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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al., Plaintiffs, - against - APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al., Defendants.	07 Civ. 11196 (SAS) **PROSKAUER DEFENDANTS' OPPOSITION TO PLAINTIFF'S SECOND MOTION TO REOPEN DOCKET**

PRELIMINARY STATEMENT

Defendants Proskauer Rose LLP, Kenneth Rubenstein, Stephen C. Krane (deceased), and the Estate of Stephen R. Kaye (collectively the "Proskauer Defendants"), respectfully submit this memorandum in opposition to the motion of *pro se* plaintiff Eliot I. Bernstein ("Bernstein") to reopen this action pursuant to Rule 59, Fed. R. Civ. P. and to strike pursuant to Rule 12(f), Fed. R. Civ. P.

ARGUMENT

This is the second frivolous motion Bernstein has brought to reopen this case, which was closed after his amended complaint was dismissed in 2008.[1] In denying his first motion in August 2012, which was based on Rules 40 and 60,[2] the Court admonished Bernstein that any further frivolous filings could expose him to sanctions, on motion of the parties or *sua sponte* by the Court. Characteristically, Bernstein has ignored the Court's admonition and has filed yet another frivolous motion, now based on irrelevant conversations that allegedly occurred long *before* Bernstein filed his first motion to reopen, and nearly *two years* before the current application. Bernstein's newest frivolous motion should be rejected and he should be sanctioned for his repeated egregious abuses of the Court and the parties.

The heart of Bernstein's current motion is that in April 2011, an employee of the New York Attorney General (the "NYAG") allegedly told Bernstein during a telephone call initiated by Bernstein that, since Bernstein said he was suing the NYAG, the employee could not talk to Bernstein and that the NYAG would seek to obtain outside counsel if being sued by Bernstein.[3] Now, almost two years later, Bernstein twists this alleged call – apparently made to an individual who had no idea as to who Bernstein was or the nature of his claims (that had been dismissed almost three years earlier) – into an argument that the NYAG's office has admitted that it is

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[1] *Bernstein v. New York*, 591 F. Supp. 2d 448, 470 (S.D.N.Y. 2008) (Dkt No. 107), *mo. for reconsideration den.* (Aug. 19, 2008) (Dkt No. 108), *app. dismissed sua sponte* No. 08-4873-cv, (2d Cir. Jan. 5, 2010) (finding appeal lacked "an arguable basis in law or fact"), *mo. to reopen den.* (Aug. 15, 2012) (Dkt No. 141).

[2] *See* Dkt No. 141 (the "August 2012 Order").

[3] *See* Dkt No. 142, pp. 42-45.

conflicted and may not represent itself or the State Defendants in this lawsuit.[4] On the basis of this purported "new evidence," Bernstein yet again seeks to reopen this long-closed case.

As in the case of Bernstein's previous motion, which this Court found to be "frivolous, vexatious, overly voluminous, and an egregious abuse of judicial resources" (August 2012 Order), this motion is similarly baseless and should be denied.

First, Bernstein cannot circumvent the Court's prior ruling that he was not entitled to relief under Rule 60 by now framing his request for relief under Rule 59.[5] Rule 59(e) requires that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment. *Id.* Here, Bernstein has not only flouted Rule 59(e)'s "strict" time limits, but he has no right to relief under this provision because he is only seeking to assert "repetitive arguments on issues that have already been considered fully by the Court."[6] Indeed, all of the conflict of interest and disqualification claims related to the purported failure to investigate that Bernstein and his co-plaintiff, P. Stephen Lamont ("Lamont"), have asserted against the NYAG, and that are at the heart of Bernstein's motion to reopen, have been fully litigated and repeatedly rejected by this Court.[7] Nothing in the purported transcripts of Bernstein's abusive telephone conversations with New York State employees can alter this result.

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[4] *See* Dkt No. 142, ¶¶14-16.

[5] Rule 59(a)-(d) applies to motions for a new trial. As there was no trial in this case, the only conceivable paragraph of Rule 59 that could apply is (e).

[6] *See Ex'r of the N.Y. Estate of Kates v. Pressley & Pressley, P.A.*, 2013 U.S. Dist. LEXIS 16873, at *10-12 (E.D.N.Y. Feb. 7, 2013) (citations omitted) (enjoining *pro se* plaintiffs from further filings and denying their Rule 59(e) motion).

[7] *See* Dkt No. 7, pp. 1-2; *Bernstein v. New York*, 591 F. Supp. 2d 448, 460, 465-69 (S.D.N.Y. 2008) (Dkt No. 107); *Bernstein v. Appellate Div. First Dep't Disciplinary Comm.*, 2010 U.S. Dist. LEXIS 132830, at *7 (S.D.N.Y. Dec. 15, 2010) (Dkt No. 128). *See also Lamont v. Proskauer Rose, LLP*, 881 F. Supp. 2d 105, 110-11 (D.D.C. 2012)(rejecting Lamont's argument that the NYAG be disqualified for a conflict of interest).

Second, even if Bernstein were now moving under Rule 60, that motion would be infirm for all the reasons set forth in the Proskauer Defendants' Opposition to Plaintiff's Emergency Motion to Reopen Docket, dated August 13, 2012 (Dkt No. 139), which this Court adopted in its August 2012 Order.

Finally, although Bernstein's motion to strike pursuant to Rule 12(f) is apparently directed at the State Defendants, the Proskauer Defendants would nonetheless note that this request is utterly without merit. Bernstein has not met, even remotely, the standards for obtaining relief under Rule 12(f):

> First, there may be no question of fact which might allow the defense to succeed. . . . Second, there may be no substantial question of law, a resolution of which could allow the defense to succeed. . . . Third, plaintiff must show that it is prejudiced by the inclusion of the defense.[8]

Bernstein has no right to relief under Rule 12(f).

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[8] *County Vanlines Inc. v. Experian Info. Solutions, Inc.*, 205 F.R.D. 148, 153 (S.D.N.Y. 2002) (quoting *SEC v. Toomey*, 866 F. Supp. 719, 722 (S.D.N.Y. 1992)), *aff'd*, 2005 U.S. App. LEXIS 25422 (2d Cir. 2005).

CONCLUSION

Bernstein shows no sign of understanding that his abuse of the judicial system must come to an end. The current motion is utterly frivolous and abusive. It should be denied and his campaign of harassment and abuse brought to an end.

Dated: New York, New York
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Respectfully submitted,

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