08-4873-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

ELIOT I. BERNSTEIN, individually, P. STEPHEN LAMONT, on behalf of SHAREHOLDERS OF IVIEWIT 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

(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 PROSKAUER ROSE LLP, KENNETH RUBENSTEIN, STEVEN C. KRANE AND THE ESTATE OF STEPHEN RACKOW KAYE

PROSKAUER ROSE LLP

Defendant-Appellee Pro Se and Attorneys for Defendants-Appellees Kenneth Rubenstein, Steven C. Krane and The Estate of Stephen Rackow Kaye

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capacity and individual capacity, JOSEPH WIGELY, in his official and individual capacity, CATHERINE O'HAGAN WOLFE, in her official and individual capacity, PAUL CURRAN, in his official and individual capacity, MARTIN R. GOLD, in his official and individual capacity, ANGELA M. MAZZARELLI, in her official and individual capacity, RICHARD T. ANDRIAS, in his official and individual capacity, DAVID B. SAXE, in his official and individual capacity, DAVID FRIEDMAN, in his official and individual capacity, LUIS A. GONZALES, in his official and individual capacity, APPELLATE DIVISION SECOND DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, LAWRENCE F. DIGIOVANNA, in his official capacity and individual capacity, DIANA MAXFIELD KEARSE, in her official and individual capacity, JAMES E. PELTZER, in his official and individual capacity, A. GAIL PRUDENTI, in her official and individual capacity, STEVEN C. KRANE, in his official and individual capacity, HON. JUDITH S. KAYE, in her official and individual capacity, KENNETH RUBENSTEIN, ESTATE OF STEPHEN KAYE, PROSKAUER ROSE LLP, MELTZER LIPPE GOLDSTEIN & BREISTONE LLP, LEWIS S. MELTZER, RAYMOND A. JOAO, FOLEY & LARDNER LLP, MICHAEL C. GREBE, WILLIAM J. DICK, DOUGLAS A. BOEHM, STEVEN C. BECKER, STATE OF NEW YORK COMMISSION OF INVESTIGATION, LAWYERS FUND FOR CLIENT PROTECTION OF THE STATE, THE FLORIDA BAR, LORRAINE CHRISTINE HOFFMAN, in her official and individual capacity, ERIC TURNER, in his official and individual capacity, JOHN ANTHONY BOGGS, in his official and individual capacity, KENNETH MARVIN, in his official and individual capacity, THOMAS HALL, in her official capacity, in her individual capacity, DEBORAH YARBOROUGH, VIRGINIA STATE BAR, ANDREW H. GOODMAN, in his official and individual capacity, NOEL SENGEL, in his official and individual capacity, MARY W. MARTELINO, in her official and individual capacity, JOHN DOES,

Defendants-Appellees.

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STATEMENT OF THE ISSUES

1. Did the District Court correctly conclude that Appellants' Sherman Act, civil RICO and civil rights claims were barred by the applicable statutes of limitation, where it was uncontested that the alleged underlying acts took place outside the applicable limitations periods?

2. Did the District Court correctly conclude that Appellants' patent and civil rights claims failed to state a claim upon which relief can be granted?

3. Did the District Court abuse its discretion in declining to exercise supplemental jurisdiction over Appellants' state law claims?

4. Did the District Court abuse its discretion in denying Appellants leave to amend the AC?

STATEMENT OF THE CASE

For many years, *pro se* Plaintiffs-Appellants Eliot I. Bernstein ("Bernstein") and P. Stephen Lamont ("Lamont") (collectively "Appellants") have engaged in a campaign against Appellee Proskauer Rose LLP ("Proskauer") and certain of its partners (as well as other law firms, executives, technology companies and now judicial and government officials), alleging an immense global conspiracy to misappropriate technology allegedly invented by Bernstein and owned by the Appellant "Iviewit" companies. On December 12, 2007 Appellants filed their

initial complaint (SA 1-13[1]) commencing this action and on or about May 9, 2008 filed their Amended Complaint ("AC") (SA 32-354), which spans over 300 pages, contains over 1100 paragraphs and seeks over one trillion dollars in damages against approximately 180 defendants. Although largely unintelligible, the AC purports to describe a fantastic conspiracy among members of the legal profession, judges, government officials and private individuals and businesses to deprive Appellants of what they describe as their "holy grail" technologies. (SA 101-02, ¶244 E.)

The AC asserts eleven federal and state causes of action. Appellants asserted federal claims under: Article 1, Section 8, Clause 8 of the Constitution and the Fifth and Fourteen Amendments to the Constitution (Count One); the Sherman Act (Count Two); Title VII of the Civil Rights Act of 1964 ("Title VII") (Count Three) and for civil RICO (Count Four). Additionally, the AC asserts state law claims for: legal malpractice and negligence (Count Five); breach of contract (Count Six); tortious interference (Count Seven); "negligent interference with contractual rights" (Count Eight); fraud (Count Nine); breach of fiduciary duty

[1] "SA" followed by a number refers to the Supplemental Appendix for Defendants-Appellees Foley & Lardner LLP, Steven C. Becker, Douglas A. Boehm, William J. Dick, Michael C. Grebe, Proskauer Rose LLP, Kenneth Rubenstein, Steven C. Krane and the Estate of Stephen Rackow Kaye.

