NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

AMY R. GURVEY,
Plaintiff-Appellant

v.

COWAN, LIEBOWITZ AND LATMAN, P.C., CLEAR CHANNEL COMMUNICATIONS, INC., LIVE NATION, INC., INSTANT LIVE CONCERTS, LLC, NEXTICKETING, INC., WILLIAM BORCHARD, MIDGE HYMAN, BAILA CELEDONIA, CHRISTOPHER JENSEN, DALE HEAD, STEVE SIMON, SUSAN SCHICK,
Defendants-Appellees

DOES, 1-X INCLUSIVE, MICHAEL GORDON,
Defendants

2020-1620

Appeal from the United States District Court for the Southern District of New York in No. 1:06-cv-01202-LGS-HBP, Judge Lorna G. Schofield.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Appellant Amy R. Gurvey filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

September 2, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

AMY R. GURVEY,
Plaintiff-Appellant

v.

COWAN LIEBOWITZ AND LATMAN, P.C., CLEAR CHANNEL COMMUNICATIONS, INC., LIVE NATION, INC., INSTANT LIVE CONCERTS, LLC, NEXTICKETING, INC., WILLIAM BORCHARD, MIDGE HYMAN, BAILA CELEDONIA, CHRISTOPHER JENSEN, DALE HEAD, STEVE SIMON, SUSAN SCHICK,
Defendants-Appellees

DOES, 1-X Inclusive, MICHAEL GORDON,
Defendants

2020-1620

Appeal from the United States District Court for the Southern District of New York in No. 1:06-cv-01202-LGS-HBP, Judge Lorna G. Schofield.

ON MOTION

PER CURIAM.

ORDER

Amy R. Gurvey petitions for a writ of mandamus and moves for various relief, including a stay of this appeal pending a decision on her mandamus petition. Responding to this court's show cause order, Cowan Liebowitz and Latman, P.C. ("CLL"), William Borchard, Midge Hyman, Baila Celedonia, and Christopher Jensen (collectively, "the CLL attorneys") urge dismissal of the appeal. Ms. Gurvey also responds to the show cause order and replies to the CLL attorneys' response to the same order.

Ms. Gurvey sued the CLL attorneys, Live Nation Inc., and other defendants in the United States District Court for the Southern District of New York. Her operative complaint asserted, *inter alia*, that the defendants misappropriated trade secrets contained in two provisional patent applications that CLL filed on her behalf and that CLL had committed legal malpractice. After the district court dismissed all of the claims, she appealed to the United States Court of Appeals for the Second Circuit.

The Second Circuit concluded that it rather than the Federal Circuit had jurisdiction to decide the matter because it was "not from a final decision of a district court in an action arising under 'any Act of Congress relating to patents.'" *Gurvey v. Cowan, Liebowitz & Latman, P.C.*, No. 17-2760, slip op. at 2 (2d Cir. May 29, 2018), ECF No. 183 (quoting 28 U.S.C. § 1295(a)(1)). The Second Circuit ultimately affirmed the judgment in December 2018.

On February 6, 2020, Ms. Gurvey moved the district court to vacate an order it had previously entered in 2009 dismissing Ms. Gurvey's claims as to Live Nation. The district court denied that motion as untimely. Ms. Gurvey moved for reconsideration, which the district court also denied. Ms. Gurvey then filed this notice of appeal, seeking review of those orders by the Federal Circuit.

The Second Circuit has already held that it has jurisdiction over this case. Under the doctrine of the law of the case, we must follow that determination unless it is shown to be clearly wrong. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Ms. Gurvey has not shown that the Second Circuit was wrong, let alone clearly so.

The problem for Ms. Gurvey in seeking to establish this court's jurisdiction is that she never amended the complaint to assert infringement of an issued patent that could give rise to a non-frivolous claim arising under the patent laws. *See Gayler v. Wilder*, 51 U.S. 477, 493 (1850); *Abbey v. Mercedes Benz of N. Am., Inc.*, 138 F. App'x 304, 307 (Fed. Cir. 2005) ("A patent application cannot be infringed."); *see also Jang v. Boston Sci. Corp.*, 767 F.3d 1334, 1338 (Fed. Cir. 2014) (explaining that this court's jurisdiction "is predicated on the cause of action and the basis of the facts as they existed at the time the complaint . . . was filed").

Ms. Gurvey suggests that she had an absolute right to amend her complaint to include infringement once her patents issued and should be allowed to do so. But the district court denied Ms. Gurvey leave to amend her complaint after the patents issued, and that ruling survived the Second Circuit's abuse of discretion review. *See Gurvey v. Cowan, Liebowitz & Latman, P.C.*, 757 F. App'x 62, 65 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 161 (2019). We lack jurisdiction to review the Second Circuit's decision or to grant leave to amend her complaint.

We likewise lack jurisdiction to grant Ms. Gurvey's request for mandamus. "The All Writs Act is not an independent basis of jurisdiction, and the petitioner must initially show that the action sought to be corrected by mandamus is within this court's statutorily defined subject matter jurisdiction." *Baker Perkins, Inc. v. Werner & Pfleiderer Corp.*, 710 F.2d 1561, 1565 (Fed. Cir. 1983) (citation omitted). Because subject matter jurisdiction over an

appeal in this case lies exclusively in the Second Circuit, any request for mandamus relief also lies exclusively with that court.

While the CLL attorneys argue that we should dismiss, we deem it the better course to transfer the matter and all filings to the Second Circuit pursuant to 28 U.S.C. § 1631.

Accordingly,

IT IS ORDERED THAT:

(1) The court accepts Ms. Gurvey's reply (ECF No. 29) for filing.

(2) The appeal and all filings are transferred to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1631.

FOR THE COURT

June 23, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s32

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff,

-against-

COWAN, LIEBOWITZ & LATMAN, P.C., et al.,

Defendants.

06 Civ. 1202 (LGS)

ORDER

LORNA G. SCHOFIELD, District Judge:

WHEREAS, by Opinion and Order dated July 6, 2017 (the "Order"), Defendants' motion for summary judgment on the claims of attorney malpractice and breach of fiduciary duty was granted based on violations of statutes of limitations and insufficiency of the evidence, and Plaintiff's cross-motion for leave to amend was denied as untimely and futile (Dkt. No. 408);

WHEREAS, on July 7, 2017, the Clerk of Court entered judgment (Dkt. No. 409);

WHEREAS, on September 1, 2017, a notice of appeal was filed (Dkt. No. 419);

WHEREAS, by letter dated November 23, 2018, Plaintiff moved for an indicative ruling under Federal Rules of Civil Procedure 60 and 62.1 (Dkt. No. 423);

WHEREAS, on January 25, 2019, the Second Circuit issued its mandate affirming the Opinion and Order dated July 6, 2017 (Dkt. No. 424); it is hereby

ORDERED that the motion for an indicative ruling is DENIED as moot.

The Clerk of Court is directed to mail a copy of this Order to pro se Plaintiff.

Dated: January 29, 2019
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMY R. GURVEY,

Plaintiff,

-against-

COWAN, LIEBOWITZ & LATMAN, P.C., et al.,

Defendants.

