16-4208-cv
Schafler v. Merrill Lynch, Pierce, Fenner & Smith, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of January, two thousand eighteen.

PRESENT: REENA RAGGI,
DEBRA ANN LIVINGSTON,
*Circuit Judges.**

PEPI SCHAFLER,
Plaintiff-Appellant,

v. No. 16-4208-cv

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Defendant-Appellee.

APPEARING FOR APPELLANT: PEPI SCHAFLER, *pro se*, North Bethesda, Maryland.

APPEARING FOR APPELLEE: MICHELLE MELLO, Norton Rose Fulbright US LLP, New York, New York.

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* Judge Raymond J. Lohier, Jr. is recused in this case. Therefore, this case is decided by the two remaining members of the panel pursuant to Internal Operating Procedure E(b) of the Rules of the United States Court of Appeals for the Second Circuit.

Appeal from a judgment of the United States District Court for the Southern District of New York (Nelson S. Román, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on December 1, 2016, is AFFIRMED.

Plaintiff Pepi Schafler, proceeding *pro se*, appeals from the district court's order dismissing her negligence, fraud, conversion, breach of fiduciary duty, and conspiracy claims against defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") as barred by *res judicata*, collateral estoppel, and the applicable statutes of limitations. She also appeals from the district court's filing injunction—which requires Schafler to include a copy of the district court's dismissal order with any new action she files in the Southern District of New York—and the district court's denial of her motion to join additional parties. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* a district court's dismissal of a claim as time-barred and its application of *res judicata* and collateral estoppel. *See Fuchsberg & Fuchsberg v. Galizia*, 300 F.3d 105, 109 (2d Cir. 2002) (collateral estoppel); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 368 (2d Cir. 1997) (*res judicata*); *Ormiston v. Nelson*, 117 F.3d 69, 71 (2d Cir. 1997) (statute of limitations). Upon such review, we conclude that the district court properly dismissed Schafler's complaint. We affirm for substantially the reasons stated by the district court in its thorough and well-reasoned November 30, 2016 order.

We also conclude that the district court did not abuse its discretion by imposing a filing injunction on Schafler. A district court may, in its discretion, impose a filing

injunction if confronted with "extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation . . . or a failure to comply with sanctions imposed for such conduct." *Milltex Indus. v. Jacquard Lace Co.*, 55 F.3d 34, 39 (2d Cir. 1995) (internal quotation marks omitted); *see generally In re Martin-Trigona*, 9 F.3d 226 (2d Cir. 1993). A district court "may not impose a filing injunction on a litigant *sua sponte* without providing the litigant with notice and an opportunity to be heard." *Moates v. Barkely*, 147 F.3d 207, 208 (2d Cir. 1998). We consider the following factors when reviewing a lower court's filing injunction:

> (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.

Safir v. U.S. Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1986). The question the court ultimately 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." *Id.*

The district court here meticulously recounted Schafler's prior actions challenging the 2001 bankruptcy order approving the sale of her stock certificates, as well as the sanctions imposed on her by other courts for continually seeking to relitigate that decision. Schafler was on notice of a possible injunction because Merrill Lynch requested it in its motion to dismiss, but Schafler chose not to address the request in the four opposition briefs she filed. At this point, Schafler cannot have any objective, good-faith expectation of

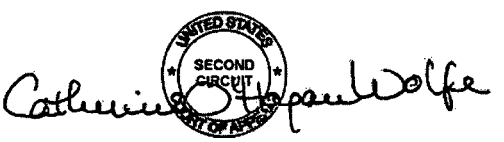
prevailing on her claims. And as the district court correctly observed, despite repeated warnings and sanctions in several jurisdictions, Schafler has continued to file actions raising the same issues. Accordingly, the district court's limited filing injunction, which requires only that Schafler include a copy of the district court's dismissal order with any new action she files in the Southern District of New York, was not an abuse of discretion.

The district court also did not abuse its discretion by denying Schafler's motion to join an additional party. *See MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 385 (2d Cir. 2006). Schafler argues that joinder was necessary because additional parties participated in the alleged conspiracy. The reasoning underlying the district court's dismissal of her complaint, however, would also bar any claims against additional parties.

Insofar as Schafler urges vacatur because Judge Román exhibited bias against her, the record belies this claim, *see Liteky v. United States*, 510 U.S. 540, 555 (1994), and shows that Judge Román resolved the case in an appropriate and impartial manner.

We have considered all of Schafler's remaining arguments and conclude that they are without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PEPI SCHAFLER,

Plaintiff,

-against-

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant.

No. 15 Civ. 7863 (NSR)

MEMORANDUM & ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff Dr. Pepi Schafler, proceeding *pro se*, initiated this action against "Bank of America Merrill Lynch" alleging, amongst other things, a conspiracy to aid a non-party in the unlawful conversion of her stock certificates, through fraud, deceit, negligence, and/or breach of fiduciary duty. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"),[1] has moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on collateral estoppel and *res judicata* grounds, or alternatively because Plaintiff's allegations are time-barred and fail to state a claim. As part of its motion, Defendant also requests that the Court issue a vexatious litigant injunction against Plaintiff prohibiting her from re-litigating these issues in this Court.

For the following reasons, Defendant's motion is GRANTED.

[1] Defendant has responded to this suit and noted for the Court that Plaintiff misnamed Defendant. (ECF No. 14.) The Clerk of the Court is respectfully directed to amend the case caption to conform to the above.

BACKGROUND[2]

This action stems from two, extremely contentious, past proceedings: a three-decade-old divorce and a two-decade-old bankruptcy. Plaintiff's allegations revolve around alleged acts undertaken by her "scorned husband" and others, including Merrill Lynch, related to those proceedings. (Am. Compl. ¶¶ 2-3, ECF No. 5.) To fully understand the background of the current action, the Court takes judicial notice of Plaintiff's filings in other actions. *See Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000) (citing Fed. R. Evid. 201(b)).

I. The Underlying Dispute Between Plaintiff and Her Former Spouse Regarding the Assets Contained in Her Concealed Trust

a. The Divorce

In 1986, Plaintiff filed for divorce from her former husband, Donald Summer. *Schafler v. C.I.R.*, 75 T.C.M. (CCH) 1897, at *2 (1998). "The divorce proceedings were acrimonious," and involved Mr. Summer "disput[ing] the property of the marital estate." *Id.*; *see Summer v. Summer*, 206 A.D.2d 930, 930 (4th Dep't 1994) ("photograph collection constitutes marital property" but should be awarded to Summer out of equitable considerations), *aff'd as modified*, 85 N.Y.2d 1014 (1995) (award of lifetime maintenance in favor of Schafler reinstated). At least a portion of that dispute centered around "[P]laintiff's concealment of [a] family trust before the commencement of the [divorce] trial[.]" *Summer v. Summer*, 233 A.D.2d 881, 881 (4th Dep't 1996), *leave to appeal dismissed*, 89 N.Y.2d 981 (1997). But since her ex-husband "acknowledge[d] that he knew of [the] concealment of the family trust," he was not entitled to reopen the divorce judgment in order to add the trust to the marital property. *Id.*

[2] The Court assumes the truth of the facts alleged in Plaintiff's complaint, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), unless directly contradicted by documents filed in other court proceedings of which the Court takes judicial notice. *See Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995).

b. The Bankruptcy

In 1996, as the ten-year divorce was concluding, Plaintiff filed for bankruptcy in Maryland, and an order discharging her debts was entered that same year. *See In re Schafler*, 263 B.R. 296, 298 (N.D. Cal. 2001).

In 1998, however, the "Trustee [Scott Field] moved to reopen the case for the purposes of . . . investigat[ing] and pursu[ing] recovery of potential bankruptcy estate assets which may have been undisclosed" after "he was 'alerted to [Schafler's] concealment of assets by her ex-spouse.'" *Id.* at 299, 306. Plaintiff had "failed to disclose in her schedules the true value of her interest" in the previously mentioned family trust: 100% of "over five hundred thousand dollars in stock and a Florida condominium." *Id.* at 299 ("Instead she listed her interest as being worth one dollar."). At the same time, Schafler moved to California and, at her request, her bankruptcy case was transferred there and appointed a new trustee, Richard Spear. *In re Schafler*, 99-42138 (Bankr. N.D. Cal. Mar. 26, 1999), Doc. No. 105. Spear sought and obtained approval to retain Dennis Davis to bring adversary proceedings in order to recover the trust. *Id.*, Doc. No. 108.

During those proceedings, the Bankruptcy Court, and the District Court on appeal, concluded that the family trust "was nothing but a sham and a fraud on [Schafler's] creditors"—Plaintiff had "transferred her assets for no consideration into the Max Family Trust before filing for bankruptcy, and . . . thereafter used the assets of the [trust] as her own property." *In re Schafler*, 263 B.R. at 299 (affirming orders). On December 21, 2000, the stocks and the condo were ordered to be delivered to the Trustee (Spear) as part of the bankruptcy estate. *Id.* On April 25, 2001 and May 17, 2001, the Bankruptcy Court approved the Trustee's sale of the stock certificates, some of which were part of an alleged Individual Retirement Account, and denied Schafler's claim that the IRA should be exempt from the estate given her previous fraudulent

concealment of the assets.[3] *In re Schafler*, No. C-01-1818 (MMC), 2002 WL 1940295, at *2, 4 & n.8 (N.D. Cal. Aug. 13, 2002) (affirming denial of exemption because "fraudulent concealment required denial . . ., irrespective of whether the claim would have been proper in the absence of [] concealment"), *aff'd, In re Schafler*, 60 F. App'x 696, 697 (9th Cir. 2003) ("exemption was properly denied" because there was no evidence in the record that the account qualified under the relevant parts of the Internal Revenue Code); *In re Schafler*, 62 F. App'x 138, 139 (9th Cir. 2003) ("trust was not subject to exclusion from the bankruptcy estate" because Schafler "had access to both the net income and the principal of the trust and used the assets . . . to her benefit"), *cert. denied*, 540 U.S. 100 (2003); *see also In re Schafler*, No. C-01-1818 (MMC), 2002 WL 1940297, at *1 (N.D. Cal. Aug. 13, 2002) (noting Plaintiff's unsupported allegations that the Bankruptcy Court was "corrupt" in deciding that she had concealed the trust).

The sale of the stocks led to many more lawsuits during the years that followed.

II. Subsequent Collateral Attacks on the Asset Liquidation

Not only did Plaintiff thoroughly litigate the bankruptcy judgment, but she initiated lawsuits against her ex-husband, his attorney, the trustees, and the bankruptcy and district judges in various different venues. *See Schafler v. Summer*, 63 F. App'x 581, 583 (2d Cir. 2003) ("Schafler set forth various claims [against her ex-husband] sounding in, *inter alia*, perjury, fraud, lying to the Court, racketeering, malicious prosecution, malpractice, negligence, professional misconduct, libel, slander, invasion of privacy, stalking, harassment, negligent and intentional infliction of emotional distress, and restitution"); *Schafler v. Aloi*, 31 F. App'x 770,

[3] In this action, Schafler argues that the asset sale order was unsigned, and that forgery was involved in the liquidation of her stocks, (Am. Compl. ¶ 17), ignoring that the order rejecting her arguments for an exemption *was signed* and that the oral ruling on the issues matched the orders. *In re Schafler*, No. C-01-1818 (MMC), 2002 WL 1940295, at *2 (N.D. Cal. Aug. 13, 2002) ("a written order consistent with the Bankruptcy Court's oral ruling was filed on May 17, 2001").

771 (2d Cir. 2002) (setting forth mostly the same claims and others against her ex-husband's attorney); *Schafler v. Field*, No. CA-02-1308 (AW), 2002 WL 32818725, at *1 (D. Md. July 25, 2002) ("the second suit filed in [the District of Maryland] by Plaintiff . . . for various claims related to Defendant Field's performance of duties as the Chapter 7 Trustee in Plaintiff's Chapter 7 bankruptcy case"), *aff'd*, 50 F. App'x 625 (4th Cir. 2002) (per curiam); *Schafler v. Spear*, 135 F. App'x 939, 940 (9th Cir. 2005) (appealing "district court's denial of her motion to disqualify the presiding [district] judge [Charles R. Breyer]" based on unsubstantiated allegations of bias); *In re Schafler*, 62 F. App'x 138, 140 (9th Cir. 2003) ("[Schafler] brings allegations of bias and corruption against United States Bankruptcy Judge Randall J. Newsome"), *cert. denied*, *Schafler v. Newsome*, 540 U.S. 1047 (2003).

These collateral attacks were resoundingly unsuccessful. *See, e.g.*, *Schafler v. Field*, 2002 WL 32818725, at *1 (D. Md. July 25, 2002) ("[Schafler] has not obtained leave of the bankruptcy court to sue the Chapter 7 trustee—and therefore, she cannot properly refile the suit."); *Schafler v. Aloi*, 31 F. App'x 770, 771 (2d Cir. 2002) (complaint dismissed in its entirety with prejudice); *Schafler v. Summer*, 63 F. App'x 581, 583 (2d Cir. 2003) ("all of the claims raised in Schafler's complaint were either meritless or not cognizable or were barred by the applicable statute of limitations"); *In re Schafler*, 62 F. App'x 138, 140 (9th Cir. 2003) ("district court properly dismissed Appellant's complaint against Judge Newsome" since he "ha[d] absolute immunity for all judicial acts taken in th[e] [bankruptcy] proceedings"); *Schafler v. Spear*, 135 F. App'x 939, 939 (9th Cir. 2005) ("district court properly dismissed Schafler's action for failure to state a claim").

Despite these losses in the Second, Fourth, and Ninth Circuits, Plaintiff continued on—shaping new and more complex causes of action in her attempts to re-litigate these issues. *See In*

re Schafler, No. CA-10-1893 (PJM), 2011 WL 691607, at *2 (D. Md. Feb. 18, 2011) (complaint when "[p]ared down to its essentials" focuses on "actions of 'malfeasants' involving alleged bribes, trafficking, racketeering, and biased court proceedings related to her Chapter 7 action in Maryland and California . . . [by] her former husband[,] . . . Field, U.S. Bankruptcy Judge Duncan Keir, M & T Bank Corporation and HSBC Bank USA and other unnamed 'predators'"); *Schafler v. Field*, No. CA-12-715 (PJM), 2012 WL 959396, at *3 (D. Md. Mar. 20, 2012) ("In filing this action, Schafler invokes numerous claims, including but not limited to [conspiracy], fraud, human trafficking, forgery, and deceit in an attempt to revisit her 1996 bankruptcy proceeding and to charge anew those individuals involved"), *aff'd*, 475 F. App'x 27 (4th Cir. 2012). But none of Plaintiff's attempts to reformulate the events that led to her forfeiture of her alleged—yet repeatedly determined to be non-exempt—retirement assets were met with success.