(Count Ten); and violation of "other civil State of New York, State of Florida and State of Delaware claims (Count Eleven).[2]

I. The Decision Below

By order dated August 8, 2008, the District Court (Judge Shira A. Scheindlin) dismissed the AC with prejudice. (SA 415-69.) Judge Scheindlin found that Appellants' Sherman Act, civil RICO and civil rights claims were barred by the applicable statutes of limitation. Judge Scheindlin further found that Appellants' patent and Title VII claims failed to state a claim (SA 454-55), and that Appellants lacked standing to sue the government for failing to initiate investigations of the Appellees. (SA 458.) Additionally, the District Court declined to exercise supplemental jurisdiction over Appellants' state law claims and denied leave to amend on futility grounds, finding that "[Appellants] have burdened this Court and hundreds of Appellees, many of whom are not alleged to have engaged in any wrongdoing, with more than one thousand paragraphs of

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[2] The original complaint filed on or about December 12, 2007 only included Counts One, Two and Three (although in different form) and named only 42 of the 180 defendants named in the AC. Prior to the AC being filed, the Proskauer Appellees requested that the district court stay service of the AC on the 130-plus "new" defendants named therein. (SA 31.1-31.3.) By order dated May 9, 2008 the court granted that request and ordered that service of the AC on the new defendants be stayed pending resolution of the original defendants' motions to dismiss. (SA 31.4-31.5.) In her opinion (SA 415-69), Judge Scheindlin considered the allegations in the AC and dismissed it in its entirety as against all defendants named therein. Nevertheless, only the defendants named in the original complaint were ever served and thus are the only parties to this appeal.

allegations, but have not been able to state a legally cognizable federal claim against a single defendant. There is no reason to believe they will ever be able to do so." (SA 459.)

II. The Appeal

Appellants Bernstein and Lamont have filed separate appeals and separate briefs (Bernstein Appellate Brief ("BAB") and Lamont Appellate Brief ("LAB")) from the August 8, 2008 Order of the District Court. On appeal, neither Bernstein nor Lamont argue that the court erred in dismissing their claim under Title VII.

STATEMENT OF FACTS

The AC is brought by Bernstein in his individual capacity and purportedly by Bernstein and Lamont "on behalf of the shareholders" of numerous Iviewit companies.[3] Appellants charge Appellees (and others) with having conspired to abscond with their video and digital imaging technology, allegedly invented by Bernstein in or about 1997 (SA 101, ¶240), which technology has allegedly "played a pivotal part in changing the Internet from a text based medium to a medium filled with magnificent images and video" (SA 101, ¶241), and is allegedly used "on almost every digital camera . . . and other devices that utilize the feature of 'digital zoom'" (SA 101, ¶242.)

[3] On appeal, Appellant Bernstein apparently acknowledges that he and Lamont have no standing to sue on behalf of others. (BAB at 8.)

Appellants allege that, "[o]n or about 1998 through 2001, Plaintiff Bernstein and Iviewit Companies retained Proskauer to review and procure IP for a number of inventions pertaining to digital video and imaging." (SA 105, ¶252.) Appellants further contend that Proskauer took on the role of securing patents covering Appellants' inventions.[4] (SA 106, ¶255.) Appellants do not allege that Proskauer prepared any patent applications and allege that was handled, in the first instance, by defendant Raymond Joao, Esq. ("Joao"). (SA 107, ¶261.)

The AC alleges that the patent applications contained false information (SA 115, ¶305) designed to vest the patent rights in "unauthorized companies created [by Proskauer] to steal the core inventions." (SA 109, ¶¶272, 274.) Upon learning of the allegedly "fraudulent" applications, Appellants fired Joao and replaced him with Foley & Lardner LLP ("Foley") as patent counsel. (SA 115, ¶307.) According to Appellants, Foley and Proskauer were then charged with correcting the false applications and securing the patent rights for Appellants. (SA 115, ¶¶305-08.) However, rather than correcting the applications, Appellants allege that during this 1998-2001 time frame, Foley joined in the alleged conspiracy between Proskauer and Joao to misappropriate the technologies. (SA 115, ¶311.)

[4] The defendants named in the original complaint included Proskauer partners Kenneth Rubenstein ("Rubenstein"), Steven C. Krane ("Krane") and the Estate of Stephen Rackow Kaye (collectively, the "Proskauer Appellees").

Appellants allege that virtually every lawyer, law firm, court and government entity they have approached for help has instead joined in the conspiracy, amounting to "a conspiratorial pattern of fraud, deceit and misrepresentation, that runs so wide and so deep, that it tears at the very fabric" of "free commerce through inventors' rights and due process" and "the very fabric of Democracy protected under the Constitution." (SA 43, ¶7.)

Proskauer allegedly set the conspiracy in motion by representing simultaneously Appellants and MPEGLA LLC ("MPEGLA"), which holds a pool of patents and distributes royalties to the patent holders. (SA 108, ¶269.) Without ever alleging that MPEGLA took any action, Appellants conclude that, by virtue of Proskauer's position as counsel and as the so-called "gatekeeper" of the patent pools, MPEGLA has incorporated Appellants' technologies in "their pool license in combination with an endless number of hardware, software, DVD, multimedia and chip technologies and Iviewit Companies has [sic] not received a dollar of royalty from the companies using them and where Proskauer inures direct benefits from these IP pools." (SA 53, ¶62.) Appellants actually allege that Proskauer formed its intellectual property department to exploit the Iviewit technology and used its representation of MPEGLA, "as part of a complex scheme to steal the IP from their retained client and convert them and control the market for the technologies." (SA 108, ¶¶267-68.)

