UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT BERNSTEIN, *et al.*	:	
	:	
Plaintiffs,	:	Civil Action Number
	:	07-Civ.-11196 (SAS)
-against-	:	
	:	
STATE OF NEW YORK, *et al.*,	:	**NOTICE OF MOTION TO**
	:	**DISMISS AMENDED COMPLAINT**
Defendants.	:	

PLEASE TAKE NOTICE that, upon the declaration of John W. Fried, dated May 30, 2008, the Memorandum of Law of Defendant Raymond A. Joao in Support of Motion to Dismiss Plaintiffs' Amended Complaint, dated May 30, 2008, and upon all prior pleadings and proceedings had herein, defendant Raymond A. Joao hereby moves this Court at the United States Courthouse, 500 Pearl Street, New York, New York, for a dismissal with prejudice of Plaintiffs' amended complaint, pursuant to Rules 8(a)(2), 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure, and for other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Court's order, dated March 24, 2008, Plaintiffs' responses are due on June 30, 2008, and Defendants' replies are due on July 14, 2008.

Dated: New York, New York
May 30, 2008

FRIED & EPSTEIN LLP

By: _____
John W. Fried (JF-2667)
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Attorneys for Defendant Raymond A. Joao

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT BERNSTEIN, *et al.*	:	
	:	
Plaintiffs,	:	Civil Action Number
	:	07-Civ.-11196 (SAS)
-against-	:	
	:	
STATE OF NEW YORK, *et al.*,	:	DECLARATION OF
	:	JOHN W. FRIED
Defendants.	:	

I, John W. Fried, hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an attorney duly admitted to practice law in the courts of the state of New York and in the United States District Court for the Southern District of New York.

2. I am a member of the law firm of Fried & Epstein LLP and, in that capacity, I represent defendant Raymond A. Joao ("Joao") in this matter.

3. I submit this declaration in support of Joao's motion, pursuant to Rules 8(a)(2), 9(b), 12(b)(6), and 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss with prejudice Plaintiffs' amended complaint, dated May 9, 2008.

4. Attached hereto as Exhibit A is a true copy of Plaintiffs' amended complaint.

WHEREFORE, the undersigned respectfully requests, for the reasons set forth in Joao's Memorandum of Law, dated May 30, 2008, that Plaintiffs' amended complaint be dismissed with prejudice.

I, John W. Fried, declare under penalty of perjury that the foregoing factual information is true and correct to the best of my knowledge. Executed this 30th day of May 2008 in the City, County, and State of New York.

John W. Fried (JF2667)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT BERNSTEIN, *et al.*	:	
	:	
Plaintiffs,	:	Civil Action Number
	:	07-Civ.-11196 (SAS)
-against-	:	
	:	
STATE OF NEW YORK, *et al.*,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW OF DEFENDANT RAYMOND A. JOAO IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendant Raymond A. Joao, by his attorneys, Fried & Epstein LLP, submits this memorandum of law in support of his motion, pursuant to Rules 8(a)(2), 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Plaintiffs' amended complaint, dated May 9, 2008.

Summary of Alleged Facts Pertaining to Joao

Defendant Raymond A. Joao ("Joao"), a resident of the state of New York and an attorney, was "of counsel" to and possibly a partner at defendant Meltzer Lippe Goldstein Wolf & Schlissel, P.C. ("MLG"), a New York law firm. (Declaration of John W. Fried, dated May 30, 2008 ["Fried Decl."], Ex. A, [Am. Compl., at 21—22, ¶¶ 60 and 62]).