----------X

06 **CIVIL** 1202 (LGS)

JUDGMENT

Defendants having moved for summary judgment on the remaining claims of attorney malpractice and breach of fiduciary duty; and Plaintiff having filed a cross-motion for summary judgment as to a number of claims that are not pending in this case, and the matter having come before the Honorable Lorna G. Schofield, United States District Judge, and the Court, on July 6, 2017, having rendered its Opinion and Order granting Defendants' motion for summary judgment, and denying Plaintiff's cross-motions; and any of Plaintiff's claims or arguments not addressed have been considered and rejected; and directing the Clerk of Court to close this case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated July 6, 2017, Defendants' motion for summary judgment is granted and Plaintiff's cross-motions are denied. Any of Plaintiff's claims or arguments not addressed have been considered and rejected; accordingly, the case is closed.

Dated: New York, New York
July 7, 2017

RUBY J. KRAJICK

Clerk of Court

BY: Kmango

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff,

-against-

COWAN, LIEBOWITZ & LATMAN, P.C., et al.,

Defendants.

06 Civ. 1202 (LGS)

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

It is hereby **ORDERED** that pro se Plaintiff Amy R. Gurvey shall not call or contact Chambers directly, but instead shall communicate with the Court solely through the Pro Se Office.

Plaintiff is reminded that, per the Order dated September 17, 2015, "Plaintiff will receive the balance of the funds she deposited [with the Court], if any, after this case is closed and all appeals have been exhausted."

If Plaintiff requires further assistance, she may contact the Legal Assistance Clinic, which is a free legal clinic staffed by attorneys and paralegals to assist those who are representing themselves in civil lawsuits in the Southern District of New York. Additional information about the Legal Assistance Clinic is available on the Southern District of New York's website: http://www.nysd.uscourts.gov/prose?clinic.

New York, New York
July 7, 2017

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff,

-against-

COWAN, LIEBOWITZ & LATMAN, P.C., et al.,

Defendants.

06 Civ. 1202 (LGS)

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Plaintiff Amy R. Gurvey commenced this action against Defendants William Borchard, Midge Hyman, Baila Celedonia, Christopher Jensen, all attorneys at the firm of Cowan Liebowitz & Latman, P.C. ("Cowan" or "the Firm"), which is also a defendant (together, "Defendants") and others. Defendants move for summary judgment on the remaining claims of attorney malpractice and breach of fiduciary duty. Plaintiff cross-moves for summary judgment as to a number of claims that are not pending in this case. Insofar as Plaintiff's claims have not been dismissed previously, Plaintiff's cross-motion is construed as a motion to amend the pleadings and is denied as both untimely and futile. *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 633 (2d Cir. 2016). For the reasons below, Defendants' motion is granted.

I. BACKGROUND

Unless noted, the facts below are undisputed and drawn from the parties' Rule 56.1 Statements and other submissions on this motion, and are construed in Plaintiff's favor. *See Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 71–72 (2d Cir. 2016). Given the long history of this litigation, only the facts relevant to the adjudication of this motion are discussed.

On December 6, 2001, Cowan sent Plaintiff a "letter of intent" confirming its offer of employment to Plaintiff, subject to finalizing the terms of the employment agreement. Around this time, Plaintiff was working on a venture that she called "ConcertMaster and Electronic Ticketing" -- a "ticketing and e-ticketing method[] on mobile devices . . . to enable distribution of live recordings and event merchandise." Plaintiff had described her venture "in general" during her interview with the Firm. She later, in a May 2002 email to a third party unrelated to Cowan, described her business idea: "The patent will allow ticket buyers to get a SmartCard or small CD in lieu of a cardboard ticket if they pay a premium over the ticket price, let's say $10. Within a certain number of hours after [*sic*] performance, the premium payer can will then [*sic*] be able to insert the disk into a computer and download an encryped [*sic*] DVD of the concert attended . . . ."

The Third Amended Complaint (the "Complaint") asserts that from January 2002, Plaintiff was Cowan's client, and Plaintiff testified that she "may have assumed that Cowan were [her] lawyers" at that time. On February 1, 2002, Plaintiff joined Cowan as "of counsel," under a one-year employment agreement, dated January 15, 2002. The only evidence of the parties' relationship from early 2002 is the employment agreement, which acknowledges Plaintiff's ownership of the e-ticketing venture, but makes no mention of any attorney-client relationship in connection with that project or any other matter.

Plaintiff presented her venture at a Firm meeting shortly after she joined in early 2002, at the request of Cowan attorney William Borchard. In her deposition, Plaintiff testified that Borchard told her that the purpose of her presentation was to inform "of-counsels who were part-time" "of the nature of [her] inventions and [her] practice . . . to find out if some of them could send [her] billings to do for their other clients." Plaintiff also testified that she provided

handouts at the meeting, and that she did not remember whether those handouts were marked "confidential" or whether she informed the attendees that her invention was confidential. She did not ask for the handouts to be returned to her.

In March or April 2002, Plaintiff claims to have attended a Firm event at which she met Michael Gordon of the band Phish and "w[as] shocked to discover how much [he] knew of plaintiff's confidential business plans and technology." Plaintiff believed that Gordon's then-girlfriend, Cowan associate Susan Schick, disclosed Plaintiff's confidential information, or that "[Gordon] may have been at the [February] meeting." Plaintiff testified that, at the time of the Firm event where she met Gordon, "Cowan had not done any filing for [her]," and "Cowan had not done anything yet."

The Firm terminated Plaintiff's employment on or around May 7, 2002. Beginning on May 10, 2002, while planning for Plaintiff's departure, the Firm agreed to help Plaintiff prepare and file with the United States Patent and Trademark Office ("USPTO") a provisional patent application ("PPA") for her electronic ticketing venture. In a May 10, 2002, email from Plaintiff to Borchard and Cowan attorney Christopher Jensen, Plaintiff stated:

> Coincidentally (and without any request on my part), Mark Montague came into my office yesterday and said he would like to file the provisional patent for my concert idea. Since my discussing this patent and the business model during my first firm meeting, a few of the associates have asked me if they could work on it. I have deferred answering them. Time has now become of the essence . . . . For expediency purposes, I am willing to pay for Mark's time and legal fees. . . . If it is better if all my projects and clients are handled separately, please so advise, and I will retain outside counsel. I told Mark that I would love him to do the work but under no circumstances could he do anything without getting your permission.

Later the same day, Jensen authorized Cowan attorney Mark Montague to file the PPA on Plaintiff's behalf and said, "[w]e should just keep track of our time for now and then we will figure out later with Amy how we are going to get paid."

On May 22, 2002, after Plaintiff's employment was terminated but before she had vacated her office at the Firm, Montague filed a PPA on Plaintiff's behalf, entitled "Premium Performance Ticket." On May 24, 2002, Cowan attorney Lewis Gable filed a second PPA that was substantially similar to, but more expansive than, the first PPA and intended to supersede the first PPA. Defendants assert that they did not perform any legal work for Plaintiff after Gable filed the second PPA, and Plaintiff has not presented contrary evidence.

In June 2002 (after Plaintiff was fired, but still before she had vacated her office, which occurred in September), Cowan attorney Midge Hyman told Plaintiff that "the firm would not send [her] work under any circumstances" or "allow [her] to work on [her] patent or . . . use any of the firm's other patent attorneys to assist [her]." In October 2002, Plaintiff sent an email to Borchard and Jensen requesting that her files be sent to her, and thereafter, that "all of [her] files . . . be burned and destroyed" and a "Certificate of Destruction [be] signed by the firm."

