08-4873-cv

United States Court of Appeals

for the

Second Circuit

ELIOT I. BERNSTEIN, individually, P. STEPHEN LAMONT, on behalf of SHAREHOLDERS OF IVIWEIT HOLDINGS, INC., IVIEWIT TECHNOLOGIES, INC., UVIEW.COM, INC., IVIEWIT.COM, INC., I.C., INC., IVIEWIT.COM LLC, IVIEWIT LLC, IVIEWIT CORPORATION, IVIEWIT, INC., and PATENT INTEREST HOLDERS,

Plaintiffs-Appellants,

– v. –

APPELLATE DIVISION FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, THOMAS J. CAHILL, in his official and individual capacity,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES FOLEY & LARDNER LLP, STEVEN C. BECKER, DOUGLAS A. BOEHM, WILLIAM J. DICK AND MICHAEL C. GREBE

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Defendants-Appellees.

RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, defendant Foley & Lardner LLP states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

This appeal concerns the District Court's (Scheindlin, J.) complete dismissal of *pro se* Plaintiffs P. Stephen Lamont's and Eliot I. Bernstein's (together "Plaintiffs")[1] claims against numerous defendants, including the Foley appellees – Foley & Lardner LLP ("Foley"), Steven C. Becker, Douglas A. Boehm, William J. Dick and Michael W. Grebe (together, the "Foley Defendants").[2] *See Bernstein v. State of New York, et al.*, 591 F. Supp. 2d 448 (S.D.N.Y. 2008) (Appendix at SA-415-463); *Bernstein v. State of New York, et al.*, No. 07 CIV 11196 (S.D.N.Y. Aug. 19, 2008) (SA-464-469.) As the District Court noted, Plaintiffs' Amended Complaint told a "dramatic story" of a wide-ranging conspiracy, including accusations of stolen technology, attempted murder and corruption in the attorney disciplinary process in three states. *Bernstein*, 591 F. Supp. 2d at 452 (Appendix at SA-415.) Plaintiffs swept the Foley Defendants into this

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[1] Although the Plaintiffs brought this action jointly, Bernstein has appealed separately from Lamont and has disputed Lamont's standing. (Bernstein Brf. at 8-9, 12-13.) (References to "Bernstein's Brf." and "Lamont's Brf." refer to Appellant-Plaintiff Bernstein's Brief filed with this Court on February 27, 2009 and Appellant-Plaintiff Lamont's Brief filed with this Court on November 17, 2008.) Notwithstanding this conflict, their arguments are largely the same and this brief responds to both Plaintiffs' arguments.

[2] References to the "Appendix" refer to the Supplemental Appendix for the Foley and Proskauer Defendants-Appellees being submitted herewith pursuant to the *Pro Se* Scheduling Order entered on February 19, 2009.

alleged conspiracy because they served as patent counsel to Iviewit (a corporate entity affiliated with Plaintiffs) for a short period ending in 2001.

The District Court dismissed all of Plaintiffs' federal claims against all defendants – asserted under the Fifth and Fourteenth Amendments to the United States Constitution (and 42 U.S.C. § 1983), civil RICO, the Sherman Act, the Patent Clause and Title VII of the Civil Rights Act – as untimely or for failure to state a claim. *Bernstein*, 591 F. Supp. 2d at 466-68, 469 (Appendix at SA-451-56.) The District Court, having dismissed all of Plaintiffs' federal claims, declined to exercise supplemental jurisdiction over their remaining state claims and dismissed those claims as well. *Id.* at 469-70 (Appendix at SA-458-59.)

Plaintiffs have conceded that their claims are untimely. Nevertheless, on appeal, they argue (as they did unsuccessfully below) that the District Court should not have dismissed their claims under various equitable and continuing violation tolling theories: (a) that dismissal is "premature" and the limitations period should be equitably tolled because of alleged "new evidence" that may be revealed in other pending actions and investigations; and, (b) a continuing "cover-up" conspiracy and the harm to Plaintiffs warrant tolling of the limitations period under the "continuing violations" doctrine. Furthermore, Plaintiffs argue that they have a valid

claim arising under the Patent Clause of the United States Constitution (Art. 1, Sec. 8). (Bernstein's Brf. at 21, 26-33, 38-39; Lamont's Brf. at 14-17; 21-24.)

As neither Plaintiff has asserted a valid basis for tolling the statute of limitations nor provided any support for their Patent Clause claim, this Court should affirm the District Court's dismissal. Alternatively, this Court should uphold the dismissal of Plaintiffs' claims for the additional and independent reason that the allegations in support of their claims are conclusory, lack the necessary plausibility, and fail to state any of the asserted claims. In addition, Lamont's claims should be dismissed because he lacks standing to pursue a *pro se* action on behalf of Iviewit shareholders.

