015 Letter from S. Wong to Bd. of the Sherry-Netherland ("Ace Decade Ex. 1"); Affidavit of Kwok Ho Wan ("Kwok") ¶ 3.)² In July 2012, Kwok became a UBS client. (Feb. 23, 2015 Letter from T. Cheung and S. Wong to Bd. of the Sherry-Netherland ("Ace Decade Ex. 2"); Kwok ¶¶ 3, 6.) Over the course of this relationship, Kwok has depended and relied upon the knowledge and expertise of UBS and Stephen Wong, the UBS Managing Director who was Ace Decade's primary contact, in making many of his investment decisions. (Compl. ¶¶ 18-20; Kwok ¶¶ 4-5.) According to UBS, Kwok was a "reliable" and "long-term client" who "[o]ver the years, has earned credibility in our bank" and "always fulfills his repayment obligations." (Ace Decade Ex. 1; Kwok ¶ 37.)

In 2014, UBS and Kwok began discussing an investment opportunity (the "Investment") in an upcoming placement (the "Placement") of H-shares (the "Shares") of Haitong Securities, Co. Ltd. ("Haitong"). (Compl. ¶ 14; Kwok ¶ 7.) UBS became one of the joint global coordinators and placement agents for the Shares and held itself out as knowledgeable and

² The Ace Decade Exhibits and affidavits of Kwok Ho Wan and Yong Yu referenced herein are submitted in support of Ace Decade's opposition to UBS's motion to dismiss.

experienced in advising investors with respect to similar investments. (Compl. ¶¶ 17-18; Kwok ¶ 9.) Wong told Kwok that if he decided to invest through UBS, UBS would protect his interests, and because of the size of Kwok's proposed Investment, senior executives from UBS globally, including from the United States, would participate in the deal. (Kwok ¶ 10.) Throughout discussions about the Investment, Wong repeatedly told Kwok that he could trust him and UBS, and that UBS was always working in Kwok's best interests. (Compl. ¶¶ 22, 26, 32; Kwok ¶¶ 24-29.)

II. UBS Advised Kwok and Yu to Invest Through an Intermediary to Avoid Disclosure Requirements But Concealed the Intermediary's Close Ties to UBS.

Kwok told Wong that he planned to make the Investment through a special purpose entity, Ace Decade. (Compl. ¶ 20.) Wong and UBS advised Kwok not to make the Investment through Ace Decade but rather to have Ace Decade enter into a side agreement with an intermediary that would hold legal title to the Shares so as to avoid disclosure requirements. (Compl. ¶ 21; Kwok ¶¶ 12-14; Affidavit of Yu Yong ("Yu") ¶ 5.) Wong's statement in his affirmation in support of UBS's motion to dismiss that "[t]he first time I heard of Ace Decade was when I learned of this lawsuit in October 2015" (Affirmation of Stephen Wong ¶ 3) cannot be reconciled with the facts alleged in the Complaint. In fact, not only was Wong aware of Ace Decade, but also he concocted the plan to hide Ace Decade's and Kwok's role in the Investment. (Compl. ¶ 21; Kwok ¶¶ 12-14, 16-17; Yu ¶¶ 5, 7.) Indeed, Wong even reviewed the resumes of Kwok's employees and advised Kwok to appoint Yu as the Director and sole shareholder of Ace Decade because, in his view, her resume was most likely to satisfy any background or Know Your Customer ("KYC") checks required by the proposed intermediary. (Kwok ¶¶ 17-18; Yu ¶ 7.) Additionally, Wong gave Kwok and Yu comments on Yu's resume to increase the likelihood of satisfying the intermediary's requirements. (*Id.*; Oct. 26, 2014 Email from Y. Yong to S.

Wong (“Ace Decade Ex. 3”); Oct. 27, 2014 Messages between Y. Yong and S. Wong (“Ace Decade Ex. 4”).)

UBS and Wong recommended that Ace Decade use Haixia Huifu Asset Investment and Fund Management Co., Ltd. (“Haixia”) as the intermediary for its Investment, representing that Haixia was the best qualified to act for Ace Decade, was independent of UBS, and would protect Ace Decade’s interests. (Compl. ¶ 22; Kwok ¶ 15; Yu ¶ 6.) UBS failed to disclose that Haixia was controlled by UBS’s joint venture partner, State Development & Investment Corp. (“SDIC”) and that Lu Bo, the principal point of contact between UBS and Haixia, was previously the Chief Financial Officer of the UBS SDIC joint venture. (Compl. ¶ 22; Kwok ¶ 16.) Had Ace Decade been aware of these close ties, Ace Decade would not have entrusted its Investment to Haixia. (Compl. ¶¶ 22-23.)

III. UBS Entered into an One-Sided Loan Agreement with Haixia Containing Terms Directly at Odds with UBS’s Representations to Ace Decade.

UBS also advised Ace Decade to finance part of the Investment through UBS, and in reliance upon UBS’s representation that it would structure the loan on terms favorable to Ace Decade, Ace Decade did not attempt to seek financing from another bank. (Compl. ¶ 26; Kwok ¶ 19.) UBS advised Ace Decade to provide \$500 million to Dawn State Limited (“Dawn State”), a special purpose vehicle and wholly-owned subsidiary of a Haixia fund, which would use Ace Decade’s \$500 million and the loan from UBS to purchase the Shares. (Compl. ¶¶ 24, 28.) UBS advised Ace Decade that it should have no management or voting rights with respect to Dawn State or the Shares, claiming that this structure was desirable to avoid disclosing Ace Decade’s ownership of the Shares. (Compl. ¶ 28.) UBS’s representation was knowingly false, as UBS lured Ace Decade into surrendering its control rights so that UBS could structure its deal with Haixia and Dawn State in UBS’s interest. (Compl. ¶ 28.)