She also sought to re-litigate a "November 7, 1985 incident involving her husband" which was already extensively litigated in New York state courts. *See Shafler v. HSBC Bank USA*, No. C-06-5908 (PJH), 2007 WL 578993, at *1 (N.D. Cal. Feb. 21, 2007), *aff'd, Schafler v. HSBC Bank USA*, 310 F. App'x 181, 182 (9th Cir. 2009) (citing *Schafler v. HSBC Bank USA*, 23 A.D.3d 1083, 1084 (4th Dep't 2005)) ("Schafler may not relitigate whether the bank defendants conspired to convert money from a bank account that she and her then-husband jointly owned because those claims have already been litigated by the parties and ultimately decided by the New York court in favor of the bank defendants."); *Schafler v. HSBC Bank USA*, No. CA-09-1758 (AW), 2009 WL 3398887, at *1 (D. Md. Oct. 19, 2009), *aff'd*, 381 F. App'x 282 (4th Cir. 2010) ("her claims arise out of the November 7, 1985 incident involving her former husband's improper withdrawal of funds, which was extensively litigated in an action before the New York State court"); *Schafler v. Field*, No. CA-12-715 (PJM), 2012 WL 959396, at *2 (D. Md. Mar. 20,

2012), *aff'd*, 475 F. App'x 27 (4th Cir. 2012) ("action raised allegations of a 'Ponzi' scheme and scam involving the purported theft, conversion and laundering of Schafler's funds arising in 1985 by Defendant bank institutions and individuals in complicity with Schafler's ex-husband.").

III. Vexatious Litigant Orders

Unsurprisingly, courts have found it necessary to warn Plaintiff that "her behavior border[s] on being 'vexatious' and caution[] her against reasserting [meritless or redundant] claims against the[] [same] defendants." *See Schafler v. Indian Spring Maint. Ass'n*, 139 F. App'x 147, 149 (11th Cir. 2005) (Schafler ignored the warning and filed a motion for reconsideration "alleging that the district court's decision was based on 'falsehoods and deceit,' and bias").[4] When such warnings went unheeded, Plaintiff's ability to bring suit was restricted.

To this Court's knowledge, vexatious litigant orders or pre-filing injunctions have been entered against Plaintiff in the Northern District of California, the District of Maryland, and the Ninth Circuit. *See Schafler v. Spear*, 135 F. App'x 939, 940 (9th Cir. 2005) (affirming vexatious litigant declaration where "district court cited eight other federal actions filed by Schafler arising out of the same bankruptcy proceedings and found that Schafler used the federal courts to harass defendants"); *Shafler v. HSBC Bank USA*, No. C-06-5908 (PJH), 2007 WL 578993, at *9 (N.D. Cal. Feb. 21, 2007) (declaring Plaintiff a vexatious litigant); *In re Schafler*, No. 07-80049, at *3 (9th Cir. July 30, 2007) (imposing pre-filing review indefinitely); *Schafler v. HSBC Bank USA*, 381 F. App'x 282, 283 (4th Cir. 2010) (declining to review district court's imposition of pre-filing injunction); *In re Schafler*, No. CA-10-1893 (PJM), 2011 WL 691607, at *3 (D. Md. Feb. 18, 2011) (discussing pre-filing injunction prohibiting filing of actions without the court's leave).

[4] Plaintiff has also brought cases unrelated to this bankruptcy dispute suffering from major procedural deficiencies. *See, e.g., Schafler v. Euro Motor Cars*, No. CA-08-2334 (RWT), 2009 WL 690676, at *1 (D. Md. Feb. 23, 2009) (diversity action surrounding an "abomination of a car" dismissed because Schafler and the car dealership, where "she purchased the alleged 'mongrel car,'" were both located in Maryland).

IV. Plaintiff Remains Undeterred and Adds Merrill Lynch to Her List of Defendants

Plaintiff's most recent failed attempt to attack the sale of the stock certificates was also filed against Merrill Lynch and contained largely the same allegations as the instant matter. *Compare Schafler v. Bank of AmericaMerrill Lynch ("Merrill Lynch I")*, No. C-14-1879 (PJH), 2014 WL 3909132, at *1 (N.D. Cal. Aug. 8, 2014) (Schafler "claim[ed] that her former husband fabricated a story that she had concealed assets in a bankruptcy filing in Maryland, and 'partnered with two San Francisco attorneys'—Dennis Davis and Richard Spear—to pressure the Bankruptcy Court in the Northern District of California to grant them access to her retirement funds."), *with* (Am. Compl. ¶ 2 ("Due to . . . a scorned former husband[']s false allegations and in conspiracy with a San Francisco attorney named Dennis Davis who was allegedly known for frauds . . ., a court ordered Plaintiff to hand over her retirement funds . . .")). In the California action, Plaintiff alleged causes of action against Merrill Lynch for breach of fiduciary duty and negligence resulting from its role in the liquidation of Plaintiff's forfeited stock, claiming Merrill Lynch was complicit in an alleged scheme perpetrated by Davis (the attorney hired by the trustee assigned during the California bankruptcy proceedings) to "liquidate the securities and turn them into cash" on the basis of "fabricated orders." *Id.* at *2, 7.

In its thorough opinion, the District Court dismissed her complaint for failure to state a claim and on statute of limitations grounds, despite recognizing that the complaint was merely an attempt to plead around the vexatious litigant injunction the Court had previously imposed. *See id.* at *5-7 & n.1. "[A]s a further basis" for dismissing the action, the Court found it "lack[ed] subject matter jurisdiction over [a] claim regarding the sale of securities that were part of plaintiff's bankruptcy estate," because the "court ha[d] no jurisdiction to vacate the [asset sale] order or to reopen [the] bankruptcy case in light of the rulings by the Ninth Circuit." *Id.* at *7,

appeal dismissed, No. 07-80049 (9th Cir. Sept. 22, 2014) ("Because the appeal is so insubstantial as to not warrant further review, it shall not be permitted to proceed.").

V. Procedural History

On October 5, 2015, Plaintiff commenced this fee-paid action *pro se*, filing her complaint against Defendant. (ECF No. 1.) On October 27, 2015, she amended her complaint. (ECF No. 5.) Defendant's motion to dismiss was fully submitted as of April 11, 2016. (ECF No. 19.)

LEGAL STANDARDS

I. Motion to Dismiss Standard

Under Rule 12(b)(6), the inquiry is whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *accord Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. To survive a motion to dismiss, a complaint must supply "factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). The Court must take all material factual allegations as true and draw reasonable inferences in the non-moving party's favor, but the Court is "'not bound to accept as true a legal conclusion couched as a factual allegation,'" or to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

In determining whether a complaint states a plausible claim for relief, a district court must consider the context and "draw on its judicial experience and common sense." *Id.* at 662.

A claim is facially plausible when the factual content pleaded allows a court "to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

II. Methods for Addressing Vexatious Litigants and Their Complaints

"[I]n order to preserve scarce judicial resources . . . district courts may dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required filing fee[.]" *Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d 362, 364 (2d Cir. 2000) ("as courts of first instance, district courts are especially likely to be exposed to frivolous actions, and thus have an even greater need for inherent authority to dismiss such actions quickly"). Moreover, "[t]he Supreme Court and numerous courts of appeals have recognized that courts may resort to restrictive measures that except from normally available procedures litigants who have abused their litigation opportunities." *In re Martin-Trigona*, 9 F.3d 226, 228 (2d Cir. 1993); *see also* 28 U.S.C. § 1651 (federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law").

"Some courts have responded to vexatious litigants by completely foreclosing the filing of designated categories of cases." *In re Martin-Trigona*, 9 F.3d at 228; *see, e.g., Jackson v. Carter Oil Co.*, 179 F.2d 524, 525 (10th Cir. 1950) (plaintiff was "restrained and perpetually enjoined from filing further suits or prosecuting further litigation against the defendants, or their successors in interest, based on the claim" alleged); *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984) (approving district court's exercise of its injunctive power against vexatious plaintiff's "litigious propensities" in light of its "obligation to protect the public and the efficient administration of justice").

When a Court decides that a litigant has filed his last frivolous lawsuit, notice and an opportunity to respond must be provided prior to imposing the sanction of a filing injunction.

Johnson v. New York, 21 F. App'x 41, 43 (2d Cir. 2001) (citing *Moates v. Barkley*, 147 F.3d 207, 208 (2d Cir. 1998)). "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." *Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986) (providing five factors for a district court to consider, including the litigant's (1) history of vexatious litigation, (2) motive for such litigation, (3) status as *pro se* or represented by counsel, (4) imposition of unnecessary expense or burden on the other parties or the courts, and (5) ability to be curtailed by other sanctions). And, if the Court determines that such a restrictive injunction should also extend to state court filings, the Second Circuit has explained that "[it] disfavor[s] 'blanket' filing injunctions that restrict a vexatious litigant from filing any action in state courts without first obtaining leave from a federal court," but has approved "certain 'qualifications relating to the protection of federal interests' that may permissibly be placed on a vexatious litigant's access to state courts, . . . includ[ing]:"

> (1) requiring the vexatious litigant to attach a copy of the federal court's sanctions order to any future state-court filing; and/or (2) fashioning a specially-crafted injunction prohibiting the vexatious litigant "from bringing new actions in any tribunal without leave from the district court" against persons whom the litigant has previously harassed through judicial proceedings.

Doe v. Republic of Poland, 531 F. App'x 113, 115-16 (2d Cir. 2013) (citing *In re Martin-Trigona*, 737 F.2d at 1263).

DISCUSSION

Defendant has articulated four separate grounds for dismissing Plaintiff's action, including collateral estoppel, *res judicata*, the applicable statutes of limitations, and failure to state a claim based on the allegations contained in the Amended Complaint. Defendant has also provided an overview of Plaintiff's extensive history of frivolous lawsuits on this subject matter,

including the recent action against Merrill Lynch filed in the Northern District of California. (Def. Mem. at 1-2, ECF No. 20.) The District Court in California, despite having issued a pre-filing injunction, addressed Plaintiff's claims on the merits, determining that her claims for breach of fiduciary duty and negligence failed to state a claim and were time-barred. *Merrill Lynch I*, 2014 WL 3909132, at *5-7.

Undeterred, Plaintiff begins anew in this Court and attempts to add new claims against Defendant, including conspiracy, fraud, and conversion. (*See, e.g.*, Am. Compl. ¶¶ 5-6.) But Plaintiff treads well-worn territory in her latest allegation of a vast conspiracy to deprive her of her retirement funds. As should be evident from the factual overview set forth above, Plaintiff's claims that Defendant was complicit in a scheme hatched by Davis (the attorney hired by the California bankruptcy trustee to commence adversarial proceedings against Plaintiff after she concealed her assets from the Bankruptcy Court) to deprive her of the stocks contained in her trust are simply "an attempt to revisit her 1996 bankruptcy proceeding and to charge anew those individuals involved directly and in a secondary manner with her proceeding." *See Schafler v. Field*, No. CA-12-715 (PJM), 2012 WL 959396, at *3 (D. Md. Mar. 20, 2012) (complaint dismissed *ab initio* for failure to state a claim), *aff'd*, 475 F. App'x 27 (4th Cir. 2012); (Pl. Mem. of Facts, ECF No. 18, Ex. 4 (elaboration on the alleged plan to "rob and harm" Plaintiff by reopening the bankruptcy proceedings in order to gain access to her trust)).

Plaintiff "Schafler, who claims to have a law degree, clearly underst[ands] the consequences" of legal proceedings and is not afforded the generous latitude usually provided to *pro se* litigants. *Schafler v. Summer*, 63 F. App'x 581, 584 (2d Cir. 2003); (Am. Compl. ¶ 21); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers").

I. Claims Alleged Against Merrill Lynch

Defendant is correct that Plaintiff's reasserted and newly asserted claims are barred by *res judicata*. The doctrine of *res judicata*, or claim preclusion, provides that "a final judgment on the merits of an action precludes the parties or their privies from litigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The Northern District of California considered Plaintiff's claims against Defendant based on largely the same set of alleged facts and dismissed the action for failure to state a claim. *Merrill Lynch I*, 2014 WL 3909132, at *5-7.

A "dismissal for failure to state a claim is a final judgment on the merits and thus has *res judicata* effects." *Berrios v. N.Y.C. Hous. Auth.*, 564 F.3d 130, 134 (2d Cir. 2009) (citing *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 399 & n.3 (1981)). "For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits." *Taylor v. Sturgell*, 553 U.S. 880, 891 n.4 (2008) (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001)). Plaintiff's California Action was brought pursuant to diversity jurisdiction and the district court applied California law; therefore, California law applies to the *res judicata* analysis here.

"California courts apply *res judicata* when: '(1) [a] claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party . . . to the prior proceeding.'" *Lee v. JP Morgan Chase Bank, NA*, No. 15 Civ. 4061 (CAS), 2015 WL 5554006, at *3 (C.D. Cal. Sept. 21, 2015) (citing *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 797 (2010)). "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in

the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *San Diego Police Officers' Ass'n v. San Diego City Emps. Ret. Sys.*, 568 F.3d 725, 734 (9th Cir. 2009) ("What is critical to the analysis 'is the harm suffered; that the same facts are involved in both suits is not conclusive.'") (citations omitted).

Plaintiff's claims for breach of fiduciary duty and negligence seek compensation for the same alleged injuries and the same alleged wrongs: in both actions, Plaintiff alleges that she was injured by Merrill Lynch's unlawful conduct with Davis in connection with the disposition of the stock certificates. *Compare Merrill Lynch I*, 2014 WL 3909132, at *1-2, *with* (Am. Compl. ¶¶ 3, 5-6, 9, 13, 17, 27, 31). The harm alleged is the illegitimate liquidation of those stocks. Thus, Plaintiff's claims for breach of fiduciary duty and negligence were raised, and disposed of, in the California Action. *Merrill Lynch I*, 2014 WL 3909132, at *2. Furthermore, the addition of fraud, conversion, and conspiracy claims does not change the focal point of her complaint—the wrongful liquidation of the stock—and these claims could have been brought in the California suit. By bringing this action, Plaintiff demonstrates that she is still "unwilling to accept the outcome of her previous lawsuits[.]" *Id.* at *4 (discussing the October 2004 vexatious litigant order entered against Plaintiff). Plaintiff's claims against Merrill Lynch must be dismissed as barred by the doctrine of *res judicata*.

Alternatively, this Court, as did the court in California, determines that Plaintiff's 15-year-old claims are time-barred and that none of the allegations in her complaint indicate a toll would be appropriate. All of Plaintiff's claims carry limitations periods of four years or less under California law. *See David Welch Co. v. Erskine & Tulley*, 203 Cal. App. 3d 884, 893 (Ct. App. 1988) (citing Cal. Code Civ. Proc. § 343), *as abrogated by Lee v. Hanley*, 61 Cal. 4th 1225 (2015) (four-year period for breach of fiduciary duty); *Hydro-Mill Co. v. Hayward, Tilton &*

Rolapp Ins. Associates, Inc., 115 Cal. App. 4th 1145, 1154 (Ct. App. 2004) (two-year period for negligence); Cal. Code Civ. Proc. § 335.1 (same); *Graham-Sult v. Clainos*, 756 F.3d 724, 743 (9th Cir. 2014) (citing Cal. Code Civ. Proc. § 338(d)) (three-year period for fraud); Cal. Code Civ. Proc. § 338(c) (three-year period for conversion); *Filmservice Labs., Inc. v. Harvey Bernhard Enters., Inc.*, 208 Cal. App. 3d 1297, 1309 (Ct. App. 1989) (statute of limitations for conspiracy determined by reference to period applicable to the underlying cause of action).[5]

No matter the timeframe Plaintiff alleges as her first indication that some additional entity was involved in the liquidation of the stocks, it cannot serve to toll the statute of limitations on the basis of a "discovery" exception because all of necessary potential facts were known to Plaintiff when the assets were sold.[6] *See also Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 756 n.2 (2016) (equitable tolling is inapplicable). Plaintiff has already sought relief against the primary and secondary actors involved in her divorce and bankruptcy, and none of the tertiary parties she attempts to add to her concept of a "conspiracy" change the fact that this action is about her "former scorned husband" and his alleged "plan to harm" Plaintiff by "steal[ing] all he [could]." (Pl. Mem. of Facts at 2.) Plaintiff has made this same argument in many different cases. And, based on the facts alleged in her complaint, there

[5] California law applies to Plaintiff's claims in this action because the locus of the alleged wrongdoing occurred in California. (Am. Compl. ¶ 2); *Krock v. Lipsay*, 97 F.3d 640, 646 (2d Cir. 1996). But Plaintiff's causes of action would also be time-barred under New York law, where the claims carry limitations periods of six years or less. *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009) (breach of fiduciary duty); *Ruso v. Morrison*, 695 F. Supp. 2d 33, 45 (S.D.N.Y. 2010) (negligence); C.P.L.R. § 213(8) (fraud); *Vigilant Ins. Co. of Am. v. Hous. Auth. of City of El Paso, Tex.*, 87 N.Y.2d 36, 44 (1995) (conversion); *see also Williams v. Arpie*, 56 A.D.2d 689, 690 (3d Dep't 1977), *aff'd*, 44 N.Y.2d 689 (1978) (a conspiracy claim, "dependent upon the substantive [underlying] torts," is time barred if the underlying tort is time barred).

[6] Plaintiff alleges searching for "many years" until "[o]ne day" she received an envelope containing "the answer to the many year searches and the concerns." (*See* Am. Compl. ¶¶ 24-25.) In her opposition memoranda, she clarifies that the envelope arrived "[i]n the summer of 2011," over four years before she filed this lawsuit. (Pl. Mem. of Cleanup, ECF No. 16 at 7.) What that envelope contained remains a mystery—therefore, it does not provide a basis for tolling the statute of limitations. To the extent Plaintiff argues the envelope contained evidence of the allegedly forged asset sale order, she had already made that "discovery" when she filed the California action.

is no plausible conspiracy or fraud for her to discover that would change the material facts relevant to what transpired.[7] Accordingly, Plaintiff's claims are also dismissed as time-barred.

II. Any Potential Claims Seeking Reversal of the Bankruptcy Judgment

The Court similarly agrees with the Northern District of California that, to the extent any of Plaintiff's claims could be construed as seeking relief from this Court in the form of vacating the Bankruptcy Court's judgment, subject-matter jurisdiction is lacking. (*See, e.g.*, Am. Compl. ¶ 23); *Merrill Lynch I*, 2014 WL 3909132, at *7; *see also In re Schafler*, No. CA-10-1893 (PJM), 2011 WL 691607, at *2, 3 (D. Md. Feb. 18, 2011) (court noted it "would lack jurisdiction to examine any arguable appellate claim regarding bankruptcy issues" where Plaintiff asked "that Judge Keir's orders issued in the bankruptcy proceeding be vacated as they 'led to scandalous misconduct, bribery, and the loss of [Schafler's] exempt retirement funds.'").

The judgment has been affirmed by the Ninth Circuit—and the Supreme Court has denied *certiorari*. *In re Schafler*, 60 F. App'x 696, 697 (9th Cir. 2003) ("exemption was properly denied"); *In re Schafler*, 62 F. App'x 138, 139 (9th Cir. 2003) ("trust was not subject to exclusion"), *cert. denied*, 540 U.S. 100 (2003). Collateral estoppel would bar any such claims in this action, given that all factual and legal issues relating to the disposition of the stock certificates at issue were adjudicated on the merits in Plaintiff's bankruptcy proceeding and affirmed on appeal. *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003) (quoting *Interoceanica*

[7] Based on the allegations in the complaint, there is no potential for a reasonable inference that Merrill Lynch is responsible for any misconduct related to the sale of the securities. *See Iqbal*, 556 U.S. at 678. The judicial records of the many prior proceedings demonstrate that the Bankruptcy Court approved the asset sale and the stocks were liquidated. *In re Schafler*, 2002 WL 1940295, at *2. The allegations against Merrill Lynch for its ancillary role in the legitimate sale of Plaintiff's non-exempt, previously concealed, assets are at best recitations of threadbare causes of action sounding in conspiracy, fraud or deceit, negligence, conversion, and breach of fiduciary duty, and include allegations of falsified orders contradicted by the findings of prior courts considering these matters. *See Hirsch*, 72 F.3d at 1092. On the basis of these allegations, it is implausible that Defendant is liable in any way for the misconduct alleged. If Plaintiff's claims were not time-barred, then they would be subject to dismissal for failure to state a claim for which relief could be granted.

Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997)) (an issue cannot be re-litigated when, in a previous proceeding, "(1) the identical issue was raised . . .; (2) the issue was actually litigated and decided in [that] proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits."). But Plaintiff has also already attacked the judgment on every conceivable collateral ground against each participant in the proceedings to no avail. *See supra* at 4-6 (detailing Plaintiff's attempts to collaterally attack the judgment).

Therefore, such claims cannot be redressed by an order of this Court, which does not have the authority to reopen the judgment even were there grounds to do so.

III. Entry of a Vexatious Litigant Injunction

Plaintiff was provided notice of Defendant's request for a vexatious litigant injunction in its motion to dismiss, and had the opportunity to respond in her opposition to the motion. *See Iwachiw v. N.Y.C. Bd. of Elections*, 126 F. App'x 27, 29 (2d Cir. 2005) (affirming imposition of injunction requested in defendant's motion to dismiss). She chose not to address the request other than to assert that the other actions were all unrelated to this new action. (*See generally* Pl. Mem. of Cleanup at 4-5, ECF No. 16.) This Court disagrees.

The application of the doctrine of *res judicata* and the imposition of an injunction against a vexatious litigant "grow out of policies favoring prevention of repetitious litigation and conservation of judicial resources[.]" *Hoffenberg v. Hoffman & Pollok*, 288 F. Supp. 2d 527, 539 (S.D.N.Y. 2003). Both are part of the same spectrum, with the former applying in good faith scenarios up until the point that the litigant is proven to be lacking in restraint, undeterred by prior outcomes, and in need of the imposition of the latter. Nevertheless, as a result of the exercise of judicial restraint and the strong policy interests in favor of open access to the courts,

some litigants may file harassing actions for years before their access is restricted. *See, e.g., In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984) (before Martin-Trigona was enjoined, his "litigious propensities" included more than 30 cases between 1980 and 1984, and at least 250 filings in total); Mary Van Vort, Note, *Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 Fordham L. Rev. 1165, 1171 n.35 (1987) (his "abuse of legal processes was 'exemplified not only by the number and variety of meritless actions' but by the use of pleadings 'as a vehicle to launch vicious attacks upon persons of Jewish heritage.'"); *In re Martin-Trigona*, 9 F.3d 226, 228 (2d Cir. 1993) (discussing restrictions on his anti-Semitic appellate filings).

Plaintiff finds herself far over the line between those seeking to litigate issues in good faith that are barred by *res judicata* and plaintiffs that bring litigation solely to harass the same defendants. She appears unable or unwilling to accept the finality of the asset sale approved by the Bankruptcy Court in 2001. Viewing her history of litigation as favorably as possible, she has demonstrated at minimum a disregard for the efficient functioning of the court system and the scarcity of available judicial resources. This Court joins previous courts in finding that Pepi Schafler is a vexatious litigant who uses the courts to harass the same defendants.

Although broader injunctive remedies may be available, the Court will, as requested, enjoin Plaintiff from filing any new litigation in this District without attaching a copy of this Order to her papers. Such an injunction is narrowly tailored to address the primary harm: the waste of time and energy responding to issues that have been resolved for over a decade. The Court hopes that the injunction will enable other courts to "preserve scarce judicial resources" and "dismiss a [new] frivolous complaint *sua sponte*" as necessary. *Fitzgerald*, 221 F.3d at 364.

* * *

"Given that the [purported] new information that has come to light has no bearing on the fact that all claims in the First Amended Complaint are untimely as a matter of law, repleading in this action would be futile." *Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 452 (S.D.N.Y.) (citing *Goodrich v. Long Island R.R. Co.*, 654 F.3d 190, 200 (2d Cir. 2011)), *aff'd*, 579 F. App'x 7 (2d Cir. 2014). The operative complaint, therefore, must be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the complaint is GRANTED with prejudice. This Court DECLARES Plaintiff Pepi Schafler to be a vexatious litigant and ENJOINS Plaintiff from filing any new actions in this District unless she attaches a copy of this Order to her papers when initiating such an action. Failure to follow this requirement may result in the action being summarily dismissed without further consideration. Plaintiff's motion to join additional parties to the action, not yet fully briefed, is therefore DENIED as moot. (*See* Minute Entry for Proceedings Held on Aug. 4, 2016.) The Clerk of the Court is respectfully directed to amend the case caption to correct the name of Defendant, terminate the motion at ECF No. 19, and close the case.

Dated: November 30, 2016
White Plains, New York

SO ORDERED:

NELSON S. ROMAN
United States District Judge