Gregg M. Mashberg (GM 4022)
Joanna Smith (JS 9187)
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036-8299
Tel. (212) 969-3000
Fax (212) 969-2900

*Attorneys Pro Se and attorneys for*
*Kenneth Rubenstein, Steven C. Krane,*
*and the Estate of Stephen Rackow Kaye*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| ELIOT I. BERNSTEIN, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>APPELLATE DIVISION FIRST DEPARTMENT DISCIPLINARY COMMITTEE, et al.,<br><br>Defendants. | : | 07 Civ. 11196 (SAS)<br>[rel. 07 Civ. 9599] |

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE PROSKAUER DEFENDANTS' MOTION TO DISMISS**

July 28, 2008

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## ARGUMENT

### POINT I
### ALL OF PLAINTIFFS' CLAIMS ARE TIME-BARRED

In moving to dismiss the prolix amended complaint ("AC") (and original complaint), the Proskauer Defendants established that each of Plaintiffs' Antitrust, RICO, tort and contract claims is barred by the applicable statutes of limitations. *See* Proskauer Defendants' Memorandum of Law ("Mov. Mem.") at 6-13. (Capitalized terms are defined in the Mov. Mem.) In their separate oppositions ("Lamont Mem." and "Bernstein Mem."), Plaintiffs do not dispute that the alleged actions underlying their claims occurred outside the relevant statute of limitations periods. In fact, Bernstein admits that Plaintiffs' claims arose and he was aware of them as early as 2001. *See* Bernstein Mem. ¶541 ("The Iviewit Companies and Plaintiff Bernstein have been trying to assert their civil rights and have the criminal matters investigated, dating back to the initial discovery of the crimes, in 2001."); *see also id.* ¶220. Plaintiffs' concession is fatal to this action.[1]

Plaintiffs nonetheless seek to escape dismissal by arguing that "newly discovered" evidence and public interest exceptions should rescue their belated claims. Lamont Mem. ¶¶7-12; Bernstein Mem. ¶216. These arguments are unavailing.

Plaintiffs primarily rely on the filing of the complaint in *Anderson v. the State of New York, et al.*, 07 CV 9599 (S.D.N.Y. 2007), on or about October 26, 2007, which allegedly "restarted" the limitations clock on all of their causes of action. Bernstein Mem. ¶222; *see also* Lamont Mem. ¶14. In seeking to invoke New York's two year "discovery rule" (Lamont Mem. ¶¶17-18), Plaintiffs seize upon an amorphous reference in the initial complaint in *Anderson* that

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[1] Plaintiffs concede (Bernstein Mem. ¶363) the identity of the claims asserted in this action and the claims asserted in the Counterclaims (*see* Mov. Mem. at 4-5).

alleged ("on information and belief") that the timing of Anderson's dismissal was connected to the naming of Thomas J. Cahill in a lawsuit filed by Plaintiffs arising out of disciplinary complaints Plaintiffs brought against the Proskauer Defendants, among others. Lamont Mem. ¶15; *see also id.* at ¶12; Bernstein Mem. ¶216. This vague allegation does not "restart" any applicable limitations period.

In the first instance, the two-year discovery rule relied on by Plaintiffs only applies to claims for common law fraud and cannot revive Plaintiffs' other claims for relief. *See* N.Y. C.P.L.R. §213(8); *BRS Assocs. L.P. v. Dansker*, 246 B.R. 755, 772 (S.D.N.Y. 2000) (Batts, J.) (cited by Plaintiffs but omitting the court's reference to "common law fraud"). Plaintiffs have thus essentially conceded that the antitrust, RICO, malpractice and other asserted tort and contract claims are time-barred. *See* Mov. Mem. at 6-13.

As for fraud, the two-year discovery rule cannot save Plaintiffs' claim. Although Plaintiffs claim to have only "discovered" the alleged whitewashing of complaints at the 1st DDC upon the filing of *Anderson* (Lamont Mem. ¶14), they relied on precisely the same claims in litigating against the Florida disciplinary authorities well more than three years prior to filing this action. For example, in November 2004, they filed a pleading with the Supreme Court of the State of Florida (of which this Court may take judicial notice), alleging the same whitewashing claims they now claim to have "newly discovered" because of *Anderson*:

> That these abuses of the New York Supreme Court with planted and conflicted Proskauer partners at state bar agencies is similar to what has happened at [the Florida] Bar, all in an effort to quash the complaints against Wheeler, Rubenstein, Joao and Krane through the abuse of Supreme Court public office positions.
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> * * *
>
> Where [] Kaye's and Krane's conflicts give the appearance of impropriety and further evidence how due process has again been skirted through manipulation of the legal system, preventing constitutionally protected fair and impartial due process and precluding inventors from their constitutionally protected rights. Further, the New York Supreme Court through its subdivision disciplinary

agencies appears to have aided and abetted Proskauer, to further perpetuate the crimes through covering-up.

