UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELIOT I. BERNSTEIN, et al.,

07 Cv. 11196 (SAS)

Plaintiffs,

-against-

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

Defendants.

----------x

STATE DEFENDANTS' OPPOSITION TO PLAINTIFF'S SECOND MOTION TO RE-OPEN ACTION

Preliminary Statement

Movant plaintiff pro se Eliot Bernstein ("Plaintiff") brought this action in 2007, ultimately suing hundreds of defendants, including, inter alia, the Hon. Judith S. Kaye, the retired former Chief Judge of the New York State Court of Appeals; various judges of the Supreme Court of the State of New York, Appellate Divisions, First and Second Departments; the attorney discipline committees of the First and Second Departments (hereafter referred to as the "Disciplinary Committees"), as well as certain members and current and former counsel of the Disciplinary Committees, and various other state actors and entities (collectively the "State Defendants").

By August 8, 2008 Order, the State Defendants' motion to dismiss the complaint was granted on the grounds that the plaintiffs lacked standing to pursue their claims against the State Defendants; plaintiffs' claims were barred by absolute judicial and quasi judicial immunity, sovereign immunity and qualified immunity; most of plaintiffs' claims, including

the Civil RICO claims, were time-barred; plaintiffs failed to state a claim; the complaint violated Fed. R. Civ. P. 8(a); and certain of the claims, if not dismissed on other bases, would be barred by the Rooker-Feldman doctrine. See Bernstein v. New York, 591 F.Supp.2d 448, 460 (S.D.N.Y. 2008). Plaintiff appealed the order to the United States Court of Appeals for the Second Circuit and that appeal was dismissed as frivolous and without a basis in law by a February 5, 2010 order. See Docket No. 115.

Since the dismissal of this action, Plaintiff, and his former co-plaintiff P. Stephen Lamont have continued to attempt to re-litigate the identical claims. See, e.g. Bernstein v. Appellate Div. First Dept. Disciplinary Committee, 2010 WL 5129069, * 2 (S.D.N.Y. December 15, 2010) (Denying Lamont's motion to re-open judgment); Lamont v. Proskauer Rose, United States District Court, District of Columbia (11 cv 00949) (Docket No. 93)(Order dismissing action brought in the District of Columbia against New York State defendants for same grounds asserted in this action); Bernstein v. Appellate Div. First Dept. Disciplinary Committee, August 19, 2008 Order (Docket No. 108) (Order denying application for reconsideration). In fact, in 2012, plaintiff again moved to re-open this action by means of a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure. By order dated August 15, 2012, this Court directed that defendants who had not yet responded to "save their resources and not file any opposition papers" to the Plaintiff's motion which the Court found to be vexatious and an "egregious abuse of judicial resources." The Court denied that application and specifically cautioned plaintiff that "any additional frivolous filings in this case could subject him to sanctions".

Yet now Plaintiff again moves to reopen, despite the clear legal defenses which bar

consideration of his claims.[1] This time, he purports to move pursuant to Rules 12 and 59 of the Federal Rules of Civil Procedure and asks this Court to strike Defendants' pleadings and to grant him a new trial. As set forth below, this application is meritless and sanctionable.

ARGUMENT

PLAINTIFF HAS FAILED TO STATE BASIS TO RE-OPEN THIS CASE OR TO STRIKE STATE DEFENDANTS' PLEADINGS.

The basis of Plaintiff's motion is his allegation that, two years ago, in April, 2011, he initiated phone conversations with employees of the State Attorney General's Office ("OAG") during which an employee informed him that since Plaintiff stated that he was suing the OAG, that employee could not speak on the phone. See Plaintiff's Motion at ¶ 16. Specifically, Plaintiff alleges that in response to his statements that he was suing the Attorney General or the OAG, an OAG employee made "admissions" such as "if you are a plaintiff in a lawsuit in which the AG I work for is a defendant, I can't talk to you unless I am represented by counsel" and directed Plaintiff to forward a copy of the complaint so that counsel could "open up a line of communication". See Plaintiff's Motion at ¶ 16. Plaintiff makes no showing, indeed, does not even allege, that the employee knew about Plaintiff's claims or litigation history or even knew that Plaintiff's action had been dismissed years previously. From this alleged conversation, in an epic leap, Plaintiff argues that the OAG has admitted the existence of a conflict which prevents it from representing state officials Plaintiff has sued in the past and that this somehow entitles Plaintiff to reinstate those claims. As in the case of Plaintiff's previous motion to re-open his case, this application is likewise

[1] Plaintiff's application was filed by ECF on or about February 28, 2013. State Defendants are unaware of any briefing scheduled put into place by the Court, and thus the motion schedule under the local rules would apply and opposition papers would be due within seven days of the filing of the motion. State Defendants ask that the Court accept this opposition and deem it timely filed, *nunc pro tunc*.

frivolous and meritless.