COUNTER STATEMENT OF ISSUES PRESENTED

1. Whether the District Court correctly held that Plaintiffs' federal claims were untimely.

2. Whether the District Court correctly held that there is no private right of action under the Patent Clause.

3. Whether the Amended Complaint fails to state a claim under civil RICO, 42 U.S.C. § 1983, and the Sherman Act.

4. Whether Lamont has standing to pursue this action.

STATEMENT OF THE CASE

Pro se Plaintiffs, Bernstein, individually[3], and Lamont, on behalf of certain Iviewit shareholders and patent holders, commenced this action on December 12, 2007 against more than thirty-five defendants, including the Foley Defendants. On May 12, 2008, Plaintiffs filed an Amended Complaint which named approximately one hundred and fifty additional defendants and spanned hundreds of pages and over one thousand paragraphs. They asserted claims under the U.S. Constitution's Patent Clause, the Fifth and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964, the Sherman Act, the federal civil RICO statute and several state common law claims, and included a laundry list of additional federal and state statutory claims (taking up one hundred pages of the Amended Complaint) with no allegations in support of those claims.[4] The essence of

[3] The Amended Complaint indicates that Bernstein brought this action both individually and on behalf of Iviewit shareholders and patent holders. He has since abandoned the action to the extent it is on behalf of Iviewit shareholders and patent holders and is only seeking relief on his own behalf. (Bernstein Brf. at 8-9, 12-13.)

[4] The parties and the District Court have treated the Amended Complaint as the operative pleading. The Amended Complaint named over one hundred and fifty additional defendants, but the District Court, by Order dated May 9, 2008, stayed service of the Amended Complaint on any newly named defendants, and refused to allow the action to proceed as against any of them pending resolution of the motions to dismiss. Therefore, those unserved defendants are not listed in the caption and are not the subject of this appeal. (Appendix at SA-31.4.)

Plaintiffs' lengthy but conclusory allegations is that multiple law firms, major corporations, the attorney disciplinary bodies of three states, two New York appellate courts, and numerous others engaged in a massive conspiracy to steal certain video technology inventions and then conspired to mask this theft by violating Plaintiffs' civil rights and preventing them from obtaining recourse in the courts.

The Foley Defendants moved to dismiss all of Plaintiffs' federal and state claims because they were time-barred and failed to state a claim. The District Court, in a 45-page Opinion and Order, dated August 8, 2008, dismissed all of Plaintiffs' claims against all defendants, finding that the federal claims were all time-barred and that certain of their claims patently failed to state a claim. Specifically, the District Court, finding that Plaintiffs had "not raised a valid ground for the tolling of any statute of limitations or the application of equitable estoppel," dismissed all claims arising under civil RICO, Section 1983 and the Sherman Act as untimely. *Bernstein*, 591 F. Supp. 2d at 466-68 (Appendix at SA-452-54.) In addition, the District Court dismissed Plaintiffs' Title VII and Patent Clause claims for failure to state a claim. *Id.* at 468 (Appendix at SA-454.) The District Court observed that "by no stretch of the imagination can the Complaint be considered 'short and plain'" and that it would have "stricke[n] the

Complaint for violating Rule 8(a)" had it not otherwise dismissed all the claims. *Id.* at 469 (Appendix at SA-457.) Finally, the Court declined to exercise supplemental jurisdiction over the state law claims and dismissed them as well. *Id.* at 469-70 (Appendix at SA-458-59.) Since the District Court dismissed certain federal claims as time-barred, and declined to exercise jurisdiction over the state claims, the Court did not need to reach the Foley Defendants' alternative argument that Plaintiffs' allegations failed to state a claim.

On August 18, 2008, Plaintiffs, raising arguments virtually identical to those raised on this appeal, moved the District Court for reconsideration of its August 8, 2008 Opinion and Order. By Order dated August 19, 2008, the District Court rejected Plaintiffs' arguments and denied reconsideration. *Bernstein v. State of New York, et al.*, No. 07 CIV 11196 (S.D.N.Y. Aug. 19, 2008) (Appendix at SA-464-467.) This appeal of the District Court's original dismissal followed.

STATEMENT OF FACTS

A. The Parties

Plaintiff Bernstein alleges he is the "[f]ounder and principal inventor of the technology of the Iviewit Companies." (Appendix at SA-44,

¶ 11.)[5] Plaintiff Lamont is alleged to be "the former Chief Executive Officer (Acting) of the Iviewit Companies." (Appendix at SA-44-45, ¶¶ 13-24.)