In December 2002, Plaintiff had a telephone conversation with Jensen in which, Jensen asserts, Plaintiff threatened to sue the Firm. The next day, Plaintiff sent an email to Jensen and Borchard, in which she sought payment for her services and threatened to "pursue vigorously" the "misappropriation of any my [*sic*] trade secrets and patent (filed by the firm)." In response, Jensen instructed Plaintiff not to email him again. According to Defendants, Plaintiff's "threat of litigation" created a conflict of interest, which prompted them to withdraw formally as her representative before the USPTO, which they did by filing a request for withdrawal on January 3, 2003. The request for withdrawal stated as the reason for the request that "[a] conflict of interest has arisen between the applicant [Plaintiff] and the law firm [Defendants]." The record includes a January 3, 2003, letter from Defendants to Plaintiff advising her, "Since a potential conflict of interest has arisen between you and Cowan, Liebowitz & Latman, P.C., we are

ethically obligated to withdraw as legal counsel to you in the above-referenced patent matter." On February 13, 2003, the USPTO accepted the request, which Plaintiff alleges in the Complaint that she learned of on February 16, 2003.

In April 2003, Plaintiff communicated with Schick and claimed not to know the source of the Firm's conflict of interest. Jensen, after learning about this communication replied, "As we previously informed you, we can not [*sic*] represent you in connection with your provisional patent applications because of your threats of legal action against this firm."

On May 5, 2003, the *New York Times* published an article that Plaintiff describes as "announcing and introducing [Clear Channel Communications, Inc.'s ("Clear Channel")] newest venture," and describing "Plaintiff's entire confidential business models for the onsite distribution of live recordings at concerts." The article reported that Clear Channel would begin selling compact discs of live recordings of concerts at Clear Channel venues "within five minutes of a show's conclusion," and that Clear Channel described the venture as "a continuation of the trend among various bands and start-ups in recent years to sell authorized recordings that are available on CD or as Internet downloads soon after the event." The article quoted various people in the music industry, including Phish's manager, John Paluska. "Although [Phish's] experience is not a direct comparison," he illustrated the potential growth of the instant disc market by noting that Phish had "sold close to $1 million in concert-show downloads over the Internet since opening the livephish.com site in late December." He observed that "it would not be easy for Clear Channel to move into the instant-CD sphere" because of "legal issues," an apparent reference to an earlier observation in the same article that instant discs could pose a problem for established artists who have contracts with "major labels." In and before 2002, Clear Channel was Cowan's client as to unrelated matters that did not concern live events.

According to the Complaint, Defendants and Clear Channel "joint[ly] misappropriate[ed] . . . Plaintiff's trade secrets, confidential business models including those contained in Plaintiff's PPA's."

On April 24, 2009, this Court dismissed the Complaint in its entirety. On February 10, 2012, the Second Circuit affirmed the dismissal, except "to the extent that it dismissed Gurvey's claims for attorney malpractice and breach of fiduciary duty." *Gurvey v. Cowan, Liebowitz & Latman, P.C.*, 462 F. App'x 26, 30 (2d Cir. 2012) (summary order). The Second Circuit held that Plaintiff had pleaded a "plausible claim by alleging that [Defendants] used the information given to them as part of a confidential attorney-client relationship to their own advantage by disclosing it to other clients who then profited therefrom to Gurvey's detriment." *Id.* The Second Circuit noted that "[t]he plausibility of this argument is bolstered by Gurvey's allegation that Cowan withdrew from representing Gurvey before the United States Patent and Trademark Office due to what Cowan allegedly termed a 'conflict of interest.'" *Id.* at n.8.

II. LEGAL STANDARD

Summary judgment should be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Proctor v. LeClaire*, 846 F.3d 597, 607 (2d Cir. 2017). There is a genuine dispute "when the evidence is such that, if the party against whom summary judgment is sought is given the benefit of all permissible inferences and all credibility assessments, a rational factfinder could resolve all material factual issues in favor of that party," and "no rational factfinder could find in favor of the nonmovant." *SEC v. Frohling*, 851 F.3d 132, 136–37 (2d Cir. 2016) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)) (affirming summary judgment and the district court's finding that "no rational factfinder could fail to find that Frohling knew" that

opinion letters he issued were false, despite his deposition testimony to the contrary, in light of his admission and documentary evidence illustrating his knowledge). This standard applies "whether summary judgment is granted on the merits or on an affirmative defense such as the statute of limitations." *Giordano v. Market Am., Inc.*, 599 F.3d 87, 93 (2d Cir. 2010).

The movant bears the initial burden of demonstrating the absence of a genuine dispute as to any material fact. Fed. R. Civ. P. 56(c)(1); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "[T]he movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Gummo v. Vill. of Depew*, 75 F.3d 98, 107 (2d Cir. 1996) (citing *Celotex Corp.*, 477 U.S. at 322–23). The burden then shifts to the nonmoving party, who must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 249. The court must construe the evidence and draw all reasonable inferences in favor of the non-moving party. *See Wright*, 831 F.3d at 71–72.

The nonmoving party may not create a triable issue of fact by contradicting factual allegations in the Complaint, *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 106 (2d Cir. 2011), or submitting an affidavit that disputes her own prior sworn testimony, *Moll v. Telesector Res. Grp., Inc.*, 760 F.3d 198, 205 (2d Cir. 2014). "The purpose of th[is 'sham issue of fact'] doctrine is clear: '[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.*; *accord Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005) (explaining that "where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete, it will be impossible for a district court to determine . . .

whether there are any genuine issues of material fact, without making some assessment of the plaintiff's account.").

New York law governs the substantive issues arising from the surviving claims of attorney malpractice and breach of fiduciary duty. "In a diversity action based on attorney malpractice, state substantive law . . . applies." *Nordwind v. Rowland*, 584 F.3d 420, 429 (2d Cir. 2009); *accord Henkel v. Wagner*, No. 12 Civ. 4098, 2016 WL 1271062, at *5 (S.D.N.Y. Mar. 29, 2016). "The parties' briefs assume that [New York] state law governs this case, and 'such implied consent is . . . sufficient to establish the applicable choice of law.'" *Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22, 31 (2d Cir. 2017) (quoting *Arch Ins. Co. v. Precision Stone, Inc.*, 584 F.3d 33, 39 (2d Cir. 2009)).

III. DISCUSSION

Defendants move for summary judgment as to Plaintiff's claims for attorney malpractice and breach of fiduciary duty. The motion is granted on the independent grounds that both claims are time barred, and that Plaintiff has proffered insufficient evidence from which a reasonable jury could find in her favor on either claim.

A. Statutes of Limitations

Plaintiff's claims are dismissed as untimely because they were not filed within the limitations period applicable to each claim -- three years, plus 228 days during which time the statutes of limitations were tolled due to Cowan's representation of Plaintiff in connection with her patent application. The Complaint was filed on February 15, 2006. To be timely, any claim must have accrued no earlier than three years plus 228 days before that date, or July 2, 2002. The evidence in the record, construed in Plaintiff's favor as required on this motion, shows that

any improper disclosure of Plaintiff's information by Cowan occurred no later than April 2002. Accordingly, the claims are time barred.