First, Plaintiff's claims that this Office should be disqualified from representing the State Defendants in this case have previously been rejected by this Court and Plaintiff has set forth no basis to overturn that holding here. In a March 10, 2008 Order, this Court previously ruled on plaintiff's claims of a conflict and rejected the same, holding:

> Plaintiffs suggest that the Attorney General is conflicted because they requested that he investigate the allegations underlying this action and because they believe he will be called upon to investigate related allegations as they are exposed. I have considered plaintiffs' request and have determined that the Attorney General does not face an improper conflict of interest in representing the State Defendants. If, however, the Attorney General concludes that an investigation of defendants is warranted, then independent counsel would be required.

See March 10, 2008 Order, p. 1. Plaintiff's citation to alleged statements made two years ago by an OAG employee that if Plaintiff was suing the OAG, he should speak to counsel, provides no basis for revisiting this holding.

Furthermore, Plaintiff's application to re-open this case is both substantively and procedurally flawed. Even if an alleged conflict were established -- and even assuming the truth of the facts alleged by Plaintiff, one was not -- this would not overcome the fact that Plaintiffs' claims against the State Defendants are barred on numerous jurisdictional and legal grounds. The complaints against the State Defendants were based upon Plaintiff's allegations that they failed to properly handle attorney grievances. But as this Court has specifically held in dismissing his claims, "there is no clearly established right to have complaints investigated or pursued" and "no cognizable interest in attorney disciplinary procedures or in having certain claims investigated." Bernstein v. New York, 591 F.Supp.2d at 466-68. As this Court correctly determined, Plaintiff had no standing to challenge the

state court system's actions in regard to attorney discipline. See, e.g., Morrow v. Cahill, 278 A.D.2d 123 (1st Dep't 2000), app. denied, 96 N.Y.2d 895 (2001); Sassower v. Comm'n on Judicial Conduct of N.Y., 289 A.D.2d 119 (1st Dep't 2001); Mantell v. New York State Comm'n on Judicial Conduct, 277 A.D.2d 96 (1st Dep't 2000), app. denied, 97 N.Y.2d 706 (2001). In addition, his claims are again barred by absolute judicial, quasi-judicial and qualified immunity and numerous other defenses. See Oliva v. Heller, 839 F.2d 37, 39 (2d Cir. 1988); Rodriguez v. Weprin, 116 F.3d 62, 66 (2d Cir. 1997). Because Plaintiff has not and cannot remedy the fundamental defects in his claims, re-opening this action would be futile and his application should thus be denied. Jones v. Commerce Bank, N.A., 2006 WL 2642153, * 3 (S.D.N.Y. September 15, 2006).

Plaintiff's application is also procedurally flawed. 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. Here, Plaintiff has ignored this time limitation and, even were this overlooked, has failed to state any basis to amend judgment. Additionally, Plaintiff's motion to strike pleadings is similarly infirm. Rule 12(f) permits the Court to strike from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter", with such motion being made sua sponte or "on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." Plaintiff did not move in a timely manner and, even if he had, has not cited to any pleading by the State Defendants which would contain an insufficient defense and cannot do so since State Defendants did not answer his complaints but, instead, successfully moved to dismiss. Motions to strike pursuant to Rule 12(f), Fed. R. Civ. P. are disfavored and will not be granted "'unless it appears to a certainty that plaintiffs would succeed despite any state of

the facts which could be proved in support of the defense.'" Scott v. WorldStarHipHop, Inc., 10 cv. 9538, 2012 U.S. Dist. LEXIS 165029 (S.D.N.Y. Nov. 13, 2012) (Internal quotations and citations omitted). Plaintiff is thus not entitled to relief under Rule 12(f). Given the fact that Plaintiff's claims have been dismissed, and his attempts to re-open the case or re-litigate the claims have repeatedly been dismissed, it can't be said that the merits of the defense are lacking.

CONCLUSION

For the foregoing reasons, State Defendants ask that the Court issue an order denying Plaintiff's motion pursuant to Fed. R. Civ. P. 12 and 59 and granting such other and further relief as the Court deems just, proper and appropriate.

Dated: New York, New York
April 29, 2014

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for the State Defendants
By:
/s

MONICA A. CONNELL (MC 9841)
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New York, New York 10271
(212) 416-8965

MONICA A. CONNELL
Assistant Attorney General
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ELIOT I. BERNSTEIN, Individually, and P. STEPHEN LAMONT ON BEHALF OF SHAREHOLDERS OF IVIEWIT HOLDINGS, INC.,

Plaintiffs,

-against-

07 Cv. 11196 (SAS)

DECLARATION OF SERVICE

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

Defendants.