*See* Exhibit A to the accompanying July 28, 2008 Supplemental Declaration of Joanna Smith, ¶¶16-17; *compare* Bernstein Mem. ¶116. This pleading (among others) conclusively documents that Plaintiffs were aware of the same "newly discovered" whitewashing facts they now claim to have learned through *Anderson* more than three years before this suit was commenced. *See also* Bernstein Mem. ¶63. Accordingly, even if a two-year discovery rule applied, Plaintiffs' claims would nonetheless be time-barred. *Compare TEG N.Y. LLC v. Ardenwood Estates, Inc.*, 2004 WL 626802 (E.D.N.Y. Mar. 30, 2004) (Trager, J.).

Even aside from when Plaintiffs claim to have learned of the alleged whitewashing, the vague allegation in *Anderson* simply has no effect on Plaintiffs' expired fraud claim because the alleged whitewashing sheds no light on and discloses no facts regarding the alleged filing of "false" patent applications and the so-called "fraudulent" billing and bankruptcy cases that took place years earlier and underlie Plaintiffs' fraud claims. *See* AC ¶¶274-75, 369; Lamont Mem. ¶65.[2]

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[2] To the extent Plaintiffs rely on *Anderson* as evidence of a "continuing pattern" to bring their RICO claim within the limitations period (*see* Bernstein Mem.¶¶221-22, 251), that argument fails. The four-year RICO statute of limitations accrues with "discovery of the injury, not discovery of the underlying pattern of predicate acts. . . ." *Nat'l Group for Commc'ns & Computers Ltd. v. Lucent Techs. Inc.*, 420 F. Supp. 2d 253, 264 (S.D.N.Y. 2006) (Buchwald, J.). Plaintiffs were aware of the alleged injury underlying their RICO claim – "to deprive Plaintiffs of rights to their inventions" (Bernstein Mem. ¶¶221, 276) – more than four years prior to commencing this action, rendering their RICO claim time-barred. *See* Mov. Mem. at 8, AC ¶740; Bernstein Mem. ¶541. The fact that Plaintiffs allegedly continue to be deprived of the IP and associated revenue does not affect the statute of limitations analysis because that alleged injury is "derivative of the core injury sustained;" *i.e.*, the alleged misappropriation of the IP. *See World Wrestling Entm't, Inc. v. Jakks Pacific, Inc.*, 530 F. Supp. 2d 486, 524 (S.D.N.Y. 2007) (Karas, J.) (finding continuous payment of under-market royalties based on "corruptly-granted" licenses granted more than four years prior to the filing of the complaint were not "new and independent" injuries). As for the alleged "whitewashing" itself, no predicate act has been properly pled (*infra* at 6) and, the alleged denial of due process is not a cognizable injury (*infra* Point III). Thus a RICO cause of action cannot accrue from it. *See Lucent* at 264.

Lastly, contrary to Plaintiffs' assertions (Lamont Mem. ¶¶7-10), there is no public interest doctrine that would exempt Plaintiffs from the running of the statutes of limitations. Nor do Plaintiffs' arguments that they were somehow denied "due process" as reflected by *Anderson* enable them to escape from the statutes of limitations. *See, e.g.* Bernstein Mem. ¶¶216-17, 219, 222, 230, 244. Aside from the fact that, as demonstrated above, Plaintiffs discovered nothing from *Anderson* (*e.g.*, Smith Decl., Ex. A; Bernstein Mem. ¶63), there is nothing in the AC or Plaintiffs' answering papers to suggest that the Proskauer Defendants interfered with Plaintiffs' due process rights such that they should be excused from having commenced this action within any of the applicable limitations periods. Plaintiffs (who are certainly not shy about litigating (*see, e.g.*, Mov. Mem. at 4-5)) admittedly had knowledge for many years of the claims they now belatedly assert, and actually admit that "it simply was not considered the right time to file yet" (Bernstein Mem. ¶214). They have not even remotely demonstrated any justification for failing to commence this action for more than six years after the alleged claims arose. *See generally Jacobs v. Mostow*, 271 Fed. Appx. 85, 88 (2d Cir. 2008) (unpublished opinion) (no equitable tolling where plaintiff "has not shown that 'it would have been impossible for a reasonably prudent person to learn about his or her cause of action'"), *quoting*, *Pearl v. City of Long Beach*, 296 F.3d 76, 85 (2d Cir. 2002), cert. denied, 538 U.S. 922 (2003); *see also Abbas v. Dixon,* 480 F.3d 636, 642 (2d Cir. 2007) (no tolling where plaintiff failed to meet burden to show that defendants wrongfully induced or prevented him from commencing suit (citing New York law)).