From in or about 1998 through 2001, plaintiff Eliot I. Bernstein ("Bernstein") and plaintiffs Iviewit Companies (collectively "Iviewit") retained defendant Proskauer Rose LLP ("Proskauer") to review and procure IP for a number of inventions pertaining to digital video and imaging. (Fried Decl., Ex. A [Am. Compl., at 74, ¶ 252]). In 1998, defendant Christopher C. Wheeler, a partner at Proskauer, misrepresented to Plaintiffs that Joao and defendant Kenneth

Rubenstein ("Rubenstein) were Proskauer partners who, with other Proskauer lawyers, "were on board to protect and secure the technologies discovered by Plaintiff Bernstein" and others. (Fried Decl., Ex. A [Am. Compl., at 15, ¶ 29; 16, ¶ 34; 74, ¶ 254. 252]). [Am. Compl., at 21—22, ¶¶ 60 and 62]). Instead, at that time, Joao and Rubenstein were attorneys with MLG. Thereafter, Proskauer hired Rubenstein away from MLG, but Joao remained at MLG. Iviewit was told that "Rubenstein would be in control of the IP with Joao assisting him at MLG until Joao could transfer to Proskauer." (Fried Decl., Ex. A [Am. Compl., at 75, ¶¶ 258—9; 76, ¶ 261]).

After being introduced to and retained by Bernstein and Iviewit, Joao began a series of actions that caused immediate suspicion concerning IP filings he was making and not making, including filing inventions for himself as the inventor for ideas he had learned from Plaintiffs' disclosures to him. (Fried Decl., Ex. A [Am. Compl., at 83, ¶¶ 299 and 300]). Days before the first provisional patent filing needed to be filed as a pending application, Joao visited Iviewit's offices in Boca Raton, Florida, where he met with the inventors, Bernstein and Zakirul Shirajee, to finalize the application and to have the inventors sign the application. Thereafter, "[Joao] immediately ran next door to Proskauer's office and in that time it was found that he had used a computer in the Iviewit Companies offices [presumably, in Proskauer's Boca Raton office] to make changes to the application, not approved by the inventors, after the inventors has signed for them." (Fried Decl., Ex. A [Am. Compl., at 83, ¶ 301]). Joao then sealed the application in an overnight packing. The inventors, however, opened the packing, "and what they found was that the application had been materially changed and they forced Joao to rewrite the application and correct a myriad of problems, once they received that, they sealed the document and Plaintiff Bernstein, Jennifer Kluge, and E. Lewin took the package to the US Post Office and sent it to the

USPTO." (Fried Decl., Ex. A [Am. Compl., at 83, ¶¶ 302]). Thereafter, Plaintiffs learned that "Joao has delayed original filings, had not filed all the IP he was supposed to and perhaps changed much of IP filings fraudently, * * * had 90+ patents in his own name . . . [and] many of these patents encompass the technologies he learned from and stole from Iviewit Companies." (Fried Decl., Ex. A [Am. Compl., at 84, ¶¶ 305 and 306]).

Plaintiffs terminated Joao's services as a lawyer due to his malfeasance and misfeasance (Fried Decl., Ex. A [Am. Compl., at 83, ¶¶ 302 and 303]) and, by August 25, 2000, Proskauer had acquired Plaintiffs' entire patent portfolio. (Fried Decl., Ex. A [Am. Compl., at 216, ¶ 796]).

Summary of Causes of Actions Involving Joao

Count One: Violations of Plaintiffs' inventive rights guaranteed by the United States Constitution and violations of the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution. (Fried Decl., Ex. A [Am. Compl., at 291—2, ¶¶ 1067—1070]).

Count Two: Violations of antitrust laws, 15 U.S.C. §§ 1 and 2. (Fried Decl., Ex. A [Am. Compl., at 292—3, ¶¶ 1071—1074]).

Count Three: Violations of Title VII of the Civil Rights Act of 1964 (as Amended). (Fried Decl., Ex. A [Am. Compl., at 293, ¶¶ 1075—1078]).

Count Four: Violations of the Racketeering and Corrupt Organizations Act, 18 U.S.C. §§ 1961—1968. (Fried Decl., Ex. A [Am. Compl., at 293—4, ¶¶ 1079—1082]).

Count Five: Legal Malpractice and Negligence. (Fried Decl., Ex. A [Am. Compl., at 294—5, ¶¶ 1083—1088]).

Count Six: Breach of Contracts. (Fried Decl., Ex. A [Am. Compl., at 295—6, ¶¶ 1089—1095]).

Count Seven: Tortuous Interference with Advantageous Business Relationships. (Fried Decl., Ex. A [Am. Compl., at 296—7, ¶¶ 1095—1098]).