----------x

MONICA CONNELL, being duly sworn, deposes and says:

On the 29th day of April, 2013, I caused the accompanying State Defendants' Memorandum of Law in Opposition to Plaintiff's Second Motion to Re-Open Action, to be served upon the Plaintiffs by first class mail as set forth below:

Eliot I. Bernstein
2753 Northwest 34' Street
Boca Raton, FL 33434
Plaintiff Pro Se

P. Stephen Lamont
35 Locust Avenue
Rye, NY 10580
Plaintiff Pro Se

by enclosing the same in properly addressed, postage paid envelopes and depositing the same in a box maintained by the United States Postal Service at 120 Broadway, New York, New York for delivery and upon all other parties electronically via ECF.

Dated: New York, New York
April 29, 2013

/s

Monica Connell

Gregg M. Mashberg
PROSKAUER ROSE LLP
11 Times Square
New York, New York 10036-8299
Tel. (212) 969-3000
Fax (212) 969-2900

Attorneys pro se and Attorneys for Kenneth Rubenstein, Christopher C. Wheeler, Steven C. Krane (deceased), and the Estate of Stephen R. Kaye

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al.,	
Plaintiffs,	07 Civ. 11196 (SAS)
- against -	**PROSKAUER DEFENDANTS' NOTICE OF MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11**
APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al.,	
Defendants.	

PLEASE TAKE NOTICE that, upon the accompanying declaration of Gregg M. Mashberg, dated April 5, 2013, and the exhibit annexed thereto, and the accompanying memorandum of law and all prior pleadings proceedings had herein, Defendants Proskauer Rose LLP, Kenneth Rubenstein, Christopher C. Wheeler, the late Steven C. Krane, and the Estate of Stephen R. Kaye (collectively, the "Proskauer Defendants"), will respectfully move this Court before the Honorable Shira A. Scheindlin, U.S.D.J., at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007, Courtroom 15C, at such time and place as the Court may direct, for an order, pursuant to the Court's August 15, 2012 Order in this action, Rule 11 of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1651 imposing

sanctions, both monetary and injunctive, against Plaintiff Eliot I. Bernstein ("Bernstein"), and for such other and further relief as this Court may deem just and proper.

Dated: April 5, 2013

Respectfully Submitted,

PROSKAUER ROSE LLP

By: 

Gregg M. Mashberg
Eleven Times Square
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Attorneys pro se and attorneys for Kenneth Rubenstein, Christopher C. Wheeler, the late Steven C. Krane, and the Estate of Stephen R. Kaye.

To: Eliot Bernstein, *pro se*
2753 NW 34th St.
Boca Raton, FL 33434

Gregg M. Mashberg
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Attorneys pro se and Attorneys for Kenneth Rubenstein, Christopher C. Wheeler, Steven C. Krane (deceased), and the Estate of Stephen R. Kaye

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al.,	
Plaintiffs,	07 Civ. 11196 (SAS)
- against -	**DECLARATION OF GREGG M. MASHBERG IN SUPPORT OF THE PROSKAUER DEFENDANTS' MOTION FOR SANCTIONS**
APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al.,	
Defendants.	

I, GREGG M. MASHBERG, depose and say upon personal knowledge as follows:

1. I am admitted to practice before this Court and appear on behalf of Defendants Proskauer Rose LLP, Kenneth Rubenstein, Christopher C. Wheeler, the late Steven C. Krane, and the Estate of Stephen R. Kaye (collectively, the "Proskauer Defendants"). I make this declaration on the basis of personal knowledge and in support of the Proskauer Defendants' Motion for Sanctions.

2. I certify that, on March 21, 2013, in compliance with § IV.B of the Court's Individual Rules and Procedures, I caused to be sent to Mr. Bernstein a letter requesting that he withdraw his Second Motion to Reopen because it was frivolous. I personally emailed

the letter to Mr. Bernstein. To date, I have not received a response to this letter from Mr. Bernstein.

3. Attached as Exhibit A is an affidavit of service showing that, pursuant to Rule 11(c)(2), Fed. R. Civ. P., the Proskauer Defendants served their Rule 11 motion for sanctions on Mr. Bernstein at least 21 days prior to filing it.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 5, 2013.