## POINT II
## THE AC FAILS TO STATE A CLAIM

In order to survive dismissal, factual allegations must be enough to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, -- U.S. --, 127 S. Ct. 1955, 1965 (2007); *see also Jacobs*, 271 Fed. Appx. at 87; Mov. Mem. at 14. The AC suffers from the dual

infirmities of both failing to allege sufficient facts to support Plaintiffs' claims and alleging too many conclusory and irrelevant "facts" that the basis for their claims, if any, is impossible to ascertain. Plaintiffs' competing oppositions and references to massive volumes of materials incorporated by reference only exacerbate the Rule 8 violations. *See* Mov. Mem. at 14, 25. Nor is there any justification for granting Plaintiffs' request for leave to amend or to pursue discovery. *See Propst v. Ass'n of Flight Attendants*, 546 F. Supp.2d 14, 26 (E.D.N.Y. 2008) (Gershon, J.).

Sherman Act. Plaintiffs' oppositions make clear that Plaintiffs are complaining of injury to *them* and their business, not to competition generally. *See, e.g.*, Bernstein Mem. ¶277 ("Plaintiffs are unable to compete at all"). This cannot support an antitrust claim. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993); Mov. Mem. at 16. Nor do they address their failure to define the market, allege plausible allegations of conspiracy to restrain trade under Sherman 1 or the fact that their antitrust claims are actually an improper proxy for state tort claims. *See* Mov. Mem. at 15-17. Additionally, none of Plaintiffs' citations to the Proskauer Web site regarding its patent law practice (Bernstein Mem. ¶273) is sufficient to plead that the Proskauer Defendants have monopolized or attempted to monopolize a market in which they self-evidently do not compete. *See Olde Monmouth Stock Transfer Co. v. Depository Trust & Clearing Corp.*, 485 F. Supp. 2d 387, 393-94 (S.D.N.Y. 2007) (Haight, J.) (no claim for monopolization or attempted monopolization where no plausible allegations that defendant competes in relevant market; factual allegations not contained in complaint rejected).

RICO. Plaintiffs' oppositions fail to address the deficiencies in their pleading the requisite RICO predicate acts or RICO enterprise. *See Propst*, 546 F. Supp.2d at 23-26; *citing Twombly*; 127 S.Ct. at 1964; Mov. Mem. at 17-20. Rather, Plaintiffs merely refer back to the

AC and conclusorily assert that it (and the hundreds of pages of documents it incorporates by reference) supports their RICO claim. *See* Bernstein Mem. ¶¶282-84; Lamont Mem. ¶¶47-48.

For the few specific predicate acts Plaintiffs do address, their oppositions do not answer the manifest deficiencies. For example, Plaintiffs still fail to identify with particularity the "who, what, when, where" of a mail fraud predicate act. *See* Bernstein Mem. ¶280. Likewise, although they claim to have adequately pled predicates of car bombing, robbery and extortion (*see* Bernstein Mem. ¶¶283, 292), the AC contains no allegations connecting the Proskauer Defendants to these purported events, notwithstanding Plaintiff Bernstein's conclusory contention (Bernstein Mem. ¶286) that Proskauer should consider itself accused of every allegation in the AC. No RICO claim has been stated.[3]

Fraud. Plaintiffs do not meaningfully dispute that they failed to plead the "who, what, when, where" of the Proskauer Defendants' supposed fraud, as required by Rule 9(b). Instead, they offer as excuses that having done so would have made the already prolix AC even longer (Bernstein Mem. ¶298) and that, although Proskauer (as the "ringleader") "can consider [itself] included in every allegation," their actual role will only become apparent through discovery. *See id.* ¶299. These excuses cannot save their pleading. *See* Mov. Mem. at 20-21.[4]

Breach of Contract. Plaintiffs admit their breach of contract claim is based on their retainer with Proskauer, and not an express promise. Bernstein Mem. ¶313; Lamont Mem. ¶55.

