



COMMONWEALTH of VIRGINIA

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March 27, 2008

J. Michael McMahon, Clerk
United States District Court
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

RE: *Bernstein v. Appellate Division, First Dept. Departmental Disciplinary
Committee*, Case No. 07cv11196 (SAS)

Dear Mr. McMahon:

Enclosed, please find a Notice of Motion and a Memorandum of Law in Support of the Virginia Bar Defendants' Motion to Dismiss to be filed with the other papers in the above-referenced matter.

Thank you for your assistance. Should you have any questions or concerns, please do not hesitate to contact me at 804-786-1586.

Sincerely,

A handwritten signature in black ink that reads "Stephen M. Hall".

Stephen M. Hall
Assistant Attorney General III

Enclosures

cc: Kent Kari Anker, Esquire
✓ Eliot I. Bernstein, *pro se*
Glenn T. Burhans, Jr., Esquire
Monica Anne Connell, Assistant Attorney General
John Walter Fried, Esquire
Stephen P. Lamont, *pro se*
Joanna Frances Smith, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELIOT I. BERNSTEIN, et al.,)

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Plaintiffs,)

) Case Number: 07 Civ. 11196 (SAS)

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- against -)

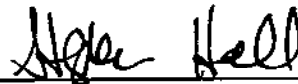
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APPELLATE DIVISION FIRST)
DEPARTMENT DISCIPLINARY)
COMMITTEE, et al.,)

) NOTICE OF MOTION

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Defendants.)
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PLEASE TAKE NOTICE that, upon all prior proceedings and herein, the accompanying Declaration of Stephen M. Hall, dated May 27, 2008, and the accompanying Memorandum of Law, Defendants Noel Sengel, Mary Martelino, Andrew Goodman, Lizbeth L. Miller, the Virginia State Bar ("Virginia Bar"), and the Commonwealth of Virginia (the "Virginia Defendants"), will move this Court before the Honorable Shira A. Scheindlin, United States District Court Judge, at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, Courtroom 12-C, New York, New York, for an order of dismissal, under Fed. R. Civ. P. Rule 12, dismissing the Complaint in this action as to the Virginia Defendants in its entirety, and such other and further relief as the Court deems just and proper.

Dated: May 27, 2008



Stephen M. Hall, Esq. *Pro Hac Vice*
Assistant Attorney General III
Office of Attorney General
900 E. Main Street
Richmond, Virginia 23219
Phone: (804) 786-2071
Attorney for the Virginia Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Defendants.)
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**DECLARATION OF STEPHEN M. HALL, ESQ., IN SUPPORT OF
THE VIRGINIA DEFENDANTS' MOTION TO DISMISS**

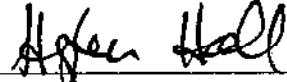
I, Stephen M. Hall, an attorney duly admitted to practice before this Court *pro hac vice*, declare the following under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am an attorney licensed to practice law in the Commonwealth of Virginia and the District of Columbia. I am an Assistant Attorney General for the Commonwealth and represent Defendants Noel Sengel, Mary Martelino, Andrew Goodman, Lizbeth L. Miller, the Virginia State Bar ("Virginia Bar"), and the Commonwealth of Virginia (herein the "**Virginia Defendants**").¹ I make this declaration in Support of The Virginia Defendants' Motion to Dismiss. The information set forth herein is based upon my own knowledge, and I could testify competently thereto if called upon to do so.

2. Attached hereto as Exhibit A is a true and correct copy of the Amended Complaint in this action.

¹ Undersigned counsel is not aware that Lizbeth Miller was ever served. If she is, undersigned counsel will serve as her attorney.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 27, 2008, in Richmond, Virginia.