Count Eight: Negligent Interference with Contractual Rights. (Fried Decl., Ex. A [Am. Compl., at 297, ¶¶ 1099—1101]).

Count Nine: Fraud. (Fried Decl., Ex. A [Am. Compl., at 297—8, ¶¶ 1102—1109]).

Count Ten: Breach of Fiduciary Duties as Directors and Officers. (Fried Decl., Ex. A [Am. Compl., at 298—9, ¶¶ 1110—1116]).

Count Eleven: Other Civil New York, Florida, and Delaware Claims. (Fried Decl., Ex. A [Am. Compl., at 299—300, ¶¶ 1117—1127]).

Count Twelve: Misappropriation and Conversion of Funds. (Fried Decl., Ex. A [Am. Compl., at 300—01, ¶¶ 1128—1131]).

As to each count, Plaintiffs seek in excess of one trillion dollars. (Fried Decl., Ex. A [Am. Compl., at 301—02]). Plaintiffs also seek certain injunctive relief that does not pertain to Joao. (Fried Decl., Ex. A [Am. Compl., at 302—309]).

The Court's Jurisdiction

Counts One, Two, Three, and Four allege claims that invoke the Court's federal question jurisdiction. 28 U.S.C. § 1331. Counts Five through Twelve do not allege claims arising under the Constitution, law or treaties of the United States; these are all state statutory or common law claims. Plaintiff P. Stephen Lamont ("Lamont") is a resident and thus a citizen of New York. (Fried Decl., Ex. A [Am. Compl., at 13, ¶ 12]). Joao also is a resident and thus a citizen of New York. (Fried Decl., Ex. A, [Am. Compl., at 22, ¶ 62]).

ARGUMENT

I. PLAINTIFFS' AMENDED COMPLAINT SHOULD BE DISMISSED AS FAILING TO COMPLY WITH RULE 8(a)(2).

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides as follows: "A pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief[.]"

A complaint should be dismissed if it is "so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) (citation omitted). A recitation of "vague and conclusory allegations whose relevance to the asserted claims is uncertain" is not a short and plain statement of a claim that complies with Rule 8. *Martin Luther King Jr. H.S. Parents v. New York City Dep't of Educ.*, No. 02 Civ. 1689 (MBM), 2004 WL 1656598, at *2 (S.D.N.Y. July 23, 2004), *vacated and remanded (on other grounds) by sub nom. Blakely v. Wells, 209 Fed. Appx. 18 (2d Cir. 2006).* Although *pro se* litigants are held to a less rigorous Rule 8(a)(2) standard than are litigants represented by lawyers, courts have dismissed *pro se* complaints for failure to comply with this rule. *See, e.g., Prezzi v. Schelter*, 469 F.2d 691, 692 (2d Cir. 1972); *Jones v. National Communication and Surveillance Networks*, 409 F. Supp.2d 456, 464-65 (S.D.N.Y. 2006), aff'd, No. 06-1220-CV, 2008 WL 482599 (2d Cir. Feb. 21, 2008); *Solomon v. H.P. Action Center,* No. 99 Civ. 10352 (JSR), 1999 WL 1051092, at *1 (S.D.N.Y. Nov. 19, 1999).

Plaintiffs' amended complaint is neither short nor plain. It is a rambling, stream-of-consciousness litany of accusations made against at least one hundred eighty-three (183) individuals, including many public servants, business organizations, law firms, and government and judicial entities. Joao is one of those defendants. The amended complaint does not reveal

how Joao, as apart from the other one hundred eighty-two (182) defendants, is liable to Plaintiffs pursuant to any one of the twelve counts. Rule 8 is intended to avoid placing on litigants the unjustified burden of having to respond to scant factual allegations in a pleading that are buried amid a mass of verbiage, comprised of accusations of misconduct. *Appalachian Enters., Inc. v. ePayment Solutions, Ltd.*, No. 01 CV 11502 (GBD) 2004 WL 2813121, at *7 (S.D.N.Y. Dec. 8, 2004).