Gregg M. Mashberg

EXHIBIT A:

Affidavit of Service

Proskauer Defendants' Motion for Sanctions,
Bernstein, et al. v. Appellate Division First Department Departmental Disciplinary Committee, et al.,
Civil Action No. 07-11196 (SAS) (S.D.N.Y.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al.,		
Plaintiffs,	:	07 Civ. 11196 (SAS)
- against -	:	**AFFIDAVIT OF SERVICE**
APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BENJAMIN M. RATTNER, being duly sworn, deposes and states:

1. I am not a party to this action, am over the age of eighteen years and reside in Rye, New York.

2. On April 5, 2013, I served true copies of the Proskauer Defendants' Notice of Motion for Sanctions Pursuant to Fed. R. Civ. P. 11, the Proskauer Defendants' Motion for Sanctions Pursuant to Fed. R. Civ. P. 11, the Declaration of Gregg M. Mashberg with the exhibit annexed thereto, a Proposed Order, and, pursuant to Local Civil Rule 7.2, copies of cases and other authorities cited in the Proskauer Defendants' Motion for Sanctions Pursuant to Fed. R. Civ. P. 11 that are unpublished or reported exclusively on computerized databases, upon the following:

Eliot I. Bernstein
2753 Northwest 34th Street
Boca Raton, FL 33434

Plaintiff Pro Se

3. Service was effectuated by first class mail by enclosing true copies of the aforementioned documents in a prepaid properly addressed wrapper to the above-referenced parties and placing them in an official depository under the exclusive care and custody of the United States Postal Service with the City and State of New York.

BENJAMIN M. RATTNER

Sworn before me this

5th day of April 2013

Notary Public

CARL FORBES, JR.
NOTARY PUBLIC-STATE OF NEW YORK
No. 02FO6235659
Qualified in Kings County
My Commission Expires February 14, 2015

EXHIBIT 2:

Proposed Order

Proskauer Defendants' Motion for Sanctions,
Bernstein, et al. v. Appellate Division First Department Departmental Disciplinary Committee, et al.,
Civil Action No. 07-11196 (SAS) (S.D.N.Y.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al., Plaintiffs,	07 Civ. 11196 (SAS)
- against -	**PROPOSED ORDER**
APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al., Defendants.	

The Court having considered the Proskauer Defendants' Motion for Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1651, it is hereby

ORDERED, that the Proskauer Defendants' motion is **GRANTED**; it is

FURTHER ORDERED, that Plaintiff Eliot I. Bernstein shall pay $ _____.00 to _____ as a sanction for filing a frivolous Second Motion to Reopen the Docket in this action; and it is

FURTHER ORDERED, that Bernstein is hereby enjoined from filing any action in any court related to the subject matter of this action without first obtaining leave of the Court. In seeking leave, Bernstein must certify that the claim or claims he wishes to present are new

claims never before raised and disposed of on the merits by any court. He must also certify that the claim or claims are not frivolous or asserted in bad faith. Additionally, the motion for leave to file must be captioned "Application Pursuant to Court Order Seeking Leave to File." Bernstein must affix a copy of this order to any such motion, as well as a copy of the pleading he seeks leave to file. Failure to comply strictly with the terms of this injunction will be sufficient grounds for denying leave to file, and such other remedy or sanction that the Court may deem appropriate.

SO ORDERED, this _____ day of _____, 2013.

_____
SHIRA A. SCHEINDLIN
United States District Judge

Copies To:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al., Plaintiffs,	07 Civ. 11196 (SAS)
- against -	**PROSKAUER DEFENDANTS' MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11**
APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al., Defendants.	

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CASES

STATUTES AND RULES

Defendants Proskauer Rose LLP, Kenneth Rubenstein, Christopher C. Wheeler, the late Stephen C. Krane, and the Estate of Stephen R. Kaye (collectively, the "Proskauer Defendants") submit this memorandum of law in support of their Motion for Sanctions against *pro se* Plaintiff Eliot I. Bernstein ("Bernstein") pursuant to Rule 11 of the Federal Rules of Civil Procedure.[1]

PRELIMINARY STATEMENT

Bernstein has ignored this Court's explicit warning that if he makes any additional frivolous filings he may be subject to sanctions, either on motion of the parties or *sua sponte* by the Court.[2] Bernstein's current motion to reopen is clearly vexatious and frivolous and the Proskauer Defendants respectfully urge the Court to impose sanctions.

This Court dismissed Bernstein's underlying case on August 8, 2008.[3] The Second Circuit dismissed his appeal *sua sponte* because it lacked "an arguable basis in law or fact."[4] Last July, Bernstein filed a frivolous and vexatious motion to reopen.[5] The Court denied that motion out-of-hand and, in so doing, gave him the sanctions warning.[6]

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[1] Pursuant to Rule 11(c)(2) of the Federal Rules of Civil Procedure, the Proskauer Defendants will refrain from filing their motion for sanctions and this supporting memorandum with the Court if Bernstein withdraws his Second Motion to Reopen within twenty-one days of having been served with the motion and supporting memorandum.