The Foley Defendants are: Foley and Lardner LLP, a national law firm based in Milwaukee; William J. Dick, formerly of counsel to Foley; Douglas A. Boehm, a former partner; Steven C. Becker, a current partner at the firm; and Michael W. Grebe, former managing partner of Foley (against whom the Amended Complaint is devoid of any allegations of wrongdoing). (Appendix at SA-53, ¶¶ 66, 65; SA-55, ¶¶ 72-73.)[6]

B. The Inventions

According to the Amended Complaint, some time in 1997, Iviewit's founder, Plaintiff Bernstein and other non-parties allegedly invented certain video technologies which permit transmission of video

[5] For purposes of this motion only, the Foley Defendants treat the facts as alleged in the Amended Complaint as true but do not admit to their truth.

[6] The District Court *sua sponte* dismissed all claims against certain of the newly named defendants listed in an Appendix to its Order. *Bernstein*, 591 F. Supp. 2d at 464-65 (Appendix SA- 446-47.) Although Bernstein argues that discovery will uncover these defendants' wrongdoing (Bernstein Brf. at 26), Plaintiffs cannot continue with the hope of being able to assert allegations of wrongdoing against hundreds of parties. (*See infra* at 18-19.) Notwithstanding that the newly named defendants are not the subject of this appeal, this Court should affirm the dismissal of all claims against all current and former Foley employees, named only in the Amended Complaint but not served, for the same reasons the District Court did so below.

signals using significantly less bandwidth than other technologies, among other valuable attributes. (Appendix at SA-101, ¶¶ 240-44.)

On or about 1998, Bernstein and the Iviewit Companies retained the Proskauer Rose law firm, Kenneth Rubenstein, and Raymond Joao to review and procure intellectual property for their inventions. (Appendix at SA-105-06, ¶¶ 252, 254-55.) Plaintiffs allege that Proskauer along with Rubenstein (as "gatekeeper" for the MPEGLA LLC patent pool) and Joao were part of a scheme to steal the inventions and that as part of this scheme, Joao filed fraudulent patent applications with the U.S. Patent and Trademark Office. (Appendix at SA-108, ¶ 270.) To mask the theft, Proskauer allegedly created numerous illegitimate companies with names similar to that of Iviewit in various jurisdictions. (Appendix at SA-109, ¶ 273.)

C. <u>Foley's Role as IP Counsel</u>

Plaintiffs allege that after Joao began work on the patents, Bernstein discovered that Joao had made changes to the patent applications after they were signed and then filed fraudulent applications. Bernstein forced Joao to fix the applications and then terminated Iviewit's relationship with him. (Appendix at SA-114-15, ¶¶ 299-306.) After Joao was terminated, Plaintiffs allege "Foley was retained" to "investigate and correct

what appeared at the time to be deficient work by Joao, later learned to be almost wholly fraudulent work," and "to file to protect the IP worldwide." (Appendix at SA-115, ¶¶ 307-09.) Boehm, Becker and Dick also worked on the matter, with Dick having been retained on Proskauer's recommendation. (Appendix at SA-115, ¶ 307.) Rubenstein allegedly retained oversight and direction over the Iviewit Companies' patents, copyrights, trademarks and trade secrets. (Appendix at SA-115, ¶ 310.)

Foley allegedly found "a multitude of problems" in the IP filings prepared by Joao but allegedly "conspired with Proskauer and others to continue the IP crimes" by filing fraudulent patent applications. (Appendix at SA-116, ¶ 313.) But, even before Foley's alleged fraudulent filing, Bernstein admits he began to discover the full extent of the alleged scheme. (Appendix at SA-119-20, ¶ 325-26; ¶¶ 330-33.) After Bernstein confronted Foley and Proskauer, they supposedly committed to correct the problem, but nevertheless, allegedly went ahead and filed the "fraudulent" applications. (Appendix at SA-119-20, ¶ 331, 335.) In 2001, as a result of Bernstein's discovery of these alleged wrongdoings, the Iviewit Companies terminated their relationship with Proskauer and Foley and Foley's replacement counsel allegedly began the "unearthing of a mass of crimes." (Appendix at SA-105, ¶ 252; SA-122, ¶¶ 345-346; SA-141, ¶ 454, SA-217, ¶

742 A, SA-403, ¶541.) Therefore, the involvement, if any, of any of the Foley individuals in this matter terminated in 2001.