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[3] Plaintiffs offer no case authority under RICO or otherwise that allows plaintiffs opposing a Rule 12(b)(6) motion to rely on allegations (*e.g.*, Bernstein Mem. ¶¶282, 285-89) of what a defendant may have done or plaintiff might find out. Plaintiffs' opposition papers are rife with such allegations and bare legal conclusions.

[4] To the extent Plaintiffs wish to assert fraud against Proskauer arising from the alleged filing of false patent applications with the USPTO (AC ¶¶274-75, Lamont Mem. ¶¶65-66), they do not have standing to assert this claim. *See Aymes v. Gateway Demolition, Inc.*, 30 A.D. 3d 196, 817 N.Y.S.2d 233 (1st Dep't 2006) (no standing to assert as fraud statement made to a third party).

Accordingly, this cause of action is redundant of Plaintiffs' time-barred malpractice claim and must be dismissed. *See* Mov. Mem. at 21.[5]

Tortious Interference. Plaintiffs ignore the Proskauer Defendants' tortious interference arguments (Mov. Mem. at 22-23) and make the conclusory argument that "there were numerous contracts between Iviewit Companies, Plaintiff Bernstein and third parties," with which Proskauer "intentionally interfered" (Bernstein Mem. ¶317). This does not support a claim for tortious interference because Plaintiffs have failed to identify those contracts or how Proskauer allegedly intentionally and improperly interfered, requisite elements of such a claim. *See White Plains Coat & Apron Corp. v. Cintas Corp.*, 8 N.Y.3d 422, 426, 835 N.Y.S.2d 530, 532 (2007). Likewise, to the extent Plaintiffs wish to rely on lost potential contracts with the "massive influx of interested parties" who allegedly signed non-disclosure agreements (AC ¶296), a claim cannot be stated where the "interested parties" are not identified and Plaintiffs have failed to plead how Proskauer allegedly intentionally and improperly interfered with those potential deals.[6]

## POINT III
## PLAINTIFFS FAIL TO STATE A CLAIM FOR CONSPIRACY

Although not pled in the AC, Plaintiff Bernstein seeks leave to amend to assert a claim under 42 U.S.C. § 1983. Bernstein Mem. ¶113. Citing to *Anderson*, Defendants are alleged to have conspired to deprive Plaintiffs of their due process rights through the alleged whitewashing of the disciplinary complaints. *See id.* ¶114. Plaintiffs allege that the actions of government

[5] Claims regarding "the breach of hundreds of NDAs" (Bernstein Mem. ¶310) for which there is no allegation that the Proskauer Defendants were parties, fails to state a claim for breach of contract.

[6] Additionally, for the reasons set forth in our moving papers., Plaintiffs' claims for "negligent interference with contractual rights" and various "civil violations," as well as their claim under Title VII, fail to state a claim. *See* Mov. Mem. at 24.

officials "have caused the denial of due process claimed by Plaintiffs acting to aid and abet the theft of the IP, and other crimes, combining to deprive plaintiff Bernstein and the other inventors from their constitutionally guaranteed IP rights and due process rights." *Id.* ¶116. None of this states a cause of action and amendment would be futile.

Plaintiffs' Section 1983 claim is time-barred. First, §1983 claims are governed by a three-year statute of limitations. *See Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir.), cert denied, 510 U.S. 865 (1993). As discussed in Point I, above, the alleged conspiracy to whitewash the disciplinary complaints regarding the Proskauer Defendants occurred more than three years prior to the filing of this action, as demonstrated by the same arguments having been advanced to the Florida Supreme Court in November 2004. Smith Decl. Ex. A. Likewise, to the extent Plaintiffs would base this claim on the Proskauer Defendants' alleged "fix" of the Billing Case (*see* Bernstein Mem.¶259), that action ended (after a default judgment was entered against Iviewit, *see* AC at ¶414) in November 2003, more than three years before Plaintiffs brought this action. *See* Smith Decl. Ex. B. Thus, any constitutional claims are time-barred.

Plaintiffs' allegations fail to state a claim under Section 1983. Plaintiffs' §1983 claim is likewise subject to dismissal because, as set forth by the New York State defendants in their memorandum of law in support of their motion to dismiss ("NY State Mem."), due process is only implicated by government conduct that affects a constitutionally protected liberty or property right. *See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1061-62 (2d Cir. 1993). Plaintiffs have no such interest in the handling of disciplinary complaints. *See* NY State Mem. at 15.

Finally, Plaintiffs' allegations that the Proskauer Defendants conspired with any state actor to deprive Plaintiffs of due process are too conclusory to state a claim. As private entities,

the Proskauer Defendants could only be held liable under § 1983 if they were "jointly engaged with state officials in [a] prohibited action." *Tornheim v. Eason*, 175 Fed. Appx. 427, 429 (2d Cir. 2006), *quoting, Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 271 (2d Cir. 1999).[7] In order to be "jointly engaged" with a state official, a private party's actions must have been the "product of a plan, prearrangement or conspiracy with a state official to deprive the plaintiff" of a constitutional right. *See Tornheim* at 429. Conclusory, vague and general claims of conspiracy fail to state a claim upon which relief can be granted. *See Lyman v. City of Albany*, 536 F. Supp. 2d 242, 248 (N.D.N.Y. 2008) (Kahn, J.) (dismissing conspiracy claim where the complaint failed to allege "whom exactly the agreement was between, when the agreement was made, what the agreement entailed, or what acts may have been taken in furtherance of the agreement.) Further, "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Tornheim* at 429, *quoting, Dennis v. Sparks*, 449 U.S. 24, 28 (1980).

Plaintiffs' conclusory allegations of a conspiracy, based primarily on defendant Krane's alleged former positions with and reputation in the New York State Bar (*e.g.*, AC ¶637-38) are far too conclusory to state a claim. Plaintiffs make no specific allegations of an agreement between the state defendants and the any of the Proskauer Defendants, nor do they allege Krane took any action other than submit to the 1st DDC allegedly "conflicted" and erroneous responses to Plaintiffs' complaints against Rubenstein, Proskauer and himself. AC ¶¶610-11, 627. Rather, they essentially claim that because the disciplinary complaints were not handled to Plaintiffs'

[7] Plaintiffs' contention that Krane acted in an "official capacity[y] at the 1st DDC," thus making him a state actor (Bernstein Mem. ¶158 ) by appearing before the 1st DDC is nonsensical. *See* Mov. Mem. at 25, n. 15.

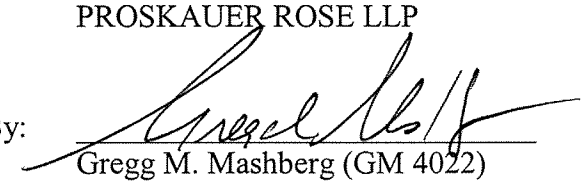
satisfaction, due process was "denied . . . in lieu of political cronyism." Bernstein Mem. ¶116. This conclusory allegation fails to state a claim. *See Twombly,* 127 S.Ct. at 1964.

## CONCLUSION

Plaintiffs should be denied leave to amend and the AC should be dismissed as against the Proskauer Defendants, with prejudice.[8]

Dated: New York, New York
July 28, 2008

PROSKAUER ROSE LLP

By: 

Gregg M. Mashberg (GM 4022)
Joanna Smith (JS 9187)
1585 Broadway
New York, New York 10036-8299
Tel:(212) 969-3000
Fax:(212) 969-2900
*Attorneys Pro Se and Attorneys for Kenneth Rubenstein, Steven C. Krane, and the Estate of Stephen Rackow Kaye*

[8] Plaintiffs assert that Proskauer attorneys who were not among the Original Defendants have defaulted. (Bernstein Mem. ¶¶120-21.) Not so. Only the Proskauer Defendants identified in the Notice of Motion and Mov. Br. at 2, n. 2 were among the Original Defendants and, pursuant to the Court's May 9, 2008 order, only they needed to respond to the AC. Other Proskauer attorneys named in the AC (including counsel of record here) have not been served and are not parties to this action. There is no default. It also should be noted that 70 pages of Bernstein's memorandum (at 37-107) were directed to Proskauer, in violation of this Court's June 18, 2008 order.