Stephen M. Hall, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail this 17th day of May, 2008, upon:

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STEPHEN M. HALL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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APPELLATE DIVISION FIRST
DEPARTMENT DISCIPLINARY
COMMITTEE, et al.,

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Defendants.
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Case Number: 07 Civ. 11196 (SAS)

MEMORANDUM OF LAW IN
SUPPORT OF THE VIRGINIA
BAR DEFENDANTS' MOTION
TO DISMISS

Defendants Noel Sengel, Mary Martelino, Andrew Goodman, Lizbeth L. Miller,¹ the Virginia State Bar ("Virginia Bar"), and the Commonwealth of Virginia (the "Virginia Defendants"), through counsel, ask the Court to dismiss all claims against them under Rule 12 on the grounds that : (1) the Court lacks personal jurisdiction; (2) the Bar is entitled to Eleventh Amendment immunity; (3) Defendants Sengel, Martelino and Goodman are entitled to absolute judicial or quasi-judicial immunity; and (4) the Plaintiffs otherwise fail to state proper claims. The Virginia Defendants also incorporate by reference the arguments raised by the New York Bar Defendants in their Motion to Dismiss and ask the Court to dismiss the Amended Complaint on those grounds as well.

BACKGROUND

In the Amended Complaint, the Plaintiffs discuss filing complaints with the U.S. Department of Justice, the U.S. Patent and Trademark Office and other agencies regarding

¹ Undersigned counsel is not aware that Lizbeth Miller was ever served. She is a former legal assistant or paralegal for the Virginia Bar, whom plaintiffs apparently believe was involved in this purported, vast conspiracy.

alleged misconduct by attorneys and others related to a patent dispute, as well as numerous crimes stemming from those patent disputes. The Plaintiffs accuse the Virginia Defendants of participating in a conspiracy with other Defendants because the Virginia Bar refused to prosecute a legal ethics case against one or more attorneys whom the Plaintiffs accused of wrongdoing. By information and belief, the Virginia Bar investigated those allegations and determined that there were insufficient grounds to open a disciplinary matter. The Plaintiffs sue the Virginia Defendants on the grounds that this refusal to prosecute ethics charges constitutes a "conspiracy." Amend. Compl. ¶¶ 125-30, 707.

ARGUMENT

POINT I

THIS COURT LACKS PERSONAL JURISDICTION

As the forum state in which this federal court sits, New York's long-arm statute, N.Y. C.P.L.R. § 302(a), determines whether they are properly sued here. As the Second Circuit stated in *Savin v. Ranier*, 898 F.2d 304, 306 (2d Cir.1990): New York's long-arm statute provides, in relevant part, that personal jurisdiction over a non-domiciliary is established when that person or his agent: (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state; or (3) commits a tortious act outside the state but injuring a person or property within the state.

The Plaintiffs have the burden of establishing jurisdiction in New York. *Cutco Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir.1986). To satisfy this burden, the Plaintiffs must demonstrate that the Virginia Defendants have sufficient minimum contacts with New York "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

However, the Complaint fails to make even a *prima facie* showing or even an allegation that the court has jurisdiction over the Defendants. They have not shown that the Virginia Defendants have had *any* contact with New York. Conclusory allegations alone cannot establish personal jurisdiction. *Gmurzynska v. Hutton*, 257 F. Supp.2d 621, 625 (S.D.N.Y. 2003). Therefore, all claims against the Virginia Defendants should be dismissed.

POINT II

THE ELEVENTH AMENDMENT BARS CLAIMS AGAINST THE VIRGINIA BAR AND THE COMMONWEALTH

The Eleventh Amendment bars a private individual from suing a state in federal court. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 363 (2001). The Eleventh Amendment bars “not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.” *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997).

The Virginia Bar is an arm of the Supreme Court of Virginia and is under the direction and control of that court. The Bar is an agency of the judicial branch of the Commonwealth of Virginia (“Commonwealth”). Va. Code § 54.1-3910 (“The Virginia State Bar shall act as an administrative agency of the [Supreme] Court [of Virginia]”). As such, it is entitled to Eleventh Amendment immunity unless the Plaintiffs state a proper cause of action under a statute that abrogates a state’s Eleventh Amendment immunity. This includes claims brought under 42 U.S.C. § 1983, since Congress has not abrogated Eleventh Amendment immunity under that statute. *Wang v. Office of Professional Medical Conduct*, 228 Fed. Appx. 17, 19 (2nd Cir. 2007). The Plaintiffs fail to state a claim under any statute abrogating the Commonwealth’s or the Virginia Bar’s Eleventh Amendment immunity, supporting dismissal of all claims against the Commonwealth and the Virginia Bar.

POINT III

THE INDIVIDUAL VIRGINIA DEFENDANTS ARE ENTITLED TO ABSOLUTE JUDICIAL OR QUASI-JUDICIAL IMMUNITY

Defendants Sengel, Martelino, Goodman and Miller are entitled to both absolute and quasi-judicial immunity. In this Court, state bar disciplinary proceedings have been found to be judicial in nature and that quasi-judicial immunity is available to members of disciplinary committees and panels. *Lipin v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 202 F. Supp. 2d 126, 134-35 (S.D.N.Y. 2002) (quoting *Sassower v. Mangano*, 927 F. Supp. 113, 120-21 (S.D.N.Y. 1996)). Courts of appeal have also extended absolute immunity to members of bar association disciplinary committees. *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 58 (2d Cir. 1996). The Defendants are all current or former employees of the Virginia Bar who were allegedly involved in receiving or processing the Plaintiffs' complaints against an attorney. Applying the case law just cited to the claims against these Defendants should lead to dismissal of all such claims.

Even under quasi-judicial immunity, and to the extent that these Defendants are sued individually, the plaintiff fails to allege any facts, as opposed to spurious allegations, showing that these defendants in any way acted inappropriately or illegally, or in bad faith. This leaves them entitled to quasi-judicial immunity, supporting dismissal of all claims against them.

POINT IV

THE COMPLAINT FAILS TO STATE A CLAIM

Without naming the Virginia Defendants specifically, the Plaintiffs accuse various "defendants" of various crimes. These include violations of the Fifth Amendment, 15 U.S.C. §§ 1 & 2, Title VII, the Racketeering and Corrupt Organizations Act, "legal malpractice" and negligence, breach of contract, various interference with contract claims, fraud, breach of

fiduciary duties, and misuse of funds. But the Plaintiffs allege no facts, as opposed to conclusory statements, establishing any of these causes of action against the Virginia Defendants. Consequently, all these claims should be dismissed as to these Defendants.

POINT V

CIVIL RIGHTS CLAIMS ARE TIME BARRED AGAINST THE VIRGINIA DEFENDANTS

Because § 1983 does not contain a limitation period, an appropriate limitation period must be borrowed from the analogous Virginia law cause of action. *Keller v. Prince George's County*, 827 F.2d 952, 955 n.2 (4th Cir. 1987)(superseded by statute affecting Title VII claims, 827 F. Supp. 349). The Supreme Court has determined that the state statute governing personal injury shall apply to § 1983 actions. *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985)(superseded by statute 155 Cal.App.4th 1152). Virginia applies a two-year statute for personal injuries. Va. Code § 8.01-243(A). Any claims against the Virginia Defendants brought under 42. U.S.C. § 1983 are time barred, since the statute of limitations under Virginia law – which the Virginia Defendants argue would apply to any causes of action in Virginia – is two years.

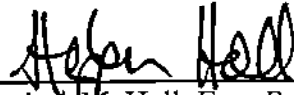
CONCLUSION

For the foregoing reasons, the Virginia Defendants ask the Court to dismiss all claims against them with prejudice.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
VIRGINIA STATE BAR, NOEL SENDEL,
MARY W. MARTILENO,
ANDREW H. GOODMAN and
LIZBETH L. MILLER

By:



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Phone: (804) 786-2071

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail, postage prepaid, this 21st day of May, 2008, upon:

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