UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ELIOT I. BERNSTEIN, et al.,

07 Cv. 11196 (SAS)

Plaintiffs,

-against-

APPELLATE DIVISION FIRST DEPARTMENT
DEPARTMENTAL DISCIPLINARY COMMITTEE,
et al.,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF THE STATE DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF THE STATE DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Preliminary Statement

Plaintiffs pro se Eliot Bernstein and P. Stephen Lamont (hereinafter "plaintiffs") bring this action, on their own behalf as well as on behalf of numerous companies in which the plaintiffs have an interest, against, inter alia, the Hon. Judith S. Kaye, Chief Judge of the New York State Court of Appeals; various judges of the Supreme Court of the State of New York, Appellate Divisions, First and Second Departments; the attorney discipline committees of the First and Second Departments (hereafter referred to as the "Disciplinary Committees"), as well as certain members and current and former counsel of the Committees, and various other state actors and entities (collectively the "State Defendants").[1]

[1] Plaintiffs initially sued only the following State Defendants: Thomas Cahill; Joseph Wigley; Martin R. Gold; Paul Curran; Catherine O'Hagen Wolfe; Hon. Angela M. Mazzarelli; Hon. Richard T. Andrias; Hon. David B. Saxe; Hon. David Friedman; Hon. Luiz A. Gonzales; James E. Pelzer; Lawrence Digiovanna; Diana Maxfield Kearse; Hon. A. Gail Prudenti; Hon Judith S. Kaye; the Departmental Disciplinary Committee of the First Department; the

Plaintiffs' claims against the State Defendants arise primarily from their allegations of "whitewashing" and/or mishandling of their complaints to the attorney disciplinary committees of the First and Second Departments and to other state agencies. As a result of this alleged conduct, plaintiffs seek to assert claims for violations of their due process rights; the Sherman Act, 15 U.S.C. §§ 1 and 2; Civil RICO, 18 U.S.C. § 1961- 1968; as well as several other State and Federal statutes.

This memorandum of law is respectfully submitted in support of the motion by the State Defendants to dismiss the Amended Complaint on the grounds that the plaintiffs lack standing to bring claims alleged herein; plaintiffs' have failed to properly plead pursuant to Fed. R. Civ. P. 8 and 12(b)(6); this Court lacks subject matter jurisdiction under the Eleventh Amendment to the United States Constitution; claims against the State Defendants are barred by absolute judicial, quasi-judicial and qualified immunity; plaintiffs have failed to state a cause of action against the State Defendants under 42 U.S.C. § 1983; plaintiffs have failed to properly plead a claim under civil RICO; and plaintiffs have failed to state a claim under the Sherman Act.

Departmental Disciplinary Committee of the Second Department; Lawyers Fund for Client Protection;. This motion is made on behalf of those defendants who have been served and appeared. In their Amended Complaint, plaintiffs have named over 180 defendants, including many officers and agencies of New York State, as well as New York State itself. These new "State Defendants" include: the State of New York; the New York State Office of Court Administration; the New York State Supreme Court, Appellate Division, First Department; the New York State Appellate Division, Second Department; State of New York Commission of Investigation; Anthony Cartusciello; the New York State Attorney General; and Eliot Spitzer. These additional defendants have not yet been served and thus cannot move to dismiss at this time. We have not waived any right to move to dismiss on behalf of these new defendants. However, it is respectfully submitted that the arguments asserted in this motion to dismiss should result in the dismissal of the Amended Complaint as against all State Defendants.

Statement of Relevant Allegations

A copy of the Amended Complaint ("Am. Complaint") is annexed to the moving affidavit of Monica A. Connell, sworn to on May 30, 2008 (hereafter "Connell Aff."), as Exhibit A.

The Alleged Conspiracy Involving the Theft of Patent Technology

As is relevant to the claims against the State Defendants, plaintiffs allege that plaintiff Bernstein is the "Founder and principal inventor of the technology of the Iviewit Companies" and that plaintiff Lamont is the former "Chief Executive Officer (Acting) of the Iviewit Companies formed to commercialize the technology of the Iviewit Companies." See Am. Complaint at ¶¶ 1, 11-13. Plaintiffs allege that various attorneys and law firms were consulted in regard to issues relating to patenting the Iviewit technology. Plaintiffs allege that these attorneys realized the value of the technology at issue and conspired to deprive plaintiffs of the beneficial use of such technology. See Am. Complaint at pp. 55, 57, 58, 60, 62, 64; ¶¶ 233-34.