According to the AC, Proskauer and other counsel who were "involved in the IP and corporate problems" were "terminated for cause" by Appellants. (SA 122, ¶345.) While no date of termination is given, Appellants allege that Proskauer was "retained" "[o]n or about 1998 through 2001." (SA 105, ¶252.) Moreover, the AC alleges that Proskauer commenced litigation against Iviewit for unpaid legal fees (SA 127, ¶377) and this Court may take judicial notice that Proskauer's Complaint in that case was filed in Florida state court on May 2, 2001 (the "Billing Case") (SA 360-66), thus establishing that the representation ended prior to that date.[5] In addition to the Billing Case, Appellants allege ambiguously that a "fraudulent involuntary bankruptcy action" was filed against Iviewit not by Proskauer, but by "Proskauer referred management" and "Proskauer strategic alliance partners" on or about July 26, 2001. (SA 126, ¶369.) According to Appellants, that allegedly fraudulent bankruptcy case – filed six years and four months prior to the commencement of this action – was "designed to abscond with the Iviewit Companies IP. . . ." (SA 126, ¶372.)

On or about January 28, 2003, Iviewit sought leave to file counterclaims in the Billing Case (the "Counterclaims"). (SA 367-68; SA 369-83.) The Counterclaims (which, again, are subject to this Court's

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[5] *See Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003), *aff'd*, 132 Fed. Appx. 381 (2d Cir. 2005) ("[j]udicial notice may be taken of public filings").

judicial notice), like the AC (*see, supra*, p. 2), included causes of action for legal malpractice, civil conspiracy, breach of contract, and tortious interference, based on the alleged misappropriation of Appellants' inventions. Specifically, mirroring the federal and state claims in this action Appellants alleged that the Proskauer Appellees and others conspired "to deprive Bernstein and Iviewit of the beneficial use of such technologies for either the use of third parties, who were other clients of Proskauer . . . ." (SA 373, ¶14), by (i) improperly putting patents in Brian G. Utley's name (Iviewit's CEO); (ii) aiding Joao in intentionally withholding pertinent information from patents and not filing them timely, so as to allow Joao to apply for similar patents in his own name, both while acting as counsel for Iviewit and subsequently; (iii) upon discovery of the "lapses" by Joao, referring the patent matters to Foley, which was close to Utley; (iv) failing to ensure that the patent applications contained all necessary and pertinent information; (v) failing to secure trademarks and copyrights; and (vi) allowing the infringement of Iviewit's patent and intellectual property rights by other clients of Proskauer (SA 374-76, ¶28; *see also* SA 373, ¶14, SA 373, ¶¶39-40.)

Just several days later, by Order dated February 4, 2003 (SA 384), the Florida court denied Appellants permission to assert the Counterclaims (the Florida

judge is among the defendants in the AC). Iviewit's counsel subsequently withdrew from the Billing Case and a default judgment was entered. (SA 133, ¶414.) The Counterclaims were not reasserted until the filing of this action, almost five years later.

In addition to the failed Counterclaims, Appellants filed complaints (also subject to judicial notice) against Proskauer and defendant Rubenstein in February 2003 with both the New York Appellate Division First Department Departmental Disciplinary Committee ("1st DDC") (SA 41, ¶3, n.3; SA 170, ¶610; SA 384) and the Florida Bar (SA 157, ¶544; SA 358-90), for essentially the same conduct that forms the basis of this action. The Florida Bar complaint was dismissed on July 1, 2003. (SA 157, ¶547.) The AC does not appear to allege the disposition of the New York complaints.

Defendant Krane represented Rubenstein in connection with the First Department complaint against him. (SA 170, ¶610.) Appellants alleged that Krane's representation of Rubenstein was "in conflict and violation of his public office positions" (*id.*) because he allegedly had positions with both the 1st DDC and New York State Bar Association ("NYBSA") (SA 170, ¶611). Further, Appellants assert that as "one of New York's disciplinary most influential members and his roles in the disciplinary departments" (SA 171, ¶612), Proskauer and Rubenstein sought to use Krane's influence to "delay the complaints and/or quickly review and

dismiss them with no investigation." (*Id.*) Apparently as a result of Krane's alleged influence and what Appellants paint as widespread corruption within the First Department and other attorney disciplinary committees, the numerous complaints raised by Appellants against their former counsel were "whitewashed" in order to cover-up the global conspiracy to misappropriate and proliferate Appellants' technologies. (*See, e.g.*, SA 169, ¶607; SA 177, ¶637.)

Almost five years after seeking to file the Counterclaims and well more than six years after the alleged underlying wrongdoing, this action was filed on December 12, 2007.

SUMMARY OF ARGUMENT

It is evident from the face of the AC and from documents of which this Court may take judicial notice that the claims against the Proskauer Appellees accrued more than six years before Appellants commenced this action, thus rendering all of Appellants' federal claims against them barred by the applicable statutes of limitations. Additionally, Appellants' civil rights and patent causes of action fail to state a claim against the Proskauer Appellees. And, although not reached by the District Court, Appellants' Sherman Act and civil RICO claims similarly fail to state a cause of action. Further, due to the nature of the legal barriers to Appellants' claims and the fact that Appellants have amended their complaint once, allowing a further amendment would be futile. Accordingly, the

District Court correctly dismissed all eleven counts of the AC and denied Appellants leave to amend. The District Court's judgment should therefore be affirmed.

ARGUMENT

III. Standards for Appellate Review and Motions to Dismiss

Appellate review of a district court's decision as to statutes of limitations and the failure to state a claim is based on a *de novo* standard. *See Mudholkar v. Univ. of Rochester*, No. 06-4732-cv, 2008 WL 213888, at *1 (2d Cir.(N.Y.) Jan. 25, 2008), *cert. denied*, 128 S.Ct. 2883 (2008). A motion to dismiss on statute of limitations grounds is cognizable under Rule 12(b)(6) if the defense appears on the face of the complaint. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). To survive such a motion, a complaint must contain allegations consistent with a claim that would not be time-barred. *See Harris v. City of New York*, 186 F.3d 243 (2d Cir. 1999). To survive a motion to dismiss for failure to state a claim, a complaint must provide "grounds" that are "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007). Factual allegations must be enough to "raise a right to relief above the speculative level." *Id.* Although the appellate court must view the facts alleged in the light most favorable to the plaintiff, "'conclusory allegations or legal conclusions

masquerading as factual conclusions are not sufficient to withstand a motion to dismiss.'" *Hoatson v. New York Archdiocese*, No. 05 Civ. 10467 (PAC), 2007 WL 431098, at *2 (S.D.N.Y. Feb. 8, 2007) (Crotty, J.), *aff'd*, 280 Fed. Appx. 88 (2d Cir. (N.Y.) 2008), quoting *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996).