1. Relevant Statutory Period

The surviving claims allege attorney malpractice and breach of fiduciary duty. Each is constrained by a three-year statute of limitations period. Under New York law, an action for attorney malpractice must be filed within three years from the date of accrual. N.Y. C.P.L.R. § 214(6). "For fiduciary duty claims, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks." *Rohe v. Bertine, Hufnagel, Headley, Zeltner, Drummon & Dohn, LLP*, 160 F. Supp. 3d 542, 548 (S.D.N.Y. 2016) (quoting *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 N.E.2d 268, 272 (N.Y. 2009)). Where, as here, Plaintiff seeks money damages, "a three-year statute of limitations similarly applies." *Id.*

Plaintiff argues that a six-year statute of limitations applies to her breach of fiduciary duty claim because "fraud, concealment, sabotage, USPTO false claims as are involved here have a six-year statute of limitations." Plaintiff is correct insofar as "where an allegation of fraud is essential to a breach of fiduciary [duty] claim, courts have applied a six-year statute of limitations under CPLR 213(8)." *Levy v. Young Adult Inst., Inc.*, No. 13 Civ. 2861, 2016 WL 6092705, at *20 (S.D.N.Y. Oct. 18, 2016) (quoting *IDT Corp.*, 907 N.E.2d at 272). The six-year statute of limitations is inapplicable here, however, because the Complaint's allegations of breach of fiduciary duty are not "inextricably bound to a fraud claim." *Id.* The essence of a fraud claim is a knowing misrepresentation of material fact. *See id.* (citing *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 164–65 (1st Dep't 2003)). After the Second Circuit's remand Order, the surviving claims are based on allegations that Defendants "used [Plaintiff's] information given to them as part of a confidential attorney-client relationship to their own advantage by disclosing it

to other clients." *Gurvey*, 462 F. App'x at 30. As Plaintiff's fiduciary duty claim is based on the alleged misappropriation and wrongful disclosure of Plaintiff's information and not fraud, the three-year -- not the six-year -- statute of limitations applies.

2. Tolling of the Statute of Limitations

"'[T]he rule of continuous representation tolls the running of the [s]tatute of [l]imitations on [a] malpractice claim until the ongoing representation is completed.'" *Grace v. Law*, 21 N.E.3d 995, 999 (N.Y. 2014) (quoting *Shumsky v. Eisenstein*, 750 N.E.2d 67, 70 (N.Y. 2001)); *see also Zaref v. Berk & Michaels, P.C.*, 595 N.Y.S.2d 772, 774 (1st Dep't 1993) (noting that "a client cannot reasonably be expected to assess the quality of the professional service while it is still in progress" and finding the continuous representation doctrine applies where "the continuous representation . . . [is] in connection with the particular transaction which is the subject of the action"). Generally, tolling under the continuous representation doctrine "end[s] once the client is informed or otherwise put on notice of the attorney's withdrawal from representation." *Champlin v. Pellegrin*, 974 N.Y.S.2d 379, 380 (1st Dep't 2013) (internal quotation marks omitted and alterations in original). There must be "clear indicia of an ongoing, continuous, developing, and dependent relationship between [plaintiff and defendant] . . . or a mutual understanding of the need for further representation on the specific subject matter[s] underlying the malpractice claim." *Id.* (internal citation and quotation marks omitted and alterations in original). The parties must "explicitly contemplate[] further representation" for tolling to apply. *Williamson ex rel. Lipper Convertibles, L.P. v. PricewaterhouseCoopers LLP*, 872 N.E.2d 842, 847 (N.Y. 2007); *accord Carvel v. Ross*, No. 09 Civ. 0722, 2011 WL 856283, at *13 (S.D.N.Y. Feb. 16, 2011).

The period for which the statute of limitations period is tolled is, at most, the duration of the attorney-client relationship. Based on the evidence, no reasonable jury could find that Cowan represented Plaintiff before May 10, 2002, or after December 24, 2002 (and likely would find that the engagement ended earlier).

In her May 10, 2002, email Plaintiff asked Jensen for his permission to have the Firm represent her before the USPTO and file her PPA. She offered to pay for attorney Montague's time and legal fees, but also offered to retain outside counsel if Jensen preferred. On the same day, Jensen authorized Montague to make the USPTO filing and instructed him to keep track of his time. Although Plaintiff says that she "may have assumed that Cowan were [her] lawyers" in early 2002, the evidence in the record shows that Plaintiff became an employee of Cowan at that time, not a client. Based on the undisputed evidence, a reasonable jury could find only that Cowan's representation of Plaintiff began on or after May 10, 2002.

Defendants expressly repudiated the attorney-client relationship in June 2002, when Hyman notified Plaintiff that Defendants would no longer assist with her patent filings, and thereafter took no further action on her behalf. Likewise, Plaintiff repudiated the attorney-client relationship, first, on October 12, 2002, when she demanded that Defendants return and destroy all of her files in their possession, and again, on December 24, 2002, when she threatened in writing to sue Defendants. The evidence shows that by December 24, 2002, Plaintiff and Defendants both had unequivocally disavowed the attorney-client relationship.

Plaintiff's unsupported and contradictory statements, including that "Cowan **never** attempted to withdraw from Plaintiff's representation until [as late as] February 20, 2007," are insufficient to create a triable issue. First, the Complaint alleges that Cowan represented Plaintiff through "at least February 2003 and May, 2003" -- not 2007. Plaintiff may not directly

contradict the pleadings to survive a motion for summary judgment, and the Court is entitled to disregard such statements. *See Rojas*, 660 F.3d at 106. Second, Plaintiff has provided no evidence that Defendants represented her after December 2002 (or even June 2002), or to controvert Defendants' evidence that (1) Hyman expressly terminated the attorney-client relationship in June 2002; (2) Plaintiff requested that the Firm send her all of her files and then destroy any copies in October 2002; and (3) Plaintiff threatened to sue Defendants in December 2002.

Plaintiff's own submissions on this motion contradict her argument that Defendants represented her after December 2002. For example, Plaintiff argues that "[D]efendant Jensen admit[ted] that Montague continued to perform patent searches until May 1, 2003." However, Plaintiff's corresponding exhibit -- a letter from Jensen to Plaintiff dated May 1, 2003 -- states that Montague performed a computer database search at some unspecified time in the past; that the search is inconclusive because of information that was unavailable at the time the search was conducted; that "we formally withdrew as your counsel in the Patent Office in January, 2003 and have not represented you in connection with this matter since that date"; and that it is "imperative that [Plaintiff] engage new patent counsel" to meet the looming May 22 and 24 USPTO deadlines. The implication is that the search was conducted before January 2003 and would need to be updated by Plaintiff's new counsel, who should be hired immediately. Nothing in the record suggests that Cowan acted on Plaintiff's behalf after June 2002.

No reasonable fact finder could conclude that the parties contemplated or had a mutual understanding as to Defendants' continuing representation respecting Plaintiff's patent application after December 24, 2002. *See, e.g.*, *De Carlo v. Ratner*, 204 F. Supp. 2d 630, 638 (S.D.N.Y. 2002) (finding plaintiff's legal malpractice claim time barred because the continuing

representation doctrine was inapplicable and where "there [was] a breakdown" in the attorney-client relationship); *Tantleff v. Kestenbaum & Mark*, 15 N.Y.S.3d 840, 843–44 (2d Dep't 2015) (affirming grant of summary judgment on attorney malpractice claim on the ground that the claim was time barred where undisputed facts showed that the representation and tolling had ended). Construing the evidence in Plaintiff's favor, and therefore assuming that Defendants represented Plaintiff no earlier than May 10, 2002, until no later than December 24, 2002, the statutes of limitations were tolled for 228 days, and any claim must have accrued no earlier than July 2, 2002.

3. Accrual of Plaintiff's Claims

Causes of action for both attorney malpractice and breach of fiduciary duty accrue on the date of the alleged breach. *Rohe,* 160 F. Supp. 3d at 549. "What is important is when the malpractice was committed, not when the client discovered it." *McCoy v. Feinman*, 785 N.E.2d 714, 718 (N.Y. 2002).