D. Alleged Cover-Up Scheme

Plaintiffs' allegations of events following Foley's dismissal are conclusory and barely involve or mention the Foley Defendants. (Appendix at SA-119-20, ¶¶ 325-336; SA-120-332, ¶¶ 337-1131.) Plaintiffs allege a vast "cover-up" conspiracy involving the Proskauer law firm, the judges of the First and Second Departments of the New York state courts, and the state bars of Florida and Virginia, and include no allegations of specific acts by the Foley Defendants, other than as the subject of a bar complaint that was dismissed, and a vague allegation that Plaintiffs' state court action in Florida was "fixed." (Appendix at SA-135, ¶ 423; SA-188, ¶¶ 695-698.) Plaintiffs allege they asserted a complaint against Dick in October 2003 for "his part in theft of the IP" and alleged professional misconduct. (Appendix at SA-188, ¶¶ 695-698.) The Virginia Bar, upon review of the record before it, decided to take "no further action with regard to [Plaintiffs'] complaint" against Mr. Dick because it found that Plaintiffs' allegations "are not true" and that "the evidence available shows [Dick] did not engage in the misconduct questioned or alleged." (Appendix at SA-355-57.) Plaintiffs allege that this finding makes the Virginia State Bar part of the "cover-up"

conspiracy. (Appendix at SA-151, ¶ 518; SA-187-89, ¶¶ 692-701; SA-190, ¶¶ 706-707.)

SUMMARY OF ARGUMENT

The Foley Defendants present four separate arguments as to why the District Court was correct to dismiss Plaintiffs' case in its entirety and should be affirmed.

First, Plaintiffs, both in the Amended Complaint and in their briefs submitted to the District Court, have conceded that their claims are untimely. The District Court properly rejected their arguments, repeated on appeal, that potential discovery of additional evidence through "related cases," a continuing conspiracy, and their unsuccessful efforts at having their claims heard in other forums constitute "manifest injustice" and serve as grounds for tolling of the applicable statutes of limitations. As to the Foley Defendants, the Plaintiffs concede their actions were known to the Plaintiffs in 2001, and none of the "discovery" in related cases or otherwise that Plaintiffs seek relates in any way to the Foley Defendants. Plaintiffs identify no facts that suggest they were unable to obtain information regarding their claims or that it was "impossible" for Plaintiffs to determine the facts regarding their course of action.

Second, Plaintiffs' claim that their rights as inventors were violated under the Patent Clause ignores that there is no private right of action under that clause and the District Court's dismissal of that claim should be affirmed.

Third, as argued before the District Court, Plaintiffs' rambling and incoherent Amended Complaint, is both in blatant violation of Rule 8, and fails to state a claim against the Foley Defendants under civil RICO, the Sherman Act, or 42 U.S.C. § 1983. This is an additional and independent reason, not relied upon by the District Court, upon which this Court should uphold the dismissal of Plaintiffs' claims.

Finally, as a *pro se* plaintiff, Lamont is barred from bringing a shareholder's derivative suit and thus has no standing to bring this action and thus all claims asserted by him should be dismissed.[7]

[7] Neither Plaintiff challenges the District Court's decision dismissing their Title VII claim for failure to state a claim; therefore this claim is not appealed. Plaintiffs also do not challenge the District Court's dismissal of their state claims – which are untimely and without merit as the Foley Defendants argued in the District Court – for lack of jurisdiction and thus these claims are also not the subject of this appeal. Moreover, Plaintiffs seek review of two issues – the *Rooker-Feldman* doctrine and immunity of certain state defendants – that do not concern the Foley Defendants and are therefore not addressed herein. Lastly, Plaintiff Bernstein makes several arguments which merit no more than a cursory response. First, he makes the absurd argument that his allegation of attempted murder is not subject to a limitations period and therefore warrants reversal of the lower court's dismissal. (Bernstein's Brf. at 23-26.) Attempted murder is not a civil

STANDARD OF REVIEW

The dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) by a district court is reviewed *de novo* by the appellate court. *ATSI Comm'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)) (footnote omitted). "[F]ormulaic recitation of the elements of a cause of action" will not suffice; a plaintiff must provide more than "labels and conclusions" and "enough facts to state a claim to relief that is plausible on its face." *Twombly,* 127 S. Ct. at 1964-65, 1974; *see also Bernstein*, 591 F. Supp. at 458 (Appendix at SA-431) ("to survive a Rule 12(b)(6) motion to dismiss, the allegations in the complaint must meet the standard of 'plausibility.'")

Moreover, "[a]n appellate court is free to affirm a district court

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claim, is not an independent cause of action in Plaintiffs' Amended Complaint, is irrelevant to the allegations against the Foley Defendants, and does not impact the applicable statutes of limitations governing Plaintiffs' dismissed claims. Second, Bernstein accuses District Court Judge Scheindlin of potential bias and claims her dismissal of his claim violates his First Amendment right to seek redress. (Bernstein's Brf. at 39-41.) Bernstein's accusations warrant no response other than illustrating that Bernstein has fully exercised his First Amendment right in bringing this action.

decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004) (internal quotation marks and citation omitted); *see also Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 885 (2d Cir. 1987).

ARGUMENT

I.

THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THERE IS NO BASIS FOR TOLLING OF PLAINTIFFS' UNTIMELY CLAIMS

Plaintiffs have explicitly conceded that their claims are time-barred, having acknowledged – both in their Amended Complaint and their briefs submitted to the District Court – that they discovered the facts supporting the Foley Defendants' alleged wrongdoing in 2001 and that they have known about their claims for "almost ten years." (Appendix at SA-105, ¶ 252; SA-122, ¶¶ 345-346; SA-141, ¶ 454, SA-217, ¶ 742 A, SA-403, ¶541.) This discovery was over six years before they filed this action on December 12, 2007, and well outside of the limitations periods under civil RICO (four years), the Sherman Act (four years), and 42 U.S.C. § 1983 (three years). *See*, *e.g., Bernstein*, 591 F. Supp. 2d at 460-61 (Appendix at SA-435, SA-437-38.)

Nevertheless, Plaintiffs, repeating the same arguments they made before the District Court, argue that the limitations periods (which bar all of their claims) should be ignored because (1) the outcome of *Anderson v. State of New York, et al.*, 07 Civ. 9599 (S.D.N.Y. 2007) ("*Anderson*") and other "related" cases (which Plaintiffs claim relate to alleged corruption in the New York attorney disciplinary process) and access to discovery in those cases *might* strengthen their claims[8] (Bernstein's Brf. at 30-33, 38-39; Lamont's Brf. at 14-17; 22-24); (2) the conclusory allegation of a "continuing" conspiracy and due process violations merit tolling of the limitations period (Bernstein's Brf. at 26, 38-39; Lamont's Brf. at 23-24); and, (3) dismissal of the action would further "cover-up" defendants' scheme and therefore result in "manifest injustice." (Lamont's Brf. at 21-22.)

Plaintiffs' arguments are the same as those below which the District Court properly rejected both in its original Opinion and Order and in

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[8] Plaintiff Bernstein argues dismissal was premature because Plaintiffs have not been able to conduct jurisdictional discovery as in *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974) (holding district court dismissal of Section 1983 claim as premature absent jurisdictional discovery on issue of Eleventh Amendment immunity.) (Bernstein's Brf. at 18-23.) *Scheuer* is inapplicable to the Foley Defendants not only because it involved jurisdictional discovery (unrelated to the Foley Defendants), but also relied on the *Conley v. Gibson* standard which has since been replaced by the *Twombly* "plausibility" standard. *Twombly,* 127 S. Ct. at 1964-65.

the Order rejecting the motion for reconsideration. *Bernstein*, 591 F. Supp. 2d at 466-67 (Appendix at SA-451-52); *Bernstein v. State of New York, et al.*, No. 07 CIV 11196 (S.D.N.Y. Aug. 19, 2008) (Appendix at SA-465-66.) The District Court held that "statutes of limitations themselves serve the public interest" and that "plaintiffs [had] not raised a valid ground for the tolling of any statute of limitations." *Bernstein*, 591 F. Supp. 2d at 466-67 (Appendix at SA-451-52.) Accordingly, the District Court applied the applicable statutes of limitations without modification and dismissed Plaintiffs' federal constitutional claims (treated by the Court as claims under Section 1983), Sherman Act and RICO claims as untimely. *Bernstein*, 591 F. Supp. 2d at 467-68 (Appendix at SA-452-54.) Plaintiffs' arguments fare no better on appeal and should be rejected.

A statute of limitations may be equitably tolled where plaintiff, despite due diligence, is unable to obtain information bearing on the existence of a claim or the defendant fraudulently concealed the facts giving rise to plaintiffs' claims. *See, e.g.*, *Pearl v. The City of Long Beach*, *et al.*, 296 F.3d 76, 82-85 (2d Cir. 2002). The Second Circuit has also applied the doctrine "as a matter of fairness where a plaintiff has been prevented in some extraordinary way from exercising his rights," but has done so only in a "situation where a plaintiff could show that it would have been *impossible*

for a reasonably prudent person to learn about his or her cause of action." *Id.* at 85 (emphasis in original) (internal quotations and citations omitted). The continuing violation theory for tolling requires "continuing unlawful acts, not . . .continued ill effects from an original violation." *Halpern v. Bristol Bd. of Educ.*, 52 F. Supp. 2d 324, 332 (D. Conn. 1999), *aff'd,* 2000 U.S. App. LEXIS 4316 (2d Cir. Mar. 17, 2000) (summary order); *see also World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc.*, 530 F. Supp. 2d 486, 527 (S.D.N.Y. 2007) (citations omitted).

Here, as the District Court found, Plaintiffs have raised no valid ground for tolling. Indeed, Plaintiffs' allegations and arguments reveal that they have known of the facts underlying their claims for many years. (Appendix at SA-141, ¶ 454; SA-217, ¶ 742 A; SA-403, ¶ 541.) The "related" actions cited by Plaintiffs, including *Anderson*, are irrelevant to the claims and allegations against the Foley Defendants, and provide no basis to toll the statutes of limitations or permit this action to go forward with discovery. Neither Plaintiffs' briefs nor their Amended Complaint identify any relationship between the claims in *Anderson, McKeown v. State, et. al*, 08 Civ. 2391 (S.D.N.Y. 2007), or *Esposito v. State*, 07 Civ. 11612 (S.D.N.Y. 2007) – which appear to allege corruption in the New York State attorney disciplinary process – and any allegations against the Foley Defendants.

Nor does Plaintiff Bernstein provide any connection between the Foley Defendants and the blog post he cites that links "a high flying corporate espionage scheme" to the alleged "NY Bar Scandal." (Bernstein Brf. at 28-29). Neither the discovery in these cases, nor the musings of the blogosphere, are relevant to the allegations asserted against the Foley Defendants.

Notwithstanding the irrelevance of the "related" cases to the allegations against the Foley Defendants, Plaintiffs argue they should be entitled to discovery to strengthen their claims. Yet, "[d]iscovery is authorized for parties to develop the facts in a lawsuit in which a plaintiff has stated a legally cognizable claim, not in order to permit a plaintiff to find out whether he has such a claim." *Propst v. Ass'n of Flight Attendants*, 546 F. Supp. 2d 14, 33 (S.D.N.Y. 2008) (internal quotations and citations omitted). Here, Plaintiffs are trying to do just what *Probst* and the Federal Rules prohibit. Indeed, as the District Court aptly noted, additional discovery is irrelevant at this stage, because "[f]or purposes of a motion to dismiss, evidence is irrelevant because all allegations are accepted as true." *Bernstein v. State of New York, et al.*, No. 07 CIV 11196 (S.D.N.Y. Aug. 19, 2008) (Appendix at SA-465.) The Federal Rules of Civil Procedure are designed to allow defendants to weed out unmeritorious claims early in the

litigation to promote efficiency and fairness and avoid the unnecessary costs that discovery and trial impose on the judicial system and parties having to defend against frivolous actions. The District Court, as required, accepted Plaintiffs' lengthy and outrageous allegations as true, and dismissed their claims because they were either untimely or their allegations failed to state a claim. The Court specifically observed that "Plaintiffs' claims fail not because they have given insufficient detail as to the alleged conduct, but rather because much of the alleged conduct does not constitute a violation of any statute and because the remaining claims are barred by statutes of limitations or immunity." *Bernstein*, 591 F. Supp. 2d at 469 (Appendix at SA-457.) Allowing discovery, or material from other cases, will only serve to prolong Plaintiffs' baseless crusade against the Foley Defendants.[9]

Plaintiffs' "continuing conspiracy" and "manifest injustice" arguments are similarly without merit. Beyond their conclusory allegation that the Foley Defendants filed supposedly false patent applications in 2001, Plaintiffs have not specifically alleged any continuing misconduct by the

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[9] *Ciralsky v. Cent. Intelligence Agency*, 355 F.3d 661, 671 (D.C. Cir. 2004), cited by Lamont as support for his argument that availability of "new evidence" justifies reversal of the District Court's dismissal is inapposite. Not only is the unidentified "new evidence" cited by Plaintiffs irrelevant to the Foley Defendants, but the "new evidence" standard governs review of a district court's denial of a Rule 59(e) motion, not review of a dismissal pursuant to a Rule 12(b)(6).

Foley Defendants and cannot rely on supposed "ill effects" stemming from Foley's alleged misconduct in 2001. *See Halpern*, 52 F. Supp. 2d at 332; *see also World Wrestling Entertainment, Inc.*, 530 F. Supp. 2d at 527 (S.D.N.Y. 2007) (noting that "courts have refused to extend the life span of a RICO plaintiff's injuries when they merely involve subsequent costs associated with the initial injury.") Plaintiffs allege no facts to support a claim that the Foley Defendants agreed to engage in, or were involved in, any conspiracy, much less any conspiracy continuing after Foley's relationship ended with Iviewit in 2001.

Plaintiffs' claims of continuing due process violations and "cover-up" are similarly unavailing, both because they provide no basis for claims against the Foley Defendants, and because they identify no due process violations. Plaintiffs' lack of success in other forums is more a reflection of their meritless claims rather than support of a "cover-up" or "manifest injustice"; indeed, their repeated prior actions, reinforce their prior knowledge of their claims and negate their arguments for equitable tolling. To the extent Plaintiffs' arguments rest on the alleged handling of prior legal or quasi-legal attorney disciplinary proceedings, they have not alleged any legally cognizable wrongdoing by the Foley Defendants in connection with any of those proceedings. *See Pearl,* 296 F.3d at 84-87 (holding that

"accrual of a cause of action based on specific acts of which a plaintiff was aware cannot be postponed, nor can a limitations period be tolled, simply by alleging that the acts were taken pursuant to a conspiracy."); *see also Bernstein*, 591 F. Supp. 2d at 469 (holding Plaintiffs have no legally protected interest in the outcome or handling of attorney disciplinary proceedings since they are non-parties to such proceedings.) (Appendix at SA-457.)

In short, allowing Plaintiffs' deficient and untimely claims to proceed would give credence to their allegations and serve a manifest injustice upon the Foley Defendants, not Plaintiffs. As the District Court recognized, "strict adherence to limitation periods is the best guarantee of evenhanded administration of the law." *Bernstein*, 591 F. Supp. 2d at 466-67 (internal quotations and citations omitted) (Appendix at SA-451); *see also Carey v. International Bhd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 47 (2d Cir. 1999) (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).) Accordingly, there is no basis for tolling and the District Court's decision should be affirmed.

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE AMENDED COMPLAINT FAILS TO STATE A CLAIM ARISING UNDER THE PATENT CLAUSE

Plaintiffs further argue that their first cause of action asserting a violation of their rights as inventors under the Patent Clause should not have been dismissed, and that the District Court's finding that there is no right of action under the Patent Clause was in error. Plaintiffs are incorrect. Article I, Section 8 of the Constitution provides that "Congress shall have the power . . .[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . ." As the District Court aptly noted, "on its face, the Copyright and Patent Clause . . . does not suggest any private right of action against any state or non-state actor," and only relates to the Congressional power to regulate patents. *Bernstein*, 591 F. Supp. 2d at 468 (Appendix at SA-455); *see also Carter v. ALK Holdings, Inc.*, 510 F. Supp. 2d 1299, 1302 (N.D. Ga. 2007) (no private right of action under Patent Clause). Neither Plaintiff cites any authority for the argument that such a right exists (Lamont's Brf. at 21; Bernstein's Brf. at 21.) Accordingly, the District Court's holding should be affirmed.

III.

ALTERNATIVELY, PLAINTIFFS' CLAIMS FAIL FOR THE ADDITIONAL REASON THAT THEY HAVE NOT ALLEGED THE NECESSARY ELEMENTS OF THEIR FEDERAL CLAIMS

While the District Court dismissed Plaintiffs' civil RICO, Section 1983 and Sherman Act claims on statute of limitations grounds, this Court may uphold the dismissal on grounds not relied upon by the District Court, namely that Plaintiffs have failed to state a claim, much less satisfy the basic pleading standards under Rule 8(a). *Alfaro Motors, Inc.*, 814 F.2d at 885, 886-87 (affirming district court decision on grounds not relied upon by district court but for which there was a sufficient record to permit conclusions of law).

Plaintiffs' Amended Complaint, spanning over one thousand paragraphs, not only fails to meet the basic pleading standard of Rule 8(a), but – despite its length – fails to state a claim.[10] As argued more fully before

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[10] Plaintiffs' "litany of vague and conclusory allegations whose relevance to the asserted claims is uncertain" fails to comply with Rule 8(a). *Jones v. Nat'l Commc'n & Surveillance Networks*, 409 F. Supp. 2d 456, 464-65 (S.D.N.Y. 2006), *aff'd* 2008 U.S. App. LEXIS 3669 (2d Cir., Feb. 21, 2008) (summary order) (a "complaint should be dismissed if it is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.") (internal citations and quotations omitted); Fed. R. Civ. P. 8(a). Indeed, the District Court held that had it not dismissed Plaintiffs' claims for lack of timeliness and other deficiencies, it would have stricken the Amended Complaint for violation of Rule 8(a). *Bernstein*, 591 F. Supp. 2d at 469 (Appendix SA-456-57.) Moreover, the

the District Court, Plaintiffs' generic and conclusory allegations against the Foley Defendants are insufficient to state any of their federal claims. In particular, Plaintiffs have not alleged specific facts to support any predicate acts, a pattern of racketeering, or enterprise as required of a claim under civil RICO, nor have they alleged an agreement to restrain trade, defined the relevant market, or alleged an injury to competition as required of a claim under the Sherman Act. *See, e.g., Rosner v. Bank of China*, 528 F. Supp. 2d 419, 42 (S.D.N.Y. 2007) (dismissing civil RICO claim for failure to allege specific predicate acts, a pattern of racketeering, or enterprise); *United Magazine Co. v. Murdoch Magazines, Inc.*, 146 F. Supp. 2d 385, 398-99 (S.D.N.Y. 2001) (dismissing antitrust claim for failure to allege basic elements of market definition), *aff'd*, 2008 U.S. App. LEXIS 6268 (2d Cir. Mar. 25, 2008); *Twombly,* 127 S. Ct. at 1965, 1974 (dismissing Sherman Act claim for lack of "enough factual matter (taken as true) to show an agreement was made."). Plaintiffs' conclusory allegations are precisely the

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District Court also denied leave to replead because "Plaintiffs have burdened this Court and hundreds of defendants. . . with more than one thousand paragraphs of allegations, but have not been able to state a legally cognizable federal claim against a single defendant," and have no hope of overcoming the deficiencies. *Id.* at 470 (Appendix SA-459.)

kind of "formulaic recitations" rejected by *Twombly*. *Twombly,* 127 S. Ct. at 1964-65, 1974.

Likewise, with respect to their constitutional due process claims, construed by the District Court to be under 42 U.S.C. § 1983, Plaintiffs have entirely failed to allege any facts showing that the Foley Defendants, non-state actors, deprived them of a protected constitutional right while acting under color of state law as required for a Section 1983 claim. *See, e.g., Greene v. Berger & Montague, P.C.*, 96 Civ. 9339 (SHS), 1998 U.S. Dist. LEXIS 2460, *7-8 (S.D.N.Y. Mar. 15, 1998). Indeed, the District Court's Opinion, although dismissing these claims for lack of timeliness, can also be read to have dismissed these claims on the merits as against all non-state actor defendants, including the Foley Defendants. *See Bernstein*, 591 F. Supp. 2d at 459, n. 96 ("Neither a section 1983 nor a direct constitutional action is available against [non-state actor defendants] because the conduct of non-state actors is not governed by those amendments.") (Appendix at SA-434.)

Accordingly, Plaintiffs' failure to state a claim constitutes an independent and alternative basis under which this Court should affirm the District Court's dismissal of their federal claims.[11]

IV.

DISMISSAL OF LAMONT'S CLAIMS SHOULD BE UPHELD FOR THE SEPARATE REASON THAT HE LACKS STANDING TO BRING THIS ACTION

Lamont has brought this *pro se* action on behalf of shareholders of various Iviewit entities and certain patent holders. *Pro se* plaintiffs, however, may not represent a corporation nor appear *pro se* to pursue a shareholder's derivative suit. *Pridgen v. Andresen*, 113 F.3d 391, 393 (2d. Cir. 1997). Indeed, Lamont's co-plaintiff, Bernstein, has acknowledged that Lamont has no standing to sue on behalf of Iviewit shareholders and has not only sought to separate his appeal from that of Lamont's but has also accused Lamont of wrongdoing. (Bernstein's Brf. at 8-9, 12-13.) Accordingly, Lamont's lack of standing serves as an additional alternative basis for this Court to uphold the dismissal of his claims.

[11] As fully briefed below, Plaintiffs' state law claims were equally untimely, deficient and failed to state a claim, and should also be dismissed on those grounds, were there to be federal jurisdiction.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Dated: New York, New York
March 30, 2009

Respectfully submitted,

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I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 30, 2009

deponent served the within**: Brief for Defendants-Appellees Foley & Lardner LLP, Steven C. Becker, Douglas A. Boehm, William J. Dick and Michael C. Grebe**

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Sworn to before me on March 30, 2009

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