IV. The District Court Correctly Found That Appellants' Sherman Act, Civil RICO And Civil Rights Claims Are Barred By The Applicable Limitations Periods

As the District Court correctly found – and Appellants essentially concede – Appellants' Sherman Act, civil RICO and civil rights claims all accrued beyond the applicable statutes of limitation periods. Because Appellants have alleged no valid ground for tolling, those claims are time-barred.

A. Sherman Act

An action brought under the Sherman Act "shall be forever barred unless commenced within four years after the action accrued." 15 U.S.C.A. § 15b. "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *see Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 217 (4th Cir. 1987). The record is unequivocal that any alleged injury occurred outside the limitations period.

Appellants allege in Count Two of the AC that "[t]he conspiratorial actions of [Appellees] in sabotaging IP applications through fraud and theft . . . creates an illegal monopoly and restraint of trade . . . ." (SA 323, ¶1073), and that "Appellees conspired to steal Iviewit companies technologies while simultaneously proliferating and monopolizing them through the patenting pooling scheme . . . ." (SA 195-96, ¶725).

This essential claim was first asserted on January 28, 2003 in the proposed Counterclaims Appellants sought to file in the Billing Case. The Counterclaims alleged, *inter alia,* that Appellees "conspired . . . to deprive Bernstein and Iviewit of the beneficial use of such technologies for the use of third parties who were other clients of Proskauer . . . ." (SA 373, ¶14) and that the Proskauer Appellees "conspired to deprive Counter Plaintiffs of their rights and interest in the Technology causing" causing them damages. (SA 378, ¶39; SA 379, ¶44) (*see also, supra,* p. 8). Although not styled as an antitrust claim in January 2003, these same essential claims constitute the purported antitrust claims asserted in December 2007, demonstrating, as the District Court held, that the antitrust claim accrued well outside the four year limitations period.

In fact, the anticompetitive conduct is actually alleged to have occurred well earlier than that, during Proskauer's retention as Iviewit's counsel, during 1998–2001. (SA 105, ¶252.) Appellees are alleged to have schemed to "control[]"

Iviewit's inventions and "blocking the . . . inventions from the inclusion in the IP pools they controlled." (SA 197, ¶727 A; *see also, e.g.* SA 108, ¶¶ 267-68 (scheme to steal from "retained client") and SA 110, ¶¶280-81). This alleged conduct necessarily occurred before Proskauer was "terminated for cause" (SA 122, ¶345) and Proskauer sued Iviewit in May 2001. The alleged antitrust conspiracy therefore took place more than six years prior to the filing of this case in December 2007. The District Court was correct (SA 453) that the Sherman Act claim is time barred.

B. Civil RICO

Claims for civil RICO are governed by a four year statute of limitations, which begins to run when the plaintiff discovers the injury on which his cause of action is based. *See World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 524 (S.D.N.Y. 2007) (Karas, J.) (citing *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998), and dismissing RICO claim in which the allegations in the complaint would have put a reasonable person on notice of the injury more than four years before filing). The District Court correctly found that "that the injury underlying [Appellants'] RICO claim is 'the theft of the IP by the enterprise and its agents....'" (SA 453-54 (quoting AC).) And that because the "alleged theft happened well before 2003" (SA 454), the RICO claim is time-barred.

Briefly, the RICO claim is premised on the alleged conspiracy to misappropriate and "steal" Iviewit's technology and to "proliferate the inventions" to third parties. (*E.g.* SA 108, ¶268, SA 202, ¶732 C.) This is precisely the "conspiracy" alleged in the January 2003 Counterclaims. (*Compare*, *supra*, p. 13; SA 378, ¶¶39-40; *see also* SA 385-97 (February 2003 disciplinary complaints).) Again, from the face of the complaint, it is unequivocal that Appellants allegedly sustained the injury that now underlies their belated RICO claim, and discovered it or knew sufficient facts so that they should have discovered it, long outside the four year limitations period, and the claim was properly dismissed. *See World Wrestling,* 530 F. Supp. 2d at 524-25.

To the extent Appellants rely on allegations of continuing misconduct, or "whitewashing" of their complaints so as to cover up the alleged theft of the inventions, as evidence of a "continuing pattern" that brings their RICO claim within the limitations period (*see* BAB at 27), 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 – "the theft of IP" (SA 211, ¶739(iv) (RICO Statement Form) – more than four years prior to commencing this action, rendering their RICO claim time-

barred. *See* SA 216, ¶740; SA 403, ¶541. The fact that Appellants 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*, 530 F. Supp. 2d at 524 (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 disciplinary "whitewashing" itself, the alleged denial of due process is not a cognizable injury. (*See* Point III.B., *infra*.) Thus a RICO cause of action cannot accrue from it. *See Lucent*, 420 F. Supp. 2d at 264.

The District Court correctly held that the RICO claim was time-barred. (SA 454.)

C. 42 U.S.C. §1983

The AC alleges that Appellants were denied due process in violation of their civil rights under Fifth and Fourteen Amendments to the United States Constitution. (SA 322-23, ¶¶ 1067-70.) 42 U.S.C. § 1983 ("Section 1983") provides a cause of action for rights protected by the Constitution and laws of the United States. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 755 (2005).[6]

[6] Appellants do not challenge the District Court's treatment of their due process claims as Section 1983 claims. In fact, Appellant Bernstein requested, in his

As discussed below (Point III.B.) Appellants' Section 1983 claim fails to state a claim against the Proskauer Appellees. In any event, even if the District Court had found that the Proskauer Appellees somehow conspired with any state actor to deprive Appellants of "due process" in connection with the state bar association disciplinary proceedings (*i.e.* to "whitewash" the disciplinary complaints against the Proskauer Appellees), Appellants' claim would be time barred.

Section 1983 claims are governed by a three-year statute of limitations, which starts to run "when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1156 (2d Cir. 1995), quoting *Singleton v. City of New York*, 632 F.2d 185 (2d Cir. 1980). To the extent Appellants argue that the existence of an ongoing conspiracy postpones the accrual of this claim (*see* BAB at 27), that argument was foreclosed by this Court in *Singleton*, which held: "[t]he existence of a conspiracy does not postpone the accrual of causes of action arising out of the conspirators' separate wrongs. It is the wrongful act, not the conspiracy, which is actionable. . . ." 632 F.2d at 192.

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opposition to the motions to dismiss, leave to amend the AC to assert a claim under Section 1983. (SA 401, ¶119.)

The alleged "whitewashing" of the disciplinary complaints regarding the Proskauer Appellees necessarily 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 (and presumably to the lower Florida courts earlier). (*See* SA 406-11.) In November 2004, Appellants argued:

> 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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> * * *
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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* SA 408-09, ¶¶16-17; *compare* SA 401, ¶116.) This pleading (among others) conclusively documents that the alleged "whitewashing" occurred – and Appellants were aware of it – more than three years before initiating this action. Thus, as the District Court correctly held (SA 453), Appellants' alleged civil rights claims are time-barred.

D. No Tolling Of Appellants' Claims

In their submissions to both the District Court and this Court, Appellants essentially concede that their claims are time-barred. Appellants (who are

certainly not shy about litigating) admittedly had knowledge for many years of the claims they now belatedly assert, and argued to the District Court that "it simply was not considered the right time to file yet." (SA 402, ¶214.) In fact, Bernstein admits that Appellants' claims arose and he was aware of them as early as 2001. (*See* SA 403, ¶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.")

Rather than identifying any claim in the AC that could support a cause of action that would not be time-barred, Appellants each argue that the applicable statutes of limitation should be tolled because their "complaints were never heard due to denials of due process. . . ." (LAB at 23; BAB at 29-30.) However, as the District Court correctly found, Appellants "have not raised a valid ground for the tolling of any statute of limitations. . . ." (SA 452.)

In *Jacobs v. Mostow*, 271 Fed. Appx. 85 (2d Cir. 2008) (unpublished opinion), this Court found equitable tolling inapplicable where the *pro se* plaintiff had "not shown that 'it would have been impossible for a reasonably prudent person to learn about his or her cause of action.'" *Id.* at 88, *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 Appellees wrongfully induced or

prevented him from commencing suit (citing New York law)). Here, Appellants admit that they were aware of the facts giving rise to their causes of action years before filing this suit. Indeed, as early as 2003 they had laid out all of the essential claims in a the form of counterclaims, which they actually attempted to litigate in the Billing Case in 2003. When the Florida court denied Appellants' motion to amend their answer to assert the Counterclaims, Appellants were free to have re-styled that pleading as a complaint and initiated a new action. For whatever reason – and Appellants offer no explanation other than that "it simply was not considered the right time to file yet" (SA 402, ¶214) – Appellants *chose* not to file this suit until December 2007. Because they have alleged nothing to suggest they were prevented from filing sooner (and, indeed, otherwise did assert virtually identical claims before three state bar associations), the District Court was correct in rejecting their equitable tolling arguments. *See Jacobs*, 271 Fed. Appx. at 88 (affirming dismissal).

E. No "New Evidence"

Appellants argue that it was premature to dismiss the AC without the benefit of discovery on Appellants' claims and in certain "related" cases. *See* BAB at 30-33, LAB at 14-17.

Appellants suggest the "related" cases of *Anderson v. the New York, et al.*, 07 CV 9599 (S.D.N.Y. 2007), *McKeown v. New York, et al.*, 08 CV 2391

(S.D.N.Y. 2008) and *Esposito v. New York, et al.*, 07 CV 11612 (S.D.N.Y 2007) – which have, except for *Anderson*, been dismissed[7] – demonstrate the existence of corruption within the First Department. Thus, Appellants argue that the District Court should have considered the evidence in those cases (such as a DVD recording that "it's all back room politics" (LAB at 17)) and allowed Appellants access to discovery in those cases prior to dismissing the AC. *See id.* at 15-16; BAP at 32.