The surviving claims in this action are based on the allegation that Defendants disclosed Plaintiff's confidential information to other clients. *See Gurvey*, 462 F. App'x at 30. The Complaint alleges that Plaintiff suspected Cowan associate Susan Schick of disclosing Plaintiff's confidential information to Phish band member Michael Gordon before or around February 2002. Plaintiff, at her deposition, testified that Gordon confirmed in April 2002 that Schick had disclosed the information. Construing these facts in the light most favorable to Plaintiff, the latest date on which a reasonable jury could find that Plaintiff's claims accrued based on the alleged Phish disclosure was in April 2002.

The Complaint also alleges that Cowan and Clear Channel jointly misappropriated Plaintiff's information. This allegation appears to be based solely on the May 2003 *New York*

Times article which reported that Clear Channel was beginning an "instant CD" venture, similar to but not the same as Plaintiff's e-ticketing venture, and described as "a continuation of the trend among various bands and start-ups in recent years to sell authorized recordings that are available on CD or as Internet downloads soon after the event." The article is insufficient to give rise to an inference of improper disclosure by the Firm to Clear Channel. As there is no evidence of any improper disclosure of Plaintiff's information to Clear Channel or any date on which it allegedly occurred, there is no date when Plaintiff's claims based on this alleged disclosure accrued.

Based on an April 2002 accrual date, Plaintiff's claims are barred by the three-year statutes of limitations. Plaintiff filed the Complaint on February 15, 2006. To be timely absent tolling, Plaintiff's claims must have accrued on or after February 15, 2003. Tolling the statutes of limitations for 228 days, the duration of Cowan's representation of Plaintiff, any timely claim must have accrued no earlier than 228 days before February 15, 2003, or July 2, 2002. Plaintiff's claims, which accrued no later than April 2002, are untimely.[1]

B. Sufficiency of the Evidence

As noted, the surviving claims in this action are based on the allegation that Defendants disclosed Plaintiff's confidential information to other clients. *See Gurvey*, 462 F. App'x at 30. These claims fail as a matter of law also because Plaintiff has not proffered sufficient evidence from which a reasonable jury could find liability or damages.

[1] Even if the attorney-client relationship continued until January 3, 2003 (the date on which Defendants withdrew as Plaintiff's counsel before the USPTO) or until February 16, 2003 (the date on which Plaintiff claims to have learned that Defendants withdrew as her counsel before the USPTO), Plaintiff's claims still are untimely. If the attorney-client relationship continued until January 3, 2003 (resulting in a tolling period of 238 days), any timely claim must have accrued no earlier than June 22, 2002. If the relationship continued until February 16, 2003 (resulting in a tolling period of 282 days) any timely claim must have accrued by May 9, 2002.

First, the undisputed evidence shows that Plaintiff's information was not confidential. She shared it at a Firm meeting where she did not take any precautions to prevent its dissemination. The Complaint also states that she shared it with various third parties, and the evidence includes a May 2002 email describing her proposal to a third party. Although the claims are premised on the confidentiality of the information in the PPAs, Plaintiff inexplicably now contends that the PPAs did not include any confidential information or information that would be "of interest to [Defendants'] clients." Lastly, as discussed in detail above, Cowan did not learn Plaintiff's confidential information during the course of a confidential relationship, as the Firm did not yet represent Plaintiff when she initially disclosed it at her employment interview in December 2001, and again at the Firm meeting in February 2002.

Second, Plaintiff has not adduced evidence to show that she entrusted information with Defendants during the course of any attorney-client or other fiduciary relationship, or that Defendants disclosed her information during the course of such a relationship. Both the disclosure by Plaintiff to the Firm, and the Firm's alleged disclosure to Pfish, occurred prior to the commencement of the representation. "Failure to establish an attorney-client relationship prevents a plaintiff from proceeding on a legal malpractice claim." *Case v. Clivilles*, 216 F. Supp. 3d 367, 379 (S.D.N.Y. 2016).

Third, as discussed above, Plaintiff has failed to adduce any evidence that the Firm disclosed her information to Clear Channel. Plaintiff repeatedly testified at her deposition that she does not have specific evidence that any of the individual Defendants actually disclosed her confidential information.

Fourth, Plaintiff has not presented evidence from which a reasonable jury could conclude that she suffered damages that were proximately caused by Defendants' alleged breach. In

remanding the claims at issue, the Second Circuit cited *Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 865 N.Y.S.2d 14, 22 (1st Dep't 2008), which held that a plaintiff must establish "but for causation" to recover on either an attorney malpractice claim or a breach of fiduciary duty claim against an attorney; "the plaintiff must establish the 'but for' element of malpractice" -- i.e., that Plaintiff would not have sustained a loss but for the defendant attorney's breach. *See also Reubens v. Mason*, 387 F.3d 183, 189 (2d Cir. 2004). "[M]ere speculation of a loss resulting from an attorney's alleged omissions . . . is insufficient to sustain a claim for legal malpractice." *Gallet, Dreyer & Berkey, LLP v. Basile*, 35 N.Y.S.3d 56, 58 (1st Dep't 2016) (quoting *Markard v. Bloom*, 770 N.Y.S.2d 869, 869 (1st Dep't 2004) (alterations in original). "[S]ummary judgment dismissing the legal malpractice claim has been granted where the asserted damages are vague, unclear, or speculative." *Id.* at 59.

There is no evidence in the record, expert or otherwise, that Plaintiff's venture would have been commercially successful but for any alleged conduct of Defendants, or that she would not have suffered any other actual damages but for the alleged improper disclosures. *See id.* at 58–59 (affirming summary judgment on malpractice claim because damages were purely speculative); *see also Stonewell Corp. v. Conestoga Title Ins. Co.*, 678 F. Supp. 2d 203, 212 (S.D.N.Y. 2010) (noting that "[e]xpert testimony is sometimes required to establish . . . whether the negligence proximately caused any injury to the plaintiff-client"); *O'Shea v. Brennan*, No. 02 Civ. 3396, 2004 WL 583766, at *14 (S.D.N.Y. Mar. 23, 2004) (granting summary judgment as to legal malpractice claim because "without expert testimony, it is unlikely that a jury could conclude whether, but for O'Shea's failure to file timely, [plaintiff] would have been successful in a defamation action in New York, had such an action been commenced").

Plaintiff erroneously argues that "in the event an attorney breaches his duty of loyalty, the client, as a matter of law, is not required to meet the higher standard of pleading and proving causation; but rather, must demonstrate only that the breach or conflict of interest was a substantial factor in bringing about its loss." The cases on which Plaintiff relies are inapposite or do not stand for the propositions for which she cites them. *See, e.g.*, *Ulico Cas. Co.*, 865 N.Y.S.2d at 22 ("[T]he plaintiff must establish the 'but for' element of malpractice"); *Schneider v. Wien & Malkin LLP*, No. 601363/02, 2004 WL 2495843, at *17 n.10 (N.Y. Sup. Ct. Nov. 1, 2004) ("The more rigorous 'but for' standard of causation will be applied where a breach of fiduciary claim against an attorney is premised on allegations of legal malpractice"); *Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907, 924 (S.D.N.Y. 1997) ("[T]o recover for legal malpractice, it must be shown not only that the attorney was negligent, but also that 'but for' the attorney's negligence the plaintiff would have prevailed in the underlying action.").

Because the evidence is insufficient to create any genuine issue of material fact as to Defendants' liability or Plaintiff's alleged damages, summary judgment is granted on this basis in addition to the expiration of the statutes of limitations.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED, and Plaintiff's cross-motions are DENIED. Any of Plaintiff's claims or arguments not addressed herein have been considered and rejected. The Clerk of Court is directed to close the motion at Docket No. 375 and close this case.