[2] Dkt. No. 141.

[3] *Bernstein v. New York*, 591 F. Supp. 2d 448 (S.D.N.Y. 2008) (Dkt. No. 107).

[4] Dkt. No. 115.

[5] Dkt. No. 138.

[6] Dkt. No. 141.

Undeterred, Bernstein filed his second motion to reopen on February 28, 2013.[7] As set forth in the Proskauer Defendants' opposition to Bernstein's motion,[8] Bernstein has not remotely offered a legitimate basis for seeking again to reopen this action. Rather, his filing is untimely, is substantively baseless and, indeed is utterly frivolous.

Bernstein's flagrant disregard of this Court's warnings make clear that if there is any hope that his abuse of the judicial process will stop, sanctions are necessary.

FACTS[9]

Bernstein (together with co-plaintiff P. Stephen Lamont ("Lamont")) commenced this *pro se* action in December 2007. Over 1,100 paragraphs in length, the Amended Complaint asserted several federal claims arising out of (i) the alleged misappropriation of Iviewit's intellectual property and (ii) the alleged interference with various attorney disciplinary complaints that Iviewit had filed in New York and Florida against scores of attorneys, law firms and officials allegedly responsible for the misappropriation and cover up. Plaintiffs also alleged various common-law claims.

Even before serving the Amended Complaint, Plaintiffs sought to disqualify the New York Attorney General (the "NYAG") from representing any of the State Defendants based on alleged conflicts of interest. This Court rejected Plaintiff's request, writing that "the Attorney General does not face an improper conflict of interest in representing the State Defendants. If, however, the Attorney General concludes that an investigation of defendants is warranted, then

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[7] Dkt. No. 142.

[8] Dkt. No. 143.

[9] For the sake of brevity, the Proskauer Defendants repeat only the facts necessary to the instant motion. Familiarity with other facts related to this case is assumed.

independent counsel would be required."[10] The Court denied Plaintiffs' request for reconsideration on March 21, 2008.[11]

On August 8, 2008, this Court dismissed all of Bernstein's federal claims on the merits, with prejudice. Bernstein's request for leave to file a second amended complaint was denied, with the Court expressing its doubts that Plaintiffs could ever state a legally cognizable claim.[12]

The Second Circuit dismissed Bernstein's appeal *sua sponte*, holding that his appeal "lack[ed] an arguable basis in law or fact."[13]

On July 27, 2012, Bernstein filed his first motion to reopen, making much of alleged developments in another case in this Court, *Anderson v. New York*.[14] This motion totaled some 286 pages, named nearly four thousand defendants, and lacked any coherent rationale. This Court denied the motion on August 15, 2012, finding it to be "frivolous, vexatious, overly voluminous, and an egregious abuse of judicial resources," and warned Bernstein that "any additional frivolous filings in this case could subject [Bernstein] to sanctions under Federal Rule of Civil Procedure 11. Monetary and/or injunctive sanctions may be imposed upon motion of the parties or by this Court *sua sponte*."[15]

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[10] Dkt. No. 7.

[11] Dkt. No. 11.

[12] *Bernstein*, 591 F. Supp. 2d at 470 (Dkt. No. 107).

[13] Dkt. No. 115.

[14] 614 F. Supp. 2d 404 (S.D.N.Y. 2009), *aff'd sub nom. Anderson v. Cahill*, 417 Fed. Appx. 92 (2d Cir. 2011); 07-Civ. 9599 (SAS) (Dkt. No. 132).

[15] Dkt. No. 141. Acting apart from Bernstein, his co-plaintiff, Lamont, moved this Court in 2010 to reopen the docket pursuant to Rule 60(b)(6), based on the dismissal of *Anderson*, which motion this Court denied, ruling that Lamont had no federally protected interest in the attorney disciplinary process. *Bernstein v. Appellate Div. First Dep't Disciplinary Comm.*, No. 07 Civ. 11196 (SAS), 2010 U.S. Dist. LEXIS 132830, at *7 (S.D.N.Y. Dec. 15, 2010), *appeal dismissed*,

Bernstein now disregards the Court's clear warning and continues to abuse the judicial process with his second motion to reopen.[16] The current motion is predicated on alleged conversations that he had with New York State employees in 2011 – *almost two years prior to the filing of this motion.* Bernstein alleges that an individual – who (based upon the purported transcript) clearly had no idea who Bernstein was or the nature of his claims – conceded that the State had a conflict of interest and would have to obtain independent counsel to defend against his claims.[17]

Bernstein's current motion to reopen is clearly frivolous. As detailed in the Proskauer Defendants' Opposition to Plaintiff's Second Motion to Reopen,[18] these alleged two-year-old conversations are substantively meaningless, do not constitute grounds to reopen and, in any event, merely address claims previously considered and rejected five years ago.[19]

No. 10-5303-cv, slip op. (2d Cir. May 5, 2011) (Dkt. Nos. 128, 135). Undeterred, and again acting without Bernstein's involvement, in 2011 Lamont commenced a watered-down version of this action in District Court for the District of Columbia. Mimicking Bernstein's "conflicts" obsession, he initially moved to disqualify the NYAG. Senior District Judge Barbara J. Rothstein denied the disqualification motion and went on to dismiss the action on grounds of *res judicata* (relying on this Court's decision in *Bernstein*). *Lamont v. Proskauer Rose, LLP*, 881 F. Supp. 2d 105, 111-14 (D.D.C. 2012).

[16] Dkt. No. 142.

[17] *See* Affirmation of Eliot I. Bernstein (the "Bernstein Aff."), ¶¶15-17 (Dkt. No. 142).

[18] Dkt. No. 143.

[19] *See* Dkt. Nos. 7, 11.

ARGUMENT

BERNSTEIN SHOULD BE SANCTIONED BECAUSE HIS MOTION IS FRIVOLOUS AND LACKS ANY GOOD FAITH BASIS IN LAW OR FACT

A. General Principles

Rule 11 is designed to "deter frivolous claims and curb abuses of the legal system, thereby speeding up and reducing the costs of litigation."[20] Filings that have a "complete lack of a factual and legal basis" have been found to "needlessly increas[e] litigation costs" and thereby harass Defendants.[21] In appropriate cases, *pro se* litigants are subject to sanctions.[22] *Pro se* litigants who show contempt for the judicial system, harass defendants and cause the court and litigants to waste resources, are not entitled to deference and may be sanctioned by the court.[23]

This Court has already concluded that Bernstein has crossed the line from acceptable conduct, although it did not impose sanctions, anticipating that he would "get the message" and refrain from further sanctionable conduct. He has not. His second motion to reopen is, as demonstrated in the Proskauer Defendants' opposition papers, frivolous in every respect. The

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[20] *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121, 126 (N.D.N.Y. 1996) (citation omitted).

[21] *Id.* at 128.

[22] *See, e.g., Ex'r of N.Y. Estate of Kates v. Pressley & Pressley, P.A.*, No. 11-CV-3221 (JFB)(ARL), 2013 U.S. Dist. LEXIS 16873, at *15-16, 24-25 (E.D.N.Y. Feb. 7, 2013) (enjoining *pro se* plaintiffs from further filings in the Eastern District of New York arising from or relating to the claims at issue and denying their Rule 59(e) motion where this was the Plaintiff's "fourth attempt" at litigating the same claims in the same court); *Schwartz v. Nordstrom, Inc.*, 94 Civ. 1005 (CSH), 1994 U.S. Dist. LEXIS 15203, at *8-9 (S.D.N.Y. Oct. 24, 1994) (imposing $3,000 monetary sanction on *pro se* plaintiff for commencing numerous lawsuits against Nordstrom and its attorneys where plaintiff had been previously warned he had no cognizable cause of action).

[23] *See Lipin v. Hunt*, 573 F. Supp. 2d 836, 845 (S.D.N.Y. 2008) (noting that "a court's special solicitude towards *pro se* litigants does not extend to the willful, obstinate refusal to play by the basic rules of the system upon whose very power the plaintiff is calling to vindicate his rights.") (internal quotations and citation omitted).

motion is untimely and substantively baseless. Bernstein has had his last chance. Sanctions are now in order.

B. Bernstein Should Be Enjoined from Any Further Filings Arising from the Same Claims

Pro se or not, Bernstein is an archetypal vexatious litigant who must be enjoined from further filings. "[T]he All Writs Act, 28 U.S.C. § 1651, gives district courts [authority] to sanction a prolific litigant who abuses the judicial process by repeatedly suing defendants on meritless grounds and enjoin him from pursuing future litigation without leave of the court."[24]

In considering injunctive relief in the context of Rule 11, the district court should consider the following factors to determine if a party like Bernstein should be enjoined:

> (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties. Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties.[25]

Bernstein's conduct meets all these factors, and this Court should end his five-year campaign of harassment.

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[24] *McKoy v. Potter*, 08 Civ. 9428 (PKC), 2009 U.S. Dist. LEXIS 39623, at *16 (S.D.N.Y. Apr. 20, 2009) (citations and internal quotations omitted).

[25] *Safir v. U.S. Lines Inc.*, 792 F.2d 19, 24 (2d Cir. 1986); *see also Positano v. New York*, 12-CV-2288 (ADS) (AKT), 2013 U.S. Dist. LEXIS 32488, at *23-25 (E.D.N.Y. Mar. 7, 2013) (imposing injunctive sanctions on *pro se* plaintiff for bringing repeated claims under civil rights statutes that he had been warned were without merit due to absolute judicial immunity and the Eleventh Amendment and applying the five factor test set forth in *Safir*).

(1) Bernstein's litigious history demonstrates that nothing short of an injunction will deter him from pursuing his repeatedly rejected claims. Indeed, a pattern of baseless filings warrants injunctive sanctions.[26] Before filing the instant case, Bernstein filed numerous attorney disciplinary complaints, including against the Proskauer Defendants, which he alleged were not investigated by the states of New York or Florida.[27] As far as the Proskauer Defendants can discern, the crux of both of Bernstein's frivolous motions to reopen have been that conflicts of interest existed that prevented investigations by the State Defendants into the alleged attorney disciplinary "cover-up." But this issue has been litigated repeatedly since the outset of this case in 2008. Indeed, the Court rejected his motion to disqualify the NYAG, finding there was no conflict of interest.[28] It denied Plaintiffs' request for reconsideration of this decision,[29] and then held that "plaintiffs have no cognizable interest in attorney disciplinary procedures or in having certain claims investigated."[30] The Second Circuit showed no patience for any of Bernstein's

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[26] *See Bridgewater Operating Corp. v. Feldstein*, 346 F.3d 27, 28-30 (2d Cir. 2003) (enjoining further federal filings by plaintiff related to the property at issue where plaintiff had filed suit in New York state and federal courts and the Southern District of Florida); *Satterfield v. Pfizer, Inc.*, 04-CV-3782 (KMW)(GWG), 98-CV-8040 (KMG)(GMG), 2005 U.S. Dist. LEXIS 14923, at *5, 47-48 (S.D.N.Y. July 13, 2005), *aff'd*, 208 Fed. App'x. 59 (2d Cir. 2006) (enjoining *pro se* plaintiff from further filings in any state or federal action arising from the same claims where plaintiff instituted two actions in the Southern District of New York, a state and federal lawsuit in Delaware, and made attorney-disciplinary complaints); *Ex'r of N.Y. Estate of Kates*, 2013 U.S. Dist. LEXIS 16873, at *15-16, 24-25 (enjoining *pro se* plaintiffs from further filings in the Eastern District of New York arising from or relating to the claims at issue and denying their Rule 59(e) motion where this was the Plaintiff's "fourth attempt" at litigating the same claims in the same court).

[27] *See Bernstein*, 591 F. Supp. 2d at 456 (Dkt. No. 107).

[28] Dkt. No. 7.

[29] Dkt. No. 11.

[30] *Bernstein*, 591 F. Supp. 2d at 468 (Dkt. No. 107).

claims and dismissed his appeal *sua sponte*.[31] Bernstein then waited nearly four years to bring his first so-called "emergency motion to reopen" in 2012, which this Court properly rejected, while warning Bernstein he risked sanctions if he continued filing frivolous motions. Bernstein, characteristically, ignored the Court's warning and has now filed another baseless motion to reopen, again seeking to litigate claims that have been repeatedly rejected.

(2) Nor does Bernstein have any objective, good-faith basis to believe that he will prevail on his "conflicts" claim.[32] This Court, in dismissing his amended complaint, wrote that Plaintiffs had:

> burdened this Court and hundreds of defendants, many of whom are not alleged to have engaged in 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.[33]

That the Second Circuit wrote that Bernstein's claims lack any "arguable basis in law or fact" only underscores that Bernstein is on notice his claims are baseless.[34] This includes his basic contentions that Plaintiffs are entitled to an investigation of the attorney disciplinary process as well as Plaintiffs' perennial claim that the NYAG is "conflicted."[35]

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[31] Dkt. No. 115.

[32] *See McKoy*, 2009 U.S. Dist. LEXIS 39623, at *19. *See also Safir*, 792 F.2d at 24 (imposing an injunction on a prolific *pro se* litigant who "has repeatedly asserted the same claims in slightly altered guise"); *Malley v. N.Y. City Bd. of Educ.*, 112 F.3d 69, 69 (2d Cir. 1997) (finding injunctive sanctions appropriate where plaintiff had been warned about the unmeritorious nature of his claims, but failed to heed this warning).

[33] *Bernstein*, 591 F. Supp. 2d at 470 (Dkt. No. 107).

[34] Dkt. No. 115.

[35] *Bernstein*, 591 F. Supp. 2d at 460, 469 (Dkt. No. 107); *Bernstein*, 2010 U.S. Dist. LEXIS 132830, at *7 (Dkt. No. 128).

(3) Although not represented by counsel, Bernstein cannot disclaim responsibility for his frivolous filings. He has been admonished by the Court and warned by opposing counsel that his abusive conduct must stop. He "must bear full responsibility for bringing" the current frivolous motion, which follows on the heels of a frivolous motion to reopen, not to mention the underlying frivolous lawsuit[36]

(4) This is the second frivolous motion to reopen that Bernstein has required the Court to review and the Proskauer Defendants to respond. These burdens on the Court and the parties have unquestionably been unnecessary.

(5) Finally, while the Court should, as discussed below, impose monetary sanctions, Bernstein's history of abusive conduct calls out for injunctive relief. It is hard to imagine how the Court could have been clearer that Bernstein faced sanctions if he continued his abusive conduct. Yet, he proceeded to file another frivolous motion, *knowing* that he was subjecting himself to the risk of sanctions. While he may consider himself judgment proof, neither he nor any other litigant is immune from an injunction and the consequences if he were to violate it.

For all these reasons, any order of sanctions should include an injunction against Bernstein making any filings in this or any other court without first obtaining leave.

C. Monetary Sanctions Should Be Imposed on Bernstein

Courts in the Second Circuit have imposed monetary sanctions on vexatious *pro se* litigants like Bernstein.[37] For all the reasons set forth above, Bernstein's abusive filings place him

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[36] *See Satterfield*, 2005 U.S. Dist. LEXIS 14923, at *47.

[37] *See Schwartz*, 1994 U.S. Dist. LEXIS 15203, at *8-9 (imposing $3,000 monetary sanction on *pro se* plaintiff for commencing numerous lawsuits against Nordstrom and its attorneys where plaintiff had been previously warned he had no cognizable cause of action). *See also Jones v. City of Buffalo*, 96-CV-0739E(F), 1998 U.S. Dist. LEXIS 6070, at *18-20 (W.D.N.Y. Apr. 22, 1998) (imposing a $2,500 sanction on *pro se* litigant for repeated abusive filings that attempted to relitigate previous decisions).

directly in the cross hairs of an order of monetary sanctions in an amount of not less than $3,500.[38]

CONCLUSION

For the foregoing reasons, the Proskauer Defendants respectfully request that the Court grant their motion for Rule 11 sanctions, including (1) an order enjoining Bernstein from filing any further motions on this docket and enjoining him from filing another action in any court related to the subject matter of this action without prior leave of the Court; and (2) an order imposing monetary sanctions in an amount of not less than $3,500.

Dated: New York, New York
April 5, 2013

Respectfully submitted,

PROSKAUER ROSE LLP

By: _____
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Attorneys pro se and Attorneys for Defendants Kenneth Rubenstein, Christopher C. Wheeler, Stephen C. Krane (deceased), and the Estate of Stephen R. Kaye

[38] While this amount is obviously less than the cost of opposing the motion to reopen and preparing this motion, the goal of the Proskauer Defendants is to end this wasteful process as promptly and as simply as possible. The Proskauer Defendants suggest that the Court direct that any monetary sanctions paid by Bernstein be contributed to the Lawyers' Fund for Client Protection of the State of New York, or other appropriate organization identified by the Court.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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).

[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
March 18, 2013

Respectfully submitted,

PROSKAUER ROSE LLP

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIOT I. BERNSTEIN, et al.,	:	
Plaintiffs,	:	07 Civ. 11196 (SAS)
- against -	:	**AFFIDAVIT OF SERVICE**
APPELLATE DIVISION, FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BENJAMIN M. RATTNER, being duly sworn, deposes and states:

1. I am not a party to this action, am over the age of eighteen years and reside in Rye, New York.

2. On March 18, 2013, I served true copies of the Proskauer Defendants' Opposition to Plaintiff's Second Motion to Reopen Docket upon the following:

Eliot I. Bernstein
2753 Northwest 34th Street
Boca Raton, FL 33434
Plaintiff Pro Se

P. Stephen Lamont
35 Locust Avenue
Rye, NY 10580
Plaintiff Pro Se

3. Service was effectuated by first class mail by enclosing true copies of the aforementioned document in prepaid properly addressed wrappers to the above-

referenced parties and placing them in an official depository under the exclusive care and custody of the United States Postal Service with the City and State of New York.

BENJAMIN M. RATTNER

Sworn to before me this

18th day of March 2013

Notary Public

JANET M. BONELLI
Notary Public, State of New York
No. 01BO4714761
Qualified in Queens County
Commission Expires March 30, 2014