

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

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

**UBS AG'S REPLY IN FURTHER SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

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PRELIMINARY STATEMENT

In its Opposition, Plaintiff Ace Decade Holdings Limited (“Ace Decade”) confirms that this Court should dismiss its Complaint for any one of four independent reasons.

First, Ace Decade now asserts that its claims against UBS rest on the “relationship” between UBS and Ace Decade’s “agent,” Kwok, who is a “longtime UBS client” with multiple accounts at UBS in the name of entities that he controls. Because Kwok’s relationship with UBS is governed by agreements requiring that “*any* disputes which may arise out of or in connection with” that relationship be litigated where those accounts are booked, *i.e.*, Hong Kong, this Court should enforce the forum selection clause and dismiss the Complaint.

Second, confirming that this Court should dismiss the Complaint for lack of personal jurisdiction, Ace Decade concedes that:

- UBS is incorporated and headquartered in Switzerland;
- Ace Decade is incorporated in the British Virgin Islands (“BVI”);
- the transaction at issue was a private placement of shares of a Chinese company, Haitong Securities Co., Ltd. (“Haitong”), traded on the Hong Kong Stock Exchange;
- Ace Decade invested in these shares through Dawn State Limited (“Dawn State”), a BVI company and a subsidiary of Haixia Capital Investment Fund (Fujian) Limited Partnership (“Haixia”), a Chinese state-controlled investment firm;
- Ace Decade was represented in this transaction solely by Hong Kong counsel;
- none of the relevant agreements was executed in New York, and the contracts Ace Decade signed to make its investment (which Ace Decade elected not to attach to its Complaint) were executed in December 2014, *before* its “agents” Kwok Ho Wan and Yu Yong moved to New York;

- the alleged misrepresentations that form the basis of Ace Decade’s claims were made by Stephen Wong, a UBS employee in Hong Kong, to Ace Decade’s “agent,” Kwok, a Chinese national and Hong Kong resident, *before* Kwok moved to New York; and
- Ace Decade does not allege that its “agents” ever met with anyone from UBS in New York or ever interacted with any UBS employees in New York.

To try to overcome these undisputed facts, Ace Decade seeks to amend its Complaint through its Opposition by asserting, for the first time, that Kwok and Yu had general discussions with Wong about this Hong Kong transaction *after* they executed the operative agreements in December 2014 and moved to New York in January 2015. Even if timely raised (they are not), those allegations are insufficient to subject UBS to jurisdiction here, because they do not show that UBS purposefully directed its activities into New York. *See infra* at 5-11.

Third, Ace Decade makes no effort to distinguish controlling New York law requiring dismissal for *forum non conveniens* where, as here, its claims arise solely out of a Hong Kong transaction and do not have the required substantial nexus to this State. *See* cases cited *infra* at 11-12. Nor has Ace Decade addressed the heavy burden that would be imposed on this Court and UBS from litigating in New York over a Hong Kong transaction when the overwhelming majority of witnesses, including Ace Decade’s counsel, and documents are located abroad and where Hong Kong law applies. Indeed, both Kwok and Yu Yong are Chinese nationals who only allegedly “moved” to New York in January 2015.

Fourth, Ace Decade concedes that it does not have any agreement or any prior dealings with UBS that would give rise to a special relationship separate from Kwok’s banking relationship with UBS, which, as explained above, is governed by agreements specifically requiring litigation of “any disputes” in Hong Kong. To the extent that Ace Decade argues that its claims do not turn on Kwok’s relationship with UBS, Ace Decade has not pled any facts

showing that it had a fiduciary or special relationship with UBS. Moreover, Ace Decade's Complaint is not plausible on its face: it defies belief that Ace Decade would invest \$500 million in reliance on the alleged oral misstatements of a single UBS banker without obtaining written confirmation or other contractual protection for itself, particularly when Ace Decade was represented by respected Hong Kong counsel who presumably reviewed all relevant agreements, including those entered into by Ace Decade. Thus, its claims should be dismissed on the merits.

ARGUMENT

I. ACE DECADE'S CLAIMS AGAINST UBS ARE GOVERNED BY A FORUM SELECTION AGREEMENT REQUIRING LITIGATION IN HONG KONG.

To try to avoid dismissal, Ace Decade asserts that the advisory relationship giving rise to its claims is not between UBS and Ace Decade, but rather between UBS and Ace Decade's "agent" Kwok. (Opp., 24 ("Kwok—who has been a longtime UBS client and has depended and relied upon Wong's and UBS's knowledge and expertise . . . for over five years—trusted and followed advice from Wong to, among other things, invest through an intermediary selected by UBS. . . .").) That relationship was formalized when, "[i]n July 2012, Kwok became a UBS client" (Opp., 4) by opening an account at UBS in Hong Kong "for an investment vehicle [he] control[s]" (Translation of Aff. of Kwok Ho Wan ("Kwok") ¶ 6 (Dkt. No. 27)). Kwok also alleges that he made the final payment for Ace Decade's investment in Haitong shares through his UBS accounts in Hong Kong. (Kwok ¶¶ 49-50.) When opening those accounts, Kwok entered into an agreement providing that his relationship with UBS "shall be governed by and construed in accordance with the law of the country in which the relevant Account is booked and the Client irrevocably and unconditionally submits to the *exclusive jurisdiction* of the courts of

such country to settle *any disputes which may arise out of or in connection with the Account or Services.*” (Supp. Ex. 13, 16 (emphases added).)¹ Because Kwok’s accounts are booked in Hong Kong (*see* Supp. Exs. 3; 6; 9; 12), this dispute, which “arise[s] out of or in connection with” those accounts, is subject to the exclusive jurisdiction of Hong Kong courts.

“[I]t is the policy of the courts of [New York] to enforce contractual provisions for choice of law and selection of a forum for litigation.” [Koob v. IDS Fin. Servs., 213 A.D.2d 26, 33 \(1st Dep’t 1995\)](#); *see* [Rubens v. UBS AG, Order, at 1, 5, 10, Index No. 654383/12 \(Sup. Ct. N.Y. Co. Nov. 14, 2013\) \(Dkt. No. 38\)](#) (Bransten, J.) (dismissing claims for fraud, breach of fiduciary duty, negligence, and securities fraud in light of “forum selection clauses contained in the [account agreements], which state that Zurich shall be the forum for . . . any dispute *arising out of or in connection with* the [account agreements]”) (emphasis added), *aff’d*, [126 A.D.3d 421 \(1st Dep’t 2015\)](#). Because Ace Decade relies on Kwok’s relationship with UBS as the basis for its claims, this Court should dismiss the Complaint in favor of litigation in Hong Kong.

II. ACE DECADE CANNOT REBUT UBS’S CLEAR SHOWING THAT THIS COURT LACKS PERSONAL JURISDICTION OVER UBS IN CONNECTION WITH THIS HONG KONG TRANSACTION.

A. In Its Opposition, Ace Decade Does Not Seriously Contest That UBS Is Not Subject to General Jurisdiction in New York.

In arguing that UBS is subject to general jurisdiction in New York, Ace Decade claims that “UBS’s presence in New York is more than merely transitory and subjects it to general jurisdiction here.” (Opp., 18.) But courts have repeatedly held that, under *Daimler*,

¹ Unless otherwise specified, all references to “Supp. Ex.” are to the exhibits to the Supplemental Declaration of Justin J. DeCamp, dated March 7, 2016. The Account Agreements for the accounts held by the other companies that Kwok controlled contain substantively identical terms. (*See* Supp. Ex. 1, 10; Supp. Ex. 7, 17; Supp. Ex. 10, 26.)

UBS is not subject to general jurisdiction in New York. (UBS Mem., 12 (citing cases).) And Judge Buchwald expressly overruled the reasoning in the only post-*Daimler* case—a bankruptcy court ruling—that Ace Decade cites (Opp., 18 (citing [*In re Hellas Telecomm. \(Luxembourg\) II SCA*, 524 B.R. 488, 507-08 \(Bankr. S.D.N.Y. 2015\)](#))). See [*In re LIBOR-Based Financial Instruments Antitrust Litigation*, 2015 WL 6243526, *27 n.43 \(S.D.N.Y. Oct. 20, 2015\)](#) (“[W]e cannot agree with the bankruptcy court’s conclusion that even very substantial corporate operations . . . in a given forum suffice to make a defendant at home in the forum.”).

B. Ace Decade’s Specific Jurisdiction Arguments Conflict with Its Complaint.

1. New York’s Long-Arm Statute Does Not Apply to UBS’s Conduct in Connection With the Hong Kong Transaction At Issue Here.

a. CPLR 302(a)(1) (Transacting Business Within New York)

In maintaining that specific jurisdiction exists in New York under [CPLR 302\(a\)\(1\)](#), Ace Decade argues that its claims “arise out of the transaction UBS induced Ace Decade to make in May 2015.” (Opp., 13.) But, according to its Complaint, Ace Decade agreed to make its investment in Haitong shares by signing “a Co-Investment Agreement . . . with Haixia and Dawn State and a letter agreement . . . with Haixia” on December 18, 2014, *before* Kwok purportedly moved to New York in January 2015 (Compl. ¶¶ 27, 36), and Dawn State executed its subscription agreement to purchase the shares on December 19, 2014 (Compl. ¶ 31). Tellingly, Ace Decade says nothing about these agreements in its Opposition, undoubtedly because they directly contradict Ace Decade’s newly minted argument that it “agreed to make the Investment” *in May 2015* (Opp., 9), reflect that these agreements were executed in Hong Kong or China, and require that litigation arising from the investment be brought there.

In support of its new argument, Ace Decade asserts, for the first time, that its “representatives,” while in New York, communicated with a UBS employee indisputably located

in Hong Kong about Ace Decade's transaction to acquire Haitong shares in Hong Kong and directed UBS to transfer funds from Hong Kong accounts Kwok controlled to allow Ace Decade to make a payment when the transaction closed in May 2015 in Hong Kong. (Opp., 12-14.) As the Complaint makes clear, Kwok made these payments to fulfill Ace Decade's obligations under the contracts signed in December 2014 before he moved to New York. (Compl. ¶¶ 27-28.)

The Court should disregard these new allegations as an improper attempt to amend the Complaint. See [*Saco I Trust 2006-5 v. EMC Mortg. LLC*, 2014 WL 2451356, *4 \(Sup. Ct. N.Y. Co. May 29, 2014\)](#) (Bransten, J.) ("Plaintiff cannot amend the Complaint through an opposition brief."). But even if the Court considers them (and it should not), these allegations confirm that this Court does not have specific jurisdiction over UBS: (i) the transfers were to fund a Hong Kong transaction with no relationship to New York; (ii) the funds were transferred from Kwok's "UBS account [in Hong Kong] first to an account at China Minsheng Banking Corp., Ltd. Hong Kong branch"; and (iii) the funds were transferred to an Ace Decade account in an unspecified location, and then to Dawn State in China. (Kwok ¶¶ 49-55.)

At best, Ace Decade, a BVI entity, alleges that its "representatives," while in New York, communicated with a UBS employee in Hong Kong about a transaction in Hong Kong. UBS was not transacting business within New York merely by following the instructions of a BVI entity's agents, who happened to be in New York, to transfer money from an account in Hong Kong to fund a Hong Kong transaction. Under Ace Decade's theory, banks would be transacting business in New York for purposes of [CPLR 302\(a\)\(1\)](#) whenever they communicated with an agent in this State, even if the instructions concerned only foreign transactions. See [*Paterno v. Lane Spine Inst.*, 112 A.D.3d 34, 42 \(2d Dep't 2013\)](#) (jurisdiction lacking where the "communications between the parties . . . were all related to" business outside of New York).

Deutsche Bank Securities v. Montana Board of Investments, 7 N.Y.3d 65 (2006)

(Opp., 12-14), is inapplicable here. Unlike this case, the defendant there was subject to personal jurisdiction because it “entered New York to transact business here by knowingly initiating and pursuing a negotiation . . . that culminated in the sale of \$15 million in bonds.” *Id.* at 71-72. Here, by contrast, the transaction was initiated and the contracts were signed while Ace Decade’s agents indisputably were in Hong Kong. The only reason why UBS allegedly communicated into New York is that those agents later moved to New York and contacted UBS in Hong Kong. Transitory contacts, such as “sending payments to a New York bank account and correspondence to a New York address, and engaging in telephone discussions with plaintiff’s principal . . . while he was in New York, [are] not a sufficient basis to satisfy the statutory requirements,” where, as here, the defendant is a foreign corporation and the operative agreements were not executed in New York. *Magwitch, LLC v. Pusser’s Inc.*, 84 A.D.3d 529, 531 (1st Dep’t 2011).²

b. CPLR 302(a)(2) (Commission of a Tort in New York)

Ace Decade cannot establish specific jurisdiction under CPLR 302(a)(2) by claiming that a UBS banker in Hong Kong made “ongoing misrepresentations . . . to Ace Decade and its representatives while they were in New York.” (Opp., 14.)

² Ace Decade’s other cases are equally inapposite. Those cases involve defendants that made a “‘purposeful attempt’ to establish an attorney-client relationship with plaintiff in New York” (Opp., 12 (citing *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007))), or “‘engaged in the purposeful creation of a continuing relationship with plaintiff’ . . . in New York” (Opp., 12 (citing *Grimaldi v. Guinn*, 72 A.D.3d 37, 51 (2d Dep’t 2010))). UBS did not attempt to create a relationship with Ace Decade or Kwok in New York. UBS already had a relationship with Kwok in Hong Kong since at least July 2012 (Opp., 4; Kwok ¶ 6), and had communicated with Kwok regarding this transaction in Hong Kong since May 2014 (Compl. ¶ 14).

First, Ace Decade’s allegations make clear that the relevant alleged misrepresentations were made *before* Ace Decade’s agents moved to New York in January 2015. The Complaint rests on two alleged misrepresentations: (i) that the “Financing Letter would not include margin call triggers based on short term price fluctuations and would give Ace Decade adequate time to meet any margin calls”; and (ii) that UBS “concealed from Ace Decade that Haixia was controlled by UBS’s joint venture partner,” which caused Plaintiff to “enter[] into its agreement with Haixia.” (Compl. ¶¶ 69-70, 73, 76-77, 80, 86-87, 91-92, 95, 98.) According to the Complaint, these alleged misrepresentations were made *before* Ace Decade’s agents relocated to New York in January 2015. (Compl. ¶ 39; *see also* Compl. ¶¶ 31-32 (noting that alleged misrepresentations were made in December 2014).) In fact, Ace Decade confirms that “Kwok did not raise with Wong again while he was in New York his concerns about payment triggers conditioned on the short term price fluctuations of the Shares.” (Opp., 8.) And the alleged misstatement that allegedly caused Ace Decade to “enter[] into its agreement with Haixia” plainly could have been made only *before* that agreement was signed in December 2014.

For the first time in its Opposition, Ace Decade claims that Kwok spoke with Wong while Kwok was in New York 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.” (Opp., 8.)³ These new claims should be disregarded. *See Saco*,

³ The prepayment triggers that resulted in the sale of the Haitong shares are separate contract terms from the margin provisions that UBS allegedly discussed with Kwok after he allegedly moved to New York in 2015. The margin provisions allegedly discussed in 2015 relate to the ratio between the amount of the loan outstanding and the value of the Haitong shares securing the loan, referred to as the loan-to-value or LTV ratio. (Affirmation of Michel Lee, Ex. 1, 14 (Dkt. No. 18) (section titled “Margining Terms”).) Under the margin terms, if the LTV ratio for Dawn State’s loan ever exceeded 66.7%—*i.e.*, the outstanding amount of the loan was

[2014 WL 2451356, at *4](#). In any event, these communications are irrelevant for jurisdictional purposes, because they are not the basis of Ace Decade’s claims in its Complaint.

Second, even if the allegedly actionable misrepresentations had been made while Ace Decade’s agents were in New York, [Section 302\(a\)\(2\)](#) applies to misrepresentations made only when the *speaker* is in New York. (See UBS Mem., 15-16 (citing [Kramer v. Vogl](#), 17 N.Y.2d 27, 31 (1966); [Bauer Indus., Inc. v. Shannon Luminous Materials Co.](#), 52 A.D.2d 897, 897-98 (2d Dep’t 1976)).) Although Ace Decade claims that these cases are no longer good law (Opp., 15), the First Department recently cited them in affirming a dismissal on jurisdictional grounds. See [Primer S.C.A. v. Abaplus Int’l Corp.](#), 76 A.D.3d 89, 97 (1st Dep’t 2010) (“To find that a defendant has committed a tortious act in New York, our courts have traditionally required the defendant’s presence here at the time of the tort” (citing [Kramer](#), 17 N.Y.2d 27; [Bauer Indus.](#), 52 A.D.2d 897)).⁴

more than 66.7% of the value of the collateral—Dawn State would be required to “deposit into the Secured Account an amount of HKD cash only so that the LTV is restored to the Initial LTV” of 60%. That is referred to as a margin call. (Lee Ex. 1, 14.) The prepayment triggers UBS allegedly misstated to Kwok in 2014, while he was still in Hong Kong, refer to entirely different terms in the financing agreement. (Lee Ex. 1, 15 (subsection titled “Full Mandatory Prepayment Events”).) These provisions allowed UBS to terminate the loan, which would require Dawn State to “repay the [Loan] Amount together with all other amounts due,” if certain conditions were met, including a sharp drop in the value of the Haitong shares. (Lee Ex. 1, 15.)

⁴ None of the cases that Ace Decade cites holds that a misrepresentation made outside of New York satisfies [CPLR 302\(a\)\(2\)](#). In [Travelers Indemnity Co. v. Inoue](#), the court held that jurisdiction existed because actions of “defendants’ ‘agent’ in New York . . . confer[red] jurisdiction over the Japanese defendants.” [111 A.D.2d 686, 688 \(1st Dep’t 1985\)](#). The language cited in the Opposition is dicta. See *id.* In [Northern Valley Partners, LLC v. Jenkins](#), [2009 WL 1058162 \(Sup. Ct. N.Y. Co. Apr. 14, 2009\)](#), in dismissing claims against non-New York defendants for lack of personal jurisdiction, the Court explained that making statements to a party in New York is not enough; a defendant must avail itself of New York by intending that the statements “be relied upon to the injury of a resident of the state.” *Id.* at *5. Ace Decade’s other cases fare no better. See [Davidoff v. Davidoff](#), [2006 WL 1479558, *12 \(Sup. Ct. N.Y. Co.](#)

c. CPLR 302(a)(3) (Tort Causing Injury in New York)

Finally, Ace Decade, a BVI entity, contends that it was injured in New York because: (i) the “event giving rise to the injury” occurred here, and (ii) it “lost potential New York investors when UBS sold all of its shares.” (Opp., 15-16.) Ace Decade is incorrect.

First, the “event[s] giving rise to” Ace Decade’s purported “injury” *did not* occur in New York. See [Marie v. Altshuler, 30 A.D.3d 271, 272 \(1st Dep’t 2006\)](#). As demonstrated above and in UBS’s opening brief, the alleged misrepresentations that caused Ace Decade to make this investment were made by a UBS banker in Hong Kong to Ace Decade’s agents *before* they moved to New York, *all* relevant contracts were executed in Hong Kong or China, Ace Decade funded the investment in Haitong using bank accounts in Hong Kong, and UBS called the loan by notifying Haixia in China and selling the Haitong shares in Hong Kong. (*Supra* at 5-10; UBS Mem., 5-11.) None of these events “giving rise to the injury” occurred in New York.

Second, after speculating that it somehow “lost potential New York investors when UBS sold all of its shares” (Opp., 16),⁵ Ace Decade admits that it never solicited investors in New York. (See Opp., 19 n.7 (“Ace Decade’s only activity in New York has been to enter into the Investment . . .”).) The only company—albeit not registered with the SEC or FINRA—alleged to have solicited investors here is Golden Spring New York. (Compl. ¶ 37.) Ace Decade has not identified any actual investors that Golden Spring New York lost, citing only a single unnamed *potential* investor that “expressed significant interest in investing in Ace Decade.”

[May 10, 2006](#)) (dismissing complaint for lack of personal jurisdiction); [Banco Nacional Ultramarino v. Chan, 169 Misc. 2d 182, 188 \(Sup. Ct. N.Y. Co. 1996\)](#) (defendant “committed an affirmative act in New York, money laundering”).

⁵ This entirely new claim should be disregarded. See [Saco, 2014 WL 2451356 at *4](#).

(Kwok ¶ 76.) And Ace Decade does not point to any case holding that a non-party corporation's loss of a single potential investor can establish a plaintiff's injury in New York. See [*Sybron Corp. v. Wetzel*, 46 N.Y.2d 197, 205-06 \(1978\)](#) (“[T]he economic injury . . . stems from the threatened loss of important New York customers.”).⁶

2. This Court's Exercise of Jurisdiction Over UBS in Connection With This Hong Kong Transaction Would Violate Due Process.

Even if UBS were subject to jurisdiction under [CPLR 302](#), exercising personal jurisdiction over UBS would not comport with Due Process. In arguing that “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” (Opp., 17), Ace Decade ignores that Due Process requires “the defendant's *suit-related conduct*” to “create a *substantial connection* with the forum state,” and that “the plaintiff cannot be the only link between the defendant and the forum.” [*Walden v. Fiore*, 134 S. Ct. 1115, 1121-22 \(2014\)](#) (emphases added). Here, but for the alleged relocation of Ace Decade's agents *after* the alleged misrepresentations were made and contracts were executed in Hong Kong, UBS would have had no connection to New York in relation to this transaction.

III. ACE DECADE CANNOT ESCAPE *FORUM NON CONVENIENS* DISMISSAL.

A. This Action Does Not Have a Substantial Nexus to New York.

In its Opposition, Ace Decade studiously avoids mentioning any of the directly on-point New York cases cited in UBS's brief holding that claims should be dismissed on *forum*

⁶ [*Penguin Group \(USA\) Inc. v. American Buddha*, 16 N.Y.3d 295 \(2011\)](#), is inapplicable here because its focus is limited to injuries for copyright infringement. [Id. at 301-02](#).

non conveniens grounds, where, as here, “the events of the underlying transaction . . . occurred entirely in a foreign jurisdiction.” [*Viking Global Equities, LP v. Porsche Automobil Holding SE*, 101 A.D.3d 640, 641 \(1st Dep’t 2012\)](#); *see also* [*Hanwha Life Ins. v. UBS AG*, 127 A.D.3d 618, 619 \(1st Dep’t 2015\)](#) (affirming dismissal where there was no “substantial New York nexus”). And, in reflexively claiming that “New York has a substantial interest in adjudicating this dispute” (Opp., 20), Ace Decade ignores China’s sovereign interest in regulating a transaction where *all aspects of the transaction* occurring solely in Hong Kong or China. *See supra* at 5-10. Even if Ace Decade were a New York resident,⁷ that would be insufficient to create the requisite nexus to New York. *See* [CPLR 327\(a\)](#) (“The domicile or residence in this state of any party to the action shall not preclude the court from . . . dismissing the action.”); [*Viking Global*, 101 A.D.3d at 641](#) (dismissing for *forum non conveniens*, even though some plaintiffs were New York residents). Likewise, communications between UBS in Hong Kong and Ace Decade’s agents in New York fail to create such a nexus. *See id.* (“[P]hone calls between plaintiffs in New York and a representative of defendant in Germany . . . fail[] to create a substantial nexus with New York.”).

B. Ace Decade Cannot Overcome UBS’s Demonstration That New York Is a Patently Inconvenient Forum for the Litigation of This Hong Kong Dispute.

1. The fact that the Court might have to apply Hong Kong substantive law to Ace Decade’s claims supports dismissal. Ace Decade argues that UBS has “not argued, let alone demonstrated, the existence of a conflict between New York law and Hong Kong law.”

⁷ Ace Decade claims that it is a New York resident because it “maintains an office” here (Opp., 19), but the Complaint actually alleges only that *Golden Spring New York*, not Ace Decade, has a New York office. (Compl. ¶¶ 36-38; *see also* Kwok ¶ 34 (same).)

(Opp., 21.) But UBS has no burden on a motion to dismiss to show such a conflict. Ace Decade ignores binding case law dismissing actions for *forum non conveniens* in part because, as here, of the “likely applicability” of foreign law. [*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 480 \(1984\)](#).⁸ Moreover, Kwok’s agreements with UBS, which govern Ace Decade’s claims, *see supra* at 3-4, require the application of Hong Kong law (*see* Supp. Ex. 13, at 16).

2. Ace Decade is wrong in claiming that litigation here would not be unduly burdensome “because the discovery in this case will be almost entirely party discovery.” (Opp., 22.) That assertion ignores that the relevant UBS documents and witnesses are located outside of the United States. And the relevant documents of third-parties Haixia, Dawn State, and Stevenson Wong (Ace Decade’s own Hong Kong counsel) are all in Hong Kong or China.

3. The burdens of international discovery are not alleviated by “copying technology.” (*See* Opp., 22.) Documents located abroad are frequently subject to privacy protections and other laws restricting their transfer to the United States. *See [In re Herald, Primeo, & Thema Sec. Litig.](#), 2011 WL 5928952, *15 (S.D.N.Y. Nov. 29, 2011)*. For example, Hong Kong law restricts disclosure of information held at a Hong Kong branch of a bank in response to a discovery request to a U.S. branch,⁹ and discovery concerning Haixia (which is controlled by a Chinese state-owned enterprise) could implicate China’s 1988 Law on Guarding State Secrets. These burdens will be amplified by the need for extensive translation, as

⁸ That UBS analyzed Ace Decade’s claims under New York law on this motion is not a concession that Hong Kong law tracks New York law. Rather, as stated in UBS’s opening brief, UBS cited New York law here because Ace Decade has purported to bring its claims under New York law, under which Ace Decade does not state a claim. (UBS Mem., 23 n.10.)

⁹ *See* National University of Singapore Bank, Bank Secrecy Symposium, Report of Proceedings, 33-34 (Mar. 2015), <http://law.nus.edu.sg/cbfl/pdfs/reports/CBFL-Rep-HY1.pdf>.

evidenced by the fact that both of Ace Decade’s affidavits were executed in Chinese (Dkt. Nos. 27-30), which could impose significant burdens on this Court. See [*Wyser-Pratte Mgmt. Co. v. Babcock Borsig AG*, 2004 WL 3312835, *5 \(Sup. Ct. N.Y. Co. July 8, 2004\)](#) (Ramos, J.) (recognizing the burden on courts where documents “will require extensive translation”).¹⁰

4. By contrast, Ace Decade identifies no burden for itself to litigating in Hong Kong, where it chose to invest and is represented by counsel. See [*Guidi v. Inter-Cont’l Hotels Corp.*, 224 F.3d 142, 147 \(2d Cir. 2000\)](#) (explaining that dismissal under *forum non conveniens* is more appropriate where plaintiff is a sophisticated entity “doing business abroad and can expect to litigate in foreign courts.”). Moreover, Kwok, a Chinese national and former Hong Kong resident on whose relationship with UBS Ace Decade now bases its claims, has agreed to litigate disputes with UBS in Hong Kong. See *supra* at 3-4.

IV. ACE DECADE HAS NOT STATED A VIABLE LEGAL CLAIM AGAINST UBS.

A. In Its Opposition, Ace Decade Concedes That It Has No Special Relationship with UBS.

Ace Decade does not dispute that it had *no* relationship with UBS prior to this transaction. Rather, Ace Decade relies solely on Kwok’s banking relationship with UBS to provide the “special relationship” necessary to assert claims for breach of fiduciary duty, negligent misrepresentation, fraudulent omission, and unjust enrichment. (Opp., 24.) But Ace Decade cannot have its cake and eat it too; if Ace Decade relies on Kwok’s relationship with UBS, it is bound by the forum selection clause governing that relationship. See *supra* at 3-4.

¹⁰ For example, in the translation of Kwok’s affidavit filed by Ace Decade, Kwok alleged that he told Wong that he planned “to operate [his] business projects *out of* New York.” (Kwok ¶ 35 (emphasis added).) Properly translated, however, the Chinese version of Kwok’s affidavit actually states Kwok to Wong that he planned to “operate [his] business projects *outside of* New York,” making clear that those businesses were operating abroad (Supp. Ex. 14, ¶ 2.)

Conversely, if Ace Decade maintains that its claims do not arise out of Kwok's relationship with UBS, those claims must be dismissed, because Ace Decade has not alleged facts that could suggest that it (as opposed to Kwok) had a relationship with UBS. (*See* UBS Mem., 23-24.)

B. Ace Decade Admits That It Did Not Justifiably Rely on any Alleged Misrepresentations or Omissions by UBS in Connection With the Hong Kong Transaction at Issue Here.

When all is said and done, Ace Decade does not dispute that it is a sophisticated party, nor claim to have conducted due diligence before investing in Haitong shares in Hong Kong. (Opp., 25; UBS Mem., 25.) These concessions doom Ace Decade's claims for fraud and negligent misrepresentation. *See* [MAFG Art Fund, LLC v. Gagosian, 123 A.D.3d 458, 459 \(1st Dep't 2014\)](#) (dismissing fraud claim for failure to plead justifiable reliance).¹¹

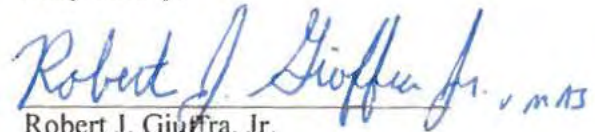
Ace Decade's argument that it should be excused from its duty to exercise due diligence because it "was never a party to the written agreement between Haixia and UBS" (Opp., 25) misstates New York law. As the First Department has held, claims should be dismissed "[a]s a matter of law [where] sophisticated plaintiffs cannot demonstrate reasonable reliance because they conducted no due diligence; for example, they did not ask defendants, 'Show us your market data.'" [MAFG, 123 A.D.3d at 459](#). Ace Decade cannot demonstrate reasonable reliance, because it did not ask UBS, Haixia or Dawn State to "show me the financing terms." And, contrary to Ace Decade's suggestion, courts routinely resolve issues of justifiable reliance at the dismissal stage. *See, e.g., id.; HSH Nordbank AG v. UBS AG, 95 A.D.3d 185, 207 (1st Dep't 2012)* (reversing trial court and dismissing for failure to plead justifiable reliance).

¹¹ Ace Decade also never responds to the fact that UBS's joint venture with the controlling shareholder of Haixia is unrelated to this transaction and, far from being concealed from Ace Decade, was widely reported in the press. (UBS Mem., 6, 25 n.11.)

CONCLUSION

For the foregoing reasons, UBS respectfully requests that the Court dismiss the Complaint in its entirety.

Respectfully,



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