During discussions about the loan, Kwok told Wong that Ace Decade would not make the Investment unless the loan documents did not include provisions permitting UBS to demand repayment of the loan (in other words, any “margin call”) based on short term price fluctuations of the Shares and UBS provided Ace Decade with adequate time to meet any margin calls. (Compl. ¶ 32; Kwok ¶ 20.) Wong represented to Kwok on several occasions that the loan financing documents would be consistent with Kwok’s requirements, namely that there would be no margin calls based on short term price fluctuations, that UBS would work with Ace Decade to allow it to meet any margin calls, and that UBS would not sell the Shares following a margin call without giving Ace Decade adequate time to pay. (Compl. ¶ 32; Kwok ¶ 21-22.)

As further reassurance, Wong told Ace Decade on numerous occasions that UBS had provided loan financing to a shareholder of Ping An Insurance Group (“Ping An”) in an even larger transaction, but that UBS had never sold any of the shares owned by that shareholder as a result of a margin call. (Compl. ¶ 32; Kwok ¶ 23; Yu ¶ 11.) Wong repeatedly promised Ace Decade that UBS would give it the same treatment it gave to the Ping An shareholder and would not sell its Shares following a margin call without giving Ace Decade adequate time. (Compl. ¶ 32; Kwok ¶ 23; Yu ¶ 11.)

IV. While in New York, Ace Decade Relied Upon UBS’s Misrepresentations in Deciding to Make the Investment.

In early January 2015, months before Ace Decade made the Investment, Ace Decade, Kwok, and Yu moved to New York to seek investors interested in investing in Ace Decade—a plan Kwok discussed with Wong several times beginning in late 2014. (Compl. ¶¶ 36-37; Kwok ¶¶ 30-31; Yu ¶ 8.) Kwok and Yu subsequently formed Golden Spring (New York) Ltd. (“Golden Spring New York”), a company registered to do business in New York, which would be responsible for seeking investors interested in investing in Ace Decade. (Compl. ¶¶ 36-37;

Kwok ¶¶ 32-33; Yu ¶ 9.) Kwok and Yu conducted business relating to Ace Decade's Investment and Golden Spring New York from their offices at 767 Fifth Avenue, New York, NY 10153. (Compl. ¶¶ 36-38; Kwok ¶ 34; Yu ¶ 9.)

UBS knew that Kwok, Yu, and Ace Decade had moved to New York and even assisted with setting up their operations here, such as by transferring funds to Golden Spring New York's account in New York and providing references for Kwok in connection with his purchase of an apartment in Manhattan. (Ace Decade Exs. 1-2; Kwok ¶¶ 35-38; Yu ¶ 10.) In March 2015, Kwok purchased the apartment, where he, Yu, and other employees and representatives of Ace Decade and Golden Spring New York have lived since the purchase. (Kwok ¶ 39.)

In the months after Ace Decade, Kwok, and Yu moved to New York, Wong spoke to Kwok by telephone dozens of times and sent numerous electronic messages to Kwok. (Kwok ¶ 40; Yu ¶ 11.) Yu joined some of the calls between Wong and Kwok. (Kwok ¶ 40; Yu ¶¶ 11-14.) In these communications, Wong and Kwok discussed the Investment and the UBS loan. (Kwok ¶ 41; Yu ¶¶ 11-14.) Kwok did not raise with Wong again while he was in New York his concerns about payment triggers conditioned on the short term price fluctuation of the Shares because he believed what Wong had told him—that there were no such triggers. (Kwok ¶¶ 42, 44.) However, during this time, Kwok discussed with Wong his concerns about other conditions of the loan, such as the margin call trigger based on the loan-to-value ratio, the size of the loan, the interest rate on the loan, and the issuance price of the Shares. (Kwok ¶¶ 43-44; Yu ¶ 13.)

Wong stated several times, including in March, April, and May of 2015, that UBS had never sold the shares of the Ping An shareholder following a margin call on its loan, that Ace Decade would receive the same treatment, that UBS would work with Ace Decade to allow it to meet any margin calls, and that UBS would not sell the Shares following a margin call without

giving Ace Decade adequate time. (Kwok ¶¶ 43, 45; Yu ¶ 11.) Wong also continued to reassure Kwok that he and UBS would act in Ace Decade’s best interests and told him on more than one occasion, “rest assured . . . I’m working for [you]. Don’t worry.” (Kwok ¶ 42.)

On May 8, 2015, Haitong announced that it had obtained the shareholder and regulatory approvals necessary to complete the issuance of the Shares and that the closing was expected to occur on May 15, 2015. (Compl. ¶ 42; Kwok ¶ 46; Yu ¶ 12.) Haitong also announced that because the trading price of Haitong’s H-Shares during the 30 trading days prior had surpassed a pre-agreed threshold, the subscription price would be increased. (Compl. ¶ 42; Kwok ¶ 46; Yu ¶ 12.) After this announcement, Wong, Kwok, and Yu had several discussions by telephone and via e-mails and electronic messages to finalize the terms of the Investment. (Kwok ¶ 47; Yu ¶¶ 12-17.) Among the topics that they discussed were the fact that the loan would have to be increased to reflect the higher per share price of the Shares and the amount of the payment Ace Decade would have to make. (Kwok ¶ 47; Yu ¶¶ 13-14.) During one of these discussions after May 8, Wong told Kwok yet again that Ace Decade would receive the same treatment as the Ping An shareholder with respect to any margin calls. (Kwok ¶ 48.)

Kwok, in reliance upon this and other misrepresentations made by Wong—many of which were made after Ace Decade, Kwok, and Yu had moved to New York—agreed to make the Investment in May 2015. (Compl. ¶¶ 42-44; Kwok ¶¶ 48-49.) Wong then discussed with Kwok on telephone calls on May 11, 2015 how best to transfer the funds needed to make Ace Decade’s HK \$2 billion (approximately US \$260 million) payment to fund the Investment. (Kwok ¶ 49; Yu ¶ 14.)³ Wong instructed Kwok not to transfer the required funds from his UBS

³ Prior to May 2015, Ace Decade, through Dawn State, made an initial down payment of approximately US \$250 million into a UBS security account. That payment would have been returned to Ace Decade had the Investment not been completed. (Kwok ¶ 55.)

account directly to the Ace Decade account, but rather to transfer the funds from his UBS account to the Ace Decade account through a third account. (Kwok ¶ 49; Yu ¶ 14.) Wong and other UBS employees then helped Kwok and Yu carry out these instructions. (Kwok ¶¶ 50-55; Yu ¶¶ 12-17.) But for its reliance on UBS's misrepresentations, Ace Decade would not have made the Investment or authorized this payment in May 2015. (Kwok ¶ 57.)

V. Contrary to Its Representations to Ace Decade, UBS Demanded Immediate Repayment of the Loan and Sold Ace Decade's Shares Without Giving Ace Decade Adequate Opportunity to Pay.

On July 6, 2015, just one week before Haixia would have had to transfer ownership and control of Dawn State and the Shares to Ace Decade, UBS demanded that Ace Decade make a \$200 million prepayment on its loan by 5pm the next day because the closing price of the Shares had triggered short term fluctuation limits in the loan agreement—conditions UBS had told Ace Decade would not be in the agreement. (Compl. ¶¶ 45, 47-49; Kwok ¶¶ 58-60.) Although Ace Decade was stunned by this demand and the less than 24 hours it had to make the payment, it made every effort to meet the call and informed UBS that it could obtain the necessary funds quickly but not before UBS's deadline. (Compl. ¶ 51; Kwok ¶ 61.) However, contrary to UBS's prior representations that it would give Ace Decade adequate time to meet any payment demands, UBS told Ace Decade that it had already identified buyers for the Shares and would make a substantial profit by selling the Shares instead of allowing Ace Decade time to gather the funds to make the payment. (Compl. ¶ 53; Kwok ¶ 62.) Wong told Kwok that the decision to immediately execute the block sale and not cooperate with Ace Decade was ordered by UBS executives outside of Hong Kong and China. (Compl. ¶ 55; Kwok ¶¶ 63-64, 70.)

After UBS sold Ace Decade's Shares, Kwok reminded Wong of the many misrepresentations that he had made, including that "there would never be" a margin call based on short term price fluctuations, the many times that Wong had promised that Ace Decade would

receive the same treatment as the large Ping An shareholder following a margin call (*i.e.*, not sell its shares), and that UBS would work with Ace Decade to allow it to meet any payment obligations. (Kwok ¶¶ 63-71.) Wong did not deny that he had made each of these misrepresentations. (Kwok ¶¶ 63, 67, 70-74.)

VI. UBS's Fraudulent Conduct Caused Ace Decade to Lose Its \$500 Million Investment and Unjustly Enriched UBS.

On July 7, instead of selling only the shares sufficient to cover the required \$200 million payment, UBS sold *all* of the Shares belonging to Ace Decade at a 20% discount off the closing price of Haitong shares on July 7. (Compl. ¶¶ 56-58; Kwok ¶ 75.) UBS sold approximately 10% of the Shares to itself. (Compl. ¶ 59.) Contemporaneous news reports questioned the pricing of the block sale, noting that the sale occurred “at unusually large discount.” (Compl. ¶ 63.) Bloomberg reported that UBS managed to emerge as “a Winner.” (Compl. ¶ 63.) Indeed, UBS profited handsomely, retaining a fee of approximately \$29.9 million for the prepayment of the loan. (Compl. ¶ 54.) Ace Decade, on the other hand, lost approximately \$495.3 million of its \$500 million Investment, as well as potential New York investors interested in investing in Ace Decade. (Compl. ¶ 67; Kwok ¶ 76.)

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER UBS.

To overcome a motion to dismiss for lack of personal jurisdiction, “a plaintiff is not required to make a *prima facie* showing of jurisdiction” and “need only demonstrate that jurisdictional facts sufficient to confer personal jurisdiction . . . ‘may exist.’” *Mobile Training & Educ., Inc. v. Aviation Ground Sch. of Am.*, 2010 WL 3310257, at *1-2 (Sup. Ct. N.Y. Cnty. June 23, 2010) (Bransten, J.).⁴ “In determining whether Plaintiff has carried this minimal burden, the

⁴ Unless otherwise noted, all internal citations, quotation marks, and brackets are omitted.

Court must view the jurisdictional allegations in the pleadings and supporting affidavits in the light most favorable to the plaintiff and resolve all doubts in its favor.” *Id.* at *1-2.⁵ Because Ace Decade has met this minimal burden, UBS’s motion should be denied.

A. This Court Has Personal Jurisdiction over UBS under New York’s Long-Arm Statute.

Pursuant to CPLR § 302, New York’s long-arm statute, courts in New York have personal jurisdiction over an out-of-state defendant who (1) “transacts any business within the state”; (2) “commits a tortious act within the state”; or (3) “commits a tortious act without the state causing injury to person or property within the state.” CPLR § 302(a)(1)-(3). The requirements for personal jurisdiction under all three prongs are satisfied here.

1. UBS Has Transacted Business Within New York State.

CPLR § 302(a)(1) is a “single act statute,” whereby “proof 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.” *Deutsche Bank Secs., Inc. v. Mont. Bd. of Invs.*, 7 N.Y.3d 65, 71-72 (2006). In *Fischbarg v. Doucet*, 9 N.Y.3d 375 (2007), the Court of Appeals held that the defendant’s telephone calls, faxes, and e-mails “that they projected into this state over many months” constituted a “purposeful attempt” to establish an attorney-client relationship with plaintiff in New York sufficient to establish a transaction of business in New York. *Id.* at 380. Likewise, in *Grimaldi v. Guinn*, 72 A.D.3d 37 (2d Dep’t 2010), the court held that a defendant who “engaged in the purposeful creation of a continuing relationship with plaintiff . . . by virtue of his telephone calls and e-mails to the plaintiff” in New York in order “to establish a

⁵ New York courts permit a party opposing a motion to dismiss for lack of personal jurisdiction to submit documentary evidence. *See Travelers Indem. Co. v. Inoue*, 111 A.D.2d 686, 687 (1st Dep’t 1985).

relationship with the plaintiff whereby he would be involved in the project” was subject to personal jurisdiction under Section 302(a)(1). *Id.* at 51; *see also Deutsche Bank Secs.*, 7 N.Y.3d at 71 (CPLR § 302(a)(1) conferred jurisdiction over out-of-state investor in lawsuit that arose from investor’s call to a New York securities firm to make a trade).

Similarly here, Ace Decade’s claims arise out of the transaction UBS induced Ace Decade to make in May 2015—months after Ace Decade and its representatives moved to New York—to invest in the Haitong Shares that were issued on May 15, 2015. (Compl. ¶¶ 42-44; *see also* pp. 7-9, *supra*.) In the days leading up to the closing of the transaction on May 15, UBS representatives communicated frequently by telephone, email, and electronic messages with Kwok and Yu, who were in New York, to reassure them that the terms of the UBS loan would not be detrimental to Ace Decade if it entered into the transaction and to facilitate Ace Decade’s payment of HK \$2 billion (approximately US \$260 million) to complete the funding for the Investment. (*See* pp. 8-9, *supra*.)⁶ Ace Decade’s Investment in May 2015 and UBS’s contacts with New York to solicit that Investment are sufficient to invoke jurisdiction under CPLR § 302(a)(1).

⁶ UBS’s reliance on *Paterno v. Laser Spine Institute*, 24 N.Y.3d 370 (2014) to argue that contacts after the transaction was “consummated in December 2014 . . . ‘cannot be the basis to establish defendant’s relationship with New York because they do not serve the as the basis for the underlying . . . claim’” (UBS Br. at 15 n.9) is misplaced. In *Paterno*, the court found that the defendant’s contacts with New York could not establish long-arm jurisdiction because they did not serve as the basis for the plaintiff’s medical malpractice suit. 24 N.Y.3d at 379. By contrast, UBS’s New York contacts are the very communications with Kwok and Yu that induced Ace Decade to enter into the investment in Haitong shares. Indeed, the fact that UBS representatives continued to make misrepresentations about the loan in early May 2015 to induce Kwok to enter into the transaction cuts against UBS’s argument that “the transaction at the heart of Ace Decade’s claims . . . was consummated in December 2014.” (*Id.* at 15 n.9.) Moreover, according to UBS’s own loan agreement, there could not have been any transaction had the conditions precedent to completing the issuance and sale of the new Shares—*e.g.*, the shareholder and regulatory approvals obtained in February and May 2015 respectively—not been met. (Ex. 4 to Affirmation of Michel Lee at 53; *see also* Compl. ¶ 42; p. 9, *supra*.)

UBS contends that CPLR § 302(a)(1) does not apply because UBS's employees associated with the Investment supposedly were not in New York. (UBS Br. at 14.) Even if UBS's jurisdictional assertions are true—and they cannot be tested without jurisdictional discovery—it is well-established that long-arm jurisdiction can be recognized “over commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions.” *Deutsche Bank*, 7 N.Y.3d at 70-71. Jurisdiction under CPLR § 302(a)(1) “is proper even though the defendant never enters New York.” *Fischbarg*, 9 N.Y.3d at 380; *see also Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 17 (1970) (“It is important to emphasize that one need not be physically present in order to be subject to the jurisdiction of our courts under CPLR 302 . . .”). UBS repeatedly projected itself into New York to conduct business with Ace Decade and its representatives, including by assisting them in setting up their New York operations, discussing terms of the Investment, making misrepresentations about the loan, and ultimately inducing them to make the Investment in May 2015. (*See pp. 7-10, supra.*) UBS's communications with Ace Decade's representatives in New York over the course of several months in 2015 are more than sufficient to justify the exercise of jurisdiction over UBS under CPLR § 302(a)(1).

2. UBS Has Committed Tortious Acts in New York State.

UBS is also subject to long-arm jurisdiction under CPLR § 302(a)(2) because it “commit[ted] a tortious act within the state” through its ongoing misrepresentations regarding the Investment and the loan to Ace Decade and its representatives while they were in New York. (*See pp. 7-10, supra.*) UBS's argument that CPLR § 302(a)(2) requires that the “actual misrepresentation *took place in New York*” and that the person making the misrepresentation be located in New York (UBS Br. at 15-16 (emphasis in original)) relies on two cases that (1) are distinguishable and (2) misstate the legal standard in the First Department.

UBS's reliance on *Bauer Industries, Inc. v. Shannon Luminous Materials Co.*, 52 A.D.2d 897 (2d Dep't 1976), decided forty years ago and involving a single letter mailed into New York, is misplaced. Contrary to *Bauer*, the First Department—as well as this Court—has held that “where defendant knowingly sends into a state a false statement . . . he has, for jurisdictional purposes, acted within that state,” even if the speaker is outside New York. *Travelers Indem. Co. v. Inoue*, 111 A.D.2d 686, 687 (1st Dep't 1985); *see also N. Valley Partners, LLC v. Jenkins*, 2009 WL 1058162, at *5 (Sup. Ct. N.Y. Cnty. Apr. 14, 2009) (Bransten, J.) (“[A] tortious act is deemed to have occurred in New York when a defendant knowingly sends false or misleading documents into this State”). UBS's misrepresentations, knowingly communicated to Ace Decade and its representatives while they were in New York, satisfy CPLR § 302(a)(2).

Likewise, *Kramer v. Vogl*, 17 N.Y.2d 27 (1966), predates the advent of electronic communication, after which time courts have routinely found jurisdiction under CPLR § 302(a)(2) even when the defendant is not physically present in New York. *See Davidoff v. Davidoff*, 2006 WL 1479558, at *8-9 (Sup. Ct. N.Y. Cnty. May 10, 2006) (“not all tortious acts that occur within the State of New York need be committed while the defendant is physically present within New York boundaries for purposes of CPLR § 302(a)(2)"); *Banco Nacional Ultramarino, S.A. v. Chan*, 169 Misc. 2d 182, 188 (Sup. Ct. N.Y. Cnty. 1996), *aff'd*, 240 A.D.2d 253 (1st Dep't 1997) (“A defendant with access to computers, fax machines, etc., no longer has to physically enter New York to perform a financial transaction which may be . . . tortious.”).

3. UBS Has Committed Tortious Acts Outside of New York Causing Injury to Ace Decade in New York.

UBS is additionally subject to jurisdiction under CPLR § 302(a)(3). UBS concedes that Ace Decade has alleged a tortious act by UBS outside of New York, but argues that Ace Decade

did not suffer harm in New York because “the event giving rise to the injury” occurred in Hong Kong. (UBS Br. at 16-17 (citing *Marie v. Altshuler*, 30 A.D.3d 271, 272 (1st Dep’t 2006)). As set forth above, the Investment that Ace Decade entered into for the Haitong Shares did not occur until May 2015; thus, the “event giving rise to the injury” occurred in New York. (See Compl. ¶¶ 42-44; pp. 7-10, *supra*.)

Moreover, Ace Decade was also injured in New York because it lost potential New York investors when UBS sold all of its Shares. (See p. 11, *supra*.) The Court of Appeals has “made clear that a tort committed outside the state that was likely to cause harm through the loss of business inside the state was sufficient to establish personal jurisdiction regardless of whether damages were likely recoverable or even ascertainable.” *Penguin Grp. (USA) Inc. v. Am. Buddha*, 16 N.Y.3d 295, 306 (2011) (citing *Sybron Corp. v. Wetzel*, 46 N.Y. 197, 204-05 (1978)); *see also Mobile Training*, 2010 WL 3310257, at *4 (Bransten, J.) (“threatened loss of . . . customers” sufficient for finding injury in New York).

UBS does not contest that CPLR § 302(a)(3)’s other requirements are also satisfied. CPLR § 302(a)(3)(i) is satisfied because UBS regularly does business in New York, including through two of its “main offices worldwide” located in New York. (Compl. ¶ 11; *see also* “Locations” Page of UBS Website (“Ace Decade Ex. 5”).) *See Murdock v. Arenson Int’l USA, Inc.*, 157 A.D.2d 110, 113 (1st Dep’t 1990) (considering factors such as defendant’s maintenance of offices in New York in § 302(a)(3)(i) inquiry). CPLR § 302(a)(3)(ii) is also satisfied because UBS derives substantial revenue from interstate and international commerce through its worldwide operations. (See, e.g., UBS Group AG and UBS AG Annual Report 2014 (“Ace Decade Ex. 6”) at 98.) *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 215 (2000) (Texas corporation with manufacturing facility in Virginia was “inherently engaged in interstate

commerce”). Moreover, UBS employees were communicating regularly with Ace Decade’s representatives in New York to induce Ace Decade to make the Investment, so UBS could reasonably expect its actions to have consequences in New York. *See Mobile Training*, 2010 WL 3310257, at *4 (Bransten, J.) (whether a defendant “had a reasonable expectation of consequences resulting from its actions in New York is determined not by looking at the specific event that led to the injury within the state, but, rather, by determining whether defendant could have foreseen consequences in the forum generally”).

B. Long-Arm Jurisdiction over UBS Is Consistent with Due Process.

Because UBS is subject to jurisdiction under CPLR § 302, due process is also satisfied. *See Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 71 (1984) (“[I]n setting forth certain categories of bases for long-arm jurisdiction, CPLR § 302 does not go as far as is constitutionally permissible.”); *Paterno*, 24 N.Y.3d at 381 (same). *Walden v. Fiore*, 134 S. Ct. 1115 (2014) does not alter that conclusion. Following *Walden*, courts have held that “because the New York long-arm statute is more restrictive than the federal due process requirements, by virtue of satisfying the long-arm statute the minimum contacts and reasonableness requirements of due process have similarly been met.” *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 108 (S.D.N.Y. 2015); *see also Noval Williams Films LLC v. Branca*, 2015 WL 5164891, at *4 (S.D.N.Y. Sept. 3, 2015) (same).

Alternatively, due process is satisfied by UBS’s substantial ties to New York that UBS has itself created, including by maintaining two of its “main offices worldwide” in the State, and the fact that UBS “purposefully reached” into New York to deal with Ace Decade and its representatives, including by communicating with Kwok and Yu about the Investment and the loan and transferring funds from Kwok’s UBS account to accounts in New York. (Compl. ¶ 11; Ace Decade Ex. 5; *see pp. 7-10, supra.*) *Walden*, 134 S. Ct. at 1122.

C. UBS Is Subject to General Jurisdiction in New York.

Daimler AG v. Bauman, 134 S. Ct. 746 (2014) and the cases relied upon by UBS (UBS Br. at 12) do not foreclose the argument that UBS is subject to general jurisdiction in New York. *See id.* at 760 (expressly refusing to hold “that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business”). For example, in *In re Hellas Telecommunications (Luxembourg) II SCA*, the court held that because Deutsche Bank’s presence in New York was “more than merely transitory,” plaintiffs adequately alleged that defendant was subject to general jurisdiction. 524 B.R. 488, 507-08 (Bankr. S.D.N.Y. 2015), *adhered to*, 526 B.R. 499 (Bankr. S.D.N.Y. 2015).

Likewise, UBS’s substantial operations in New York and facts such as that its New York Branch had assets totaling over \$63 billion and revenues of \$154 million in 2014 demonstrate that UBS’s presence in New York is more than merely transitory and subjects it to general jurisdiction here. (Compl. ¶ 11; Ace Decade Ex. 5; 2015 UBS US Resolution Plan (“Ace Decade Ex. 7”) at 14.) Ace Decade also has sought limited jurisdictional discovery into facts that are not publicly available and uniquely within UBS’s possession, such as information about UBS’s New York facilities, employees, and assets, which Ace Decade expects will further support its allegation that UBS is subject to general jurisdiction in New York.

II. UBS FAILS TO ESTABLISH THAT NEW YORK IS AN INCONVENIENT FORUM.

UBS also fails to meet the “‘heavy burden’ of establishing that New York is an inconvenient forum.” *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep’t 2013). As the First Department has recognized, “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.” *OrthoTec, LLC v. Healthpoint Capital, LLC*, 84 A.D.3d 702, 702 (1st Dep’t 2011). In resolving a motion under CPLR § 327, a

court may consider the residence of the parties, the location of the events giving rise to the transaction, the applicability of foreign law, the potential hardship to the defendant and burden on the court, and the location of witnesses and documents. *Elmaliach*, 110 A.D.3d at 208. Each of these factors weighs against dismissal.

A. Ace Decade and Its Representatives Are New York Residents, and UBS Has a New York Branch.

As an initial matter, the residence of a plaintiff “has been held to generally be the most significant factor” on a motion to dismiss under CPLR § 327. *See Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc.*, 131 A.D.3d 431, 432 (1st Dep’t 2015). Ace Decade is a resident of New York because it maintains an office here. (Compl. ¶¶ 36-38; *see also* pp. 7-8, *supra*.) Siegel, N.Y. Prac. § 119 (5th ed.) (“If the corporation is of a kind not required to designate an office in its filed papers, it may be deemed a resident of the county in which it actually maintains an office.”).⁷ Ace Decade’s representatives Kwok and Yu are also New York residents because they maintain a place to live in New York, have lived in New York for a “length of time during the course of a year,” and intend to reside here in the future. *Antone v. GM Motors Corp., Buick Motors Div.*, 64 N.Y.2d 20, 30 (1984).

Moreover, UBS has a New York branch (*see* Ace Decade Ex. 7 at 12, 14), and this Court has found that a foreign bank’s operation of a New York branch “further erodes its argument for *forum non conveniens*.” *See Nordkap Bank AG v. Standard Chartered Bank*, 2011 WL 2764279, at *4 (Sup. Ct. N.Y. Cnty. May 6, 2011) (Bransten, J.); *see also Mionis v. Bank Julius Baer &*

⁷ Because Ace Decade’s only activity in New York has been to enter into the Investment, it is not required to register to do business in New York. *See* NY Business Corporation Law § 1301(b); *People ex rel. Manila Elec. R.R. & Lighting Corp. v. Knapp*, 229 N.Y. 502, 508-09 (1920). In other circumstances, New York courts have held that where an entity is exempt from registration under New York’s Business Corporation Law, the entity is resident where its principal office is located. *See Providence Washington Ins. Co. v. Squier Corp.*, 31 A.D.2d 514, 514 (1st Dep’t 1968); *Mazzocki v. State Farm Fire & Cas. Co.*, 170 Misc.2d 70, 71 (Sup. Ct. N.Y. Cnty. 1996).

Co., Ltd., 9 A.D.3d 280, 282 (1st Dep’t 2004) (denying motion to dismiss under CPLR § 327 in part because, “although defendant companies are foreign, they have a New York branch”).

B. The Events Giving Rise to the Transaction Were in New York, and New York Has a Substantial Interest in Providing a Forum to Ace Decade.

The events giving rise to Ace Decade’s Investment were also substantially in New York. In the months leading up to May 2015, when Haitong announced that it had obtained the shareholder and regulatory approvals necessary to issue the Shares, Wong communicated with Kwok and Yu, who were in New York, dozens of times by telephone and via numerous electronic messages. (*See* pp. 7-10, *supra*.) During this time, Wong continued to make misrepresentations upon which Ace Decade relied in deciding to make the Investment in May 2015. (*Id.*) Moreover, because Ace Decade suffered injury in New York (*see* pp. 15-17, *supra*), New York has a substantial interest in adjudicating this dispute. *See LaMarca*, 95 N.Y.2d at 218 (“New York has an interest in providing a convenient forum for . . . a New York resident who was injured in New York . . .”).

C. New York Law Applies Because UBS Has Failed to Demonstrate the Existence of an Actual Conflict Between New York and Hong Kong Law.

UBS argues that Hong Kong law governs Ace Decade’s claims under an “interest” analysis, and that the need to apply foreign law favors dismissal.⁸ (UBS Br. at 21.) But UBS’s conclusion ignores New York’s choice-of-law rules. When a party raises a choice-of-law issue, “the court is required first, using New York conflict of laws principles, to determine whether there is an actual conflict” between foreign law and the law of New York. *Elmaliach*, 110

⁸ UBS also notes that “the Financing Letter between UBS and Dawn State is governed by English law.” (UBS Br. at 21.) However, the choice-of-law provision in the Financing Letter is irrelevant because Ace Decade’s claims sound in tort and do not arise from a breach of the Financing Letter (to which Ace Decade was not a party). *See J.A.O. Acquisition Corp. v. Stavitsky*, 192 Misc. 2d 7, 11 (Sup. Ct. N.Y. Cnty. 2001).

A.D.3d at 200-201. “The burden is on the party asserting the conflict, if any, to assert that a conflict actually exists.” *Shareholder Rep. Servs. LLC v. Sandoz, Inc.*, 2015 WL 1209358, at *6 (Sup. Ct. N.Y. Cnty. Mar. 16, 2015) (Bransten, J.). If there is no actual conflict, an interest analysis is unnecessary, and the court must apply the law of the forum state where the action is being tried—here, New York. *See SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354 (1st Dep’t 2004). UBS has not argued, let alone demonstrated, the existence of a conflict between New York law and Hong Kong law that relates to Ace Decade’s claims, and thus, New York law must be applied. *See SNS Bank*, 7 A.D.3d at 354; *Sandoz*, 2015 WL 1209358, at *6; *Portanova v. Trump Taj Mahal Assocs.*, 270 A.D.2d 757, 759-60 (3d Dep’t 2000), *appeal denied*, 95 N.Y.2d 765 (2000).

Nonetheless, UBS contends that Hong Kong has a greater interest in applying its conduct-regulating rules against fraud because any “misrepresentations that UBS made to Kwok occurred in Hong Kong.” (UBS Br. at 21.) Putting aside that this contention is incorrect (*see pp. 7-10, supra*), it is also contrary to the rule that when conflicting laws are conduct-regulating, “the law of the place where the tort occurs will generally apply, with the locus of the tort generally defined as the place of injury.” *Elmaliach*, 110 A.D.3d at 202-203. Because New York is the place of injury (*see pp. 15-17, supra*), New York law governs.⁹ *See Sondik v. Kimmel*, 131 A.D.3d 1041, 1042 (2d Dep’t 2015) (“Although the alleged tortious conduct . . . occurred in [the non-forum state], the plaintiff’s alleged injury occurred in New York.”).

⁹ Even if Hong Kong law applied—and it does not—New York courts are capable of applying the laws of other jurisdictions, and UBS has failed to demonstrate “any particular difficulty likely to arise from applying” Hong Kong law. *See Hong Leong Fin. Ltd. (Singapore) v. Morgan Stanley*, 2014 WL 4650238, at *5 (Sup. Ct. N.Y. Cnty. Sept. 12, 2014) (Bransten, J.).

D. Litigating in New York Would Not Unduly Burden UBS or Inconvenience the Court.

Finally, UBS's argument that it would be prejudiced in this forum because key witnesses and documents are located abroad and outside the subpoena power of the Court (UBS Br. at 22) is misplaced because the discovery in this case will be almost entirely party discovery. Ace Decade's claims and UBS's defenses revolve around the relationship between Ace Decade and UBS, misrepresentations made by UBS employees to Ace Decade, Ace Decade's reliance on UBS's misrepresentations, and resulting injury to Ace Decade. UBS has established neither its need to obtain nor the unavailability of discovery from third parties. *See Hong Leong Fin. Ltd.*, 2014 WL 4650238, at *5 (Sup. Ct. N.Y. Cnty. Sept. 12, 2014) (plaintiff's "employees and customers are not essential witnesses to Defendants' alleged fraudulent activity"); *Yoshida Printing Co. v. Aiba*, 213 A.D. 2d 275, 275 (1st Dep't 1995) ("Defendant failed to make any showing with respect to the materiality of certain potential witnesses and could not demonstrate that their testimony would be unavailable here.").

Moreover, UBS's "reliance on the location of documents overlooks the fact that copying technology has made the use of original documents in litigation about as common as the dodo bird." *Southland Terrace Associates v. Mellon Bank, N.A.*, 874 F. Supp. 69, 71 (S.D.N.Y. 1995); *see also Oubre v. Clinical Supplies Mgmt., Inc.*, 2005 WL 3077654, at *3 (S.D.N.Y. Nov. 17, 2005) ("In today's era of photocopying, fax machines, Federal Express, and electronic document transmission, the location of documents is entitled to little weight.") Additionally, UBS "is a large international bank with ample resources to bring witnesses to New York if needed." *Nordkap Bank AG*, 2011 WL 2764279, at *4 (Bransten, J.). Indeed, UBS routinely litigates in New York courts, including in actions brought by it and its foreign branches. *See, e.g., UBS AG v. Rep. of Croatia*, 14-cv-08316 (S.D.N.Y.); *UBS Sec. LLC, et al. v. Highland Cap. Mgmt., L.P.*,

No. 650752/2010 (Sup. Ct. N.Y. Cnty.) (UBS AG, London Branch is one of the plaintiffs).

III. THE COMPLAINT’S ALLEGATIONS GO WELL BEYOND WHAT IS REQUIRED TO STATE A CLAIM.

In resolving a motion to dismiss for failure to state a claim, “all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs, and the plaintiffs must be given the benefit of all reasonable inferences.” *Mill Fin., LLC v. Gillett*, 2013 WL 5476020, at *3 (Sup. Ct. N.Y. Cnty. Sept. 27, 2013) (Bransten, J.). A motion to dismiss must be denied where the complaint pleads factual allegations, “which taken together manifest any cause of action cognizable at law.” *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002).

The CPLR § 3016(b) requirement that fraud be pleaded in detail is satisfied where “the complaint contains some rational basis for inferring that the alleged misrepresentation was knowingly made.” *Houbigant, Inc. v. Deloitte & Touche, LLP*, 303 A.D.2d 92, 98 (1st Dep’t 2003). The Complaint’s allegations exceed what is required to state a fraud claim, as well as the other causes of action for breach of fiduciary duty, negligent misrepresentation, and unjust enrichment.

A. Ace Decade Has Adequately Pleaded the Existence of a “Special Relationship.”

As an initial matter, UBS’s contention that all of Ace Decade’s claims are doomed by its failure to plead the existence of a “special relationship” between the parties (UBS Br. at 23-24) is wrong. Ace Decade’s fraud claim is based on affirmative misrepresentations made by UBS (Compl. ¶¶ 21-23, 26, 28, 32) and thus does not require the existence of a “special relationship.” *See U.S. Express Leasing, Inc. v. Elite Tech. (N.Y.), Inc.*, 87 A.D.3d 494, 497 n.1 (1st Dep’t 2011) (“Defendant appears to have confused the elements of negligent misrepresentation, which requires the presence of a special relationship, with the elements of fraud, which do not.”).

With respect to its other claims, Ace Decade more than adequately pleads that Wong was “in a special position of confidence and trust” with Ace Decade such that Ace Decade’s reliance on his misrepresentations was justified. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996). In *Lau v. Mezei*, 2012 WL 3553092 (S.D.N.Y. Aug. 16, 2012), the court found evidence sufficient to show a special relationship where plaintiff and defendant “engaged in a professional relationship involving substantial interaction for years” during which time plaintiff “repeatedly asked [defendant] for investment advice” and made it clear to defendant that plaintiff “depended on [his] knowledge and specialized experience” and “trusting [defendant’s] advice, . . . subsequently acted according to [defendant’s] suggestions.” *Id.* at *11. Likewise, Kwok—who has been a longtime UBS client and has depended and relied upon Wong’s and UBS’s knowledge and expertise in making investment and financing decisions for over five years—trusted and followed advice from Wong to, among other things, invest through an intermediary selected by UBS so as to avoid disclosure obligations. (*See* pp. 4-10, *supra*.)

UBS argues that there was no special or fiduciary relationship because there was no investment or advisory agreement between UBS and Ace Decade. But the Complaint alleges a relationship of trust and confidence, not contract. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 20 (2005) (“Fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.”). UBS also contends that a lender-borrower relationship is not a “special relationship.” (UBS Br. at 24.) However, the Complaint does not merely allege that Ace Decade borrowed money from UBS but that UBS acted as Ace Decade’s investment adviser and provided advice on the structure of its investment and the intermediary Ace Decade should use—advice upon which Ace Decade detrimentally relied. (*See* Compl. ¶¶ 1-3, 14, 17-35; pp. 4-7, *supra*.)

B. Ace Decade Has Adequately Pleaded Reasonable Reliance.

Ace Decade also has adequately pleaded that it reasonably relied upon UBS's representations because UBS assured Kwok that it would protect Ace Decade's interests and work cooperatively with Ace Decade to allow it to meet any margin calls. (Compl. ¶¶ 17-19, 32; *see also* pp. 4-10, *supra*.) The thrust of UBS's argument is that UBS's oral misrepresentations were later contradicted by the written loan agreement, and therefore Ace Decade's reliance on those oral misrepresentations does not constitute reasonable reliance. (UBS Br. at 25.) But UBS misses the most important point: Ace Decade was never a party to the written agreement between Haixia and UBS—a situation that resulted from Ace Decade following UBS's advice to make the Investment through an intermediary. Indeed, all of the cases relied upon by UBS are inapposite because they involved oral representations made by one party to another party that were contradicted by subsequent writings *between those parties*.¹⁰

Moreover, whether Ace Decade reasonably relied upon UBS's misrepresentations is “generally a fact specific determination inappropriate for determination on a motion to dismiss.” *Hong Leong Fin. Ltd.*, 2014 WL 4650238, at *8; *see also Am. Media, Inc. v. Bainbridge & Knight Labs., LLC*, 2016 WL 115890, at *1 (1st Dep’t Jan. 12, 2016) (“The issue of reasonable reliance is one of fact unsuitable for resolution on this motion to dismiss.”).

CONCLUSION

For the foregoing reasons, Ace Decade respectfully requests that the Court deny UBS's motion to dismiss.

¹⁰ Nor should the assertion by UBS about Ace Decade's supposed sophistication absolve UBS. *See Hong Leong Fin. Ltd.*, 2014 WL 4650238, at *8 (“The fact that HLF may be considered a sophisticated, commercial party does not insulate the Defendants from liability for fraud.”).

Dated: New York, NY
February 5, 2016

Respectfully submitted,



David Boies
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200
Fax: (914) 749-8300
dboies@bsfllp.com

Joshua I. Schiller
Qian A. Gao
David L. Simons
Christopher L. Martin, Jr.
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
Tel: (212) 446-2300
Fax: (212) 446-2350
jischiller@bsfllp.com
qgao@bsfllp.com
dsimons@bsfllp.com
cmartin@bsfllp.com

Attorneys for Ace Decade Holdings Ltd.