Nothing involving the *Anderson*, *McKeown* and *Esposito* cases could excuse Appellants' manifest failure to file their claim within the applicable statutes of limitations periods. The only specific "evidence" Appellants identify from the "related" cases that appears remotely connected to their allegations that their complaints were "whitewashed" is a reference in the *Anderson* complaint – an employment discrimination case brought by a former employee against the First Department – alleging that the timing of Anderson's firing was connected to "revelations" regarding her boss being named as a "defendant" in the disciplinary proceedings commenced by Appellants' complaints. *See* LAB at 15 (quoting, *Anderson* Complaint, ¶97.) Even if this "evidence" were to somehow confirm that the disciplinary complaints against the Proskauer Appellees were "whitewashed,"

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[7] *See Esposito v. New York*, Nos. 07 Civ. 11612, 08 Civ. 2391, 08 Civ. 3305, 08 Civ. 4438, 08 Civ. 5455, 08 Civ. 6368, 2008 WL 3523910 (S.D.N.Y. Aug. 8, 2008) (dismissing related cases).

it would not revive Appellants' belated claims. The statute of limitations on a Section 1983 claim runs from the date the plaintiff learns of the injury, not the date he learned of an alleged conspiracy. *See Pinaud*, 52 F.3d at 1156; *Singleton*, 632 F.2d at 192. As demonstrated above (Point II.C.), Appellants learned of the alleged "whitewashing" more that three years prior to filing this suit in December 2007. This allegation was prominently featured in the papers they filed in November 2004 with the Florida Supreme Court challenging the dismissal of the disciplinary complaints. (*See* SA 406-11.) The claim that Appellants may now discover more facts about the alleged "whitewashing" cannot change when those events took place, and thus cannot revive their expired claims.

Moreover, the specter of corruption that Appellants attempt to cast over this case is a red herring. Even if it were true that Appellants' claims were mishandled, and discovery in the "related" cases were to turn up evidence of corruption within the First Department, that evidence would not be material to any actionable claim. Appellants have no cognizable injury stemming from the dismissal of the disciplinary complaints (*see* Point III.B., *infra*), and thus have no standing to seek redress for it in this Court. Accordingly, all of Appellants' allegations of corruption and "whitewashing" are irrelevant.[8]

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[8] Appellant Bernstein relies heavily on *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974), *cert. denied*, 435 U.S. 924 (1978), for the proposition that dismissal was premature "at this stage of the litigation." (BAB at 16-18.) This reliance is

V. Failure to State a Claim

The District Court correctly held that Appellants' patent and civil rights causes of action failed to state a claim and were therefore subject to dismissal. In addition, although not reached by the District Court, Appellants' Sherman Act and civil RICO claims against the Proskauer Appellees failed to state a cause of action.[9]

A. Patent claim

Count One of the AC includes a claim under Article 1, Section 8, Clause 8 of the Constitution, commonly known as the Copyright and Patent Clause. (SA 322-23, ¶¶1067-70.) The District Court dismissed this claim, holding that: "[t]he text of the clause does not suggest any private right of action against any state or non-state actor, nor am I aware of any court that has created such a right. Because the Copyright and Patent Clause does not bestow any rights on individuals, [Appellants'] claim under this clause is dismissed. (SA 455.)

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misplaced. On the issue of immunity, the Supreme Court in *Scheuer* found fault with the district and appellate courts' acceptance "as fact the good faith of the Governor" despite that there was no evidence before the courts from which that finding could be made. *See* 416 U.S. at 250-51. The District Court here made no such unsupported finding of fact. Accordingly, *Scheurer* is inapposite.

[9] It is well settled that this Court may affirm the decision of a District Court on any ground for which there is support in the record, even if not relied on by the District Court. *See MacNaughton v. Warren County*, 123 Fed. Appx. 425, 428 (2d Cir. (N.Y.) 2005).

Appellants argue that this holding was error (LAB at 21), but offer no authority to support a direct claim under the Constitution. Indeed, the Copyright and Patent Clause vests power in Congress to "promote Progress of Science and useful Arts" through the use of patents and copyrights. *See Howes v. Great Lakes Press Corp.*, 679 F.2d 1023, 1027-28 (2d Cir. 1982), *cert denied*, 459 U.S. 1038 (1982), *aff'd*, 897 F.2d 538 (Fed. Cir. (N.Y.) 1990). Appellants have identified no statute enacted by Congress allowing for a private right of action under the Copyright and Patent Clause. Accordingly, the District Court did not err in dismissing Appellants' patent claim.[10]

B. Civil Rights Claim

Even if it were not time-barred, as discussed in Point II.C., Appellants' Section 1983 would nonetheless be subject to dismissal for failure to state a claim. It is axiomatic that to be able to claim a civil rights violation for denial of due process, one must have had a right to due process in the first place. As the District Court correctly found, Appellants have no standing to sue for the government's failure to pursue investigations initiated by Appellants' complaints. (SA 457-58.)

[10] Moreover, Appellants acknowledge that they are not patent holders or licensees with respect to any of the "holy grail" inventions, a necessary precursor to any patent claim authorized by Congress. *See Enzo APA & Son v. Geapag A.G.*, 134 F.3d 1090, 1093 (Fed. Cir. 1998) (only a patentee may sue for patent infringement).

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.), *cert. denied*, 510 U.S. 865 (1993). Appellants have no such interest in the handling of disciplinary complaints because they have no right to a specific outcome of the investigations initiated by their complaints. *See generally*, *Hilbert v. County of Tioga*, No. 3:03-CV-193, 2005 WL 1460316, at *12 (N.D.N.Y. June 21, 2005). Accordingly, Appellants have no standing to sue the disciplinary committees for "whitewashing" their complaints. Moreover, because the alleged "whitewashing" is not actionable as a due process violation, Appellants' claim against the Proskauer Appellants for conspiring to "whitewash" cannot be actionable.[11]

C. Sherman Act

The Sherman Act prohibits combinations or agreements in restraint of trade (15 U.S.C. § 1("Section 1")), and illegal monopolies (15 U.S.C. § 2 ("Section 2")).

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[11] As private entities, the Proskauer Appellees could only be held liable under Section 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). Because there is no underlying "prohibited action", the Proskauer Appellees cannot be liable for conspiracy. *See O'Bradovich v. Village of Tuckahoe*, 325 F. Supp. 2d 413, 426 (S.D.N.Y. 2004), *citing Indianapolis Minority Contractors Ass'n, Inc. v. Wiley*, 187 F.3d 743, 754 (7th Cir. 1999).

