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

PRESENT: PART 53

Index Number : 650795/2009
GORDON GROUP INVESTMENTS, LLC
vs.
MICHAEL "JACK" KUGLER
SEQUENCE NUMBER : 009
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

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

Dated: 7/20/2012

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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GORDON GROUP INVESTMENTS, LLC,

Plaintiff, Index No. 650795/09

-against-

MICHAEL "JACK" KUGLER,
BARBARA VOGT KUGLER,
ALEXANDER VIK, XCELERA, INC.,
STAR ASSET MANAGEMENT LIMITED,
GRYPHON BOND FUND LIMITED,
DABBAH SECURITIES, STEVEN DABBAH,
JACK CRYSTAL, DAVID CRYSTAL, and
ZEV CYRSTAL,

Defendants.

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Charles Edward Ramos, J.S.C.:

In a series of five separate motions, all defendants move to dismiss the Second Amended Complaint. Defendant Michael "Jack" Kugler (Kugler) seeks dismissal (seq. no. 009) of all claims against him, based on the statute of limitations (CPLR 202 and 3211 [a] [5]) and for failure to state a claim for relief (CPLR 3211 [a] [7]). Defendant Barbara Vogt Kugler (Barbara Kugler) moves to dismiss (seq. no. 010) each of the three causes of action asserted against her based on lack of personal jurisdiction (CPLR 3211 [a] [8]), the statute of limitations, and failure to state a fraud claim or to plead that claim with particularity (CPLR 3016 [b]).

Defendants Xcelera, Inc. and Alexander Vik (Vik) move to dismiss (seq. nos. 011 & 012) the two claims asserted against

them (conspiracy to commit fraud and aiding and abetting fraud) for failure to state a claim for, and to plead with particularity, these fraud claims, and based on the statute of limitations. Vik also seeks dismissal for a second time on the basis of lack of personal jurisdiction.

Finally, defendants Star Asset Management Limited, Gryphon Bond Fund Limited, Jack Crystal, David Crystal and Zev Crystal (the Crystal defendants) and defendants Dabbah Securities and Steven Dabbah move (seq. no. 013) to dismiss the complaint for failure to state a cause of action and lack of personal jurisdiction over the Crystal defendants.

FACTUAL ALLEGATIONS

Plaintiff Gordon Group Investments, LLC (GGI) claims that the defendants swindled it out of tens of millions of dollars through a "pump and dump" scheme involving the stock of a thinly-traded and now bankrupt German public company known as BKN International A.G. (BKN) (Second Amended Complaint [SAC], ¶ 2).

In March 2002, defendant Kugler became a member of BKN's Supervisory Board. Shortly thereafter, Kugler and the other defendants began buying large quantities of BKN stock (SAC, ¶ 49). Kugler allegedly did not report his large purchases of BKN stock to BaFin, the German equivalent of the SEC, because he was trying to make it appear that there was a public demand for BKN stock (*id.*, ¶¶ 59-60). Barbara Kugler, Kugler's wife, purchased

shares of BKN's stock using her children's custodial accounts at Kugler's direction (*id.*, 64-66).

GGI alleges that Star Asset Management Limited (Star Asset), Gryphon Bond Fund Limited (GBF), Dabbah Securities, Jack Crystal, David Crystal and Zev Crystal (defined as the "Counterparty Defendants" [*id.*, ¶ 7]), were also buying BKN Stock in large quantities "as part of their fraudulent scheme" and because they knew that Kugler possessed (and would likely share) material, non-public information relating to BKN" (*id.*, ¶ 52).

Vik is the principal of Xcelera, Inc., a company that Kugler also allegedly served as a senior executive and investment advisor (SAC, ¶¶ 19, 184). Xcelera, with the help of Kugler and the Counterparty Defendants, purchased large quantities of BKN stock, all with the knowledge and consent of Vik (*id.*, ¶¶ 96-97). GGI also alleges that defendants' family members were buying BKN stock and that one of Vik's family members, Eric Vik, owned approximately one million shares of BKN stock in June 2004 (*id.*, ¶¶ 61-62).

In April 2003, GGI's principal, Sheldon Gordon (Gordon), engaged Kugler as an investment manager to allegedly invest $40 million in highly-rated, liquid and secure bonds, such as government securities (SAC, ¶¶ 4-5, 35-39). At Kugler's direction, GGI opened an investment trading account with Fortis Investment Services, LLC (Fortis) on or about April 17, 2003,

which was governed by a clearing agreement between GGI and Fortis, whose address was in New York (*id.*, ¶¶ 6, 42-43; Gordon Aff., Ex. 2).

Between late June 2003 and June 2005, Kugler caused GGI to purchase over nine million shares of BKN stock exclusively from the Counterparty Defendants at a cost of over $30 million (SAC, ¶¶ 68, 74, 76, 152). Kugler allegedly caused GGI to buy all of its BKN stock from one or more of the Counterparty Defendants, rather than "on the open market," for four reasons: (1) to conceal the participation of Kugler, a BKN insider, in the fraudulent scheme; (2) to enrich the Counterparty Defendants at GGI's expense, because they always charged a premium to GGI when they sold BKN shares to GGI; (3) to conceal trades where Kugler caused GGI to buy shares from other defendants such as Xcelera at the artificial prices that the defendants had allegedly created; and (4) by trading with the Counterparty Defendants in such large volumes and at such high prices, Kugler caused the stock of BKN to increase dramatically (*id.*, ¶¶ 76-86).

GGI alleges that from April 2003 to January 2005, BKN's stock price rose more than 3,700% from the prices that Kugler had initially purchased his own shares (SAC, ¶ 87). "During the meteoric rise that BKN's stock price experienced," GGI alleges that the defendants and their family members sold their BKN shares, but Kugler never caused GGI to sell any of its shares

(*id.*, ¶¶ 88, 90, 106).