Plaintiffs' Complaints to State Agencies

Beginning in or about February, 2003, plaintiffs filed grievances against various attorneys they alleged were involved in misconduct relating to the Iviewit technology. Plaintiffs assert that these grievances were not properly handled and that the State Defendants "whitewashed" the complaints. See Am. Complaint at ¶¶ 610-691. Plaintiffs allege that conflicts of interest existed which prevented the First Department Disciplinary Committee from fairly considering their complaints and that the transfer of those complaints to the Second Judicial Department occurred after too long a delay.[2] Plaintiffs were further dissatisfied with the Second Department's

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[2] Pursuant to Judiciary Law § 90(10), attorney disciplinary proceedings are confidential. For that reason, because plaintiffs' Amended Complaint is subject to dismissal on its face for the reasons set forth herein, and because of the difficulty in responding to each and every allegation

dismissal of those complaints. See Am. Complaint at ¶¶ 638-679. Plaintiffs allege that they subsequently filed complaints relating to the alleged mishandling of their various attorney grievances but claim that those complaints were similarly mishandled or "whitewashed". See Am. Complaint at ¶¶ 648, 649, 651, 666, 679.

The Instant Action

On or about December 12, 2007, plaintiffs Bernstein and Lamont commenced the instant action on behalf of themselves and various Iviewit-related corporate entities.[3] Their Complaint was fourteen pages long and named 42 defendants. On or about May 14, 2008, plaintiffs sent State Defendants a copy of their Amended Complaint which is more than 300 pages long and names over 180 defendants. Pursuant to the May 9, 2008 Order of this Court, service of the Amended Complaint is stayed pending the resolution of any motions to dismiss by defendants who have already appeared in this action. The Amended Complaint asserts the following causes of action:

- Count One: Plaintiffs allege that defendants violated plaintiffs' due process rights;
- Count Two: Plaintiffs allege that defendants violated the Sherman Act, 15 U.S.C. §§ 1 and 2;

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in plaintiffs' prolix complaint, State Defendants do not address plaintiffs' specific factual allegations regarding the disciplinary complaints. In the event that any of plaintiffs' claims against the State Defendants survive this motion to dismiss, and in particular any of the claims relying upon the handling of specific attorney disciplinary complaints, State Defendants ask to have the opportunity to address such claims in a more focused fashion.

[3] Plaintiffs Bernstein and Lamont lack standing to sue on behalf of the named corporate entities, which may appear in a federal action only through licensed counsel. Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993).

- Count Three: Plaintiffs allege that defendants violated Title VII of the Civil Rights Act of 1964;

- Count Four: Plaintiffs assert a civil RICO, 18 U.S.C. §§ 1961-1968, claim;

- Count Five: Plaintiffs allege that certain of the defendants are guilty of malpractice or negligence under state law in connection with their representation of plaintiffs;

- Count Six: Plaintiffs allege that the defendants with whom they had contracts for legal representation or accounting services breached such contracts;

- Count Seven: Plaintiffs allege that defendants caused tortious interference with advantageous business relationships under state law.

- Count Eight: Plaintiffs allege that defendants negligently interfered with contractual rights under state law;

- Count Nine: Plaintiffs allege that the defendants conspired to commit fraud in order to steal plaintiffs' intellectual property;

- Count Ten: Plaintiffs allege that some of the private defendants breached their fiduciary duties;

- Count Eleven: Plaintiffs claim that certain of the private defendants are subject to suit under unspecified laws of various states; and

- Count Twelve: Plaintiffs claim that defendants are guilty of misappropriation and conversion of funds under the laws of various states.

See Am. Complaint at pp. 291-301. Plaintiffs seek monetary relief of more than a trillion ($1,000,000,000,000) dollars for each cause of action as well as extensive injunctive relief including the appointment of federal monitors to oversee the operations of the Disciplinary Committees as well as the Federal Bureau of Investigation and the United States Patent and Trademark Office. See Am. Complaint at pp. 301-309. For the reasons set forth herein, plaintiffs' Amended Complaint must be dismissed, with prejudice.

ARGUMENT

POINT I

PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS AGAINST THE STATE DEFENDANTS.

In a federal action, standing must be resolved as a threshold matter and the court has an independent obligation to ensure that standing exists. N.Y. Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 324-25 (2d Cir. 2003); Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663-64 (1993). At a minimum, in order to establish standing, plaintiffs must show three elements:

(1) Injury: Injury in fact, an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical.

(2) Causation: A causal connection between the injury and the challenged conduct.

(3) Redressability: It must be likely, as opposed to merely speculative, that the injury complained of will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

Here, plaintiffs cannot show such standing in regard to their claims against the State Defendants. Such claims arise from plaintiffs' dissatisfaction with the handling of plaintiffs' attorney grievance and subsequent complaints. Yet plaintiffs, as a complainants, have no legally cognizable interest in the handling of such complaints. Thus, the Amended Complaint fails to set forth any actual injury or injury in fact. See Morrow v. Cahill, 278 A.D.2d 123 (1st Dep't 2000), app. denied, 96 N.Y.2d 895 (2001) (Holding that a complainant lacked standing to compel a disciplinary committee's investigation of his former counsel as he suffered "no direct and harmful effect" from the committee's decision); Sassower v. Comm'n on Judicial Conduct of

N.Y., 289 A.D.2d 119 (1st Dep't 2001)(Affirming dismissal of Article 78 proceeding because Commission had discretion as to whether to commence an investigation of alleged judicial misconduct and the complainant lacked standing where there was no showing of actual injury); Mantell v. New York State Comm'n on Judicial Conduct, 277 A.D.2d 96 (1st Dep't 2000), app. denied, 97 N.Y.2d 706 (2001) (Complainant lacked standing to require Commission to investigate all facially meritorious complaints of judicial misconduct). Furthermore, the Amended Complaint is devoid of any allegations demonstrating that plaintiffs' injury is redressable through any decision by this Court. Plaintiffs therefore lack standing to assert claims against the State Defendants.

POINT II

PLAINTIFFS' PROLIX, CONCLUSORY, AND IMPLAUSIBLE CLAIMS ARE SUBJECT TO DISMISSAL PURSUANT TO FED R. CIV. P. 8 AND 12(b)(6).

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint be "a short and plain statement of the claim showing that the pleader is entitled to relief." See, e.g., Iwachiw v. N.Y. State DMV, 396 F.3d 525, 529 (2d Cir. 2005); Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988). It should be plain "in order to give the adverse party fair notice of the claims asserted." Moscowitz v. Brown, 850 F. Supp. 1185, 1189 (S.D.N.Y. 1994). The complaint should be short because an unnecessarily long pleading places an unjustified burden on the court and the party who must respond to it because they "are forced to select the relevant material from a mass of verbiage."' Jones v. Nat'l Communs. & Surveillance Networks, 409 F.Supp.2d 456, 471-72 (2006), aff'd, 2008 U.S. App. LEXIS 3669 (2d Cir. Feb. 21, 2008) (Affirming the dismissal of a 58 page, single-spaced complaint)(Citations omitted).

In this case, plaintiffs have filed a 300 page Amended Complaint against 180 defendants which places an unfair burden upon the defendants, who must "select relevant material from the mass of verbiage." Despite its length, the pleading is unclear and vague on a number of points. For example, it is unclear from the pleading whether some of the claims are being asserted against the State Defendants.[4] State Defendants have been forced to ascertain which claims they believe are being asserted against any State Defendant, to comb through over 300 pages to find relevant allegations in support of such claim, and to try to summarize all defenses to plaintiffs' many and varied claims. It is respectfully submitted that such pleading violates Fed. R. Civ. P. 8.

Plaintiffs' claims are also improperly pled in that they require this Court to accept legal conclusions and unwarranted factual deductions. It is well established that conclusory, vague, or general allegations are not sufficient to properly state a claim. See Kittay v. Kornstein, 230 F.3d 531 (2d Cir. 2000); Shuster v. Oppelman, 962 F. Supp. 394, 395 (S.D.N.Y. 1997); Cohen v. Litt, 906 F.Supp. 957, 961 (S.D.N.Y. 1995). Yet the pleading here relies upon vague and conclusory statements in lieu of sufficient pleading. For example, plaintiffs' allegations of the State Defendants' participation in an alleged conspiracy rely upon mere statements of legal conclusions. In regard to defendant New York State Commission of Investigation, plaintiffs assert "through the doctrine of respondeat superior, the [Commission of Investigation] itself conspired with [various private and State Defendants], and this constitutes another instance of state and federal law claims cited herein that resulted from patent sabotage, theft of IP, robbery

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[4] Since plaintiffs assert so many claims against so many defendants in such a lengthy pleading, State Defendants cannot address each and every claim which is potentially asserted against them in depth. To the extent that any of plaintiffs' claims against the State Defendants survive this motion to dismiss, State Defendants ask that they be permitted, if appropriate, to submit further briefing in support of a motion to dismiss such claims.

and other state and federal law claims cited herein." See Am. Complaint at ¶ 687. Plaintiffs' claims about the participation by other State Defendants in an alleged conspiracy are similarly conclusory. See, e.g., Am. Complaint at ¶¶ 687-691. Such allegations are insufficient to properly plead a conspiracy. See, e.g. Jones v. Nat'l Commun. & Surveillance Networks, 409 F. Supp. 2d at 471-472 citing Ciambriello v. County of Nassau, 292 F.3d 307, 324-25 (2d Cir. 2002). See also Dwares v. City of N.Y., 985 F.2d 94, 100 (2d Cir. 1993); Cho v. Bush, 2008 U.S. Dist. LEXIS 8921 (S.D.N.Y. Feb. 4, 2008); Bertucci v. Brown, 663 F.Supp. 447, 449 (E.D.N.Y. 1987) (Conclusory allegations of conspiracy are insufficient to state a civil rights claim.).

Furthermore, to avoid dismissal under Fed. R. Civ. P. 12(b)(6), the allegations in the complaint must be plausible. In Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), the Supreme Court rejected the "oft-quoted" standard set forth in Conley v. Gibson, 355 U.S. 41 (1957), that a complaint should not be dismissed, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 45-46. Where a plaintiff "ha[s] not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." Twombly 127 S. Ct. at 1974. See also Benzman v. Whitman, 523 F.3d 119 (2d Cir. 2008); Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007); Patane v. Clark, 508 F.3d 106, 111-12 (2d Cir. 2007); Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008). Here, plaintiffs conclusorily allege the existence of a massive, international plot to aid and abet various people in the theft of plaintiffs' intellectual property. See Am. Complaint at ¶ 719. Plaintiffs' claim of this massive conspiracy is unsupported by allegations demonstrating the existence of any agreement between the defendants to actually violate plaintiffs' rights or the possibility that most of the defendants would in any way benefit

from the violation of plaintiffs' rights. It is respectfully submitted that plaintiffs' allegations fail to meet the plausibility standards set forth by the Supreme Court in Twombly. Plaintiffs' prolix, conclusory and implausible pleading should be dismissed.

POINT III

ELEVENTH AMENDMENT IMMUNITY BARS PLAINTIFFS' CLAIMS AGAINST THE STATE DEFENDANTS.

The Eleventh Amendment to the United Stated Constitution bars suit in federal court for relief against a State by a private citizen absent the State's consent or specific Congressional abrogation of the immunity. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). This immunity extends to state agencies and also bars actions for damages against state officials in their official capacities where the state is the real party in interest. Papason v. Allain, 478 U.S. 265, 276 (1986); Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). The Eleventh Amendment specifically bars federal actions against the state courts. See Richards v. State of New York, 597 F. Supp. 692, 693 (E.D.N.Y. 1984), aff'd, 767 F.2d 908 (2d Cir. 1985, cert. denied, 474 U.S. 1066 (1986) (a state court is immune from suit under the Eleventh Amendment); Zuckerman v. Appellate Division, Second Department, Supreme Court of New York, 421 F.2d 625, 626 (2d Cir. 1970); Humphreys v. Nager, 962 F.Supp. 347, 354 (E.D.N.Y. 1997) (Id.); Sassower v. Mangano, 927 F. Supp. 113, 120 (S.D.N.Y. 1996), aff'd, 122 F.3d 1057 (2d Cir. 1997), cert. denied, 525 U.S. 872 (1998)(suit against presiding and associate justices of the Supreme Court of New York, Appellate Division, Second Department are barred); Mathis v. Clerk of the First Dep't, Appellate Div., 631 F. Supp. 232, 234 (S.D.N.Y. 1986).

Absent a waiver on the part of the state or a valid congressional override, neither of which exist here, under the Eleventh Amendment, nonconsenting states may not be sued in federal court by private individuals and plaintiff's claims are thus barred. Garcia v. State Univ. of N.Y. Health Scis. Ctr., 280 F.3d 98, 107 (2d Cir. 2001).

POINT IV

ABSOLUTE JUDICIAL, QUASI-JUDICIAL AND QUALIFIED IMMUNITY BAR PLAINTIFFS' CLAIMS AGAINST THE INDIVIDUAL STATE DEFENDANTS.

A. Plaintiffs' Claims Against State Judges Are Barred by Absolute Judicial Immunity.

It is firmly established that judges have absolute immunity from suit for acts performed in their judicial capacities. Mireless v. Waco, 502 U.S. 9, 12 (1991)(per curiam); Forrester v. White, 484 U.S. 219, 225 (1988); Stump v. Sparkman, 435 U.S. 349, 356 (1978); Pierson v. Ray, 386 U.S. 547, 553-55 (1967); Tucker v. Outwater, 118 F.3d 930, 935 (2d Cir. 1997), cert. denied, 522 U.S. 997 (1997). Judicial immunity is so expansive that it is not overcome merely by allegations of bad faith or malice but can be defeated only in circumstances where: 1) a judge takes a nonjudicial action or where 2) a judge's actions, though judicial in nature, are taken in the complete absence of all jurisdiction. Mireless, 502 U.S. at 11-12. Stump, 435 U.S. at 356-357.

In this case, the defendant judges of the Appellate Divisions have the jurisdiction to preside over attorney disciplinary matters. Such jurisdiction has been statutorily vested in the state courts. See Judiciary Law § 90(2). As a result, to the extent that plaintiffs challenge the actions of any judges regarding the state courts' handling of their attorney disciplinary complaints (see Am. Complaint at ¶¶ 647, 649, 653, 669-671, 678-679), such claims are barred

by absolute judicial immunity.[5]

Furthermore, to the extent that plaintiffs seek injunctive relief against any of the defendant judges, such relief is unavailable. Pursuant to the Federal Court Improvement Act of 1996, which amended 42 U.S.C. § 1983, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. An injunction against a judicial officer is prohibited by § 1983 absent a showing that a prior declaratory judgment has been entered against the officer in question and the judicial officer has violated that declaration. See, e.g., Huminski v. Corsones, 396 F.3d 53, 74 (2d Cir. 2004). Plaintiffs have not pled that the State Defendants have violated any declaratory decree and, accordingly, such injunctive relief against them is barred.

B. Quasi-Judicial Immunity Bars Plaintiffs' Claims.

Quasi-judicial immunity similarly bars plaintiffs' claims against the non-judicial state officials sued herein. Quasi-judicial immunity applies to those "who perform functions closely associated with the judicial process.'" Oliva v. Heller, 839 F.2d 37, 39 (2d Cir. 1988) (quoting

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[5] Although not clear from the face of the Amended Complaint, if plaintiffs are challenging any of the specific court determinations regarding his disciplinary complaints, such claims may be barred under the Rooker-Feldman doctrine. Under Rooker-Feldman, the federal district courts lack subject matter jurisdiction if the exercise of jurisdiction would result in the reversal or modification of state court judgments. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). Although Rooker-Feldman is a narrow doctrine which has been limited by the Supreme Court in recent years (see Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)), it has been consistently applied to foreclose review of state judicial proceedings involving the admission and discipline of attorneys. See Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005); Campbell v. Greisberger, 80 F.3d 703 (2d Cir. 1996); Zimmerman v. Grievance Comm. of the Fifth Jud. District, 726 F.2d 85 (2d Cir. 1984), cert. denied, 467 U.S. 1227 (1984).

Cleavinger v. Saxner, 474 U.S. 193, 200 (1985)); Mireles, 502 U.S. at 13. It will extend to the acts of non-judicial personnel who are performing discretionary acts of a judicial nature. Sassower v. Mangano, 927 F. Supp. at 120; Rodriguez v. Weprin, 116 F.3d 62, 66 (2d Cir. 1997). This immunity applies to bar claims against state bar disciplinary committee members arising from attorney disciplinary proceedings. Sassower v. Mangano, 927 F. Supp. at 121. See also Cleavinger v. Saxner, 474 U.S. at 200.

In this case, the quintessentially judicial functions of disciplining members of the bar was given to the Appellate Divisions which in turn designated part of this process to the committees on attorney discipline in each of the judicial departments. See Judiciary Law § 90(2); 22 N.Y.C.R.R. §§ 605.1 et seq. and 691.1 et seq. See also Rappoport v. Dep't Disciplinary Comm., 1989 U.S. Dist. Lexis 13854, *4 (S.D.N.Y. 1989). A review of the Amended Complaint here reveals that the claims against the individual State Defendants arose out of plaintiffs' objections to the handling of their attorney discipline complaints. As such, these claims are barred by quasi-judicial immunity.

C. Qualified Immunity Bars Plaintiffs' Claims Against the Individual State Defendants.

The individual State Defendants are additionally entitled to qualified immunity. The qualified immunity doctrine shields government officials from suits for civil damages if "(a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." Tierney v. Davidson, 133 F.3d 189, 196 (2d Cir. 1998) (quoting Salim v. Proulx, 93 F.3d 86, 89 (2d Cir. 1996)). See also Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Plaintiffs have failed to set forth allegations that the conduct of each individual defendant violated clearly established law. Plaintiffs allege that the State Defendants failed to properly handle or respond to their various complaints of misconduct. For example, plaintiffs allege that the Attorney General's office has failed to properly respond to their complaints regarding various attorneys and regarding the handling of their attorney disciplinary complaints. See Am. Complaint at ¶ 689. But there is no clearly established law mandating that the Attorney General must investigate every complaint received and impose a criminal or civil sanction. Plaintiffs' failure to allege the violation of clearly established law mandates the dismissal of claims against the State Defendants on qualified immunity grounds.

POINT V

PLAINTIFFS FAIL TO STATE A CLAIM FOR VIOLATION OF THEIR DUE PROCESS RIGHTS.

Plaintiffs' claim that the State Defendants have violated their due process rights fails for the reasons set forth below. See Am. Complaint at ¶¶ 6, 624, 636, 650, 719,733, 734, 745, 747, 1067.

A. Plaintiffs Have No Due Process Right to a Particular Outcome in an Attorney Grievance Proceeding.

Under the Fourteenth Amendment to the United States Constitution, states are prohibited from depriving individuals of property (or life and liberty) without due process of law by means of the Due Process Clause. A due process violation is established by showing the existence of a constitutionally cognizable right; the deprivation of that right; and that the process afforded to the party was less than that which is due. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1992); Mathews v. Eldridge, 424 U.S. 319, 335(1976); Mehta v. Surles, 905 F.2d 595, 598

(2d Cir. 1990). Plaintiffs' due process claims against the State Defendants arise from their assertion that the State Defendants' mishandled their complaints. See Am. Complaint at ¶¶ 624, 630, 636, 650, 676. Because plaintiffs have no protectable property or liberty interest in the handling of such complaints, their due process claim must be dismissed.

Due process is implicated only by governmental conduct which affects a constitutionally protected liberty or property interest. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents of State Colls. v. Roth, 408 U.S. 564, 577(1972). "The hallmark of property is an individual entitlement grounded in state law which cannot be removed except 'for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982). In determining whether there is such an entitlement, one must look not to the Constitution, but to "existing rules or understandings that stem from an independent source such as state law." Roth, 408 U.S. at 577; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 538.

Moreover, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at 577; Perry v. Sinderman, 408 U.S. 593, 601 (1972).

In this case, plaintiffs have not set forth allegations of any property or liberty interest which has been violated by the State Defendants. Plaintiffs have no right to any particular outcome in regard to complaints filed with the State Defendants, such as the Disciplinary Committees. Nor could plaintiffs state such a right as the State Defendants are given discretion

in handling complaints and the outcomes of such complaints are not certain. For example, the Disciplinary Committees are not required to commence an official investigation of alleged professional misconduct upon receipt of each and every complaint and, in any event, even where such an investigation has been commenced, are certainly not required to find misconduct and impose the sanction or punishment that the complainant feels is appropriate. See 22 N.Y.C.R.R. § 691.4(c) ("Investigation of professional misconduct may be commenced upon receipt of a specific complaint") and 22 N.Y.C.R.R. §605.6. There is no clear legal right or entitlement on the part of a complainant to the commencement of an investigation or the imposition of a sanction. Plaintiffs can point to no statute, regulation or case law granting them any property or liberty interest which the State Defendants have violated. As a result, their due process claim must be dismissed.

B. To the Extent that Plaintiffs Assert a Due Process Claim Through a § 1983 Claim, Their Claims Are Defective.

1. Many of Plaintiffs' Claims Are Time Barred.

The statute of limitations applicable to claims under 42 U.S.C. § 1983 in New York is three years. Patterson v. County of Oneida, 375 F.3d 206, 225 (2d Cir. 2004); Ormiston v. Nelson, 117 F.3d 69, 71 (2d Cir. 1997). To the extent that plaintiffs challenge conduct by the State Defendants which occurred more than three years prior to the filing of the instant action on December 12, 2007, such claims are time-barred. So, for example, plaintiffs' complaints regarding the First Department's handling of their Disciplinary Complaints prior to the transfer of those complaints to the Second Department in 2004 (see, e.g., Am. Complaint at ¶¶ 619-646) accrued more than three years before the commencement of this action and are barred.

2. Plaintiffs Fail to State Claim Under § 1983 Against the State and Its Agencies.

Plaintiff's § 1983 claims against the State and its various agencies, such as the Appellate Divisions, the Disciplinary Committees and the Commission of Investigation, are defective because such claims must be asserted against a person and state agencies are not persons for the purposes of the statute. Will v. Michigan Dept. of Police, 491 U.S. 58, 71 (1989); Spencer v. Doe, 139 F.3d 107, 111 (2d Cir. 1998).

3. Plaintiffs Fail to State a Claim Under § 1983 Against the Individual State Defendants Based Upon The Lack of Allegations of Their Personal Involvement in the Purported Constitutional Violations.

Plaintiffs' claims against the individual State Defendants fail because they have not sufficiently alleged the personal involvement of each named defendant in the violation of plaintiffs' federal rights, as they must. See, e.g., Provost v. City of Newburgh, 262 F.3d 146, 154 (2d Cir. 2001); Rosa R. v. Connelly, 889 F.2d 435, 437 (2d Cir. 1989); Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 886 (2d Cir. 1987). Plaintiffs have also failed to establish a tangible connection between the acts of each individual defendant and the alleged injuries. Bass v. Jackson, 790 F.2d 260, 263 (2d Cir. 1986)

Here, plaintiffs have failed to set forth allegations that any individual State Defendant has deprived them of any constitutional right or caused them specific injury. Instead, plaintiffs, in a conclusory fashion, allege that the State Defendants' conduct was illicit and part of a vast conspiracy. See Am. Complaint at ¶¶ 6,624,626,672,688,689,690,719. Such allegations are insufficient to support plaintiffs' claims.[6] For the foregoing reasons, plaintiffs have failed to state

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[6] To the extent that plaintiffs hope to rely upon conclusory allegations of a conspiracy to make out their claims for a constitutional violation, the pleading is insufficient to make out the

a § 1983 claim for violation of the due process rights.

POINT VI

PLAINTIFFS FAIL TO STATE A CIVIL RICO CLAIM

Plaintiffs' RICO claims should be dismissed on the ground that plaintiffs have failed to satisfy the threshold pleading requirements of RICO. See 18 U.S.C. §§ 1961 et seq. To state a claim under civil RICO, plaintiffs must allege that the State Defendants are (1) conducting, participating in, or conspiring to conduct or participate in (2) an enterprise (3) through a pattern (4) of racketeering activities and (5) that has caused injury to plaintiffs business or property. See 18 U.S.C. § 1962 a-d; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, (1985); Azrielli v. Cohen Law Offices, 21 F.3d 512, 520 (2d Cir. 1994). Plaintiffs fail to meet even the minimal RICO pleading requirements. See Am. Complaint at ¶¶ 732-759. They have not set forth sufficient allegations to satisfy any of these pleading requirements in relation to the State Defendants.

First, plaintiffs have not adequately pled that State Defendants committed or agreed to commit two or more predicate acts or offenses that satisfy the definition of "racketeering activity." See 18 U.S.C. §§ 1961(1),(5). Plaintiffs claim that State Defendants violated 18 U.S.C. § 1503 (obstruction of justice) and 18 U.S.C. § 1511 (obstruction of state or local law enforcement), 18 U.S.C. §1957 (engaging in monetary transactions in property derived from

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necessary elements of such conspiracy. Additionally, such conspiracy claims must be pled with specificity. Brewster v. Nassau County, 349 F. Supp. 2d 540, 547 (E.D.N.Y. 2004); Jones v. Nat'l Commun. & Surveillance Networks, 409 F. Supp. 2d at 469-470. See also Sloane v. Mazzuca, 2006 U.S. Dist. LEXIS 79817 (S.D.N.Y. 2006), citing, Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir. 1983), cert. denied, 464 U.S. 857 (1983). See also Contemporary Mission, Inc. v. United States Postal Service, 648 F.2d 97, 107 (2d Cir. 1981); Leon v. Murphy, 988 F.2d 303, 311 (2d Cir. 1993); Cho v. Bush, 2008 U.S. Dist. LEXIS 8921 (S.D.N.Y. 2008).

specified unlawful activity); all are predicate acts under § 1961(1)(b).[7] See Am. Complaint at ¶ 733(a)&(f). However, plaintiffs have failed to state any facts indicating that the State Defendants violated § 1503. Obstruction of justice under §1503 requires the act obstructing justice be in relation to a proceeding pending in federal court. United States v. Biaggi, 853 F.2d 89, 104 (2d Cir. 1988); United States v. Scoratow, 137 F. Supp. 620, 621 (D. Pa. 1956). Here there are no allegations that State Defendants obstructed a federal proceeding. Thus, plaintiffs have failed to plead a predicate act under § 1503.

Plaintiffs also fail to allege the requisite facts to sustain a violation of § 1511. This statute applies to individuals conspiring to obstruct law enforcement to facilitate an illegal gambling business. See 18 U.S.C. § 1511(a). Plaintiffs do not allege facts regarding a connection between State Defendants and illegal gambling. Thus, plaintiffs fail to plead facts for the second predicate act as well.

Also, plaintiffs fail to sufficiently plead a conspiracy to violate § 1957. Plaintiffs alleged that "all defendants participated in a conspiracy to violate section 1957...[by] engag[ing] in monetary transactions in property derived from specified unlawful activity." See Am. Complaint at ¶ 733(j). Under § 1957, it is a crime to engage in a monetary transaction in criminally derived property. Plaintiffs fail to plead facts that provide grounds that State Defendants engaged in or conspired to engage in monetary transactions with criminally derived property. In addition, because the core of a RICO civil conspiracy is an agreement to commit predicate acts, at the very least the complaint must specifically allege such an agreement. Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23 (2d Cir. 1990). Since plaintiffs failed to allege that each State

[7] Plaintiffs allege that the Disciplinary Committees and Cahill violated § 1503, the Disciplinary Committees violated § 1511, and all defendants violated § 1957.

Defendant committed or agreed to commit two or more predicate acts, the RICO claim must be dismissed. See 18 U.S.C. § 1961; Sedima, S.P.R.L. v. Imrex Co., 473 U.S. at 496; United States v. Teitler, 802 F.2d 606, 613 (2d Cir. 1986).

Plaintiffs have also failed to plead the necessary facts regarding State Defendants' participation in the alleged "enterprise." To be members of the "enterprise," individuals must share a common purpose and commit the acts to further this common purpose. United States v. Indelicato, 865 F.2d 1370, 1376 (2d Cir. 1989). Here, plaintiffs' allegations against State Defendants rest entirely on their alleged "inaction," conflicts of interest, and supposed denial of due process. See Am. Complaint at ¶¶ 743,745(b). This is insufficient to establish that State Defendants were part of a RICO enterprise involved in racketeering activity to steal intellectual property.[8]

Finally, plaintiffs' conclusory RICO allegations are not pled with the particularity required under rule 9(b) of the Federal Rules of Civil Procedure. Plaintiffs allege that Defendants committed fraud, but do not provide the necessary facts to meet the pleading requirements. The courts have emphasized that "all of the concerns that dictate that fraud be stated with particularity exist with even greater urgency in civil RICO actions". Plount v. American Home Assurance Co., 668 F. Supp. 204, 206 (S.D.N.Y. 1987). Accordingly, the RICO claim should be dismissed.

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[8] In relation to § 1962(c), plaintiffs allege that the "enterprise" and the "persons" are the same entities. See Am. Complaint at ¶ 744(A). Under § 1962(c), "enterprise" and "person" must be separate entities. Bennett v. United States Trust Co., 770 F.2d 308, 315 (2d Cir. N.Y. 1985)Thus, the § 1962(c) allegation must be dismissed.

POINT VII

PLAINTIFFS FAIL TO STATE A CLAIM FOR A SHERMAN ACT VIOLATION.

Plaintiffs' Sherman Act claims should be dismissed due to their failure to satisfy the threshold pleading requirements for the Act. See 15 U.S.C §§ 1 & 2. To survive a motion to dismiss, Plaintiffs must state factual allegations that give rise to an inference of conspiracy. To do this, the complaint must provide circumstantial evidence that the activity resulted from an agreement rather than just parallel conduct.[9] Bell Atl. Corp. v. Twombly, 127 S.Ct at 1966. Here, plaintiffs assert nothing more than parallel conduct at most. Plaintiffs state that the alleged whitewashing of the attorney complaints allowed the alleged violations of intellectual property rights to continue, which allegedly resulted in a restraint of trade. See Am. Complaint ¶ 1073. Such allegations do not create an inference that an agreement to restrain trade existed. Since plaintiffs have failed to plead any facts which create an inference that the State Defendants had an agreement to restrain trade, the § 1 count should be dismissed.

Similarly, plaintiffs have failed to state a claim for relief under 15 U.S.C. § 2. At minimum, plaintiffs were required to set forth "factual allegations sufficient 'to raise a right to relief above the speculative level.'" Goldstein v. Pataki, 516 F.3d 50, 56 (2d Cir. 2008). Plaintiffs have failed to provide any facts connecting the alleged whitewashing with an attempt, intent, or desire of the State Defendants to monopolize the market for video and imaging encoding. The information provided is insufficient to raise the right to relief to a speculative level. Thus, the § 2 action should be dismissed.

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[9] "A [§ 1] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made...[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice." Bell Atl. Corp. v. Twombly, 127 S.Ct at 1966.

POINT VIII

NO PRIVATE RIGHT OF ACTION EXISTS FOR ALLEGED VIOLATIONS OF FEDERAL OR STATE CRIMINAL LAWS.

Plaintiffs seemingly allege civil claims for the alleged violation of federal and state criminal provisions, including 18 U.S.C. §§ 1014 (Bank Fraud), 1341 (Mail Fraud), 1503 (Obstruction of Justice), 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity), and 1511 (Obstruction of State and Local Enforcement) and New York Penal Law §§ 155.40 (Grand Larceny, Extortion), 175.35 (Offering a false instrument for filing, Fraud on Government Agencies), and 200.00 (Bribery). See Complaint, ¶¶ 54-62. However, both federal and state law preclude these civil claims.

No private right of action or civil causes of action exist for alleged violations of the criminal statutes contained in Title 18 of the United States Code unless the statute specifically creates a private right. Powell v. Kopman, 511 F. Supp. 700, 704 (S.D.N.Y. 1981); Katz v. Molic, 1984 U.S. Dist. LEXIS 22546 (S.D.N.Y. 1984); See also Shaw v. Neece, 727 F.2d 947, 949 (10th Cir. 1984), cert. denied, 466 U.S. 976, (1985); Del Elmer; Zachay v. Metzger, 967 F. Supp. 398, 403 (S.D. Calif. 1997). With the exception of the civil RICO claims, plaintiffs Title 18 allegations do not specifically create private rights of action.

Similarly, no private right of action or civil causes of action exist under the criminal statutes contained in the New York Penal Law. Luckett v. Bure, 290 F.3d 493, 497 (2d Cir. 2002); Crandall v. Bernard, Overton & Russell, 133 A.D.2d 878, 879,(3rd Dept. 1987), app. dismissed, 70 N.Y.2d 940, (1987). Accordingly, all claims and request for damages under the respective federal and state criminal statutes should be dismissed.

CONCLUSION

For the foregoing reasons, State Defendants ask that the Court issue an order granting State Defendants' motion to dismiss the Amended Complaint as against all State Defendants, with prejudice, and granting such other and further relief as the Court deems just, proper and appropriate.

Dated: New York, New York
May 30, 2008

ANDREW M. CUOMO
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State of New York
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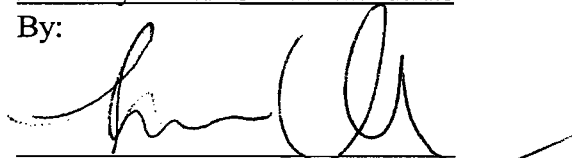
By:



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