Dated: July 6, 2017
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,
Plaintiff,

-against-

COWAN, LEIBOWITZ & LATMAN, P.C., et al.,
Defendants.

06 Civ. 1202 (LGS) (HBP)

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Magistrate Judge Henry B. Pitman, to whom this matter has been referred for supervision of pretrial proceedings, issued a Report and Recommendation (the "Report"), dated July 24, 2015, recommending that: (1) Defendants Cowan Liebowitz & Latman, P.C., William Borchard, Midge Hyman, Baila Celedonia and J. Christopher Jensen's (collectively, "Defendants") motions for sanctions against Plaintiff Amy Gurvey under Federal Rule of Civil Procedure 11 be granted; (2) Plaintiff be sanctioned $20,000, payable to the Clerk of Court; and (3) this action be stayed until Plaintiff pays the sanction, and that, if Plaintiff fails to pay the sanction within one year, the action be dismissed with prejudice. For the reasons stated below, the Report is adopted in part and rejected in part.

I. BACKGROUND

The facts and procedural history relevant to the motions are set out in the Report and summarized here.

A. Relevant Factual and Procedural History

Plaintiff Amy Gurvey brought this action against her attorneys, Defendant Cowan Liebowitz & Latman, P.C. ("Cowan"), several partners of, and one associate employed by, Cowan (together with Cowan, the "Cowan Defendants") and various other defendants, alleging claims for, inter alia, misappropriation of trade secrets, unfair competition, breach of fiduciary

duty, attorney malpractice and violations of the Lanham Act. In April 2009, the Third Amended Complaint was dismissed. In February 2012, the Second Circuit affirmed the dismissal of most of Plaintiff's claims, but found that the Third Amended Complaint stated plausible claims for attorney malpractice and breach of fiduciary duty against the Cowan Defendants and remanded the case for further proceedings. *Gurvey v. Cowan, Liebowitz & Latman, P.C.*, 462 F. App'x 26, 30 (2d Cir. 2012). The mandate issued on March 12, 2012.

Plaintiff is a lawyer suspended from the practice of law in the State of New York. In the three-and-a-half years since the Second Circuit mandate, Plaintiff has acted pro se except for a five-month period from April 7, 2015, to September 14, 2015. During those years, she has done little to bring her claims to resolution. Plaintiff has failed to comply with discovery orders, has resisted the taking of her own deposition and has filed a multitude of meritless motions and applications.

For instance, by Order dated July 15, 2013, Judge Pitman found that Plaintiff had violated: (1) an Order dated October 10, 2012, by seeking discovery that far exceeded the scope of her malpractice and breach of fiduciary claims; and (2) an Order dated January 14, 2013, by failing to provide Judge Pitman with written explanations of how each of her discovery requests served on Defendants were relevant to her two claims for attorney malpractice and breach of fiduciary duty by the court-order deadline of January 17, 2013. The July 15, 2013, Order denied Plaintiff's request for an extension of time, stating that Plaintiff's excuse that she was hospitalized for a couple months for health reasons were baseless as she continued to make numerous filings during that period.

Rather than pursuing her claims, Plaintiff has made the following applications, among others: (1) permission to file a proposed fourth amended complaint, fifth amended complaint and

sixth amended complaint; (2) disqualification of Defendants' counsel; (3) an extension of time to effect service even though Plaintiff commenced the action in 2006; (4) reconsideration of orders and opinions; (5) remand to state court; (6) purported interlocutory review of Judge Pitman's decisions directly by the Second Circuit; (7) sanctions against Defendants; and (8) judicial recusal.

As a result, the docket sheet has grown by over 200 entries since this case was remanded by the Second Circuit over three years ago. Despite the size of the docket sheet, and a fact discovery deadline of September 19, 2014, this case has not proceeded to the summary judgment stage or trial.

B. The Report and Subsequent Events

Defendants have moved for Rule 11 sanctions against Plaintiff, asserting that she filed (1) a frivolous motion for reconsideration of an order imposing Rule 37 sanctions on Plaintiff for failure to comply with her discovery obligations and two court orders; (2) a frivolous motion to file a proposed sixth amended complaint; and (3) a frivolous motion for disqualification of Judge Pitman. The Report found that each of these three submissions by Plaintiff violated Rule 11. The Report recommended sanctions of $20,000 payable to the Clerk of Court, a stay pending payment and dismissal of this case if the sanction was not paid within one year. The Report reasoned that such sanctions were appropriate because, inter alia, Plaintiff's conduct was willful; Plaintiff had engaged in a pattern of frivolous motion practice both in this case and in other unrelated cases; and sanctions of $8,783 and $5,700 imposed in unrelated proceedings had not dissuaded Plaintiff from continuing to engage in sanctionable conduct.

On August 7, 2015, Plaintiff -- briefly represented by counsel -- timely filed objections to the Report (the "Objections"). The Objections do not specifically address why the three

submissions do not violate Rule 11. Rather, the Objections assert that the procedural history of this case shows that Plaintiff's conduct has not been frivolous and was not intended to harm, harass or delay the proceedings.

On August 20, 2015, Defendants timely filed responses to the Objections (the "Responses"), stating the Objections should not be sustained and that the Report should be affirmed.

Proceeding pro se, on August 24, 2015, Plaintiff filed an interlocutory appeal with the Second Circuit challenging, among other things, two of the matters at issue on this sanctions motion -- Judge Pitman's decision denying Plaintiff's motion for recusal and her motion for leave to file a proposed sixth amended complaint.[1]

II. LEGAL STANDARD

A. Standard of Review

A reviewing court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Typically, the district court "may adopt those portions of the report to which no 'specific, written objection' is made, as long as the factual and legal bases supporting the findings and conclusions set forth in those sections are not clearly erroneous or contrary to law." *Adams v. N.Y. State Dep't of Educ.*, 855 F. Supp. 2d 205, 206 (S.D.N.Y. 2012) (citing Fed. R. Civ. P. 72(b), *Thomas v. Arn*, 474 U.S. 140, 149 (1985)). But in the context of Rule 11, the Second Circuit has left open whether de novo review is required for a magistrate judge's recommendation of sanctions under Rule 11.

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[1] Where, as here, a party files a frivolous interlocutory appeal, a district court is not divested of jurisdiction. *See United States v. Rodgers*, 101 F.3d 247, 251-52 (2d Cir. 1996) ("We fail to see any efficiency in allowing a party to halt district court proceedings arbitrarily by filing a plainly unauthorized notice of appeal which confers on [the appeals court] the power to do nothing but dismiss the appeal.").

Kiobel v. Millson, 592 F.3d 78, 79-80 (2d Cir. 2010) (declining to decide "whether the District Judge applied the correct standard of review to the Magistrate Judge's determination that Rule 11 sanctions were warranted"). In an exercise of caution, the review below is de novo.

B. Rule 11 Standard

Rule 11 states that an attorney or pro se party who presents "a pleading, written motion, or other paper" to a court thereby "certifies" that to "the best of the person's knowledge, information, and belief," formed after a reasonable inquiry, the filing is: (1) not presented for any improper purpose, such as to "harass, cause unnecessary delay, or needlessly increase the cost of litigation"; (2) "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"; and (3) supported in facts known or likely to be discovered on further investigation. Fed. R. Civ. P. 11(b). "[A] court may impose an appropriate sanction on . . . a party that violated [Rule 11(b)] or is responsible for the violation." Fed. R. Civ. P. 11(c).