In order to state a Section 1 claim, a plaintiff must allege: (1) a combination or conspiracy (2) that results in a restraint on interstate or foreign commerce; and (3) injury to the plaintiff's business or property. *Philip Morris Inc. v. Heinrich*, No. 95 Civ. 0328 (LMM), 1996 WL 363156, at *7 (S.D.N.Y. June 25, 1996) (citing *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 78 (2d Cir. 1980), *cert. denied,* 454 U.S. 1083 (1981)). The complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556.

There are simply no allegations in the AC to support a claim under Section 1 that an agreement was made between competitors to restrain trade. Appellants do not allege who made an agreement, what that agreement was or how it harms competition in general. Their naked conclusory claims that "violation of [Appellants'] proprietary IP rights creates an illegal monopoly and restraint of trade in the market for video imaging encoding, compression, transmission and decoding by, including but not limited to, the IP pools of MPEGLA LLC, . . . Intel, NDA, other contract violators and others" (SA 323, ¶1073), cannot meet *Twombly's* standard for supporting that an agreement was made. Indeed, as set forth below, Appellants are merely alleging business torts, which are not actionable under the Sherman Act.

To state a claim under Section 2, a plaintiff must allege: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or

maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).)

The AC fails to state a claim against the Proskauer Appellees for an illegal monopoly. First, the Proskauer Appellees – a law firm and its partners – do not participate in the market for "video imaging encoding, compression, transmission and decoding," the "relevant market" as inadequately defined by the AC. (*See* SA 323, ¶1073.) Nor have Appellants addressed basic elements of market definition such as substitutability, *United Magazine Co. v. Murdoch Magazines, Distrib.*, 146 F. Supp. 2d 385, 389 (S.D.N.Y. 2001) (Schwartz, J.), *aff'd*, 279 Fed. Appx. 14 (2d Cir. 2008), or that any of the defendants enjoys "monopoly power" in this market, *i.e.*, the power to control prices and exclude competition, *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 271 (2d Cir. 2001).

What Appellants are really alleging is that they have been excluded from the market by defendants' alleged misappropriation of their inventions. These allegations simply do not support an antitrust claim. The antitrust laws were not designed to serve as a remedy for businesses aggrieved by the allegedly unfair actions of their rivals, and courts have repeatedly warned against the dangers of using those laws to litigate alleged business tort disputes. *Brooke Group Ltd. v.*

Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'"); *see also Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990) ("courts should be circumspect in converting ordinary business torts into violations of antitrust laws") (internal quotations omitted).

Appellants do not allege an injury to competition generally, but only that they have been injured by way of Appellees' purported misappropriation. Accordingly, this claim is actually in the nature of a business tort and cannot be converted into an antitrust claim.

D. Civil RICO

To state a civil RICO claim, a plaintiff must allege both a violation of the substantive RICO statute, 18 U.S.C. §§ 1962, *et seq.*, and that he was "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c) (1976). The elements of Section 1962 are: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate

or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied,* 465 U.S. 1025 (1984), citing 18 U.S.C. § 1962(a)-(c).

"Racketeering activity" is defined in 18 U.S.C. § 1961(1), which incorporates by reference certain crimes under state law and federal law, including obstruction of justice and mail and wire fraud. *Id.* To plead a "predicate act," a plaintiff must do more than simply list the statutes purportedly violated; he must allege facts, which if true, would establish a violation of the statute. *See Hoatson*, 2007 WL 431098, at *4-5. Further, where the predicate act alleged involves fraud (*e.g.*, mail or wire fraud), that act must be pled with particularity. *See, e.g., Medina v. Bauer*, No. 02 Civ. 8837 (DC), 2004 WL 136636, at *5 (S.D.N.Y. Jan. 27, 2004) (Chin, J.).

Appellants purport to identify a number of "predicate acts" (SA 202-07, ¶733) and further give a laundry list of purportedly-violated federal and state statutes, judicial cannons and attorney ethics rules, spanning 100 pages (SA 222-322) and over 300 paragraphs (SA 222, ¶750-SA 322, ¶1066). It is unclear whether this list is intended to allege further predicate acts. Many of these statutes are inapplicable on their face. (*See, e.g.*, SA 269, ¶865 (alleging Contempt).) Further, many are not "racketeering activity" as defined in Section 1961. Rather than sifting through the AC trying to divine which claims were actually intended as "predicate acts," we will address only those specifically identified as such.

The "predicate acts" alleged (SA 202-07, ¶¶733 A. – U.) are insufficient because they consist of barely more than a recitation of the laws purportedly violated. Rather than plead the elements of the purported statutory violations,[12] the AC offers mere boilerplate: "Plaintiffs state on information and belief, defendants, did knowingly, unlawfully, and intentionally combine, confederate, conspire and agree together . . . and . . . participate in a conspiracy to" and then adds the title of the law supposedly violated. (SA 202-07 ¶733.) These allegations fail to identify any specific act that any specific defendant (among the 180 named) is believed to have undertaken or any agreement or understating evidencing a conspiracy.[13] Such conclusory and ambiguous allegations do not suffice to state a RICO claim. *See Hoatson*, 2007 WL 431098, at *4-5.

Focusing on mail and wire fraud as predicate acts, Appellants fail to allege with particularity (as required by Rule 9(b)), the "who, what, where and when" of the alleged fraud; *i.e.*, except for themselves (SA 114, ¶302), Appellants do not allege who mailed or wired something, what that something was, when it was done

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[12] The elements of certain of the crimes Plaintiffs appear to primarily rely on are set forth in the following cases: *United States v. Shellef*, 507 F.3d 82, 107 (2d Cir. 2007) (mail and wire fraud); *United States v. Schwimmer*, 649 F. Supp. 544, 548 (E.D.N.Y. 1986) (obstruction of justice).

[13] In certain instances, Plaintiffs go on to identify which defendants allegedly committed that predicate act, but they note that the allegation is not limited to the listed defendants, so the additional language does not help to clarify the allegation. (*See* AC ¶¶733 C., E. and F.)

or why it was fraudulent (SA 203, ¶¶733 A. and B.). And to the extent Appellants intend to assert that any defendant committed mail fraud by submitting false patent applications to the USPTO, the law is clear that such conduct cannot constitute this predicate act. *See Medina*, 2004 WL 136636, at *5.

Moreover, Appellants' invocations of other statutes are contrary to the facts alleged. For example, Appellants assert a violation of 18 U.S.C. § 1510, relating to the obstruction of criminal investigations. (*See* SA 204, ¶733 D.) However, the investigations the Proskauer Defendants are alleged to have "obstructed" (*i.e.*, the disciplinary proceedings) are not criminal investigations (*see* SA 204, ¶733 E.) and thus cannot constitute a violation of this section.

Given that Appellants have failed to allege properly any acts of racketeering activity, it is axiomatic that they have failed to allege a "pattern of racketeering activity," which is defined as at least two acts of racketeering activity committed within a ten-year period. *See* 18 U.S.C. § 1961(5). To establish a "pattern," the AC must allege that the predicate acts are related and that they "amount to or pose a threat of continued criminal activity." *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999). Appellants' allegations regarding the misappropriation of their technology, if anything, describe a single "scheme," not continued racketeering activity. Predicate acts comprising only a single scheme generally do not suffice to establish continued criminal activity or the

threat of criminal activity continuing into the future. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989) (recognizing that "proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity").

Finally, Appellants have failed to allege sufficiently a RICO "enterprise." The AC describes the enterprise as "presumed to be through the law firms of Proskauer and Foley. . . ." (SA 212.) Numerous courts have agreed that a RICO enterprise is "'a group of persons associated together for a common purpose of engaging in a course of conduct,' the existence of which is proven 'by evidence of an ongoing organization, . . . and by evidence that the various associates function as a continuing unit.'" *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 428 (S.D.N.Y. 2007) (citations omitted). The AC offers no facts as to how Proskauer and Foley "improperly functioned as a unit" or the organization or hierarchy of the alleged enterprise. Accordingly, Plaintiffs have failed to sufficiently allege a RICO enterprise. *See id.* at 429.[14] The AC fails to state a RICO cause of action.

[14] Because Appellants have failed to adequately allege a substantive violation of RICO, their RICO conspiracy claim under 1962(d) was also properly dismissed. *See Schuh v. Druckman & Sinel, L.L.P.*, No. 07 Civ. 366 (LAKGWG), 2008 WL 542504, at *11 (S.D.N.Y. Feb. 29, 2008).

VI. Jurisdiction

"This Court reviews a district court's decision to decline supplemental jurisdiction over pendant state law claims for abuse of discretion." *Wetzel v. Town of Orangetown*, No. 07-5114-cv, 2009 WL 159268, at *2 (2d Cir. 2009); *see also, Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003) (same). Usually, where federal claims are dismissed well before trial, the district courts will decline to exercise supplemental jurisdiction over the remaining state law claims. *See Valencia* at 305. In contrast, where the federal claims are dismissed on the eve of trial or the state law claims implicate federal doctrines, such as preclusion, the exercise of supplemental jurisdiction is not an abuse of the district court's discretion. *See id.* This is not the case here. Appellants' federal claims were dismissed at the earliest possible stage of the action. The remaining state law claims, for, *inter alia,* breach of contract, tortious interference and fraud, do not implicate any federal doctrines. Accordingly, the District Court did not abuse its discretion in declining to exercise supplemental jurisdiction.

In fact, Appellants seem to misapprehend the lower court's jurisdiction holding, arguing that the District Court had subject matter jurisdiction over Appellants' claims. *See* BAB at 22. However, Judge Scheindlin never found subject matter jurisdiction lacking over the federal claims, and in fact exercised jurisdiction by reviewing the substance of those claims and finding them to be

time-barred. The only holding in the lower court's order regarding jurisdiction is the decision not to exercise supplemental jurisdiction, which, as discussed above, was not an abuse of the lower court's discretion and should therefore be affirmed.

VII. Leave to Amend

The District Court denied Appellants leave to amend, holding that:

> [Appellants] have burdened this Court and hundreds of Appellees, many of whom are not alleged to have engaged in any wrongdoing, with more than one thousand paragraphs of allegations, but have not been able to state a legally cognizable federal claim against a single defendant. There is no reason to believe they will ever be able to do so.

(SA 459.) Where the proposed claims would be time-barred, leave to amend is properly denied on futility grounds. *See Trakansook v. Astoria Fed. Sav. & Loan Ass'n*, No. 07-2224-cv, 2008 WL 4962990, at *2 (2d Cir. (N.Y.) Nov. 21, 2008). Here, given the fact that Appellants have already amended their pleading once and the nature of the bar to their federal claims: the statutes of limitation; the District Court did not err in finding that a further amendment would be futile. *See id; see also Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 168 (2d Cir. 2003) (not an abuse of discretion to deny leave to amend where there was "a 'repeated failure to cure deficiencies by amendments previously allowed.'") (citations omitted). Accordingly, leave to amend was properly denied.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the District Court dismissing the AC.

Dated: New York, New York
March 30, 2008

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This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 7,850 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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