Accordingly, Plaintiffs' amended complaint should be dismissed.

II. EACH OF THE FOUR FEDERAL QUESTION CLAIMS AGAINST JOAO SHOULD BE DISMISSED AS FAILING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Joao moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the four federal questions claims (Counts One through Four).

With regard to Count One (Constitutional violations), Count Two (antitrust violations), and Count Three (violations of Title VII of the Civil Rights Act of 1964), those claims should be dismissed as a matter of law. Joao is an individual, he is not a state official or other public servant and, therefore, he cannot be held liable for a denial of Plaintiffs' Constitutional rights. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Further, Plaintiffs' have alleged no conduct by Joao that constitutes a restraint of interstate commerce (Count Two) or that he engaged in employment discrimination (Count Three).

Likewise, the civil RICO claim (Count Four) should be dismissed for failure to state a cause of action.

Recently, the Supreme Court modified pleading requirements. *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007). Under the old rule, that the Supreme Court abandoned in the

Bell Atlantic case, "a complaint should not be dismissed for failure to state a claim 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." *Conley v. Gibson*, 355 U.S. 41, 45-6, (1957), 102. In the *Bell Atlantic* case, the Court stated that "[f]actual allegations [in a pleading] must be enough to raise a right to relief above the speculative level[,]" and "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl.*, 127 S.Ct. at 1965, 1969 (citations omitted). Although the Second Circuit Court of Appeals does not believe that the *Bell Atlantic* case set a heightened standard for fact pleading, the court did acknowledge that now a pleader must amplify a claim with sufficient factual allegations so as to render the claim plausible. *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007). Applying the *Bell Atlantic* pleading standard here requires a dismissal of Plaintiffs' civil RICO claim against Joao.

To prove a civil RICO claim, "a plaintiff must show that he was injured by defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999) (quoting *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 520 (2d Cir. 1994). Here, for the reasons set forth by other defendants in their motions to dismiss, the amended complaint does not properly allege the existence of a RICO enterprise. But, if the Court concludes a RICO enterprise was pleaded properly, then the amended complaint as to Joao should still be dismissed because it does not allege sufficient facts, under the *Bell Atlantic* standard, to make that claim even remotely plausible as to Joao. In particular, the amended complaint does not allege that Joao conducted the alleged enterprise through a pattern of racketeering activity.

The RICO statute defines "racketeering activity" to include certain enumerated federal and state crimes, which are the predicate acts. 18 U.S.C. § 1961(1). To plead properly a "pattern of racketeering activity," a plaintiff must allege that at least two predicate acts of "racketeering activity" were committed in a ten-year period, 18 U.S.C. § 1961(5), that the predicate acts are related to each other and constituted a threat of continuing activity, *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989), and that **each defendant** must have engaged in at least two predicate acts. *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001); *Hoatson v. New York Archdiocese*, No. 05 Civ. 10467 (PAC), 2007 WL 431098, *3 (S.D.N.Y. Feb. 8, 2007). Here, there are simply no facts pleaded that even suggest that Joao engaged in two predicate acts. At most, Bernstein discovered problems in a patent application that Joao had prepared while in Boca Raton. Bernstein then had Joao rewrite the application to his satisfaction. Thereafter, Bernstein and not Joao sent the application to the USPTO via the U.S. mail. (Fried Decl., Ex. A [Am. Compl., at 83, ¶¶ 301 and 302]). There are no other factual allegations concerning Joao in the amended complaint. True, the amended complaint accuses Joao of stealing Plaintiffs' technology for use in patent applications Joao fraudulently filed with the USPTO, but no facts are pleaded in support of that accusation.

Accordingly, the amended complaint as to Joao should be dismissed because it does not allege sufficient facts, under the *Bell Atlantic* standard, to make that claim even remotely plausible. As an alternative ground, the RICO claim also should be dismissed as barred by the four-year statute of limitations, *see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), which began to run in 2001, when the attorney-client relationship between Bernstein and Proskauer terminated.

III. EACH OF THE EIGHT STATE LAW CLAIMS AGAINST JOAO SHOULD BE DISMISSED.

If the four federal question claims are dismissed, then that order would deprive the Court of subject matter jurisdiction of Plaintiffs' remaining state law claims against Joao because the Court would not have diversity of citizenship jurisdiction over those claims, based on the fact plaintiff Lamont and defendant Joao are both citizens of New York. (Fried Decl., Ex. A [Am. Compl., at 13, ¶ 12; 22, ¶ 62]).

As an alternative ground, each of the eight state law claims as to Joao should be dismissed as barred by various statutes of limitation, all of which began to run no later than August 25, 2000. According to the amended complaint, as of that date, Plaintiffs already had terminated Joao's services as a lawyer (Fried Decl., Ex. A [Am. Compl., at 83, ¶¶ 302 and 303]), and Proskauer had acquired Plaintiffs' entire patent portfolio. (Fried Decl., Ex. A [Am. Compl., at 216, ¶ 796]). Plaintiffs initiated this action on December 12, 2007.

Count Five: Legal Malpractice and Negligence. Three-year limitation, CPLR 214(6). Expiration of limitation period: August 25, 2003.

Count Six: Breach of Contracts. Six-year limitation, CPLR 213(2). Expiration of limitation period: August 25, 2006.

Count Seven: Tortuous Interference with Advantageous Business Relationships. Three-year limitation, CPLR 214(4). Expiration of limitation period: August 25, 2003.

Count Eight: Negligent Interference with Contractual Rights. Three-year limitation, CPLR 214(4). Expiration of limitation period: August 25, 2003.

Count Nine: Fraud. Six-year limitation, CPLR 213(8). Expiration of limitation period: August 25, 2006. The fraud claim also should be dismissed because it fails to comply with Rule

9(b) of the Federal Rules of Civil Procedure. Rule 9 requires that allegations of fraud be pled with particularity. Here, the amended complaint does not identify what statements Joao made that Plaintiffs believe are fraudulent, when and where those statements were made, why Plaintiffs believe those statements are fraudulent, and there must be allegations of facts that give rise to a strong inference of fraudulent intent. *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, 136 (2d Cir. 2000), *amended by* 229 F.3d 424 (2d Cir. 2000); *S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.*, 84 F.3d 629, 634 (2d Cir. 1996).

Count Ten: Breach of Fiduciary Duties as Directors and Officers. Three-year limitation, CPLR 214(4). Expiration of limitation period: August 25, 2003.

Count Eleven: Other Civil New York, Florida, and Delaware Claims. Six-year limitation, CPLR 213(1). Expiration of limitation period: August 25, 2006.

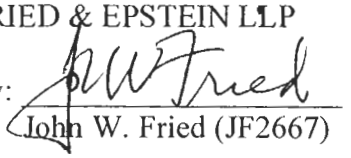
Count Twelve: Misappropriation and Conversion of Funds. Three-year limitation, CPLR 214(4). Expiration of limitation period: August 25, 2003.

CONCLUSION

Defendant Raymond A. Joao respectfully requests that Plaintiffs' amended complaint be dismissed with prejudice.

Dated: New York, New York
May 30, 2008

FRIED & EPSTEIN LLP

By: 
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Attorneys for Defendant Raymond A. Joao

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MAUREEN BIAGI, being duly sworn, deposes and says:

I am not a party to this action, and I am over 18 years of age. On May 30, 2008, I served the annexed Notice of Motion to Dismiss Amended Complaint, Declaration of John W. Fried, and Memorandum of Law of Defendant Raymond A. Joao in Support of Motion to Dismiss Plaintiffs' Amended Complaint, all dated May 30, 2008, by enclosing same in post-paid (First Class U.S. Mail) envelopes, and by placing those envelopes in an official depository of the United States Postal Service within the State of New York, properly addressed to the following attorneys of record for the parties in this matter:

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Maureen Biagi
MAUREEN BIAGI

Sworn to before me this
30th day of May, 2008.

Notary Public

MICHAEL CARMODY
Notary Public, State of New York
No. 02CA5024046
Qualified in Westchester County
Commission Expires Feb. 22, 20 10