"[T]he main purpose of Rule 11 is to deter improper behavior, not to compensate the victims of it or punish the offender." *Universitas Educ., LLC v. Nova Grp., Inc.*, 784 F.3d 99, 103 (2d Cir. 2015) (quoting 5A Charles Alan Wright et al., *Federal Practice and Procedure* § 1336.3 (3d ed. 2004)). For sanctions issued pursuant to a motion by opposing counsel, courts have held that an attorney or litigant "could be sanctioned for conduct that was objectively unreasonable." *Muhammad v. Walmart Stores East, L.P.*, 732 F.3d 104, 108 (2d Cir. 2013). "[D]istrict courts are given 'broad discretion' in creating Rule 11 sanctions," so long as the sanctions "fit within the confines of the rule." *Universitas Educ.*, 784 F.3d at 103 (quoting *O'Malley v. N.Y.C. Transit Auth.*, 896 F.2d 704, 709 (2d Cir.1990)).

III. DISCUSSION

Upon a de novo review of the record in this litigation, including the pleadings, the docket sheet, the parties' respective submissions filed in connection with the motions described in the Report, applicable legal authorities, the Report, the Objections and the Responses, the Court adopts the Report's findings, reasoning and legal support for concluding that Plaintiff violated Rule 11. The Report's recommendations about the sanctions to be imposed are modified as discussed below.

A. Plaintiff Violated Rule 11

The Report correctly found that the following frivolous filings violated Rule 11: (1) Plaintiff's motion for reconsideration dated March 24, 2014 (the "Motion for Reconsideration"); (2) Plaintiff's motion for leave to file a proposed sixth amended complaint ("Motion to Amend"); and (3) Plaintiff's motion to disqualify Judge Pitman (the "Disqualification Motion").

1. Plaintiff's Motion for Reconsideration

The Motion for Reconsideration violated Rule 11 as it lacked any factual or legal basis. "Rule 11 permits sanctions against a litigant who submits a pleading or motion that, evaluated 'under an objective standard of reasonableness, . . . [has] no chance of success and [makes] no reasonable argument to extend, modify or reverse the law as it stands.'" *Smith v. Westchester Cnty. Dep't of Corr.*, 577 F. App'x 17, 18 (2d Cir. 2014) (quoting *Caisse Nationale de Credit Agricole-CNCA, N.Y. Branch v. Valcorp, Inc.*, 28 F.3d 259, 264 (2d Cir. 1994)) (affirming imposition of Rule 11 sanction for a frivolous motion for reconsideration); *accord Maisonville v. F2 America, Inc.*, 902 F.2d 746, 748-49 (9th Cir. 1990) (affirming imposition of Rule 11 sanctions for frivolous motion for reconsideration); *Miller v. Norfolk S. Ry. Co.*, 208 F. Supp. 2d

851, 853-54 (N.D. Ohio 2002) (imposing Rule 11 sanctions for frivolous motion for reconsideration that "presented no basis on which it could, or should[,] have been granted"); *Atkins v. Marathon LeTourneau Co.*, 130 F.R.D. 625, 626-27 (S.D. Miss. 1990) (imposing Rule 11 sanction for frivolous motion for reconsideration that merely repeated arguments made in original motion). Applying an objective standard, a reasonable person in Plaintiff's circumstances would have known that the motion was baseless.

The Motion for Reconsideration lacked any chance of success. The motion asserted that Judge Pitman did not consider the evidence before him and found facts not supported by the evidence. In support, however, it relied on numerous factual misrepresentations, including that: (1) Judge Pitman admitted at a conference that he "only considered [Defendants'] papers but did not consider all [of] Plaintiff's relevant papers" in connection with a motion for sanctions, which is contradicted by the extensive discussion of Plaintiff's submissions in the relevant order; and (2) Defendants had been permitted to "reframe sanction arguments already rejected . . . [by] the Second Circuit," when the Second Circuit's decision did not discuss sanctions and the conduct being sanctioned occurred after the Second Circuit's decision. The motion also relied on numerous alleged instances of misconduct by defense counsel that were unrelated to the relief requested -- reconsideration of an order imposing Rule 37 sanctions on *Plaintiff* for failing to comply with court orders or with her discovery obligations. Accordingly, the Motion for Reconsideration violated Rule 11 as the legal arguments were frivolous, and the factual contentions were unsupported by any evidence.

Bringing the Motion for Reconsideration was objectively unreasonable because Plaintiff knew the standard for a motion for reconsideration. First, in April 2013, Plaintiff had been sanctioned for filing "repeated, unsupported requests for reconsideration" in an unrelated case.

Gurvey v. Legend Films, Inc., No. 09 Civ. 942, 2013 WL 1883229, at *1 (S.D. Cal. May 3, 2013). Second, on August 1, 2013, Plaintiff -- acting pro se -- filed a motion for reconsideration that included the legal standard for such a motion. Finally, about one month before Plaintiff brought the Motion for Reconsideration, Judge Pitman's February 25, 2014, Order again stated the relevant legal standard in denying Plaintiff's motion for reconsideration not at issue here. The February 25, 2014, Order also warned Plaintiff that further noncompliance with the Federal Rules of Civil Procedure could result in sanctions, including dismissal of the action. By failing to heed Judge Pitman's warning and filing the frivolous Motion for Reconsideration, Plaintiff violated Rule 11.

2. Plaintiff's Motion to Amend

Plaintiff's Motion to Amend also violated Rule 11 because the proposed sixth amended complaint was duplicative of her proposed fifth amended complaint. Rule 11 sanctions may be imposed when a proposed amended complaint "not only failed to correct legal deficiencies in plaintiffs' earlier amended complaints, but reasserted, without sufficient new factual allegations, numerous claims that [had been] dismissed, and asserted certain other claims without any substantive legal basis." *Adams v. N.Y. State Dep't of Educ.*, 855 F. Supp. 2d 205, 206 (S.D.N.Y. 2012) (imposing Rule 11 sanctions for proposed complaint that "merely retreaded claims previously dismissed"), *aff'd sub nom. Hochstadt v. N.Y. State Educ. Dep't*, 547 F. App'x 9 (2d Cir. 2013).

By Decision and Order dated July 15, 2013, Judge Pitman denied Plaintiff's motion to file the proposed fifth amended complaint based on futility, failure to state a claim, undue delay and prejudice to defendants. That order provided a detailed recitation of the relevant pleading standards and discussed the substantive law. Judge Pitman then denied Plaintiff's motion to

reconsider that order. Plaintiff subsequently sought leave to file a proposed sixth amended complaint, asserting that it made new allegations based on facts disclosed by Defendants in their document production after the proposed fifth amended complaint had been rejected. But, as detailed in the Report and in Judge Pitman's Opinion and Order dated July 21, 2015, denying leave to file a sixth amended complaint, there is no material difference between the two proposed complaints.

Among other things, both proposed complaints allege: (1) Defendants failed to act competently in prosecuting Plaintiff's patent applications, causing her damages; (2) Defendants disclosed Plaintiff's confidential information to its clients; and (3) Defendants breached its obligations to Plaintiff by providing services to Legends Film to Plaintiff's detriment. The proposed sixth amended complaint was merely a restated and reorganized iteration of the proposed fifth amended complaint. Accordingly, the motion to file yet another amended complaint violated Rule 11.

