

**JPMorgan Chase Bank, N.A. v Baird**

2006 NY Slip Op 30274(U)

June 22, 2006

Supreme Court, New York County

Docket Number: 0602178/2005

Judge: Richard B. Lowe

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

PART 56

Index Number : 60217  
JPMORGAN CHASE BANK

~~RICHARD B. LOWE III~~

vs  
BAIRD, DAVID

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 2/23/06

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUN 29 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion is decided in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/22/06

RICHARD B. LOWE III

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

-----X  
JPMORGAN CHASE BANK, N.A., as trustee,

Plaintiff,

Index No. 602178/05

-against-

DAVID BAIRD, J. TAL BEVAN, ERIC A. DEMIRIAN,  
NICHAEAL D. D'AVELLA, GEORGE ESTEY,  
ROBERT R. GHEEWALLA, MARK R. HEMINGWAY,  
LEO J. HINDREY, P. KENNETH KILGOUR, JAMES G.  
MANSOUR, DANIEL R. MILLIARD, JAMES G.  
MATKIN, RONALD D. ROGERS, JIM SHAW, JOZEF  
STRAUS, and ROBERT WATSON ,

Defendants.  
-----X

**RICHARD B. LOWE III, J.:**

In motion sequence number 001, defendants Jim Shaw, Ronald D. Rogers, and Michael D'Avella (Shaw Defendants) move to dismiss the complaint for failure to state a cause of action, lack of personal jurisdiction, on the ground that the action is time-barred by the applicable statute of limitations and collateral estoppel (CPLR 3211 [a] [5], [7], [8]).

In motion sequence number 002, defendant James M. Mansour moves to dismiss the complaint for failure to state a cause of action, lack of personal jurisdiction, exemption from liability based upon an exculpatory by-law provision and the business judgment rule, lack of subject matter jurisdiction and on the ground that the action is time-barred (CPLR 3211 [a] [1], [2], [5], [7], [8]).

In motion sequence number 003, defendants David Baird, J. Tal Bevan, Eric A. Demirian, George Estey, Robert R. Gheewalla, Mark R. Hemingway, Leo J. Hindrey, Kenneth Kilgour, James G. Matkin, Daniel R. Milliard, Jozef Straus and Robert Watson (Baird Defendants) move

**FILED**  
JUN 29 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

\* 3 ] .  
to dismiss the complaint for failure to state a cause of action, lack of personal jurisdiction, collateral estoppel, and on the ground that the action is time-barred (CPLR 3211 [a] [5], [7], [8]).

The above motions are herein consolidated and are disposed of in accordance with the following memorandum.

### **Background**

The allegations set forth below are taken from the complaint, unless otherwise indicated.

This action was commenced by Plaintiff JPMorgan Chase Bank N.A. (JPMorgan), the successor to The Chase Manhattan Bank, acting as trustee on behalf of holders of senior unsecured discount notes (Noteholders), against sixteen former officers and directors of GT Group Telecom Inc. (GT Inc.), a Canadian telecommunications company. JPMorgan alleges tortious interference with contract and breach of fiduciary duty arising out of the defendants' participation in a plan of arrangement (Plan of Arrangement) in connection with the insolvency of subsidiaries of GT Inc., including GT Group Telecom Services Corp. (GT Services), and GT Telecom Services (USA) Corp. (GT USA) (GT Operating Companies) (collectively with GT Inc., the GT Companies). JPMorgan is suing to recover \$450 million, representing the value of the Notes.

The Notes were marketed, advertised and solicited for sale in New York by GT Inc. officer and director, Milliard (Affidavit of Daniel R. Milliard, ¶ 15). They were subsequently issued in February of 2000 pursuant to an indenture (Indenture) between GT Inc. and The Chase Manhattan Bank (Complaint, ¶ 1). GT Services, a GT Inc. subsidiary, raised additional funds by entering into a senior bank facility with a bank syndicate of eleven lenders, totaling CDN \$220 million, and vendor facilities totaling US \$315 million. GT Inc. additionally entered into a

\* 4 ] .  
vendor facility totaling CDN \$120 million (collectively, Secured Lenders).

At the time the Notes were issued, defendants Gheewalla, Kilgour, Mansour, Matkin, Milliard and Shaw were members of GT Inc.'s Board of Directors, Demirian was the Executive Vice President for Corporate Development, and Watson became the Executive Vice President of Engineering, Operations and Customer Service the day that the Indenture was signed.

According to the complaint, GT Inc.'s consolidated financial statements for the fiscal year ending in 2001 were grossly overstated and did not reveal that the GT Companies were actually insolvent. GT Inc.'s Board allegedly approved the overstated consolidated financial statements with Board members Kilgour, Matkin and Mansour, signing them on the Board's behalf. Subsequent to the financial statements filing with the SEC, the Board issued a press release, containing additional misrepresentations as to GT Inc.'s financial strength.

In the background, however, concerned with the GT Companies' deteriorating financial state, representatives of GT Inc. began engaging accounting firms to conduct reviews of its financial condition and negotiating with the Secured Lenders regarding restructuring. On June 24, 2002, the Board of the GT Companies filed for creditor protection under Canada's Companies' Creditors Arrangement Act (CCAA) in the Ontario Superior Court of Justice (Ontario Court), followed by the filing of a petition in the United States Bankruptcy Court for the Southern District of New York on behalf of GT Inc. (US Proceedings), pursuant to 11 USC § 304, to commence a case ancillary to a foreign proceeding. The petition was filed by PricewaterhouseCoopers, which was appointed by the Ontario Court as the GT Companies' auditor (Monitor).

Thereafter, GT Inc.'s Board began considering the various tax implications that would

result from implementation of a reorganization plan for the GT Companies. According to the complaint, the Board was concerned with the taxable income and subsequent tax liability that would be created in GT Inc. in the event of debt forgiveness on the Notes. Additionally, the Board was allegedly concerned that GT Inc.'s assets would be depleted in order to pay administrative expenses for the appointment of a receiver. Further, the Board was allegedly concerned with the intercompany loan GT Inc. previously made to GT Services, which would contribute to an intercompany claim by GT Inc. (Intercompany Claim) in any reorganization plan made by GT Services. Therefore, to avoid these scenarios, the Board allegedly resolved that GT Inc. would have to be excluded from any reorganization plan that would be devised.

Notwithstanding the filing for CCAA protection in the Ontario Court, however, in September of 2002, the GT Companies put in place an executive retention plan (ERP) for its senior executives, which included defendants Bevan, Demirian, Hemingway, Milliard and Watson. Under the ERP, certain executives stood to receive compensation based upon the level of recovery realized by GT Inc.'s Secured Lenders under any reorganization plan. According to the complaint, the ERP created an incentive for GT Inc.'s executives to maximize the recovery of the Secured Lenders under a reorganization plan.

Around this time, the defendant Board members of GT Inc. allegedly devised a scheme whereby a reorganization plan would be filed for the GT Operating Companies only, while GT Inc. would be excluded. Subsequent to the implementation of the reorganization plan, GT Inc. would transfer its assets to one of the GT Operating Companies for nominal consideration and subsequently file for bankruptcy after it had been stripped of its assets. The alleged motivation behind this scheme was to maximize the recovery for GT Inc.'s Secured Lenders, leading to

[\* 6 ]  
higher compensation for those GT Inc. executives who were eligible to participate in the ERP.

According to JPMorgan, the result of this scheme was to deprive the Noteholders of the value of their Notes.

### **Plan of Arrangement**

On November 15, 2002, the GT Companies entered into an agreement (Agreement) with 360networks Corporation, 360networks Canada Holdings Ltd. and 360networks Canada Ltd., whereby 360networks Corporation would sponsor a CCAA reorganization plan for GT Services and GT USA, and the existing shares of GT Services and GT USA, all of which were owned by GT Inc., would be cancelled for no consideration. The GT Operating Companies would thereafter issue new shares to 360networks Corporation.

Under the Plan of Arrangement, GT Inc. was to be excluded. Further, it called for the purchase of the GT Operating Companies by 360networks Corporation pursuant to the Agreement, GT Inc.'s shares in the GT Operating Companies were to be cancelled for no consideration. The remainder of the proceeds from the Agreement would be paid to the GT Operating Companies' Secured Lenders. Additionally, GT Inc. would be liquidated and the GT Companies' third party liabilities, which included the Notes, would be settled for \$3 million. According to statements made to the Ontario Court in support of an application to extend CCAA protection, Milliard allegedly represented that the reason a reorganization plan was not being filed for GT Inc. was because "none of the offers to contribute funding to a plan" would generate sufficient recovery for the Secured Lenders, who allegedly "insisted upon . . . a minimum level of recovery" of CDN \$229 million (Complaint, ¶ 98). In reality, the Secured Lenders obtained a recovery of CDN \$257 million, CDN \$28 million more than they allegedly insisted upon.

\* 7 ] .  
According to JPMorgan, this additional recovery could have contributed to a higher recovery to GT Inc.'s unsecured creditors, which included the Noteholders.

On November 20, 2002, the Ontario Court approved the Plan of Arrangement including the Agreement, and authorized its submission to the GT Companies' creditors for a vote, which was later approved in December of 2002.

### **Ontario and New York Proceedings**

On December 23, 2002, the GT Companies applied to the Ontario Court for a sanction order formally approving the Plan of Arrangement, which was granted. In the sanction order, the Ontario Court ruled that the Plan of Arrangement was the product of "good faith . . . [and] due diligence," and "all transactions contemplated by the Plan are fair and reasonable" (Declaration of Jennifer J. Barrett, Exhibit 12).

The application for a sanction order followed the Ontario Court's dismissal of a motion made by JPMorgan to delay the scheduled vote on the Plan of Arrangement to allow an independent assessment of it. JPMorgan argued that the Plan of Arrangement was unfair, inequitable and the product of a breach of fiduciary duty on the part of the Monitor to the Noteholders (Declaration of Jennifer J. Barrett, Exhibit 11).

The Ontario Court rejected JPMorgan's motion in its entirety on the ground that the allegations against the Monitor were unwarranted (Declaration of Jennifer J. Barrett, Exhibit 10, ¶ 2). JPMorgan filed a motion for leave to appeal the Ontario Court's sanction order to the Ontario Court of Appeal. The court dismissed the motion and assessed costs against JPMorgan. (Declaration of Jennifer J. Barrett, Exhibit 6, 18).

The Monitor thereafter applied to the US Bankruptcy Court for the Southern District of

\* 8 ] .

New York for recognition of the sanction order; JPMorgan filed an objection to the application, which was rejected by the Court. On January 2, 2003, the Monitor's application was granted in the US Proceedings and the sanction order was given full force and effect (Declaration of Jennifer J. Barrett, Exhibit 16). In early February of 2003, the Agreement was consummated and the Plan of Arrangement implemented.<sup>1</sup>

On February 11, 2003, GT Inc. filed for bankruptcy liquidation; the Secured Lenders received CDN \$257 million on their claims, while the Noteholders, whose claims had been subordinated to unsecured status, received nothing.

JPMorgan then commenced this action, asserting causes of action for (1) tortious interference with the Indenture, against Bevan, Demirian, Estey, Gheewalla, Hemingway, Kilgour, Milliard and Watson; and (2) breach of fiduciary duty, against all defendants, in connection with their role in the concealment of GT Inc.'s insolvency and the Plan of Arrangement.

In response to the filing of this action, Gheewalla moved in the US Proceedings for a stay of this action, contending that it was barred by prior preclusive proceedings of the Ontario Court. JPMorgan opposed the motion. The presiding judge in the US Proceedings denied the application for a stay of this action and declined to make any rulings regarding the applicability of collateral estoppel (Declaration of Jennifer J. Barrett, Ex. 20, at 20).

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<sup>1</sup> Under the Plan of Arrangement, GT Inc. transferred its assets to GT Services, in exchange for a promissory note in the amount of CDN \$1,036, the Intercompany Claim, purportedly worth CDN \$1,043 million, was transferred to a subsidiary of GT Services, 41254414 Canada Limited (Canada Limited); GT Inc. allegedly received CDN \$1 in consideration for it. GT USA's Intercompany Claim, allegedly worth CDN \$1 million, was transferred to Canada Limited in exchange for CDN \$1 in consideration. Shortly thereafter, GT Inc.'s shares in the GT Operating Companies were cancelled for no consideration.

## Discussion

### I. Personal Jurisdiction

Defendants challenge this court's jurisdiction over them.<sup>2</sup> JPMorgan predicates jurisdiction over non-domiciliary defendants upon New York's long-arm statute, CPLR § 302 (a) (1), (2) and (3), on several grounds: (1) defendants caused GT Inc. to enter into the Indenture within this state which contains a choice of forum clause; (2) defendants conspired to commit tortious acts that caused injury to Noteholders located within this state and Milliard's New York contacts are imputable to the other defendants; and (3) Noteholders within this state were injured by defendants' tortious acts and defendants derive substantial income from international and interstate commerce.

The Baird Defendants challenge jurisdiction over Milliard on the ground that the alleged injury did not arise out of Milliard's transaction of business in this state. Further, the Baird Defendants challenge jurisdiction over the remaining non-domiciliaries, on the ground that JPMorgan has failed to make out a prima facie claim of conspiracy.

The Shaw Defendants challenge this court's jurisdiction over them on the ground that, as the only injury claimed by JPMorgan is financial loss that occurred in New York and where the critical events, including the alleged failure to disclose GT Inc.'s financial condition and the alleged scheme to exclude GT Inc. from the Plan of Arrangement occurred in Canada, JPMorgan has failed to meet the threshold requirement of CPLR § 302 (a) (3) that the situs of the alleged injury occurred in New York. Mansour additionally challenges personal jurisdiction due to the

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<sup>2</sup> All defendants, with the exception of Gheewalla and Hindrey, who are domiciliaries of this state and are not challenging the court's jurisdiction over them, are non-domiciliaries.

absence of any connection between him and the alleged acts from which the complaint arises.

A. Jurisdiction Under CPLR § 302 (a) (1)

To determine whether non-domiciliaries are subject to personal jurisdiction in this state, a two-part analysis has been developed in which the court determines whether the requirements of New York's long-arm statute are satisfied, and if so, whether the exercise of jurisdiction would comport with principles of constitutional due process (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [1990]). CPLR § 302 (a) (1) permits a court to exercise personal jurisdiction over a non-domiciliary if the non-domiciliary conducts "purposeful activities" within the state and the claim against the non-domiciliary involves a transaction bearing a "substantial relationship" to those activities (*Deutsche Bank Sec. Inc. v Montana Bd. of Inv.*, 21 AD3d 90, 93 [1<sup>st</sup> Dept 2005], *affd* \_ NY3d \_, 2006 WL 1525924 [2006]). Thus, the threshold inquiry is, necessarily, whether there was a "transaction of business" within this state (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 [2<sup>nd</sup> Dept 2005]).

A transaction of business for the purposes of this statute covers a wide range of activities and may be predicated upon proof of a single act alone, as long as the defendant's activities were purposeful, and the requisite nexus between the business transacted and the cause of action sued upon is demonstrated, even if the defendant has never actually entered the state (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). The mere solicitation of business in New York, without more, does not establish the requisite contacts between the state and the non-domiciliary (*Holness v Maritime Overseas Corp.*, 251 AD2d 220, 222 [1<sup>st</sup> Dept 1998]). However, a foreign defendant's travel to New York for the negotiation, execution or performance of a contract in New York has been held to constitute a transaction of business for jurisdictional

purposes (*Berk v Nemetz*, 646 F Supp 1080, 1083 [SDNY 1986]).

Milliard is a non-domiciliary and resident of Ontario. According to Milliard's own affidavit, in his capacity as officer and director of GT Inc. from September 1999 to January 2003, CEO of GT Inc. from September 1999 to February 2003, and the CEO of the GT Operating Companies from September 1999 to February 2003 (Complaint, ¶ 18), he traveled to New York to meet with analysts approximately two or three times per year on behalf of GT Inc., and participated in the marketing, advertising and solicitation of the sale of the Notes to New York residents. Additionally, Milliard acknowledges that he participated in the negotiation of certain terms of the Indenture (Affidavit of Daniel R. Milliard, ¶ 15). Milliard's activities which were soliciting, negotiating and contracting, resulted in the purposeful creation of commercial relationships with New York residents, and the raising of \$400 million in capital for GT Inc., came to fruition, in part, as a result of his efforts in New York. Such activities constitute the transaction of business.

Further, JPMorgan's cause of action for tortious interference with contract and breach of fiduciary duty arise out of Milliard's transaction of business within this state. Both claims are predicated upon Milliard's alleged participation in a scheme to cause GT Inc. to breach the Indenture. Therefore, because the claims here arose out of Milliard's transaction of business in New York, Milliard is subject to this court's jurisdiction under CPLR § 302 (a) (1).

Milliard's reliance on *Holness v Maritime Overseas Corp.*, 251 AD2d at 222, is misplaced. There, the defendant's activities in New York were limited to advertising, marketing and occasional visits to New York, and whose contracting activities in the state were limited to the solicitation of business by another corporation on its behalf, but which corporation did not

have authority to bind the defendant without its approval (*id.*). Here, in contrast, Milliard engaged in activities in the state beyond the mere solicitation of business. Rather, in addition to soliciting business, he participated in negotiations for a contract with some New York residents which resulted in the raising of \$450 million in capital as an agent for GT Inc. (*compare Samsung Am., Inc. v GS Indus. Inc.*, 278 AD2d 138, 138 [1<sup>st</sup> Dept 2000] [four-day meeting in New York attended by non-domiciliary defendants did not constitute purposeful activities within the state where the sole purpose of the meeting was to finalize documents for the defendants' acquisition of a steel mill in Peru, and where letter agreement was product of negotiations held entirely in Peru]; *Alas Int. Ltd. v Ramiz*, 257 AD2d 408, 409 [1<sup>st</sup> Dept 1999] [non-domiciliary officers and directors were not subject to personal jurisdiction under CPLR § 302 (a) (1) where their only in-state activity in connection with the preparation of a memorandum of understanding that they were not signatories to was one visit prior to its execution to discuss its terms, and telephone and fax exchanges with another domiciliary-defendant]).

Neither can Milliard avoid being subject to personal jurisdiction in New York because he was present in this state as a fiduciary acting on behalf of a corporation because the Court of Appeals has expressly rejected the fiduciary shield doctrine (*See, Kreutter*, 71 NY2d at 468).

Finally, the assertion of jurisdiction over Milliard comports with due process. In relation to jurisdictional analysis, due process is not offended "so long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there even if not 'present' in the State" (*Kreutter*, 71 NY2d at 466). In order to satisfy the minimum contacts requirement, courts have held that it is essential that there be "some act by which a defendant purposefully avails itself of the privilege of conducting activities within

the forum State, thus invoking the benefit and protection of its laws” (*Liberatore v Calvino*, 293 AD2d 217, 220 [1<sup>st</sup> Dept 2002]). By entering the state for the express purpose of marketing, advertising and soliciting the sale of Notes by New York residents and subsequently participating in the negotiation of the Indenture, Milliard engaged in purposeful activities aimed at this state, and purposely availed himself of the privilege of conducting activities within this state.

These acts constitute a transaction of business in this state and upon which the causes of action arise, and, thus, are sufficient to confer long-arm jurisdiction over him under CPLR § 302 (a) (1).

There is no allegation that the other defendant non-domiciliaries transacted any business or otherwise participated in the solicitation of the sale of the Notes and the negotiation of the terms of the Indenture within this state to establish this court’s jurisdiction over them under CPLR § 302 (a) (1).

B. Jurisdiction Under CPLR § 302 (a) (2)

JPMorgan seeks to establish personal jurisdiction over the remaining non-domiciliary defendants, maintaining that they are co-conspirators of Milliard, whose jurisdiction is imputable to them. CPLR § 302 (a) (2) provides that “a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . commits a tortious act within the state.” A co-conspirator has been held to be the equivalent of an agent for jurisdictional purposes (*see Small v Lorillard Tobacco Co.*, 252 AD2d 1, 17 [1<sup>st</sup> Dept], *lv granted* 252 AD2d 1 [1998], *affd* 94 NY2d 43 [1999]). Thus, under New York law, where an act is committed in furtherance of a tortious act by a co-conspirator or agent of the defendant within this state, that act alone may be sufficient to obtain jurisdiction over the non-domiciliary, the alleged co-conspirator, pursuant

to CPLR § 302 (a) (2) (*see Travelers Indem. Co. v Inoue*, 111 AD2d 686 [1<sup>st</sup> Dept 1985]).

The Court of Appeals has given restrictive meaning to the requirement of CPLR § 302 (a) (2) that there be a tortious act committed *within* the state, however (*Kramer v Vogl*, 17 NY2d 27, 30-31 [1966] [misrepresentations made by defendant in Paris and confirmed in writing and subsequently transmitted in a letter by mail to New York did not constitute the commission of a tortious act within the state, within the meaning of CPLR § 302 [a] [2]). Rather, New York courts interpret the statutory language of CPLR § 302 (a) (2) literally, such that jurisdiction over a defendant is proper only if that defendant commits a tortious act while physically present in the state (*id.*; *Bensusan Rest. Corp. v King*, 126 F3d 25, 28 [2d Cir 1997]).

According to the complaint, the tortious acts, including the alleged scheme to exclude the Noteholders from the Plan of Arrangement to deprive them of the value of their Notes created in and around June of 2002 and upon which the claims for tortious interference with the Indenture and breach of fiduciary duty are predicated, were not committed within New York. Rather, all of the allegations involving the remaining non-domiciliary defendants concern their activities while sitting on GT Inc's Board in Canada. Furthermore, there are otherwise no allegations that these non-domiciliaries ever entered this state when the wrongful acts were performed (*see Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 464-65, *cert denied* 382 US 905 [1965]). Therefore, there is an insufficient basis to confer co-conspirator jurisdiction upon the remaining non- domiciliary defendants under CPLR § 302 (a) (2).

### C. Jurisdiction Under CPLR § 302 (a) (3)

Alternatively, JPMorgan argues that personal jurisdiction can be invoked over the remaining defendants pursuant to CPLR § 302 (a) (3) (ii), which requires the commission of a

tort without the state causing injury within the state, if those defendants expected their actions to have consequences in the state and they derive substantial revenue from interstate commerce. In determining whether there is injury within this state sufficient to predicate jurisdiction under CPLR § 302 (a) (3) (i) or (ii), courts conduct a “situs of the injury” test to locate the original event which caused the injury (*O’Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201-202 [1<sup>st</sup> Dept 2003]; *Hermann v Sharon Hosp., Inc.*, 135 AD2d 682, 683 [2d Dept 1987]). Thus, the relevant inquiry is where the original event which caused the injury occurred, and not where the resultant damages took place (*id.*). Thus, “the occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under CPLR § 302 (a) (3), where the underlying events took place outside of New York” (*Whitaker v American Telecasting, Inc.*, 261 F3d 196, 209 [2d Cir 2001]; *Cooperstein v Pan-Oceanic Mar., Inc.*, 124 AD2d 632, 633 [2d Dept 1986], *appeal denied* 69 NY2d 611 [1987] [to satisfy the first part of CPLR § 302 (a) (3), there must be “a more direct injury within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled here”]).

Here, the original event which ultimately resulted in the financial loss to the Noteholders was the concealment of GT Inc.’s insolvency, followed by the commencement of CCAA proceedings marred by alleged breaches of fiduciary duty, which occurred in Canada. While the resultant loss claimed by JPMorgan is the financial loss suffered by Noteholders, some of whom reside within this state, such consequent economic injury is insufficient to render New York the situs of the injury within the meaning of CPLR § 302 (a) (3) (*see Stemcor USA v Hyundai Merchant Mar. Co.*, 386 F Supp 2d 229, 234 [SDNY 2005]).

Furthermore, that the Indenture contains a New York forum selection clause does not subject its officers and directors to the jurisdiction of this court (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1<sup>st</sup> Dept 2004]). A corporation's submission to jurisdiction within this state by the insertion of a forum selection clause located in an agreement does not render its non-domiciliary agents personally subject to jurisdiction (*id.*).

JPMorgan further maintains that it should be afforded the right to conduct jurisdictional disclosure, pursuant to CPLR 3211 (d). However, JPMorgan has failed to demonstrate a "starting point" to show that jurisdiction over the remaining non-domiciliaries could exist thereby justifying such disclosure (*see Insurance Co. of N. Am. v EMCOR Group*, 9 AD3d 319, 320 [1<sup>st</sup> Dept 2004]).

## II. Collateral Estoppel

The remaining defendants move for dismissal on collateral estoppel grounds, maintaining that rulings in the prior bankruptcy proceedings in the Ontario Court and in the US Proceedings preclusively establish that the Plan of Arrangement was fair and reasonable, and that the Noteholders did not suffer damage because they would not receive recovery under any reorganization plan that may have been implemented.

JPMorgan argues that collateral estoppel is not justified as identity of issue is not present, because the Ontario Court only addressed claims asserted against the Monitor and not against GT Inc.'s officers and directors. Moreover, JPMorgan maintains that the rulings of the Ontario Court and the US Proceedings approving the Plan of Arrangement are not entitled to preclusive effect because they were obtained by misrepresentations due to defendants' concealment of facts.

The doctrine of collateral estoppel precludes a party from re-litigating in a subsequent action an issue necessarily raised and decided against that party in a prior action (*Buechel v Bain*, 97 NY2d 295, 302 [2001], *cert denied* 535 US 1096 [2002]). In order to invoke the doctrine's application here, there must be (1) identity of the issue posed by JPMorgan in the CCAA proceedings in the Ontario Court and the US Proceedings, and which is decisive of the present action, and (2) JPMorgan must have had a "full and fair opportunity to contest the decision now said to be controlling" (*id.*). A prior judicial determination will be given preclusive effect if resolution of the issue was *essential* to the decision rendered in the prior proceedings (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Moreover, identity of issue depends not upon how the parties characterize them, "but on what facts are determinative of each proceeding in light of the substantive principles . . . governing each" (*Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 14 [1982]).

As for the claim of breach of fiduciary duty, a comparison of the issues raised in the Ontario Court and US Proceedings reveals that the identical issues were already litigated and decided. JPMorgan predicates the existence of a fiduciary duty here upon the principle that directors and officers of an insolvent corporation owe a fiduciary duty to creditors of that corporation, reflecting the New York policy that assets of an insolvent corporation should be preserved for the benefit of creditors, and citing to *Mediators, Inc. v Manney*, 1996 WL 554576, \*3 [SDNY 1996]. Several key rulings of the Ontario Court necessarily decided that, notwithstanding that the Plan of Arrangement was fair and equitable, the Noteholders would not have received any recovery under a different plan of reorganization because their claims were so subordinated to other creditors.

According to defendants, Canadian law requires a court sanctioning a plan of arrangement to first determine that the plan itself is fair and reasonable (Declaration of Jennifer J. Barrett, Exhibit 21); JPMorgan does not dispute this assertion of Canadian law. In undertaking this analysis, the Ontario Court ruled that the Plan of Arrangement was the product of “good faith . . . [and] due diligence,” and that “all transactions contemplated by the Plan [of Arrangement] are fair and reasonable” (Declaration of Jennifer J. Barrett, Exhibit 12). In an endorsement accompanying the sanction order, the presiding judge wrote, “I am satisfied . . . that the subject Plan [of Arrangement] is to be approved . . . . The fact circumstances of the parent’s [GT Inc.’s] unsecured creditor’s [Noteholders] being subordinate to the claims of the secured and unsecured creditors or the operating subsidiaries . . . was clearly spelled out . . . that the parent is not in the Plan is not unfair or unreasonable in these circumstances” (Declaration of Jennifer J. Barrett, Exhibit 13).

Further, as to JPMorgan’s current claim that the officers and directors of GT Inc. breached their fiduciary duty to the Noteholders by not maximizing their recovery and otherwise failing to preserve GT Inc.’s assets to insure a greater recovery for the Noteholders, the Court ruled that the fact that GT Inc. was not included in the Plan of Arrangement, the result being that the Noteholders received no recovery on their claims, was insignificant because the Noteholders’ claims were “\$400 million CDN underwater and there is no foreseeable [or even remote] possibility that they [the claims of the Noteholders] will come to the surface” (bracketed material appears in original) (Declaration of Jennifer J. Barrett, Exhibit 13).

Thus, the Ontario Court’s findings that the Noteholders’ claims were \$400 CDN million subordinate to the claims of the GT Operating Companies’ other creditors necessarily

undermines JPMorgan's current allegations, namely that defendants breached their fiduciary duty to the Noteholders by allowing the Secured Lenders to realize an additional CDN \$27 million in recovery than was insisted upon in order to serve their own financial interests by maximizing ERP payments (Complaint, ¶¶ 97, 98, 100).

JPMorgan sought leave to appeal the rulings of the Ontario Court, which was dismissed by the Ontario Court of Appeal, which ratified the Ontario Court's factual findings that the Plan of Arrangement was fair and there was no recovery to be had by the Noteholders. The Ontario Court of Appeal stated that, "the complaint about [GT Inc.'s] assets transfer [to the GT Operating Companies] is illusory since the assets of the parent company [GT Inc.] would be lost to the secured creditors in any event" (bracketed material appears in original) (Declaration of Jennifer J. Barrett, Exhibit 6, 18).

This court finds that the Ontario Court and Ontario Court of Appeals' determination that the Plan of Arrangement was fair, the product of good faith and due diligence, and that the Noteholders would not have received any recovery under any plan of reorganization because their claims were subordinate, is the identical issue posed by JPMorgan in its claim for breach of fiduciary duty and is dispositive of that claim.

Further, JPMorgan was granted a full and fair opportunity to litigate this issue. In ruling that the Plan of Arrangement was fair and the product of due diligence, the Ontario Court necessarily decided that the process which led to the Plan of Arrangement was not marred by breaches of fiduciary duty or otherwise any wrongdoing (*see Loving v Abbruzzese*, 298 AD2d 749 [3d Dept 2002] [a bankruptcy court order approving a company's plan of reorganization collaterally estopped shareholders from asserting claims against corporate officers and directors for breach of fiduciary duty where shareholders advanced the theory

in bankruptcy court that plan was unfair; in confirming the reorganization plan, the court necessarily decided that in proposing such plan, the officers and directors had not breached their fiduciary duty]). The identity of issue, coupled with the fact that JPMorgan was granted a full and fair opportunity to litigate this issue, justifies invocation of the doctrine of collateral estoppel barring the re-litigation of JPMorgan's breach of fiduciary duty claim.

As for allegations relating to pre-CCAA filing misconduct on the part of defendants in connection with their alleged concealment of GT Inc.'s insolvency comprising the remainder of the claim for breach of fiduciary duty, that claim is time-barred. A claim for breach of fiduciary duty which seeks monetary damages must be brought within three years from the date of the breach (*Kaufman v Cohen*, 307 AD2d 113, 118-119 [1<sup>st</sup> Dept 2003]). Where, as here, the claim is based upon multiple occurrences of alleged breaches, a plaintiff can recover only for those occurrences which fall within the applicable limitations period (*Nathanson v Nathanson*, 20 AD3d 403, 404 [2d Dept 2004]).

This action was filed on June 16, 2005, and thus, occurrences of breaches occurring prior to June 16, 2002 are not actionable, as time-barred. According to the complaint, GT Inc. was insolvent as early as September of 2001, which insolvency was allegedly concealed by defendants by the filing of misleading financial statements until the Board filed for creditor protection on June 24, 2002 (Complaint, ¶ 41-51). As the allegedly false financial statements and the concealment of GT Inc.'s insolvency occurred prior to June 16, 2002, these occurrences cannot form the basis of liability for breach of fiduciary duty, and thus are time-barred.

JPMorgan's allegations of fraud and misrepresentation upon the Ontario Court, relating to Milliard's alleged failure to apprise that court that GT Inc. was to be excluded from the Plan of Arrangement, was transferring all of its assets and would not continue as a going concern, are unsubstantiated.

Notwithstanding that JPMorgan's papers fail to identify such misrepresentations, the allegations are largely inconsequential in light of the Ontario Court's determination that "the Noteholders have no economic interest in this situation - either in a plan of the [GT] operating companies or in anything to do with the parent [GT Inc.] which is not included in the Plan [of Arrangement]. That the parent [GT Inc.] is not in the Plan is not unfair or unreasonable . . . The compromise of the [unsecureds] in the [GT] operating companies allows for these companies to continue . . . The jurisprudence is clear as to not having all applicants - or all classes of any applicant - in a Plan [of Arrangement]. Here that possibility was clear from the get go . . . Substance should prevail over form" (Declaration of Jennifer J. Barrett, Exhibit 13).

As for the claim of tortious interference with the Indenture, JPMorgan alleges that defendants intentionally procured a breach of the Indenture by their participation in the Plan of Arrangement. However, this claim is additionally barred by the doctrine of collateral estoppel. A claim for tortious interference with contract is properly stated when a plaintiff pleads the existence of a valid contract between itself and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of that contract without justification, and actual breach of the contract, resulting in damages (*330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B.*, 293 AD2d 314, 315 [1<sup>st</sup> Dept 2002]).

JPMorgan alleges that defendants intentionally procured a breach with the Indenture by participating in the Plan of Arrangement's creation and implementation, which included the transfer of GT Inc.'s assets, for the purpose of maximizing the recovery of the Secured Lenders and leading to increased ERP compensation for GT Inc. executives. However, notwithstanding the rulings of the Ontario Court that the Plan of Arrangement was fair and equitable, it was *ordered* to be implemented by the Ontario Court and in the US Proceedings (Declaration of Jennifer J. Barrett, Exhibit 12, 16). These rulings necessarily determine that the participation and implementation of the Plan of Arrangement could not have been undertaken by

defendants “without justification.” Moreover, it has already been determined that the Noteholders would not recover on their claims under any reorganization scenario that may have been implemented because their claims were so subordinated to the claims of other creditors, and thus the element of damage, required for a claim of tortious interference with contract, has already been resolved against JPMorgan. As discussed above, JPMorgan was afforded a full opportunity to litigate these issues and thus is bound by these findings of fact against it.

In light of this disposition, the court need not reach the defendants’ remaining arguments.

Accordingly, it is

ORDERED that the motion to dismiss the complaint (001) by Jim Shaw, Ronald D. Rogers, and Michael D’Avella is granted and the complaint is dismissed as against Jim Shaw, Ronald D. Rogers, and Michael D’Avella ; and it is further

ORDERED that the motion to dismiss the complaint (002) by James M. Mansour is granted and the complaint is dismissed as against James M. Mansour; and it is further

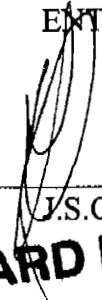
ORDERED that the motion to dismiss the complaint (003) by David Baird, J. Tal Bevan, Eric A. Demirian, George Estey, Robert R. Gheewalla, Mark R. Hemingway, Leo J. Hindrey, Kenneth Kilgour, James G. Matkin, Daniel R. Milliard, Jozef Straus and Robert Watson is granted and the complaint is dismissed as against David Baird, J. Tal Bevan, Eric A. Demirian, George Estey, Robert R. Gheewalla, Mark R. Hemingway, Leo J. Hindrey, Kenneth Kilgour, James G. Matkin, Daniel R. Milliard, Jozef Straus

and Robert Watson; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 22, 2006

ENTER:

  
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U.S.C.

**RICHARD B. LOWE III**

**FILED**  
JUN 29 2006  
NEW YORK  
COUNTY CLERK'S OFFICE