By purchasing more than nine million shares of BKN stock on GGI's behalf, Kugler caused GGI to acquire more than 30% percent of BKN's publicly-available stock (SAC, ¶ 152). This triggered a mandatory tender obligation under German law, requiring the owner to submit a mandatory public offer to acquire all of the remaining shares of the company at a price equivalent to at least the highest consideration paid during the six-month period prior to crossing the 30% threshold (*id.*, ¶ 155).

GGI first crossed the 30% threshold in April 2004, and thus, its mandatory tender price was €4.36 (*id.*, ¶¶ 153, 156). Once a mandatory tender obligation arose, it allegedly remained with GGI regardless of whether it continued to hold more than 30% of BKN's stock. Consequently, Kugler caused GGI to acquire a potentially devastating liability (*id.*, ¶¶ 157-158).

GGI alleges that the defendants were able to execute their fraudulent scheme, in part, by not disclosing the true nature of their trades (SAC, ¶¶ 110-115). In addition, Kugler allegedly forged Gordon's name on two GGI's disclosure statements to BaFin regarding the extent of GGI's BKN holdings (*id.*, ¶¶ 117-120), and failed to submit additional required disclosure statements (*id.*, ¶ 122).

Gordon claims he ran into Kugler in Hong Kong on April 28, 2005 and "inquired about a reference to BKN contained in one of

the Fortis profit and loss statements" (SAC, ¶ 134). Kugler allegedly responded that he had purchased only $5 million worth of BKN stock and would not acquire any additional shares (*id.*, ¶ 135). To the contrary, however, Kugler caused GGI to purchase 370,788 additional shares of BKN stock between April 29 and June 24, 2005 (SAC, ¶ 138; Gordon Aff., Ex. 3).

Sometime in May 2005, Gordon asked Kugler to transfer $10 million from its Fortis account to one of GGI's checking accounts, but was allegedly unable to do so, because the money was tied up in BKN stock "for which there was no legitimate or liquid market" and Kugler "could not under German law" sell the BKN stock to return GGI's $10 million (SAC, ¶ 140). When Kugler did not provide the requested funds "in a timely fashion," Gordon confronted Kugler, and then terminated him, after learning of the extent of Kugler's purchases of BKN stock (*id.*, ¶¶ 139-143).

While the Second Amended Complaint does not give the date of Kugler's termination (*id.*, ¶ 143), the original complaint alleged that Kugler was terminated in August 2005 (Complaint, ¶ 117). GGI also claims that, even after his termination, Kugler was still misrepresenting the extent of GGI's BKN holdings, so that GGI would not know that it owned more than 30% of the company (SAC, ¶¶ 147-150).

Between 2006 and 2009, GGI claims that it tried to sell its BKN holdings to a third party to mitigate its damages (SAC, ¶

159). At this time, BKN's stock was trading below €4.36 (*id.*, ¶ 161). GGI claims that Kugler "became aware" of these efforts and the identity of the potential buyer, and shared this material, non-public information with the defendants, because they knew that the public disclosure of GGI's potential buyer would likely cause BKN's stock price to rise (*id.*, ¶¶ 160-164).

In or about September 2007, Vic and Kugler bought large quantities of BKN stock (*id.*, ¶¶ 165-167, 171). Kugler also caused non-party Sebastian Holdings, Inc. (Sebastian Holdings), a company owned by Vic and for whom Kugler also acted as an investment manager, to amass large quantities of BKN stock (*id.*, ¶¶ 169-171, 174). However, by early 2008, GGI's talks with its potential buyer had stalled and BKN's stock had not substantially increased (*id.*, ¶ 173).

GGI alleges that, in March 2008, "Sebastian Holdings (*i.e.*, Vik) purportedly 'discovered' Kugler's 'unauthorized' trades in BKN and terminated Kugler as Sebastian Holdings' investment manager" (SAC, ¶ 174). Sebastian Holdings allegedly caused Kugler to sign a letter dated March 30, 2008 in which he admits wrongfully purchasing 3.1 million shares of BKN on behalf of Sebastian Holdings (*id.*, ¶¶ 175, 179).

On July 30, 2008, Sebastian Holdings sued Kugler in Connecticut federal court alleging that Kugler's investment of Sebastian Holdings' money in BKN stock was unauthorized (*id.*, ¶¶

176-177). GGI, however, alleges that the Connecticut lawsuit is a "sham" designed to make it appear that the defendants were not conspiring to defraud GGI and to obtain discovery to bolster another litigation in Germany, discussed *infra* (*id.*, ¶ 178).

On August 28, 2008, Sebastian Holdings transferred virtually all of its BKN shares to another of Vic's companies, Sarek Holdings, in an effort to further conceal "Defendants' unlawful conspiracy" (SAC, ¶¶ 188-189, 195-196). On September 25, 2008, Sarek Holdings made a demand on GGI to purchase its shares pursuant to Germany's mandatory tender rule (*id.*, ¶ 192). When GGI refused, Sarek Holdings filed a lawsuit against GGI and Gordon in Germany, and GGI alleges that the bona fides of that lawsuit are also questionable (*id.*, ¶¶ 192-197).

GGI commenced this lawsuit on December 30, 2009 against Kugler, Vik, Erik Vik and another individual, Per Johansson. By Decision and Order dated October 22, 2010 (2010 Decision), this Court dismissed the complaint against Per Johansson for lack of personal jurisdiction.

GGI filed a Second Amended Complaint on March 14, 2011, naming several new defendants, and pleading six causes of action. The first, second and third causes of action for breach of contract, breach of fiduciary duty and common law fraud, respectively, are asserted solely against Kugler. The fourth cause of action asserts a fraudulent conveyance claim against

Kugler and his wife, Barbara Kugler, based on the transfer of Kugler's interest in his personal residence to his wife in August 2005. The fifth cause of action alleges that Dabbah Securities was Kugler's employer and is responsible, under the doctrine of respondeat superior, for all of Kugler's wrongful acts committed against GGI. The sixth cause of action is against all defendants and purports to state a claim for conspiracy to commit fraud. The seventh cause of action is asserted against all defendants except Kugler for aiding and abetting the latter's fraud.

DISCUSSION

II. Lack of Personal Jurisdiction

A. Barbara Kugler

Barbara Kugler was first named as a defendant in the Second Amended Complaint, and is named as a defendant in the claims for fraudulent conveyance under N.Y. Debtor and Creditor Law § 276, conspiracy to commit fraud, and aiding and abetting Kugler's fraud. The only factual allegations against her claim that "at Kugler's direction" (SAC, ¶ 65), Barbara Kugler bought BKN shares in the custodial accounts for her and Kugler's minor children (*id.*, ¶¶ 64-65), did not disclose those purchases to BaFin (*id.*, ¶¶ 66, 111), and that, not long after his termination by GGI, Kugler transferred ownership of his personal residence to his wife out of concern over the security of his assets in the event

GGI sued him (*id.*, ¶¶ 145-146).[1]

Barbara Kugler argues that she is a resident of Connecticut, has no office or place of business in New York, and does not solicit business here. She avers that she has never purchased shares of BKN stock in New York or elsewhere, and that she has never been involved in her husband's business dealings (Barbara Kugler Aff., ¶¶ 3,4, 8).

In opposition, GGI maintains that the Court has long arm jurisdiction over Barbara Kugler under CPLR 302 (a) (1) and 302 (a) (3) (ii), because she acted as custodian for her children's New York-based accounts in which she traded BKN stock in the same illicit manner as the other defendants. GGI submits documentary evidence showing that Barbara Kugler was the custodian of four Merrill Lynch custodial accounts for her children and that the financial advisor on these four accounts was located in Garden City, New York (Feuerstein Affirm., Ex. 2). These statements show the acquisition of 15,000 shares of BKN stock for each child, through transfers from an account owned by "Michael J Kugler," and the sale of those shares on September 24, 2009 (*id.*).

CPLR 302 (a) (1) permits a New York court to "exercise

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[1]In support of her motion to dismiss, Barbara Kugler submits a copy of a quit claim deed showing that the conveyance of the Kugler's home occurred on August 17, 2005, and the deed was recorded on August 18, 2005 (Baker Aff., Ex. B).

personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . transacts any business within the state." "It is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

In determining whether a "transaction of business" has occurred, "[t]he key inquiry is whether [the] defendant purposefully availed itself of the benefits of New York's laws" (*Courtroom Tel. Network v Focus Media*, 264 AD2d 351, 353 [1st Dept 1999]). Both New York State and federal courts have held that actively maintaining a brokerage account in New York constitutes "transacting business" within the statutory definition (*see e.g. Ehrlich-Bober & Co. v University of Houston*, 49 NY2d 574, 577 [1980] [conducting 22 securities purchases worth approximately $44 million mainly by telephone with New York brokerage firm combined with visits to plaintiff's New York office on "several occasions"]; *Deutsche Bank Sec., Inc. v Montana Bd. of Investments*, 21 AD3d 90 [1st Dept 2005], *affd* 7 NY3d 65, *cert denied* 549 US 1095 [2006] [defendants' investment officer negotiated a single securities purchase with a New

York-based bank via an internet instant messaging system]; *L.F. Rothschild, Unterberg, Towbin v Thompson*, 78 AD2d 795 [1st Dept 1980] [although defendant only dealt with plaintiff securities broker by telephone and mail, he sent checks and securities to New York and conducted 25 transactions in four months]; *Credit Lyonnais Securities (USA), Inc. v Alcantara*, 183 F3d 151, 154 [2d Cir 1999] [defendant maintained an "active account" with its New York-based securities broker and agreed to sell that broker various securities through that account]; *but see L.F. Rothschild, Unterberg, Towbin v McTamney*, 89 AD2d 540 [1st Dept 1982], *affd* 59 NY2d 651 [1983] [no long-arm jurisdiction over Pennsylvania resident whose only relevant contacts with New York were several telephone conversations with his New York stock broker during which he made one purchase of stock]).

Barbara Kugler argues that only two stock transfers were made into the accounts in which she was the custodian, and that she did not order or direct any purchases of BKN stock. Even GGI alleges that her purchase of BKN shares was done "at Kugler's direction" (SAC, ¶ 65), and the documentary evidence establishes that relatively small amounts of BKN stock were transferred into the children's custodial accounts from an account owned by Kugler (Feuerstein Affirm., Ex. 2).

It appears that Barbara Kugler was only a passive recipient of the BKN shares on behalf of her minor children, and thus, does

not constitute engaging in purposeful activity in New York. "Only in a rare case should a [non-resident] be compelled to answer a suit in a jurisdiction with which they have the barest of contact" (*McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 383 [1967]). Accordingly, the Court does not have personal jurisdiction over Barbara Kugler under CPLR 302 (a) (1).

Even if Barbara Kugler's maintenance of custodial brokerage accounts in New York were sufficient to exercise jurisdiction over her under CPLR 302 (a) (1), that activity does not have a substantial relationship with the fraudulent conveyance claim, which arises from a different set of facts.

GGI alleges that Kugler, a Connecticut resident, fraudulently transferred his Connecticut home to his wife, also a Connecticut resident, because he "was concerned about the security of his other assets in the event GGI sued him" (SAC, ¶ 145). GGI argues that the court has long-arm jurisdiction over Barbara Kugler for this claim based on CPLR 302 (a) (3) (ii), i.e., that Barbara Kugler committed a tort outside of New York, causing injury to person or property in the state, where she "expects or should reasonablely expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

Barbara Kugler's conduct with respect to the alleged fraudulent conveyance did not cause GGI to suffer an injury in

New York. The Court's prior ruling that "the situs of the injury is New York" because of "the losses sustained in the New York-based Fortis account as a result of Kugler's unauthorized trading of BKN stock" (2010 Decision, at 15) related only to the claims alleged in the original complaint, and not with the transfer of Kugler's ownership of his home to his wife to place his assets beyond the reach of a potential creditor such as GGI. Any injury to GGI as a result of this conduct occurred in Connecticut where GGI is located (*see, infra*, the discussion of GGI's residency for purposes of the borrowing statute [CPLR 202]). Nor has GGI alleged that Barbara Kugler derives substantial revenue from interstate or international commerce. Thus, there is no basis to assert personal jurisdiction over Barbara Kugler with respect to the fourth cause of action alleging a fraudulent conveyance.

B. Alexander Vik

Vik moves to dismiss the Second Amended Complaint for lack of personal jurisdiction, contending that plaintiff has not sufficiently alleged an injury in New York, as required by CPLR 302 (a) (3). Vik argues that, in ruling on his prior motion to dismiss the original complaint, the Court made a clear mistake of law and fact in holding that GGI, an investment company with no contacts or business in New York other than the fortuitous

location of its Fortis investment account,[2] suffered any injury in this state.

In opposition to Vik's prior motion to dismiss the original complaint, GGI had argued that long-arm jurisdiction existed over him pursuant to CPLR 302 (a) (3). This Court denied the motion, ruling that GGI had alleged enough to warrant jurisdictional discovery, pursuant to CPLR 3211 (d). In so ruling, the Court stated:

> "The situs of the injury, for long-arm purposes under CPLR 302 (a) (3), is where the event giving rise to the injury occurred, not where the resultant damages to the plaintiff occurred (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d at 97-98, citing *Marie v Altshuler*, 30 AD3d 271, 272-273 [1st Dept 2006]; *see also Uzan v Telsim Mobil Telekomunikasyon Hizmetleri A.S.*, 51 AD3d 476, 478 [1st Dept 2008]). "Moreover, for commercial torts causing economic damages, losses within New York will be necessary to establish a jurisdictional predicate" (*Pramer S.C.A.*, 76 AD3d at 98).
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> In this case, the injury is the losses sustained in the New York-based Fortis account as a result of Kugler's unauthorized trading of BKN stock; and, thus, the situs of the injury is New York, rather than New Jersey where GGI is located"(2010 Decision, at 15).

The Court based this conclusion on allegations in the original complaint, which the court accepted as true, that GGI's principal place of business is New Jersey (Complaint, ¶ 18), and

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[2]As noted in connection with the earlier motions to dismiss, the parties dispute whether GGI's Fortis account was located in New York or New Jersey (Decision and Order dated October 22, 2010, at 12-13). For purposes of Vik's present motion, it is assumed that the Fortis account was located in New York (*see* Vik's Moving Memo. of Law, at 22, n 11).

that when Kugler stopped buying BKN on plaintiff's behalf after his termination in August 2005, the price of the stock dropped to it true fair market value of "mere pennies per share" (*id.*, ¶¶ 15, 117). In addition, GGI's counsel had argued in its opposition that: "Defendants' conduct led to GGI's loss of at least $35 million - a loss that was first experienced in GGI's New York Fortis account" (GGI's Opposing Memo. of Law, at 20).

Defendants maintain that GGI did not suffer any actual losses while the BKN stock was located in the Fortis account. They rely on documents produced by GGI which show that, as of June 30, 2005, three million of the BKN shares that GGI owned were located in a UBS account in Stamford, Connecticut (Alperstein Aff., Ex. 25).

Then, in early September 2005, GGI transferred all of its BKN shares in the Fortis account to a Deutsche Bank account, and the Deutsche Bank office that handled that transaction was itself located in Greenwich, Connecticut (Kugler Ex. P). According to a summary of GGI's BKN trades prepared by GGI, it acquired a total of 9,379,730 shares of BKN at an overall average price per share of €3.0046 (Gordon Aff., Ex. 3). Defendants maintain that, in September 2005, BKN stock was trading at an average price of over €4.0 (Alperstein Affirm., Exs. 2 and 5), and that, according to the Deutchse Bank statement, GGI sold 1,430,000 shares on or about September 15, 2005, at a price of €4.05 (*id.*, Ex. 5).

After the Court issued its ruling on Vic's motion to dismiss, the First Department issued another decision interpreting CPLR 302 (a) (3). In *CRT Invs., Ltd. v BDO Seidman, LLP* (85 AD3d 470 [1st Dept 2011]), the First Department held that, "[i]n the context of a commercial tort, where the damage is solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred" (85 AD3d at 471-472). Although the First Department cited its earlier decision in *Pramer S.C.A. v Abaplus Intl. Corp.* (76 AD3d 89 [1st Dept 2010]), it made no mention of the additional requirement that "losses within New York will be necessary to establish a jurisdictional predicate" (76 AD3d at 98), which presumably must no longer be proven.

The original critical events associated with the alleged conspiracy to defraud GGI are Kugler's allegedly unauthorized purchases of BKN stock on behalf of GGI at artificially high prices. Vik argues that this conduct occurred in Connecticut, where Kugler resides and worked, and that the documentary evidence he now submits establishes that GGI never sustained any losses in the Fortis account, alleged to be merely a clearing house for the trades, even assuming that account was located in New York. Vik relies on *Baptichon v Nevada State Bank* (304 F Supp 2d 451, 460 [ED NY 2004], *affd* 125 Fed Appx 374 [2d Cir

2005]), where the court held that the "fortuitous location of plaintiff's bank in New York" was not sufficient basis for jurisdiction under CPLR 302 (a) (3) where the underlying events took place outside of New York.

GGI argues that the conspiracy was centered in New York due to the fact that the BKN stock was purchased by Kugler through GGI's New York Fortis account. GGI further maintains that Star Asset, GBF, Dabbah Securities, and Xcelera all had accounts in New York with Fortis, and often traded through Dabbah Securities, which is located and does business in New York (SAC, ¶¶ 22, 27, 31). As the Court noted in its earlier decision, Kugler is alleged to have faxed the forged disclosure statements to BaFin using the fax machine located in BKN's New York office (SAC, ¶ 121).

While defendants submit documentary evidence showing the transfer of GGI's BKN shares from the Fortis account to Connecticut-based brokerage accounts after Kugler's termination, this documentary evidence does not conclusively prove that GGI was not injured in New York. GGI alleges that Kugler could not transfer $10 million from the Fortis account in May 2005 to one of GGI's checking accounts because "there was no legitimate or liquid market" and Kugler could not, under German law, sell this much BKN stock to return GGI's $10 million (SAC, ¶ 140).

In addition, GGI alleges that, once Kugler caused GGI to

cross the 30% ownership threshold in April 2004, the obligation to purchase BKN stock from all remaining shareholders at a price per share of €4.36 remained with GGI whether or not it continued to hold the shares in question and that this was a "potential devastating liability" (*id.*, ¶¶ 155-158).

Whether GGI could have sold its large position in BKN at the end of 2005 at a profit, as defendants suggest, is clearly a question of fact for trial. Consequently, the injury to GGI may have occurred in New York, and thus, Vik fails to demonstrate that the complaint should be dismissed for lack of personal jurisdiction at this juncture.

C. The Crystal Defendants[3]

Zev and David Crystal are citizens of Canada and reside in London, England (Zev Crystal Aff., ¶ 3; David Crystal Aff., ¶ 6). Star Asset was incorporated in the Bahamas in 1994, and does business in Bermuda and London (David Crystal Aff., ¶¶ 3, 4). The Crystal brothers are directors, and are responsible for trading and investment decisions (*id.*, ¶ 3). GBF is a Bermuda open-ended mutual fund that engages in proprietary trading of

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[3] Jack Crystal, who is the father of David and Zev Crystal, avers that he is 87 years old, and has been retired since before the events in questions took place (Jack Crystal Aff., ¶¶ 7-9). He claims to be a citizen of Canada, residing outside of the United States (*id.*, ¶ 3). At oral argument, GGI's counsel stated: "Your Honor, I'm prepared to dismiss him from the case. I think he ought to be dismissed" (2/9/12 Tr. at 49). Accordingly, the motion to dismiss the complaint against Jack Crystal is granted.

securities, and its business is conducted in Bermuda and London (*id.*, ¶¶ 3, 4). Star Asset's main businesses are (a) to manage its proprietary securities trading accounts, and (b) to serve as the investment manager of GBF (*id.*, ¶ 4). While both companies buy and sell securities in markets all over the world (*id.*), David Crystal contends that they do not conduct business in New York (*id.*, ¶ 12).

David Crystal avers that he believed that Kugler was physically in Connecticut where he lives and works "during most if not all ... calls" (David Crystal Aff., ¶ 13). He further avers that the trading activity of which GGI complains did not occur in New York, and that when Kugler asked Star Asset and/or GBF to buy specified number of shares of BKN for GGI or any other counter party, all of Kugler's requests were received by telephone at offices located outside of the U.S. (*id.*).

Star Asset/GBF located traders outside the U.S. and would place an order with the London trading desk of Jeffries & Company, Inc., electronically with Barclays, a U.K. firm headquartered and based in London, or occasionally with another European firm (*id.*). The issuer in question, BKN, was at all relevant times a German company whose shares traded only on markets in Germany and the U.K. (*id.*).

David Crystal further avers that Kugler always directed Star Asset/GBF to sell the shares to a specified counter party that

had an account at Fortis, and that Fortis did nothing more than settle trades on agreed-upon terms between counter parties, each of which had an account at Fortis (*id.*, ¶ 15).

GGI argues that the Court has long-arm jurisdiction over the Crystal defendants pursuant to CPLR 302 (a) (1) and (a) (3) (ii) because they conspired with Kugler to cause GGI to buy millions of shares of BKN from Star Asset and/or GBF through the parties' New York-based Fortis accounts, and that Star Asset and GBF allegedly received significant profits from dumping their shares during the height of the alleged pump and dump scheme.

As discussed, *supra*, GGI has plead sufficient factual allegations, which, if proven, demonstrate that it was injured in New York from the alleged conspiracy. While the Crystal defendants maintain that GGI cannot show that the first requirement of subsection (ii) of CPLR 302 (a) (3) has been met, given that all of the sales of BKN stock were done through Fortis accounts maintained by GGI, Star Asset, GBF and Xcelera, often through, and with the assistance of Dabbah Securities, which is located in New York, GGI has sufficiently alleged that the Crystal defendants should have reasonably expected their acts to have consequences in New York. Therefore, dismissal of the complaint for lack of personal jurisdiction over Star Asset, GBF, and David and Zev Crystal is denied.

II. Statute of Limitations

A defense common to all five motions to dismiss[4] is that GGI's claims are untimely by operation of the borrowing statute, CPLR 202. "When a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. This prevents nonresidents from shopping in New York for a favorable Statute of Limitations" (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]). There is no dispute that GGI is a Delaware limited liability company (*see* Kugler Ex. I), and that it is not a resident of New York. The key and disputed issue is whether GGI's causes of action accrued outside of New York.

A. Place of Accrual

In *Global Fin. Corp. v Triarc Corp.* (93 NY2d at 529), the Court of Appeals held that "a cause of action accrues at the time

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[4]Although the notice of motion filed by the Crystal and Dabbah defendants does not explicitly seek dismissal based on the statute of limitations (*see* CPLR 2214 [a]), these defendants raise the issue in their moving memorandum of law, contending that the claims asserted against them are time-barred under Connecticut law, and the issue has been fully briefed by the parties. Procedural defects in the filing of a motion "should be disregarded unless there is substantial prejudice to a party" (*National Microtech v Satellite Video Servs.*, 107 AD2d 860, 861 [3d Dept 1985]; *see also Caride v Alonso*, 78 AD3d 466 [1st Dept 2010], *lv dismissed, denied in part* 16 NY3d 806, *rearg denied* 17 NY3d 755 [2011] [plaintiff's failure to request particular relief in his order to show cause not fatal where it was requested in the petition and addressed by the defendant]).

and in the place of the injury" for purposes of the borrowing statute. The Court further ruled that "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" (93 NY2d at 529]; *see also Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 417 [2010]).

This is a different standard than the situs of injury for purposes of long-arm jurisdiction under CPLR 302 (a) (3), where the focus is on the tortious activity of the defendant and not the economic impact to the plaintiff. Thus, the Court's prior ruling on Vik's jurisidctional challenge to the original complaint is not dispositive with respect to the application of the borrowing statute.

GGI contends that a plaintiff's residence "need not be the situs of the economic impact of the fraud, and the court can properly consider all relevant factors in determining where the loss is felt," citing to *Lang v Paine, Webber, Jackson & Curtis, Inc.* (582 F Supp 1421, 1425 [SD NY 1984]).

However, an economic injury is said to occur in a location other than where plaintiff resides only in extremely rare cases involving unusual circumstances (*Baena v Woori Bank*, 2006 WL 2935752, at *6 [SD NY 2006]). In *Lang* (582 F Supp at 1425), the plaintiff was a Canadian citizen residing in Ottawa, but the court found that he maintained a separate financial base in

Massachusetts in a strategic attempt to move and keep assets in the United States as a hedge against currency fluctuations, and that all trades through his Massachusetts brokerage account were directed by his Massachusetts-based broker.

GGI has not demonstrated the sort of unusual circumstances that would justify deviation from the standard rule that a plaintiff became poorer in its state of residence (*accord Gorlin v Bond Richman & Co.*, 706 F Supp 236, 239-240 [SD NY 1989] [claims by Connecticut residents who suffered losses in New York brokerage account from unauthorized trading accrued in Connecticut]). Accordingly, this Court determines that GGI's causes of action arose in the state of its residency at the time the claims accrued.

B. **GGI's Residency: State of Incorporation or Principal Place of Business**

GGI is a limited liability company created under the laws of Delaware. Under earlier case law, for purposes of CPLR 202, "a corporation is a resident of the state which creates it" (*American Lumbermens Mut. Cas. Co. v Cochrane*, 129 NYS2d 489, 490 [Sup Ct, NY County 1954], *affd* 284 App Div 884 [1st Dept 1954], *affd* 309 NY 1017 [1956]); *see also Wydallis v U.S. Fed. & Guar. Co.*, 63 NY2d 872 [1984] [holding that a New York corporation with its principal place of business in Massachusetts was a New York resident for purposes of the borrowing statute]).

However, the actual holding in *American Lumbermens Mut. Cas. Co.* Is narrower than this language suggests, as the corporate litigant argued in that case that it was a New York resident based merely on the fact that it was qualified to do business and maintained an office there, as opposed to maintaining its principal place of business.

Indeed, the Court of Appeals in *Global Fin. Corp. (*93 NY2d at 530), did not resolve this issue, instead ruling that the "plaintiff's causes of action are time-barred whether one looks to its State of incorporation or its principal place of business" (93 NY2d at 530). On April 29, 2010, the Court of Appeals decided *Portfolio Recovery Assocs., LLC* (14 NY3d 410), in which the Court ruled that a claim for recovery of a credit card debt accrued where the credit card company, Discover, sustained the economic injury when the card holder allegedly breached the contract. The Court stated: "Discover is incorporated in Delaware and is not a New York resident. Therefore, the borrowing statute applies and the Delaware three-year statute of limitations governs" (*id.*, at 416). However, according to one court, this was "unremarkable given that the plaintiff's principal place of business and state of incorporation were both in Delaware" (*In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 834 F Supp 2d 949, 955 [CD Cal May 23, 2012]).

The issue was again raised in *Verizon Directories Corp. v*

[* 27]

Continuum Health Partners, Inc. (2009 WL 1116113 [Sup Ct, NY County 2009], *affd* 74 AD3d 416, 416-417 [1st Dept 2010]). In that case, the defendant had argued that Verizon's breach of contract claim was time-barred under Delaware's one-year Statute of Limitations, because the plaintiff was a Delaware corporation. Alternatively, the defendant argued that the cause of action accrued in Texas, where Verizon had its principal place of business, and that Verizon's claim would be barred in large part by Texas' four-year Statute of Limitations. Verizon had argued that the fact that it was authorized to transact business in New York and had an extensive presence in the state made it a resident of New York for purposes of the borrowing statute. The Supreme Court rejected this argument, ruling that "the place of plaintiff's injury in this case is the State of its incorporation, i.e., Delaware." The First Department unanimously affirmed, stating, "[f]or purposes of CPLR 202, plaintiff is a 'resident' of, and its cause of action accrued in, Delaware, the state of its incorporation" (74 AD3d at 417).

However, in *Kat House Prods., LLC v Paul, Hastings, Janofsky & Walker, LLP* (71 AD3d 580, 580-581 [1st Dept 2010]), the First Department ruled that a legal malpractice claim brought by a limited liability company accrued in California, which was the company's principal place of business. Neither the Supreme Court (*see* 2009 WL 1032719), nor the Appellate Division, makes mention

of the company's state of incorporation.

Just recently, the First Department released *Oxbow Calcining USA, Inc. v American Indus. Partners* (96 AD3d 646 [1st Dept June 26, 2012]). Relying on *Verizon Directories Corp.*, the trial court ruled that a corporation resides and suffers economic injury in the state where it is incorporated for purposes of the borrowing statute. The Appellate Division reversed, stating that "[i]n the case of a corporate plaintiff, that may be the state of incorporation or its principal place of business" (*id.*, at *4). The Appellate Division further stated that *Verizon Directories Corp.* was distinguishable, because in that case Verizon did not claim that its principal place of business was New York, only that it was authorized to do business here and had an extensive presence (*id.*).

Since the law is unsettled on this issue, the Court will analyze the timeliness of GGI's claims under both Delaware law, where GGI was incorporated, and the state of its principal place of business, which is either New Jersey, according to GGI, or Connecticut, according to the defendants.

C. Delaware's Statute of Limitations

Del Code Ann tit 10, § 8106 sets a three-year limitations period for breach of contract, breach of fiduciary duty, fraud and civil conspiracy claims. Under Delaware law, the three-year statute of limitations on breach of contract claims begins to run

when the contract is breached (*GRT, Inc. v Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at * 6 [Del Ch 2011]). A tort claim accrues at time of injury (*Krahmer v Christie's Inc.*, 903 A2d 773 [Del Ch], *appeal refused* 906 A2d 806 [Del 2006]). Section 8106 is not a discovery statute, and the limitations period runs from the accrual date, even if the plaintiff is ignorant of the cause of action (*SmithKline Beecham Pharm. Co. v Merck & Co., Inc.*, 766 A2d 442, 450 [Del 2000]). The statute of limitations for civil conspiracy runs from the time of the overt act which allegedly damage the plaintiff (*Freedman v Beneficial Corp.*, 406 F Supp 917, 924 [D Del 1975]).

With two exceptions, GGI's claims for breach of contract, breach of fiduciary duty, fraud, conspiracy to commit fraud and aiding and abetting fraud all accrued in June 2003 when Kugler began purchasing BKN stock. The claims against Dabbah Securities and Steven Dabbah accrued on June 24, 2004, when Dabbah Securities first became inter-positioned in the trading of BKN stock (Steven Dabbah Aff., Ex. G). At the very latest, the claims accrued in August 2005 when GGI fired Kugler after admittedly having discovered Kugler's alleged unauthorized trading. GGI admits that Barbara Kugler "accepted her husband's transfer of title of their home [which occurred on August 17, 2005] at a time when they both knew that claims had accrued against Kugler" (Mem. of Law In Opp., at 14). Thus, GGI's first,

second, third, fifth, sixth and seventh causes of action are time-barred under Delaware law when this action was commenced on December 30, 2009.

In Delaware, a fraudulent transfer made with actual intent to deceive must be brought "within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant" (6 Del C § 1309). Thus, the fourth cause of action against Kugler and Barbara Kugler accrued on August 17, 2005, and was time-barred by August 17, 2009 under Delaware law.

D. GGI's Principal Place of Business is Connecticut

The complaint alleges that GGI's principal place of business is New Jersey (SAC, ¶ 15), despite the fact that it is not registered to do business in New Jersey (James Aff., ¶ 9), and the two principals of GGI - Gordon and his wife-- live in Connecticut (*see* Kugler Exs. C and G; Gordon Aff., ¶ 11). Gordon and his son, Scott Gordon, submit affidavits in which they attempt to explain GGI's nexus to New Jersey. Gordon contends that GGI and all of his other companies were located in New Jersey "during the relevant time period," because, starting in June 2002, he was working on a large real estate development in Atlantic City through another company he owns or controls -- Gordon Group Holdings, LLC - and spending "the vast majority of

[his] working time" in Atlantic City (Gordon Aff., ¶¶ 11-15). After Gordon left for a sailing trip around the world in September 2004, Scott Gordon claims he became the primary person responsible for looking after his father's business affairs, including GGI. Scott Gordon contends that he received the vast majority of GGI's mail in Atlantic City at this time, and that "[f]or all intents and purposes, GGI was headquartered where I was located, in Atlantic City, New Jersey" (Scott Gordon Aff., ¶ 6).

Notably, Scott Gordon is not a principal of GGI and he makes no claim that he was authorized to, by power of attorney or otherwise, and did make, investment decisions on behalf of GGI. Thus, his re-location to New Jersey in early 2005 and the activities of him and his father on behalf of their real estate investment company, Gordon Group Holdings, have no bearing on the issue of GGI's principal place of business.

Scott Gordon claims he "received" GGI's mail in New Jersey (Scott Gordon Aff., ¶ 5) while Gordon was out of the country between August 2004 and August 2005 (*see* SAC, ¶ 127). However, with two exceptions discussed below, all correspondence, brokerage and bank account statements, and tax returns that GGI produced in discovery[5] show GGI's address in Connecticut, either

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[5] According to defendants, GGI refused to produce many relevant documents and respond to interrogatories that would demonstrate where its business was located (*see* James Reply Aff.,

at the personal residence of Gordon and his wife in Greenwich, Connecticut (Kugler Ex. D), or at the business address of GGH (Kugler Exs. B, D, E and L; Alperstein Affirm., Exs. 5, 6, 7, 13, 14, 15, 16, 22). Indeed, both the clearing agreement between GGI and Fortis dated April 17, 2003 and the W-9 IRS form Gordon signed on June 3, 2006 and provided to Fortis lists the same Greenwich, Connecticut address for GGI (Kugler Ex. L; Alperstein Affirm., Ex. 12). Fortis apparently sent all of its statements and daily trade advices regarding trading in GGI's account to that Connecticut address between January 15, 2004 and October 3, 2005 (Kugler Ex. D; Feuerstein Affirm., Ex. 9; Alperstein Affirm., Ex. 13; Hutner Aff., Ex. A).

Finally, a letter dated September 1, 2005, which was signed by Gordon on behalf of GGI and sent to Fortis requesting the transfer of GGI's BKN stock to an account at Pershing, denotes GGI's address as the 6 Glenville Street, Greenwich, Connecticut address (Kugler Ex. E).

In contrast to this documentary evidence, only two documents show GGI's address in a state other than Connecticut. The first is a UBS account statement for the period June 1-30, 2005, which was sent to the company's registered address in Wilmington, Delaware (Alperstein Affirm., Ex. 25). The second is a letter dated August 16, 2007, from GGI and Gordon to BaFin, wherein the

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Exs. R and S).

address for both Gordon and GGI is listed as Atlantic City, New Jersey (Kugler Ex. H).

Gordon contends that he was formulating his investment strategies and directing GGI's business from an office and a construction trailer on-site in Atlantic City during some indeterminate time period (Gordon Aff., ¶ 14). However, he declines to provide any specifics of how, when, and where he or his son conducted any business on behalf of GGI from New Jersey. According to the testimony of Allen Bohbot, the former Chairman and Chief Executive Officer of BKN, he met with Gordon three times in Greenwich, Connecticut to talk about GGI's investment in BKN (James Reply Aff., Ex.Q; Bohbot Dep. at 119-120, 122, 131-132, 134-135, 257-258, 315).[6] The first meeting occurred in the late Summer or early Fall of 2003 (*id.*, at 258), and was attended by Kugler (*id.*, at 119).

In short, GGI has produced only a single document that it drafted in mid 2007 supporting its claim that GGI was ever located in New Jersey, while the remainder of the documentary evidence it has agreed to produce overwhelmingly establishes that its principal place of business is and was Connecticut during the 2003 to 2005 time period.

E. Connecticut Statute of Limitations

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[6]Mr. Bohbot, a resident of Connecticut, was subpoenaed to testify in this action by GGI and gave testimony on June 15 and 27, 2011.

In Connecticut, a breach of contract claim accrues when the breach occurs, even if damages are delayed (*Amoco Oil Co. v Liberty Auto & Elec. Co.*, 810 A2d 259, 266 [2002]; *Rosenfield v I. David Marder & Assocs., LLC*, 956 A2d 581, 586 [2008]). Claims based on verbal contracts must be brought within three years of accrual (Conn Gen Stat § 52-581 [a]); while there is a six-year statute of limitations for claims based on written contracts (Conn Gen Stat § 52-576 [a]).

GGI's first cause of action for breach of contract alleges that GGI's agreement with Kugler was "memorialized" in the undated Fortis "Resolution to Obtain Credit With or Without Security and to Contract For Services" (the Fortis Resolution) executed by Gordon and Kugler in January 2005 (*see* SAC, ¶¶ 46, 199). However, the claim for breach of fiduciary duty admits that GGI and Kugler had an "oral agreement" (SAC, ¶ 204), and the Fortis resolution merely provided Kugler with written authority "to execute trades only" in GGI's Fortis account (Alperstein Affirm., Ex. 12).

While the Fortis Resolution refers to the April 17, 2003 Clearing Agreement between GGI and Fortis, that document provides that GGI was approved to trade in "Equities" (*id.*, Ex. 12). Neither of these documents make any mention of any of the limitations on Kugler's trading activity that is the basis for GGI's claims against Kugler, namely "that GGI's money be invested

in highly rated, highly secure, and highly liquid bonds, such as securities issued or fully guaranteed by the United States government" (SAC, ¶¶ 38, 136). Any such agreement between GGI and Kugler was oral, and thus, GGI's claim for breach of contract does not benefit from the longer six-year limitations period contained in Conn Gen Stat § 52-576 (a).

The first cause of action against Kugler alleges a breach of contract accruing in June 2003, and thus, was time-barred by June 2006. At the very least, GGI's claim accrued by August 2005, and thus, was time-barred by August 2008.

The claims asserted against Kugler for breach of fiduciary duty and against the other defendants based on fraud are governed by a three-year statute of limitations (*see* Conn Gen Stat § 52-577 ["No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."]; *see also Krondes v Norwalk Sav. Socy.*, 728 A2d 1103, 1109-10 [1999] [fraud claims are governed by Conn Gen Stat § 52-577]; *Ahern v Kappalumakkel*, 903 A2d 266, 268 [2006] ["Breach of fiduciary duty is a tort action governed by the three year statute of limitations contained in General Statutes § 52-577"]).

The "date of the act or omission complained of" is the date when the wrongful conduct of the defendant occurs; Section 52-577 is a statute of repose and its limitation period is not tolled until the plaintiff first discovers any injury (*Certain*

Underwriters at Lloyd's, London v Cooperman, 957 A2d 836, 850 [2008]). For the reasons stated above with respect to Delaware's statute of limitations, the second, third, fifth, sixth and seventh causes of action accrued, at the latest by August 2005, and were time-barred by August 2008.

Connecticut law on fraudulent transfers is identical to Delaware, as they both have adopted the Uniform Fraudulent Transfer Act (Conn Gen Stat §§ 52-552 et seq.). A fraudulent transfer made with actual intent to defraud creditors must be brought, pursuant to Conn Gen Stat § 52-552e (a) (1), "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant" (Conn Gen Stat § 52-552j). Here, the transfer was made on August 17, 2005, the deed recorded on August 18, 2005, and thus, the claim was time-barred by August 17, 2009.

F. Conclusion

Accordingly, since all of GGI's claims are untimely under both Delaware and Connecticut law, the Second Amended Complaint must be dismissed pursuant to CPLR 202 and 3211 (a) (5).

III. Failure To State A Claim For Relief

For the reasons stated on the record, the motions are denied to the extent that defendants challenge the sufficiency of GGI's amended pleading pursuant to CPLR 3211 (a) (7) and 3016 (b) (*see*

2/9/12 Tr. at 37-38). The documentary evidence offered by defendants Steven Dabbah and Dabbah Securities, although compelling, is more suited to consideration of a motion under CPLR 3212 for summary judgment.

For the foregoing reasons, it is

ORDERED that the motions of defendants Michael "Jack" Kugler (seq. no. 009), Xcelera, Inc. (seq no. 011), Alexander Vic (seq. no. 012), Star Asset Management Limited, Gryphon Bond Fund Limited, Dabbah Securities, Steven Dabbah, David Crystal and Zev Crystal (seq. no. 013) to dismiss the Second Amended Complaint (seq. no. 009) is granted pursuant to CPLR 202 and 3211 (a) (5); and it is further

ORDERED that the motion of defendant Barbara Vogt Kugler to dismiss the Second Amended Complaint (seq. no. 010) is granted pursuant to CPLR 202 and 3211 (a) (5) and CPLR 3211 (a) (8); and it is further

ORDERED that the motion of defendant Jack Crystal to dismiss the Second Amended Complaint (seq. no. 013) is granted without opposition; and it is further

ORDERED that the Second Amended Complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

Dated: July 18, 2012

ENTER:

J.S.C.

CHARLES E. RAMOS