3. Plaintiff's Disqualification Motion

The Disqualification Motion also violated Rule 11 because it contained numerous factual misrepresentations. As discussed in the Report and in Judge Pitman's Opinion and Order dated July 21, 2015, denying the Disqualification Motion, this motion incorrectly asserted, inter alia, that: (1) Judge Pitman denied Plaintiff discovery by failing to schedule a discovery conference until March 19, 2014, but conferences were held on October 9, 2012, and January 3, 2013, and, in any event, Judge Pitman decided various discovery motions on the papers; (2) Judge Pitman improperly considered information from outside this case; (3) Defendants' counsel supervised attorneys on the Departmental Disciplinary Committee in 2007 to obtain an unfair advantage in

this litigation; and (4) Defendants' counsel submitted "altered" evidence and "tamper[ed] with files in the public room." These frivolous allegations violate Rule 11.

4. The Objections

In arguing for a contrary result, the Objections make three arguments. First, the Objections assert that Plaintiff acted in good faith. Specifically, the Objections argue that Plaintiff "was 'over her head' in attempting to litigate this case herself" and had filed numerous motions in an effort to obtain discovery and move this case to a decision on the merits. This argument is unpersuasive. Rule 11 applies to pro se litigants. Fed. R. Civ. P. 11(b)-(c) ("[T]he court may impose an appropriate sanction on any attorney, law firm, *or party* that violated [Rule 11(b)] . . . .") (emphasis added); *see also Patterson v. Aiken,* 841 F.2d 386, 387 (11 Cir. 1988) (per curiam) ("[O]ne acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." (quoting *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986)).

Moreover, "[Plaintiff] is a lawyer and, therefore, [s]he cannot claim the special consideration which the courts customarily grant to *pro se* parties." *Harbulak v. Suffolk Cnty.,* 654 F.2d 194, 198 (2d Cir. 1981); *accord Fox v. Boucher*, 794 F.2d 34, 38 (2d Cir. 1986) ("When the litigant is an attorney sanctions are particularly appropriate."). Finally, Plaintiff had been warned that further noncompliance with the Federal Rules of Civil Procedure would result in sanctions, but failed to heed this warning. Accordingly, this argument fails.

Second, the Objections assert that this Court's March 19, 2013, Order divested Judge Pitman of any further jurisdiction. This is incorrect. This case was reassigned from the Honorable Barbara S. Jones, upon her retirement, to this Court on March 11, 2013, in effect advising that a new judge would be replacing Judge Jones on the case. The March 19, 2013,

Order did not withdraw the referral to Judge Pitman for general pretrial supervision, and Judge Pitman has continued to supervise general pretrial matters since that Order was entered over two years ago. Accordingly, this argument is meritless.

Finally, the Objections allege that "Judge Pitman may not have the power to decide a motion to amend the complaint due to its dispositive nature." This is incorrect. The Second Circuit has considered and rejected a similar argument, finding that a "magistrate judge acted within his authority in denying [a] motion to amend the complaint." *Marsh v. Sheriff of Cayuga Cnty.*, 36 F. App'x 10, 1 (2d Cir. 2002) (citing 28 U.S.C. § 636(b)(1)(A)). Accordingly, this argument fails and the Report's finding that Plaintiff's Disqualification Motion violated Rule 11 is adopted.

B. Nature of Sanctions Imposed

"Once a court determines that Rule 11(b) has been violated, it may . . . impose sanctions limited to what is 'sufficient to deter repetition of such conduct.'" *Margo v. Weiss,* 213 F.3d 55, 64 (2d Cir. 2000) (quoting Fed. R. Civ. P. 11(c). "District courts are given broad discretion in tailoring appropriate and reasonable sanctions." *O'Malley,* 896 F.2d at 709; *accord* 5A Charles Alan Wright et al., *Federal Practice and Procedures* § 1336.3 (3d ed.) ("[F]ederal courts retain broad discretionary power to fashion novel and unique sanctions to fit the particular case."). "[D]ismissal remains available directly under Rule 11 although it is reserved for the rare case involving extreme misbehavior by the offending party, such as fraud, contempt, and willful bad faith." *Id.*

The Report recommended -- and this Court agrees -- that significant monetary and non-monetary sanctions should be imposed because, inter alia, (1) Plaintiff's conduct has been willful; (2) prior sanctions of $5,700 and $8,783 in unrelated actions had not dissuaded Plaintiff from

engaging in frivolous motion practice; and (3) Plaintiff's actions in this litigation have unnecessarily delayed resolution of this case.

The Report's recommendation of a $20,000 sanction, however, is reduced to $10,000 to pay for a special master, as detailed below. The amount of $10,000 is reasonable and likely sufficient to pay a special master as discovery has closed and all that remains are dispositive motions, if any, followed by a potential trial. Review by the special master at Plaintiff's expense is necessary to deter Plaintiff from repeating the sanctionable conduct as Plaintiff has continued to file meritless applications and motions notwithstanding the close of discovery approximately one year ago. *See* Fed. R. Civ. P. 11(c)(4) ("A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."). To the extent that Plaintiff continues to make court submissions as she has in the past, review by a special master appears necessary to address pretrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge. *See* Fed. R. Civ. P. 53(a). Barring Plaintiff from filing further papers in this case, except as specified below, is necessary to deter repetition of Rule 11 violations, prevent further delay and bring this nine-year-old case to a resolution on the merits. Accordingly, the Report's recommendation is modified, and the following sanctions are imposed on Plaintiff:

(1) This case is stayed, unless and until $10,000 is deposited with the Clerk of Court.

(2) Plaintiff may deposit $10,000 with the Clerk of Court, and the Clerk of Court shall maintain the funds in an interest bearing account until further order of the Court.

(3) The funds shall be used to pay a special master appointed by the Court to (a) familiarize himself or herself with this case and (b) review Plaintiff's proposed filings to determine whether they are frivolous or otherwise patently improper.

(4) Plaintiff will receive the balance of the funds she deposited, if any, after this case is closed and all appeals have been exhausted.

(5) Plaintiff will be required to deposit additional funds on terms to be specified, if the original $10,000 is exhausted before the conclusion of the case.

(6) If the initial $10,000 deposit is not made within one year of the date of this Opinion and Order, then the case will be dismissed.

(7) Plaintiff shall submit all proposed filings to the special master and obtain a written statement from the special master as to whether the proposed filing is frivolous or otherwise patently improper ("Approval for Filing").

(8) Plaintiff's ECF filing privileges are revoked and she must make all filings through the Pro Se Office.

(9) Plaintiff may submit a proposed submission to the Pro Se Office for filing only if the submission is accompanied by an Approval for Filing.

(10) The Pro Se Office shall reject any proposed submission by or on behalf of Plaintiff that is not accompanied by an Approval for Filing. The Pro Se Office shall file on ECF any proposed submission by or on behalf of Plaintiff that is accompanied by an Approval for Filing.

IV. CONCLUSION

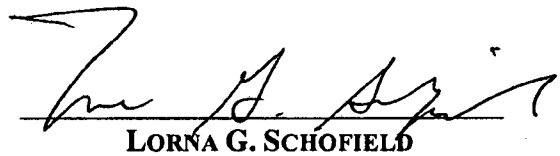
For the foregoing reasons, the Report's recommendation that Plaintiff be sanctioned by requiring her to pay $20,000 to the Clerk of Court is REJECTED, and the sanctions outlined in

numbered paragraphs 1 through 10 above are imposed. The remainder of the Report is ADOPTED.

The Clerk of Court is respectfully directed to close Docket Numbers 223, 224 and 294.

SO ORDERED.

Dated: September 17, 2015
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE