SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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J.G. JEWLRY PTE. LTD., JDM IMPORT CO. INC., MG WORLDWIDE LLC, MILES BERNARD, INC, ASIA PACIFIC JEWELRY, L.L.C.,

Plaintiffs,

- v -

TJC JEWELRY, INC., SHREE RAMKRISHNA EXPORTS PVT., LTD, THE JEWELRY COMPANY,

Defendants.

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INDEX NO. 651469/2018

MOTION DATE 10/31/2018, 04/03/2019, 10/16/2019

MOTION SEQ. NO. 005 007 008

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 58, 59, 60, 61, 62, 63, 64, 65, 66, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 140, 141, 142, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 169, 180, 183, 184, 186, 218, 219, 238, 239, 240, 241, 242, 243, 244

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 161, 162, 163, 164, 165, 166, 167, 168, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 187, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215

were read on this motion for RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 220, 221, 222, 223, 224, 225, 226, 227, 228, 230, 231

were read on this motion to DISMISS.

This case is about an alleged joint venture among international diamond merchants. Plaintiffs, most of whom are based in New York, say they entered into the joint venture with Defendants, most of whom are based in India, in order to expand the parties' collective reach and

their collective profit. Plaintiffs allege that Defendants instead drained tens of millions of dollars from the joint venture, before unilaterally withdrawing from it and then denying its existence.[1]

The Moving Defendants are Indian corporations, and their overarching argument, pressed in the three motions now before the Court, is that they do not belong here. They contend that Plaintiffs have not properly served them with the complaint, and that the complaint should be dismissed for lack of personal jurisdiction, forum non conveniens, lack of standing, and because an unsigned draft joint venture agreement provides for mandatory arbitration of this dispute. The three motions are combined for purposes of this decision and order.

BACKGROUND[2]

A. The Joint Venture

1. The Parties

The JDM Entities, which comprise Plaintiff entities JDM, MG Worldwide, Miles Bernard, and Asia Pacific, are in the diamond business (NYSCEF 14 ¶¶ 14-16 [Am. Compl.]). All of the JDM Entities are domestic companies with principal places of business in New York (*id.* ¶¶ 49-52). Plaintiff JGJ, the corporate embodiment of the alleged joint venture between the JDM Entities and Defendants, is incorporated in Singapore (*id.* ¶ 53).

Defendants (described interchangeably as the "SRK Entities") are also in the diamond trade. Moving Defendant SRK is a foreign business corporation organized under the laws of

[1] "Plaintiffs" refers to, collectively, JDM Import Co. Inc. ("JDM"), MG Worldwide LLC ("MGW"), Miles Bernard, Inc. ("MBI"), and Asia Pacific Jewelry, L.L.C. ("APJ") (together, the "JDM Entities") and J.G. Jewelry Pte. LTD ("JGJ"). "Defendants" refer to, collectively, Shree Ramkrishna Exports Private Limited ("SRK"), The Jewelry Company, and TJC Jewelry, Inc. ("TJC"). The Moving Defendants here are SRK and The Jewelry Company.

[2] The recitation of facts is based on the allegations in the Amended Complaint and accompanying affidavits, which are taken to be true solely for purposes of this motion to dismiss (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]).

India, with its principal place of business also in India (*id.* ¶ 54). Moving Defendant The Jewelry Company is based in India too, and Plaintiffs allege that it is either a division of SRK or a wholly-owned subsidiary (*id.* ¶¶ 55-56). Non-Moving Defendant TJC is a corporation authorized to do business in New York with a principal place of business at 10 West 46th Street in New York City. Plaintiffs allege that TJC (standing for "The Jewelry Company") is controlled by, is a marketing affiliate of, and serves as SRK's and The Jewelry Company's agent in the United States (*id.* ¶ 58).

2. The Joint Venture is Allegedly Formed

The dispute at the crux of this case is whether, and under what terms, the SRK Entities and the JDM Entities formed a joint venture. Plaintiffs assert that a joint venture was created in 2015, with the agreed intent of creating a worldwide diamond jewelry business (*id.* ¶ 30). To operate this joint venture, the parties created JGJ, an entity incorporated in Singapore on April 2, 2015 (*id.* ¶ 80). The shares in JGJ were divided evenly between the JDM Entities and the SRK Entities (*id.* ¶ 82). The JDM Entities and the SRK Entities were supposed to commit their profits and losses to the joint venture, and at the end of each year apportion the profits or losses evenly between the JDM and SRK interests (*id.* ¶ 33). Under the agreed-upon terms of the joint venture, all income and expenses generated by all participating joint venture entities – that is, JDM and SRK – were for the account of JGJ (*id.* ¶ 86).

Plaintiffs allege that the SRK Entities used JGJ as a vehicle to steal tens of millions of dollars from the JDM Entities. The SRK Entities failed to deposit their fair share of revenues into JGJ, forcing the JDM Entities to absorb virtually all of JGJ's expenses and to provide much of JGJ's initial inventory (*id.* ¶¶ 39-40). At the same time, the SRK Entities retained all of JGJ's sales revenues and profits (*id.* ¶ 126). And because the SRK Entities controlled the "back office

bookkeeping and accounting of the Joint Venture", they were able to conceal these activities from the JDM Entities (*id.* ¶¶ 35, 39).

3. Defendants Withdraw from the Joint Venture

To address persistent accounting problems with the joint venture, in August 2017 the JDM Entities' principals, Michael and David Kriss, traveled to India to discuss the issues with the Managing Director of SRK (*id.* ¶ 150). These discussions ended with the SRK Entities announcing they would withdraw from JGJ, effective August 31, 2017 (*id.* ¶ 81). In breaking up the joint venture, the SRK Entities allegedly cut off the JDM Entities' diamond supply, failed to perform a final accounting or make any distributions to the JDM Entities, disrupted the JDM Entities' business operations, and jeopardized the companies' finances (*id.* ¶¶ 152, 154, 157-160).

4. The Joint Venture's Contacts with New York

According to Plaintiffs, during the term of the joint venture, the U.S. operations of the JDM Entities, the SRK Entities, and JGJ ran, in substantial part, through JDM's office in New York City. Key to this assertion is TJC, the New York-based entity that Plaintiffs say acted as the American arm of Defendants' Indian businesses. Among other things, Plaintiffs allege that: TJC's CEO and President, Ashish Shah, worked at JDM's offices in New York City and there provided services on behalf of SRK and The Jewelry Company[3] (NYSCEF 91 ¶ 15 [Kriss Aff.]); SRK's representatives put up a sign at the JDM office stating that it was also SRK's office (*id.*, Ex. H); TJC is controlled, or wholly owned, by SRK and sells only products of SRK and The Jewelry Company (*id.* ¶ 16); SRK and The Jewelry Company regularly sent goods to TJC at

[3] Shah himself was named as a Defendant in this action, but the claims against him were dismissed by the Court (Bransten, J.) in a Decision and Order dated October 19, 2018 (*see* NYSCEF 51 [Decision and Order]).

JDM's office, for re-packaging and delivery to SRK's U.S.-based customers (*id.* ¶ 23, Exs. C-G, L-O); and the SRK Entities used the New York City office to meet with U.S.-based customers, negotiate with them, and deliver consignments of goods (*id.* ¶¶ 17-22, 29, Exs. K-O, V). In addition, JGG's bank account – to be used by all parties to the joint venture – was set up at a New York bank (the Israel Discount Bank of New York) (*id.* ¶¶ 24-26, Ex. R).

B. The Instant Action

Plaintiffs initiated the instant action by filing a Summons and Complaint on March 27, 2018 (NYSCEF 1).

On April 23, 2018, SRK brought suit in Singapore against JGJ, alleging that JGJ owes SRK over $20 million for goods purchased and received by JGJ (NYSCEF 14 ¶ 173). In that lawsuit, SRK denies the existence of any joint venture between the SRK Entities and the JDM Entities (*id.* ¶ 174).

On June 29, 2018, Plaintiffs filed an Amended Complaint in this case, asserting seven causes of action against various groupings of Defendants: (1-3) breach of contract, (4) fraud, (5) unjust enrichment, (6) quantum meruit, and (7) conversion.

C. Plaintiffs' Attempts at Serving the Moving Defendants

Much of this litigation has been mired in the threshold question whether Plaintiffs ever properly served the Moving Defendants. Plaintiffs insist they have done so at least six times since 2018, in multiple places and in multiple ways. There is no question that the Moving Defendants have had *actual* notice of these proceedings for a very long time.

Plaintiffs first attempted to effect service of process on SRK and The Jewelry Company in April 2018 through the Indian government, pursuant to the Hague Convention, using Indian

addresses connected to the companies.[4] The Indian authorities attempted service on those corporate addresses in October 2018, but advised Plaintiffs that the attempt was unsuccessful. SRK's "officials [were] not present at the site" and The Jewelry Company's "doors were locked" (NYSCEF 128 ¶¶ 18-22 [Kolod Aff.]). Meanwhile, in September 2018, Plaintiffs attempted to serve the directors of SRK and The Jewelry Company personally at an industry trade show in Hong Kong (the "September 2018 Service") (*id.* ¶ 23). Defendants argued, however, that service did not physically occur at the time (NYSCEF 64 ¶ 5 [Dholakia Aff.] ["No one ever delivered an envelope containing a copy of the [court documents] to me while I was in Hong Kong"]; NYSCEF 66 ¶ 5 [Shah Aff.] ["[A]t no time were copies of the Summons and Amended Complaint ever served upon me."]).

Then in March 2019, Plaintiffs served the documents by email to SRK and The Jewelry Company's principals, by email and mail to their New York-based counsel, and by email and mail to their Singapore-based counsel, pursuant to a March 4, 2019 *ex parte* Court order authorizing such alternative means of service (NYSCEF 155). Notably, the Moving Defendants' Indian counsel wrote back to *confirm receipt by the corporations' principals* (NYSCEF 171 ¶¶ 9-10 [Fleesler Aff.]; NYSCEF 175-176). Following a court hearing on September 4, 2019, about whether to reconsider that *ex parte* order, the Moving Defendants' counsel provided Plaintiffs' counsel with updated service addresses for SRK and The Jewelry Company in India (*see* NYSCEF 207). The Moving Defendants' counsel represented to the Court that "if [Plaintiffs] go through The Hague and serve those addresses . . . [the] clients are there" (Oral Arg. Tr. at 15).

[4] Specifically, Plaintiffs aver that the address for SRK was the one used by SRK in court documents filed in Singapore, while The Jewelry Company's address was listed on the company's website (NYSCEF 128 ¶¶ 10-13 [Kolod Aff.]).

A few days later, on September 17, 2019, Plaintiffs elected to attempt service once again on a representative of SRK and The Jewelry Company in Hong Kong (the "September 2019 Service"). This time, the Moving Defendants do not dispute that the court documents were in fact served: a process server approached S.G. Dholakia, a director of SRK and a principal of The Jewelry Company, at the Hong Kong Jewelry Fair and, after trying to hand Mr. Dholakia the court papers, placed them "on [his] left foot" (NYSCEF 188 ¶ 8 [Law Aff.]). But the Moving Defendants maintain that such service was still legally ineffective because it was untimely and in violation of the Hague Convention's protocol for serving process on Indian nationals in India.

* * * *

Against that factual and procedural backdrop, the Court turns to the three motions at hand. *First*, the Moving Defendants move to dismiss the Amended Complaint on the grounds that the September 2018 Service was ineffective, and that even if it were effective, the Amended Complaint should still be dismissed due to lack of personal jurisdiction, forum non conveniens, the existence of an arbitration provision in an unsigned draft document, and lack of standing as to certain Plaintiffs [Mot. Seq. No. 005]. *Second*, the Moving Defendants move for reconsideration of the Court's *ex parte* order dated March 4, 2019, authorizing email service on Defendants [Mot. Seq. No. 007]. And *third*, the Moving Defendants move (again) to dismiss the Amended Complaint based on the purportedly invalid September 2019 Service [Mot. Seq. No. 008].

DISCUSSION

The standard for assessing a motion to dismiss is a familiar one. The Court must afford the Complaint a liberal construction, accept the factual allegations as true, and accord the plaintiff the benefit of every favorable inference. The job is to determine whether the facts, as

alleged, fit within any cognizable legal theory (*see*, *e.g.*, *Maddicks v Big City Properties, LLC*, 34 NY3d 116, 123 [2019]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Grassi & Co. v Honka*, 180 AD3d 564, 564 [1st Dept 2020]). Allegations that are "bare legal conclusions," or that are inherently incredible or flatly contradicted by documentary evidence, are not sufficient to withstand a motion to dismiss (*see*, *e.g.*, *Myers v Schneiderman*, 30 NY3d 1, 11 [2017]; *Doe v Bloomberg, L.P.*, 178 AD3d 44, 47 [1st Dept 2019]; *JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009]).

A. PERSONAL JURISDICTION – SERVICE OF PROCESS

The Moving Defendants argue that, notwithstanding their acknowledged actual *receipt* of process, and the fact that they have known about this case for two years, the September 2019 Service was still ineffectual for two reasons: (1) it was untimely, and (2) it did not comply with the terms of the Hague Convention. Neither argument provides grounds for dismissal.[5]

1. Service was Timely

CPLR 306-b requires that service of a summons and complaint "shall be made within [120] days after the commencement of the action or proceeding," but also provides that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, *or upon good cause shown or in the interest of justice, extend the time for service*" (emphasis added).

[5] Defendants' motion for reconsideration of the Court's *ex parte* Decision and Order [Motion Sequence No. 007], to assess the applicability of the Hague Convention, is granted. Upon reconsideration, based on further briefing and a supplemented factual record, the Court finds that email service under CPLR 308(5) in this instance was not sufficient service on Defendants under the Hague Convention. Given that the email service was superseded by adequate *personal* service, however, the issue is moot.

"An extension of time for service [under CPLR 306-b] is a matter within the court's discretion" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001]). Among the "many relevant factors to be considered by the court" are the plaintiffs' diligence in attempting to effect service, and prejudice to the defendant (*id.* at 105-06; *see Henneberry v Borstein*, 91 AD3d 493, 497 [1st Dept 2012] ["Granting plaintiff the opportunity to pursue this action is not only consistent with the 'interest of justice' exception set forth in CPLR 306–b, but also with our strong interest in deciding cases on the merits where possible."]).

Although the September 2019 Service fell outside the period prescribed by CPLR 306-b, the Court deems service timely in the interest of justice (*Edan v Johnson*, 117 AD3d 528, 529 [1st Dept 2014] [holding "trial court properly exercised its discretion to deem the affidavits of service timely filed nunc pro tunc" in spite of deadline imposed by CPLR 306-b]). Plaintiffs have shown a diligent record of attempting service on Defendants through various means (*see, e.g.*, NYSCEF 6, 81, 157-159, 188-202). Moreover, Defendants have not articulated any prejudice that they would suffer as a result of an extension of the service period *nunc pro tunc*, since they have had actual notice of this action (*see Leader*, 97 NY2d at 106 ["actual notice of the action" eliminates any prejudice from extended service]; *Henneberry*, 91 AD3d at 496).

2. Service Did Not Violate the Hague Convention

By its terms, the Hague Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad" (Hague Convention, Art. 1). And "[b]y virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies" (*Volkswagenwerk AG. v Schlunk*, 486 US 694, 699 [1988]; *see*

Morgenthau v Avion Resources Ltd., 11 NY3d 383, 390 [2008] ["[T]hat treaty, of course, is the supreme law of the land and its service requirements are mandatory."]).

As relevant here, Article 10 of the Hague Convention states that "provided that the State of destination does not object, the present Convention shall not interfere with . . . (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination" (*see id.*, art. 10).

The Moving Defendants' principal was undisputedly served with the relevant legal documents in Hong Kong, which permits the means of service that was used (NYSCEF 195 ¶¶ 10-11 [Lo Aff.]; *see* NYSCEF 231 ¶ 8.2 [Wise Aff.] [acknowledging "that Hong Kong has not objected to service under Article 10(b) or 10(c) of the Hague Convention"]; *UMG Recordings, Inc. v Kobler*, 2015 WL 4764207 [Sup Ct, New York County 2015] ["Pursuant to Article 10 of the Hague Convention, provided that *the country where a defendant is to be served does not object*, service may be accomplished 'directly through the judicial officers, officials or other competent persons of the State of destination.'"] [emphasis added]; *American Intl. Group. Inc. v Greenberg*, 23 Misc 3d 278, 294 [Sup Ct, New York County 2008] [where the plaintiff attempted to serve individuals located in Bermuda, Bermuda was the "State of destination"]; *Interlink Metals and Chemicals, Inc. v Kazdan et al.*, 222 AD2d 55, 56 [1st Dept 1996] [same with British Virgin Islands]; *see also* 4B Fed. Prac. & Proc. Civ. § 1134 [4th ed.] [noting "signatories may object to the use of these methods within their territory"]).

The manner of service in September 2019 neutralized Defendants' sole objection to the September 2018 Service. That service was the subject of the Moving Defendants' initial motion to dismiss, which was pending at the time Plaintiffs renewed their attempt. In September 2018,

Defendants disputed whether the service had actually occurred (NYSCEF 64, 66), but not whether service on an individual would be effective upon the Moving Defendants if it had occurred. Plaintiffs therefore essentially repeated the method in September 2019, and this time successfully transmitted the documents to an individual representing the Moving Defendants. In addition, the Moving Defendants have not cited to any provision in the Hague Convention, or any case law interpreting the treaty, forbidding the method of service used by Plaintiffs here.[6]

To be clear, the Court is not deciding, as a general proposition, that foreign businesses located in jurisdictions subject to the Hague Convention may be served anywhere in the world through personal service on their principals. But the circumstances in this case, including the undisputed and confirmed fact of service, the absence of objection to the September 2018 Service on grounds other than mistaken identity (which has now been remedied), and the extraordinary good faith lengths to which Plaintiffs have already gone to effect service, weigh in favor of deeming the September 2019 Service effective.

Therefore, Defendants' motion to dismiss the Amended Complaint against SRK and the Jewelry Company under CPLR 3211(a)(8) [Motion Sequence No. 008] is **DENIED**, and the branch of Defendants' prior motion to dismiss the Amended Complaint based on service [Motion Sequence No. 005] is **DENIED** as moot.

B. PERSONAL JURISDICTION – CONTACTS WITH FORUM

On a motion to dismiss for lack of personal jurisdiction, "[t]he opposing party need only demonstrate that facts 'may exist' whereby to defeat the motion" and "[i]t need not be

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[6] The cases cited involve Indian residents served in India (*Goldman, Horowitz & Cherno, LLP v PCP Intern. Ltd.*, 2012 N.Y. Slip Op. 30640[U] [Sup Ct, Nassau County 2012] [addressing "whether or not defendant was properly served in India"]; *Imax Corp. v E-City Entertainment (I) Pvt. Ltd.*, 2014 N.Y. Slip Op. 31710[U] [Sup Ct, New York County 2014] [contesting "service through the Hague Convention in India"]).

demonstrated that they do exist" (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466 [1974] [authorizing jurisdictional discovery "to prove other contacts and activities of the defendant in New York"]; *Am. BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007] [denying motion to dismiss for lack of personal jurisdiction because "[p]laintiffs' pleadings, affidavits and accompanying documentation made a 'sufficient start' to warrant further discovery on the issue of personal jurisdiction"]; *Ying Jun Chen v Lei Shi*, 19 AD3d 407, 408 [2d Dept 2005] [denying motion to dismiss for lack of personal jurisdiction where "plaintiffs established that facts 'may exist' to exercise personal jurisdiction over [defendant] and have made a 'sufficient start' to warrant further discovery on the issue of personal jurisdiction over him"]).

Here, at the very least, Plaintiffs have made a sufficient showing of personal jurisdiction to warrant further discovery on the issue. Plaintiffs' jurisdictional argument is premised on CPLR 302(a)(1) through (3):

> (a) . . . As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, **who in person or through an agent**:
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . . .

(emphasis added).

The starting point is subsection (a)(1), which "is a 'single act statute'; accordingly, physical presence is not required and one New York transaction is sufficient for personal

jurisdiction" (*C. Mahendra (N.Y.), LLC v Natl. Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015]). "The statute applies where the defendant's New York activities were purposeful and substantially related to the claim", with "'[p]urposeful' activities'" defined as "'those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*id.*, citing *D&R Global Selections, S.L. v Bodega Olegario Falcón Piñeiro*, 90 AD3d 403, 404 [1st Dept 2011]); *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]).

Plaintiffs' allegations, set forth in the Amended Complaint and supplemented in its opposition to the motion to dismiss, indicate that SRK and The Jewelry Company purposefully projected themselves into New York in order to transact business that is substantially related to the claims here. To begin with, Plaintiffs allege that TJC acted as agent in New York for SRK and The Jewelry Company. "The conduct of an agent may be attributed to the principal for jurisdictional purposes where the agent engaged in purposeful activities in this state in relation to the transaction at issue for the benefit of and with the knowledge and consent of the principal and the principal exercised some control over the agent in the matter" (*Morgan ex rel. Hunt v A Better Chance, Inc.*, 70 AD3d 481, 482 [1st Dept 2010] [finding that "[p]laintiff provided sufficient evidence to warrant further discovery to determine whether [company] was an agent"]). TJC is allegedly controlled, or wholly owned, by SRK and sells only products of SRK and The Jewelry Company (NYSCEF 91 ¶ 16), and TJC's chief executive allegedly worked at JDM's offices and provided services on behalf of those companies (*id.* ¶ 15). Also, SRK and The Jewelry Company allegedly sent goods to TJC at JDM's office, for re-packaging and delivery to SRK's U.S.-based customers (*id.* ¶ 23, Exs. C-G, L-O; *see Laufer v Ostrow*, 55 NY2d 305, 311 [1982]).

In addition, SRK and The Jewelry Company co-authorized the JGJ bank account in New York from which it transferred funds, shipped goods to JDM's offices in New York en route to their final customers, deployed employees to work out of the JDM office during the joint venture, and more (NYSCEF 91 ¶¶ 11, 24-26, 28, 32). These allegations evince volitional acts on the part of the Moving Defendants to conduct business in New York in conjunction with Plaintiffs, and thus satisfy the requirements of CPLR 302(a)(1) (*Fischbarg*, 9 NY3d at 383-84 [holding that personal jurisdiction existed over non-domiciliary who solicited plaintiff's business and then regularly communicated with him by telephone and email while plaintiff was in New York]; *C. Mahendra (N.Y.), LLC*, 125 AD3d at 457 [holding that "telephone dealings over several years and in the two transactions at issue" were sufficient to establish long-arm jurisdiction]; *see Al Rushaid v Pictet & Cie*, 28 NY3d 316, 329 [2016] ["Defendants' correspondent banking activity is sufficient to establish a purposeful course of dealing, constituting the transaction of business in New York under CPLR 302(a)(1)."]).[7]

Further, exercising personal jurisdiction over Defendants comports with due process (*id.* at 330 [noting "[e]xercise of personal jurisdiction under the long-arm statute must comport with federal constitutional due process requirements"]). To satisfy due process, the defendant must have "certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (*Daimler AG v Bauman*, 134 S. Ct. 746, 754 [2014] [quoting *Int'l Shoe Co. v Washington*, 326 US 310, 316 [1945]); *accord LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000] ["Under the Due Process Clause, the standards of 'minimum contacts' and 'fair play and substantial justice' are implicated in the

[7] Because the Court finds that CPLR 302(a)(1) is met here, it need not decide the merits of Plaintiffs' arguments under CPLR 302(a)(2) and (3).

decisional law governing personal jurisdiction."]). This standard asks whether the defendant has "'minimum contacts' with the forum state," and whether "personal jurisdiction is reasonable under the circumstances of the particular case" (*D & R Glob.*, 29 NY3d at 300).

The contacts with New York alleged in this case meet both requirements of the due process inquiry. First, based on the activities described above, Defendants had the required minimum contacts with New York. They purposefully conducted business with New York entities – that is, the JDM Entities – and also allegedly directed their own agents, employees, and goods to the forum (*LaMarca*, 95 NY2d at 216-19 [finding non-domiciliary tortfeasor had minimum contacts with New York because the company "itself forged the ties with New York" through "purposeful action"]; *Travelers Health Ass'n v Com. of Va. ex rel. State Corp. Comm'n*, 339 US 643, 647 [1950] [noting that minimum contacts exist "where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state"]). And second, the exercise of personal jurisdiction over Defendants in New York is reasonable in these circumstances. "Considering that [the non-domiciliary's] long business arm extended to New York, it seems only fair to extend correspondingly the reach of New York's jurisdictional long-arm" (*LaMarca*, 95 NY2d at 218-19; *see FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 494 [1st Dept 2017] [holding that "numerous" contacts with New York over eight-year period rendered exercise of personal jurisdiction reasonable]). In short, it is both fair and reasonable to subject Defendants to the jurisdiction where they purposefully directed their business dealings.

Therefore, the branch of Defendants' motion seeking to dismiss the Amended Complaint for lack of personal jurisdiction is **DENIED**.

C. FORUM NON CONVENIENS

"The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that in the interest of substantial justice the action should be heard in another forum" (*Nat'l Bank & Tr. Co. of N. Am. v Banco De Vizcaya, S.A.*, 72 NY2d 1005, 1007 [1988]; CPLR 327 [a] ["When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just."]). This is not such an action.

To determine whether an action should be dismissed under forum non conveniens, the Court must consider several factors, including the residence of the parties, the situs of the underlying transaction, the existence of an adequate alternative forum, the location of potential witnesses and relevant evidence, potential hardship to the defendant, and the burden on New York courts (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 [1984], cert denied 469 US 1108 [1985]); *see Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 294 [1st Dept 2005]). No one factor is controlling.

"In determining whether an action should be dismissed for forum non conveniens, plaintiff's choice of forum is entitled to strong deference" (*JTS Trading Ltd. v Asesores*, 178 AD3d 507 [1st Dept 2019] [citing *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984], cert denied 469 US 1108 [1985]), and Defendants must bear the "heavy burden of demonstrating that [the] plaintiff's selection of New York was not in the interest of substantial justice" (*Wilson v Dantas*, 128 AD3d 176, 177 [1st Dept 2015]; *see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 218 [2000] ["New York has an interest in providing a convenient forum for . . . a New York resident who was injured in New York and may be entitled to relief under New York law."];

Waterways Ltd. v Barclays Bank PLC, 174 AD2d 324, 327 [1st Dept 1991] ["It is well established law that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed . . ."]).

Defendants do not meet that heavy burden here, and the Court therefore declines to disturb the Plaintiffs' choice of New York as the forum for this dispute. Taking the allegations in the Amended Complaint as true for these purposes, all but one of the parties conducted business or maintained offices in JDM's New York office. And the other party, JGJ, is the corporate embodiment of a joint venture that allegedly flowed, in part, through New York (*see* NYSCEF 91 ¶¶ 15-16, 23, Exs. H-J, P, Q). A significant part of the operations of the joint venture allegedly took place out of JDM's New York office, including substantial sales, inventory supply to various end-customers, and regular visits by the SRK Entities' representatives (*id.*, ¶¶ 11-30, 19, 28, 33; *id.* Ex. C-X). That means key witnesses are likely based in New York, as are relevant documents (*see Posh Pooch Inc. v Nieri Argenti s.a.s.*, 11 Misc 3d 1055[A] [Sup Ct., New York County 2006] [holding that New York was a proper forum where defendant's witnesses and documents were in Italy, most of plaintiffs' witnesses and documents were in New York, both New York and international law applied, and the plaintiffs were New York residents]).

Therefore, the branch of Defendants' motion seeking to dismiss the Amended Complaint under the doctrine of forum non conveniens (CPLR 327 [a]) is **DENIED**.

D. ARBITRATION PROVISION

Next, Defendants argue that an arbitration provision found in an unsigned draft joint venture agreement (the "Draft JV Agreement") requires that this dispute be litigated in arbitration in Singapore. This argument is meritless. "It is settled that a party will not be

compelled to arbitrate . . . absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes," and such "agreement must be clear, explicit and unequivocal" (*Matter of Waldron v Goddess*, 61 NY2d 181, 183 [1984]). Here, there is no basis to find that the arbitration provision in the Draft JV Agreement was clearly, explicitly, and unequivocally assented to by the parties. None of the parties signed the Draft JV Agreement, the JDM Entities' principal denies ever being presented with a draft for his review and approval, and the document itself does not specify which entities would be bound by it (NYSCEF 91 ¶¶ 41-45 [Kriss Aff.]). To the extent Defendants dispute those facts, that is a matter for discovery (*Henry Schein, Inc. v Archer and White Sales, Inc.*, 139 S Ct 524, 530 [2019] ["[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."]; *see Zachariou v Manios*, 68 AD3d 539, 539 [1st Dept 2009]).[8]

Therefore, the branch of Defendants' motion seeking to dismiss the Amended Complaint under the arbitration provision in the Draft JV Agreement is **DENIED**.

E. STANDING

Last, Defendants contend that the claims asserted by the JDM Entities should be dismissed because these entities lack standing to pursue claims relating to injuries allegedly sustained by JGJ, the joint venture vehicle. But as the JDM Entities acknowledge, their claims are only viable if the Court ultimately finds that no joint venture existed. At this stage,

[8] To be sure, "[t]here is no requirement that the writing be signed *so long as there is other proof that the parties actually agreed on it*", and the "case law makes it clear that a signature is not required" to enforce an otherwise agreed-to arbitration agreement (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc.*, LLP, 6 NY3d 371, 374 [2006] [emphasis added]). But here, unlike in *God's Batallion*, Plaintiffs do not allege that the parties operated under the terms of the Draft JV Agreement. And as noted above, Defendants' "other proof that the parties actually agreed on" the Draft JV Agreement is a matter of factual dispute.

"[P]laintiffs [are] entitled to plead alternative and inconsistent causes of action and to seek alternative forms of relief" (*Gold v 29-15 Queens Plaza Realty, LLC*, 43 AD3d 866, 867 [2d Dept 2007], citing CPLR 3014 ["Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency. Causes of action or defenses may be stated alternatively or hypothetically."]; *see generally Haythe & Curley v Harkins*, 214 AD2d 361, 362 [1st Dept 1995] ["That plaintiff might be ultimately precluded from recovering against each defendant under theories of both breach of contract and quantum meruit . . . does not preclude her from pleading both in the alternative."]).

Therefore, the branch of Defendants' motion seeking to dismiss the JDM Entities' claims in the Amended Complaint is **DENIED**.

In sum, it is

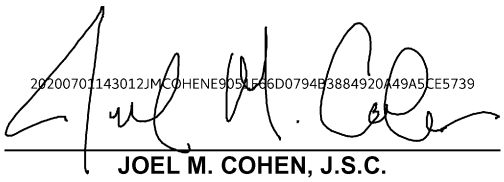
ORDERED that the Moving Defendants' motion to dismiss the Amended Complaint [Motion Sequence No. 005] is denied; it is further

ORDERED that the Moving Defendants' motion for reconsideration [Motion Sequence No. 007] is granted; it is further

ORDERED that the Moving Defendants' motion to dismiss the Amended Complaint [Motion Sequence No. 008] is denied; and it is further

ORDERED that all parties are to appear for a status conference on **July 28, 2020 at 10 a.m.**

This constitutes the Decision and Order of the Court.



7/1/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE