UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 25th day of March, two thousand twenty-one,

Present:

Guido Calabresi,
Reena Raggi,
Denny Chin,
Circuit Judges

Amy R. Gurvey,

Plaintiff - Appellant,

v.

Cowan, Liebowitz and Lathman, P.C., Clear Channel Communications, Inc., Live Nation, Inc., Instant Live Concerts, LLC, Nexticketing, Incorporated, William Borchard, Midge Hyman, Baila Celedonia, Christopher Jensen, Dale Head, Steve Simon, Susan Schick,

Defendants- Appellees,

Does, 1-X Inclusive, Michael Gordon,

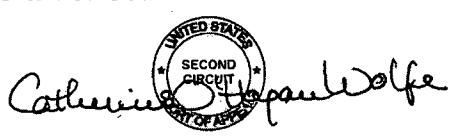
Defendants.

ORDER
Docket No. 20-1986

Appellant filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



A1

MANDATE

S.D.N.Y.–N.Y.C.
06-cv-1202
Schofield, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

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 twenty-one.

Present:

Guido Calabresi,
Reena Raggi,
Denny Chin,
Circuit Judges.

Amy R. Gurvey,

Plaintiff-Appellant,

v. 20-1986

Cowan, Liebowitz and Lathman, P.C., et al.,

Defendants-Appellees,

Does, 1-X Inclusive, Michael Gordon,

Defendants.

Appellees move to dismiss the appeal and for sanctions. Upon due consideration, it is hereby ORDERED that Appellees' motion is DENIED. It is further ORDERED that the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also Pillay v. INS*, 45 F.3d 14, 17 (2d Cir. 1995) (holding Court has inherent authority to dismiss an appeal that lacks an arguable basis in law or fact). Appellant's mandamus petition, which was transferred to this Court as part of this appeal from the United States Court of Appeals for the Federal Circuit, is DENIED because mandamus may not be used as a substitute for an appeal. *See Linde v. Arab Bank, PLC*, 706 F.3d 92, 117–18 (2d Cir. 2013).

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

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

MANDATE ISSUED ON 04/01/2021

AMY R. GURVEY, Pro Se
315 Highland Avenue
Upper Montclair, NJ 07043
(917) 733-9981

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

AMY R. GURVEY,
(and LIVE-FIT™ TECHNOLOGIES, LCC
as the real party-in-interest assigned
Gurvey's US patents).

Plaintiffs.

-against-

COWAN, LIEBOWITZ & LATMAN, PC;
CLEAR CHANNEL COMMUNICATIONS,
INC. INSTANTLIVE CONCERTS, LLC;
LIVE NATION, INC.; NEXTICKETING, et al.,

Defendants.

X

CASE NO. 06-CV-1202 (BSJ)

NOTICE OF MOTION

PLEASE TAKE NOTICE that Plaintiff Amy R. Gurvey and (proposed) new Plaintiff LIVE-FIT™ Technologies, LLC as the real party-in-interest assigned Gurvey's issued US patents and other rights of enforcement in and to Plaintiff's proprietary technologies and trade secrets, will move this Court on May 10, 2010 pursuant to FRCP Rule 60(b), Title 35 and Title 15 of the US Code, for an order, *inter alia*, vacating the Court's previous order of April 24, 2009 as moot, joining LIVE-FIT™ Technologies as a party plaintiff, granting Plaintiffs an extension of time to retain new counsel, severing certain claims against the different groups of defendants, and ordering service of Plaintiff's Fourth Amended Complaint herein for a temporary restraining order, damages for patent infringement, unfair competition, violation of the antitrust laws, sanctions for fraud, attorneys fees and costs, damages pursuant to 18 USC 1030, breach of fiduciary duty and such other and further relief as the Court deems just and proper.

AT

AMY R. GURVEY
[LIVE-FI™ TECHNOLOGIES, LLC]
315 Highland Avenue
Upper Montclair, NJ 07043
(917) 733-9981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

AMY R. GURVEY
(and LIVE-FI™ TECHNOLOGIES, LCC
as the real party-in-interest assigned
Plaintiff's US patents),

Plaintiffs,

-against-

COWAN, LIEBOWITZ & LATMAN, PC;
CLEAR CHANNEL COMMUNICATIONS,
INC.; LIVE NATION, INC.;
INSTANTLIVE CONCERTS, LLC;
NEXT TICKETING; ET AL.,

Defendants.

X

CASE NO. 06-CV-1202 (BSJ)

AFFIDAVIT IN SUPPORT
PLAINTIFFS' MOTION TO
VACATE AND SERVE
FOURTH AMENDED COMPLAINT

I. INTRODUCTION

This motion is brought pursuant to FRCP Rule 60(b), Titles 35, 15 and Rule 15 of the US Code, the Restatement of Torts Second and the Uniform Trade Secrets Act. [1]. In it, Plaintiff *pro se*, Amy R. Gurvey [2], an inventor, producer and attorney, seeks to:

[1] See also, *Schreiber Foods, Inc. v. Beatrice Cheese and Kustner Industries*, 402 F. 3d 1198, 61 Fed. R.Serv.3d 174, 74 USPQ 2d 1204 (USCA Fed. Cir.) (2005); *Vaxiion v. Foley & Larnder*, 593 F. Supp. 2d 1153 (SD CA 2008); *Opals On Ice Lingerie v. Bodylines*, 425 F. Supp. 2d 286 (EDNY 2004)

[2] Plaintiff's 2008-9 arbitration attorney, Lee Squitieri, Esq., moved to withdraw pursuant to Local Rule 1.4 on or about April 16, 2010. Plaintiff now seeks time to retain new counsel who does not notice a conflict of interest with Live Nation defendants, their new proposed merger partner, Ticketmaster, Inc. or with defendant CLL.

(1) Vacate the April 24, 2009 order of SDNY, Hon. Barbara S. Jones (annexed as Plaintiff's **Exhibit 1**) pursuant to FRCP Rule 60(b)(2) based on new evidence, *i.e.*, two US patents issued to Plaintiff Gurvey in October, 2009 and January, 2010 [3] representing separate inventions premised on two unpublished USPTO provisional patent application Nos. 60/382,710 and 60/382,949 ("PPAs") filed by defendant NY law firm Cowan Liebowitz & Latman, PC ("CLL") as Plaintiff's attorneys on May 22 and 24, 2002;

(2) Vacate this Court's April 24, 2009 order pursuant to FRCP Rule 60(b)(3) and the catchall fraud phrase of Rule 60(b) based on two distinct sets of untruthful/frivolous Rule 12(b) motion papers submitted in 2006 and 2008 by opposing law firm Baker Botts on behalf of its clients, defendants Clear Channel, Live Nation, Inc., Instant Live Concerts and Next Ticketing (collectively "Live Nation defendants") wherein defendants falsely swore under oath "no contacts with NYS" to attempt to avoid jurisdiction over them in this lawsuit (**Exhibit 2**) [4].

[NOTE: Live Nation defendants' contacts with New York State were subsequently acknowledged and found in the current proceedings before Hon. Rosemary M. Collyer in *United States v. Ticketmaster and [defendant herein] Live Nation, Inc.*, Fed. R. Vol. 75, No. 27, Case No. 1:10-cv-00139) (DC District Court, February 10, 2010) (**Exhibit 3**). Live Nation defendants also submitted similar untruthful motion papers denying all contacts with other

---

[3] US Patent Nos. 7, 603, 321(the "321 Patent") and 29/310,547 (the "547 Patent), the latter issued Notice of Issuance with all fees paid in January, 2010.

[4] Defendants' motions papers were, in fact, knowing false when submitted, aimed only at unduly prejudicing/dismissing Plaintiff's instant lawsuit, and merit sanctions in Plaintiff's favor particularly because moving attorneys, with knowledge of the blatant falsity of their proffers, never informed the Court or corrected the record. See, e.g., *Schreiber Foods v. Beatrice and Kustner, supra,* 402 F. 3d 1198, 1205 (USCA Fed. Cir. 2005) on the issue of sanctions for fraud under Rule 60(b) for an attorney's failure to take reasonable remedial measures after learning of the falsity of his own proffered material evidence.

jurisdictions in cases brought by private litigants (**Exhibit 4**), demonstrating defendants' pattern of prejudicial and frivolous documentary misconduct before the Federal Courts that is expressly proscribed in Section IV of Judge Collyer's Competitive Impact Statement issued January 25, 2010 and precedent for purposes of this lawsuit (**Exhibit 3**)];

(3) Vacate this Court's April 24, 2009 order pursuant to FRCP Rule 60(b)(6) based on Live Nation defendants' antitrust crimes against society cited by the Electronic Frontier Foundation in 2005-2006 that are the same dishonest business practices defendants used to unlawfully preclude Plaintiff and LIVE-FI ™ Technologies from its venues (**Exhibit 5**) while, at the same time, unlawfully using its monopoly of 150 US concert venues, 30 abroad and 250 radio stations to attempt to destroy Plaintiff's business and violate the antitrust laws;

(4) Join as a party plaintiff, real party-in-interest LIVE-FI™ Technologies, LLC, a Delaware limited liability corporation assigned Gurvey's patents and other rights of enforcement in and to Plaintiff's intellectual property interests and trade secrets;

(5) Grant Plaintiffs an extension of time to retain new counsel and sever the claims against the Live Nation defendants on the one hand from those against the CLL defendants on the other; and

(6) Order service of Plaintiff's Fourth Amended Complaint herein that seeks a TRO, double and treble damage claims, as the case may be, sanctions, and such other and further relief as the Court deems just and proper for defendants' infringement of Plaintiff's patents directly and through the doctrine of equivalents, dishonest business practices, unfair competition, violations of the Sherman Act and 18 USCA Section 1030, breach of fiduciary duty, misappropriation, malpractice, fraud before this Court and unauthorized continuing use and deployment of each of Plaintiff's inventions.

II. JURISDICTION

Jurisdiction over Plaintiff's Fourth Amended Complaint is based on Titles 15 and 35 of the US Code, 18 USC Section 1030, the Uniform Trade Secrets Act, as they pertain to unlawful and unauthorized misappropriation of Plaintiff's trade secrets that resulted in two US patents, unauthorized deployment and infringement of Plaintiff's inventions directly and by the doctrine of equivalents, unfair competition, dishonest business practices, antitrust violations and defendant CLL's misappropriation of Plaintiff's trade secrets and misconduct before the United States Patent and Trademark Office that prejudiced prosecution of Plaintiff's patent portfolio.

Claims for CLL's breach of fiduciary duty, violations of 22 NYCRR 603 and tortious interference with Plaintiff's contract with Legend Films are joined as arising out the same nucleus of operative facts under the pendent jurisdiction of the Federal Courts. FRCP Rule 60(b), *Schreiber Foods, Inc. v. Beatrice Cheese and Kustner Industries*, 402 F. 3d 1198, 61 Fed. R.Serv.3d 174, 74 USPQ 2d 1204 (USCA Fed. Cir.) (2005), *Vaxiion v. Foley & Larnder*, 594 F. Supp. 2d 1153 (SD CA 2008).

III. PARTIES

Plaintiff, Amy R. Gurvey, is an inventor, producer, development executive and CA attorney currently residing in Montclair, NJ.

LIVE-FI™ Technologies, LLC is a Delaware limited liability company assigned Plaintiff Amy R. Gurvey's patents and intellectual property interests including rights of enforcement therein.

Defendant CLL is a New York law firm with an international trademark practice headquartered at 1133 Avenue f the Americas, New York, NY 10036.

Defendants Midge Hyman, Esq., Simon Gerson, Esq., William Borchard, Esq., Christopher Jensen, Esq. and Baila Celedonia, Esq. are equity partners of defendant CLL. Defendants CLL, Hyman, Gerson, Borchard, Jensen and Celedonia are collectively referred to herein as "CLL defendants".

Defendant Michael Gordon is bass guitarist of the band *Phish*. Upon information and belief, either or both of Gordon or *Phish* were at times relevant, client(s) of defendant CLL. Upon further information and belief, defendant Gordon resides in Burlington, VT.

Defendant Clear Channel Communications, Inc. is a Texas corporation and the parent and/or holding company of defendant Clear Channel Entertainment Inc. ("CCE"), a client of defendant CLL, that became CCE Spinco and in turn defendant Live Nation, Inc. in 2005.

Defendant Live Nation, Inc. is the world's largest concert promoter, and is a Delaware corporation, located at 9348 Civic Center Drive, Beverly Hills, CA, assigned all defendant CCE's US and foreign concert venues.

Defendant Instant Live Concerts is a Massachusetts LLC formed in 2003 by principals of defendant CCE that was acquired by defendant Live Nation in 2005 and is now also located at 9348 Civic Center Drive, Beverly Hills, CA.

Defendant Next Ticketing is an affiliate of defendant Clear Channel based in San Antonio, TX.

Defendants Clear Channel Communications, CCE, Live Nation, Instant Live Concerts and Next Ticketing are collectively referred to herein as "Live Nation defendants", except when expressly referred to individually.

IV. LITIGATION HISTORY

The following facts are undisputed in support of Plaintiff's motion-in-chief and instant Fourth Amended Complaint since issuance of two US Patents to Plaintiff in October, 2009 and January, 2010 assigned to proposed new plaintiff LIVE-FI™ Technologies, LLC:

(1) In 2001, Plaintiff, an inventor, producer, development executive and attorney, was General Counsel of a brand new company, Legend Films, a Nevada LLC, comprised then only of three Class A shareholders - two founders and one investor, Jeffrey Yapp (Plaintiff's long standing client and business colleague), Barry Sandrew and Alan Folkman. Since then, and based on Plaintiff's efforts, ideas for Legend's digital v. previous analog technology and work to get Legend a patent, the LLC has become Legend Films, Inc. of San Diego, CA, employing some 240 individuals worldwide in the field of black and white film and video colorization.

(2) Plaintiff's contract with Legend Films for services since 1999 to its original founders entitled Plaintiff to 3% of Class B authorized stock pre-dilution plus an in-house salary to be negotiated to take effect when the company had its first significant round of venture funding.

(3) On April 17, 2002, defendant CLL partners, interested in representing Legend and other of Plaintiff's entertainment and technology clients including videogame/Atari mastermind Nolan Bushnell, signed a one-year Of Counsel contract with Plaintiff effective January 15, 2002 inclusive of a rider on which Plaintiff's reserved interests were expressly set stated.[5] [6] Plaintiff's

---

[5] That Plaintiff's Of Counsel contract including the rider was signed by defendant CLL on April 17, 2002, was found by arbitrator Charlotte Moses Fischman, Esq. in 2009 and is res judicata in this lawsuit.

6 CLL's first papers in this lawsuit submitted by attorney Hinshaw & Culbertson with a sworn affirmation by CLL partner Simon Gerson, Esq. omitted the rider that had CLL's own codes, in an attempt to defraud Plaintiff and the Court and improperly argue for a different date of

A13

Original Court Copy

Pro Se Office Docketing Rm 200

Amy R. Gurvey
US Patentee/Plaintiff Pro Se
315 Highland Avenue
Upper Montclair, NJ 07043
PH: (917) 733-9981
amygurvey@gmail.com

Application for reconsideration DENIED. Plaintiff does not raise any new information compelling a different result on her Motion to Vacate the March 17, 2009, Order dismissing Defendant Live Nation (Dkt. No. 65):

1. Contrary to Plaintiff's claim that the Order dismissing Live Nation -- which she is now challenging -- was dated April 24, 2009, the dismissal Order was dated March 17, 2009 (Dkt. No. 65). Accordingly, as this Court's February 13, 2020, Order explains: even if Plaintiff had filed an April 22, 2010, motion to vacate the March 17, 2009, order, any such motion would "not [have been] reasonably prompt, because it would have been filed over a year after the March 17, 2009, Order. *Cf.* Fed. R. Civ. P. 60(c)(1) (Rule 60 motions generally should not be made "more than a year after the entry of the... order" being challenged.)"

2. Any appeal of the March 17, 2009 Order is not timely. *See* Fed. R. App. P. 4; *Gurvey v. Cowan, Liebowitz & Latman, P.C.*, 462 F. App'x 26, 30 n.5 (2d Cir. 2012) ("*Gurvey I*") (finding that Second Circuit did not have jurisdiction to consider appeal of the March 17, 2009, Order, because Plaintiff did not timely include the Order in her notice of appeal). The issues in this action have been fully adjudicated and appealed twice. *See Gurvey I*, 462 F. App'x 26; *Gurvey v. Cowan, Liebowitz & Latman, P.C.*, 757 F. App'x 62 (2d Cir. 2018), *cert. denied*, 140 S. Ct. 161, 205 L. Ed. 2d 52 (2019), *reh'g denied*, No. 18-8930, 2019 WL 6257536 (U.S. Nov. 25, 2019).

3. None of the documents Plaintiff attaches below are the April 22, 2010 filings she references. Among the attachments, the one closest in time is a May 10, 2010, notice of motion to vacate the April 24, 2009, Order. Both Judge Jones in a reconsideration Order (Dkt. No. 80) and the Second Circuit conclusively reviewed the April 24, 2009, Order.

4. The January 28, 2020, Amended Final Judgment and Consent Decree, in the Department of Justice's antitrust action against Live Nation Entertainment, Inc. (available at https://www.justice.gov/atr/case-document/file/1241016/download), does not bear on the issues below or warrant vacatur of Orders in this action.

Accordingly, reconsideration of the February 13, 2020, Order (Dkt. No. 428) -- denying Plaintiff's untimely motion to vacate -- is DENIED. If Plaintiff files frivolous materials, an injunction may be imposed, requiring Plaintiff seek permission first before filing anything further on the

DISTRICT COURT

ICT OF NEW YORK

X

Amy R. Gurvey v. Cowan, Liebowitz & Lathman, PC, ET AL.

CASE NO. 06-1202-cv (LGS)

NOTICE OF MOTION TO RECONSIDER DENIAL OF US PATENTEE/PLAINTIFF'S MOTION TO VACATE SDNY ORDERS BASED ON FAILURE TO ADJUDICATE APRIL 2010 AMENDED COMPLAINT STATING DAMAGES FOR PATENT INFRINGEMENT, AIDING & ABETTING INFRINGEMENT AND CLAYTON ANTITRUST VIOLATIONS [35 USC § 271 271(b) 285 286; 15 USC§18]

Dated: March 9, 2020
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

A14

Original Court Copy
Clerk Pro Se Office Rm 200

Amy R. Gurvey
US Patentee/Plaintiff Pro Se
315 Highland Avenue
Upper Montclair, NJ 07043
PH: (917) 733-9981
amygurvey@gmail.com

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

X

AMY R. GURVEY,

Plaintiff *Pro Se*,

CASE NO. 06-1202-cv (LGS)

NOTION OF MOTION TO VACATE SDNY ORDERS AS TO DEFENDANT LIVE NATION [FRCP 60(b)(6)]
[NOTE: Plaintiff's previous motion filed April 22, 2010 to vacate March 17, 2009 order dismissing defendant Live Nation, Inc. was never adjudicated]
RETURN DATE FEB. 21, 2020

Volume II

This motion to vacate is DENIED. There is no April 22, 2010, motion on the docket. In any case, this motion to vacate is untimely. Federal Rule of Civil Procedure 60(c)(1) requires that any motion to vacate, under Rule 60(b)(6), "be made within a reasonable time." It's been over a decade since the March 17, 2009, order was entered. Even if the April 22, 2010, motion to vacate were filed, that motion was also not reasonably prompt, because it would have been filed over a year after the March 17, 2009, Order. *Cf.* Fed. R. Civ. P. 60(c)(1) (Rule 60 motions generally should not be made "more than a year after the entry of the . . . order" being challenged.) This action has been appealed several times to the Second Circuit, and has been resolved and closed.

The Clerk of Court is respectfully directed to close Dkt. No. 427, and to mail a copy of this Order to Plaintiff.

Dated: February 13, 2020
New York, New York

EY
LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

A22

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, Plaintiff filed a letter on January 20, 2017, seeking to correct the record or, in the alternative, an Order directing Defendants to produce all documents cited in support of its summary judgment motion, or in the alternative for Rule 11 sanctions.

WHEREAS, Plaintiff's letter alerted the Court that documents may be missing from the Court's records.

WHEREAS, the Court has located the majority of documents filed on the docket in 2006, but for which electronic copies were not available.

WHEREAS, these records are being scanned and a links to them will be placed on the docket. It is hereby

ORDERED that Plaintiff's motion to correct the record is DENIED as moot. The majority of the documents that Plaintiff raised in her letter were located and will be scanned and placed on the docket in electronic form. The remaining documents do not appear to be material to the remaining claims at issue in this case -- attorney malpractice and breach of fiduciary duty -- or should not be filed. For example, the arbitration documents mentioned, the "pre-arbitration and post-hearing briefs," are not typically filed on the docket because they are submitted to the arbitrator and not to this Court. It is further

A23

ORDERED that if there are specific documents cited by Defendants in their motion for summary judgment for which there is a docket entry but which are not available on the docket, Plaintiff may submit a letter, no longer than one page, listing those documents and the citation to the document in Defendants' summary judgment papers.

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

SO ORDERED.

Dated: January 31, 2017
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

A24

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:

A conference having been held before the Court on November 29, 2016, and the Parties having stated their intentions to file cross-motions for summary judgment, it is hereby

ORDERED that Defendants shall file any motion for summary judgment, not to exceed thirty (30) pages, by **January 4, 2017**. Plaintiff shall file her opposition and cross-motion for summary judgment, not to exceed thirty-five (35) pages, by **February 17, 2017**. Defendants shall file their reply and opposition to Plaintiff's cross-motion for summary judgment, not to exceed ten (10) pages, by **March 3, 2017**. Plaintiff shall file her reply in support of its cross-motion, not to exceed five (5) pages, by **March 17, 2017.** It is further

ORDERED that, notwithstanding the aforementioned page allocation, the Parties may reallocate the page numbers as they deem appropriate, so long as no Party exceeds forty (40) pages of briefing in total; it is further

ORDERED that Defendants shall provide courtesy copies of all briefs to the Court in accordance with the Court's Individual Rule III.B.5; it is further

A25

ORDERED that the Parties shall otherwise comply with the Local Civil Rules and the Court's Individual Rules in filing their motions and supporting papers, including Local Civil Rule 11.1, which directs the format to be used, and Individual Rule III.B.

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

SO ORDERED.

Dated: December 1, 2016
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

A28

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.

[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.").

A32

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)).

A33

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

A37

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

A41

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

A49

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff,

v.

COWAN, LIEBOWITZ & LATMAN, PC, 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, MICHAEL GORDON, and SUSAN SCHICK,

Defendants.

06 Civ. 1202 (BSJ)(THK)

Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff's attorney's amended motion to withdraw (Dkt. 79) as counsel is GRANTED.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
September 21, 2010

A50

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY,

Plaintiff,

v.

COWAN, LIEBOWITZ & LATMAN, PC, 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, MICHAEL GORDON, and SUSAN SCHICK,

Defendants.

06 Civ. 1202 (BSJ)(THK)

Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff Amy R. Gurvey moves for re-argument and reconsideration of the Court's April 24, 2009 order. Plaintiff argues, first, that the Court overlooked the fact that Plaintiff's original complaint was filed in February 2006, which, based on the accrual date of May 2003, was within the three year statute of limitations period. Plaintiff never argued during the motion to dismiss briefing, however, that the original complaint should serve as the operative pleading for purposes of the statute of limitations.[1] Because a motion for

[1] Because Plaintiff never argued that the original complaint should serve as the operative pleading for purposes of the statute of limitations, the Court specifically noted in the April 24, 2009 order that Plaintiff "failed to

A51

reconsideration "'cannot assert new arguments . . . which were not before the court on the original motion,'" this argument does not warrant reconsideration. See, e.g., Chenensky v. New York Life Ins. Co., No. 07 Civ. 11504(WHP), 2010 WL 2710586, at *1 (S.D.N.Y. June 24, 2010) (citations omitted).

Plaintiff contends, second, that the Court misapprehended Plaintiff's allegations regarding the accrual date of her claims for misappropriation and unfair competition. Plaintiff claims that her third amended complaint included factual allegations that the named partners from Cowan, Liebowitz & Latman, PC ("CLL") shared Plaintiff's trade secrets with Clear Channel, who used Plaintiff's trade secrets no earlier than in the fall of 2005. But, as the April 24, 2009 order explains, Plaintiff's third amended complaint describes "a misappropriation that occurred and was disclosed some time between . . . early 2002 and . . . May 5, 2003." (April 24, 2009 order, at 5.) Because a defendant "'becomes liable . . . upon disclosure,'" see Architectronics, Inc. v. Control Sys., Inc., 935 F. Supp. 425, 433 (S.D.N.Y. 1996) (citation omitted), the Court found that May 5, 2003 was the accrual date for Plaintiff's misappropriation and unfair competition claims. Plaintiff has pointed to no new information that the Court overlooked that

---

establish that the earlier Complaint should operate to bring these claims against these Defendants within the applicable period." (April 24, 2009 order, at 5 n.6.)

A52

warrants altering the April 24, 2009 order. See, e.g., Chenensky, 2010 WL 2710586, at *1 (citation omitted). Accordingly, Plaintiff's second argument also does not warrant reconsideration.

Plaintiff's final argument is that the Court overlooked well pleaded allegations of acts constituting legal malpractice and breach of fiduciary duty, and Plaintiff's description of damages and causation. Plaintiff merely reasserts, however, that CLL committed legal malpractice and breached its fiduciary duty by misappropriating Plaintiff's trade secrets to Clear Channel, by failing to properly advise her, and by having an improper conflict of interest that damaged Plaintiff. The Court considered and rejected these allegations in the April 24, 2009 order. Plaintiff also fails to offer any new authority or data that the Court overlooked regarding Plaintiff's description of damages and causation that warrants altering the April 24, 2009 order. See, e.g., id. (citation omitted). Thus, Plaintiff's third argument also does not support reconsideration.

For the reasons provided above, Plaintiff's motion for re-argument and reconsideration (Dkt. 68) is DENIED.

A53

SO ORDERED:

Barbara S. Jones

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
September 20, 2010

A54

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMY R. GURVEY,

Plaintiff,

-against-

COWAN, LIEBOWITZ & LATMAN, P.C., CLEAR CHANNEL COMMUNICATIONS, INC., INSTANT LIVE CONCERTS, LLC, LIVE NATION, INC., NEXTICKETING, INC., DALE HEAD, STEVE SIMON, and DOES I-VIII, INCLUSIVE

Defendants.

----------X

06 **CIVIL** 1202 (BSJ)

JUDGMENT

Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable Barbara S. Jones, United States District Judge, and the Court, on April 23, 2009, having rendered its Opinion and Order dismissing plaintiff's claims against all defendants, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated April 23, 2009, plaintiff's claims against all Defendants are dismissed; accordingly, the case is closed.

Dated: New York, New York
April 27, 2009

J. MICHAEL McMAHON

Clerk of Court

BY: _____

Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____

A55

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY

Plaintiff,

v.

COWAN, LIEBOWITZ & LATMAN, PC., CLEAR CHANNEL COMMUNICATIONS, INC., INSTANTLIVE CONCERTS, LLC, LIVE NATION, INC., NEXTICKETING, INC. DALE HEAD, STEVE SIMON, and DOES I-VIII, INCLUSIVE,

Defendants.

---

06 Civ. 1202

Opinion & Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Plaintiff Amy Gurvey brings claims of misappropriation (trade secrets; ideas, labor or skill), Sherman Act and state antitrust violations, Lanham Act violations, interference with prospective economic relations, tortious interference with contract, legal malpractice, breach of fiduciary duty, and unjust enrichment against her former employer, Cowan, Liebowitz & Latman, P.C. ("CLL"), named CLL partners ("CLL Partners"), and various entities affiliated with Clear Channel Communications ("CCC Defendants")[1].

BACKGROUND[2]

Plaintiff was employed as Of Counsel to CLL pursuant to an employment agreement dated January 15, 2002. (Third Amended Complaint ("TAC") ¶29). At that

[1] Although two entities affiliated with the Clear Channel family have been released from this case after personal jurisdiction was found lacking, two other affiliated entities, InstantLive and NextTicketing, remain. They will continue to be referred to as the CCD Defendants.

[2] The facts described are taken from Plaintiffs' Complaint and are assumed to be true for the purposes of this motion only.

time, CLL agreed to represent the Plaintiff before the US Patent and Trademark office ("USPTO") to file Provisional Patent Applications ("PPA"s) for inventions developed by Plaintiff prior to joining CLL. (TAC ¶¶28, 33).

Plaintiff's inventions included business plans to edit, package and distribute live recordings of live music events, as well as electronic ticketing methods related to these recordings. (TAC ¶¶28, 33.)

Shortly after beginning at CLL, Plaintiff presented her projects, business plans, and inventions at the firm's monthly partners' conference. (TAC ¶34).

After the meeting a CLL Partner told Plaintiff that the her business plans would be of significant interest to the firm's client CCC. (TAC ¶36). This same CLL Partner also told Plaintiff that he preferred to have her as a client of CLL rather than as Of Counsel. (TAC ¶37.)

In early May 2002, Plaintiff was notified that she would no longer be employed Of Counsel, but that CLL continued to have interest in the subject matter of her patents and would file the Plaintiff's PPA's before the USPTO. (TAC ¶43). On May 22, 2002 and May 24, 2002, CLL filed two patents with the USPTO naming the plaintiff as sole inventor and CLL as attorneys of record. (TAC ¶44).

In August 2002, Plaintiff returned from a business trip to find that she had been locked out of her office. (TAC ¶47)

On or about February 16, 2003, the Plaintiff received notification from the USPTO that CLL had withdrawn as the attorney on one of her patents because of a conflict of interest. (TAC ¶50).

In March 2003, the CCC affiliated entity InstantLive posted ads/statements on their website announcing a new program that would allow concert-goers to purchase its recordings. (TAC ¶55). On May 5, 2003, *The New York Times* published an article describing InstantLive. Plaintiff alleges that this description mirrored her business models for the onsite distribution of live recordings at concerts. (Band members of Phish were also interviewed for the article and identified their interest in this new product. (TAC ¶52). A member of Phish is married to a CLL attorney.)

In Fall 2005, CCC formed defendant LiveNation, which acquired defendant InstantLive. (TAC ¶57).

On June 5, 2006, Plaintiff filed an Amended Complaint, which was served on the CLL law firm and the CCC Defendants on June 16, 2006.[3] The named CLL partners were added as parties to the TAC, filed on March 4, 2008.[4]

STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint that fails to state a claim upon which relief may be granted. "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). The court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of

[3] An earlier Complaint was filed on February 15, 2006, but was never served.

[4] It is unclear whether the individual partners were ever served with the Third Amended Complaint. Plaintiff appears to argue that constructive notice was sufficient, since the CLL firm was itself served with the Amended Complaint on June 5, 2006. The Court need not, however, reach the constructive notice argument, since the relevant claims are time-barred whether they are measured from the Amended Complaint or the TAC.

A58

the plaintiff. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, ----, 127 S.Ct. 1955, 1964 (2007) (internal quotation marks, citations, and alterations omitted). A plaintiff must assert "enough facts to state a claim to relief that is plausible on its face." Id. at 1974. This "plausibility standard" is a flexible one, "oblig[ing] a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007), *cert. granted,* 128 S.Ct. 2931 (2008).

DISCUSSION

A. Misappropriation Claims

i. Misappropriation of Trade Secrets

The date upon which a cause of action for misappropriation of trade secrets begins to accrue depends on the nature of the misappropriation alleged: "If a defendant misappropriates and discloses a trade secret, he becomes liable to plaintiff upon disclosure. On the other hand, if the defendant keeps the secret confidential, yet makes use of it to his own commercial advantage, each successive use constitutes a new, actionable tort for the purpose of the running of the Statute of Limitations." Architectronics, Inc. v. Control Systems, Inc., 935 F.Supp. 425, 433 (S.D.N.Y. 1996) (citing Lemelson v. Carolina Enterprises, Inc., 541 F.Supp. 645, 659 (D.C.N.Y. 1982).

A59

Plaintiff here has alleged the former. The TAC describes a misappropriation that occurred and was disclosed some time between Plaintiff's CLL presentation in early 2002 and the May 5, 2003 *New York Times* article that allegedly revealed (in the guise of CCC's own venture) Plaintiff's "entire confidential business models for the onsite distribution of live music at concerts" (TAC ¶¶34, 52).[5] The statute of limitations for this cause of action is three years. Plaintiff's Amended Complaint (the first to be served on Defendants) was not filed until June 5, 2006.[6] The claim was therefore brought more than three years subsequent to the disclosure of the allegedly misappropriated trade secret. Plaintiff's claim is time-barred and is DISMISSED as against all Defendants.

ii. Unfair Competition / Misappropriation of Ideas, Labor, or Skill

Under New York law, a claim for unfair competition claim premised on misappropriation and unauthorized use is subject to a three-year statute of limitations under N.Y. C.P.L.R. § 214. *Sporn v. MCA Records, Inc.,* 58 N.Y.2d 482, 488 (1983). In a case such as this, where the unfair competition claim is identical to a misappropriation claim and where the extent of the misappropriation alleged is more akin to a wholesale conversion rather than a mere interference with Plaintiff's alleged property interest, the statute of limitations period is identical to that of a claim for misappropriation of trade secrets. See Greenlight Capital, Inc. v. GreenLight (Switzerland) S.A., No. 04-cv-3136, 2005 WL 13682, at*7 (S.D.N.Y. 2005); Opals on Ice Lingerie v. BodyLines, Inc., 425 F.Supp.2d 286, 296 -297 (E.D.N.Y. 2004) ("Defendant's unlawful actions culminated in numerous products it designed, sold and manufactured that are 'substantially similar' to

[5] Plaintiff argues that the May 5 article did not "disclose" the misappropriated trade secret, but only "addressed its practical application." (Opp'n at 11.) However, the TAC itself is clear in stating that disclosure of Plaintiff's "entire confidential business models" occurred on in that article, on that date.

[6] Plaintiff has failed to establish that the earlier Complaint should operate to bring these claims against these Defendants within the applicable period.

A60

those of [Plaintiff],... which were 'generally unavailable in the marketplace' during the time period in which [Plaintiff] shared samples with [Defendant]...As in Sporn, these allegations of misappropriation amount to more than mere interference with [Plaintiff's] designs and, as such, constitute a "taking" or conversion of plaintiff's property."); LinkCo, Inc. v. Fujitsu Ltd., 230 F.Supp.2d 492, 501 (S.D.N.Y. 2002).

Therefore, Plaintiff's claim began to run on than May 5, 2003. Defendants were not notified of her claims until the filing of the Amended Complaint on June 5, 2006, and its service on June 16, 2006. This claim is therefore time-barred and DISMISSED as against all Defendants.

B. Sherman Act and State Antitrust

Plaintiff claims that the CCC Defendants violated federal and state antitrust laws, and that CLL and its partners aided and abetted those antitrust violations. Plaintiff has failed to adequately plead these causes of action.

In order to state a claim under Section Two of the Sherman Act,[7] Plaintiff must allege: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) (internal quotation marks and citation omitted).

The TAC describes various business practices implemented by the CCC Defendants, speculating as to various concert recording arrangements, describing

[7] The TAC attempts to state claims under both section 2 of the Sherman Act and "the antitrust laws of the states of New York, Texas, and California." (TAC para. 140.) It is unclear from the TAC precisely which state antitrust statutes and provisions Plaintiff refers to. Based on the TAC and the parties' papers pursuant to this motion, however, there do not appear to be any substantive differences amongst the various antitrust claims brought by Plaintiff.

A61

corporate structures, and referring vaguely to supposed admissions of "monopoly" control. (TAC ¶¶128-130.) These practices, as alleged, do not describe the holding or wielding of monopoly power--"the power to control prices in the relevant market or to exclude competitors," Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596, n. 20, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)--and so do not provide a basis for Plaintiff's conclusory pleadings of antitrust violations. .

Similarly, Plaintiff has made little attempt to define the market within which CCC's monopoly supposedly exists, alleging only that Defendants have made certain efforts to operate within "the relevant live concert venue market in the United States" (TAC para. 128) or the "US pop concert venues and radio markets." (TAC ¶129.). The relevant market on claims of antitrust violation involves the specification of its dimensions, its product, geographic and time dimensions. Yankees Entertainment and Sports Network, LLC v. Cablevision Systems Corp., 224 F.Supp.2d 657, 666 (S.D.N.Y. 2002) (citing 2 Earl W. Kintner, *Federal Antitrust Law* § 12.2 (1980), and must provide a factual basis for the Court's evaluation of the marketplace in light of "the realities of competition" Balaklaw v. Lovell, 14 F.3d 793, 797 n. 9 (2d Cir.1994) (quotation omitted);see United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Yellow Page Solutions, Inc. v. Bell Atlantic Yellow Pages Co., No. 00-cv-5563, 2001 WL 1468168, at *12 (S.D.N.Y. Nov. 19, 2001).

Plaintiff has failed to adequately plead these elements and her claims of antitrust violations, federal and state, are hereby DISMISSED as against all Defendants.

C. Lanham Act

Section 43(a) of the Lanham Act provides two grounds upon which a plaintiff may assert a claim: false designation and false advertising. 15 U.S .C. § 1125(a)(1). Plaintiff alleges that Defendant misrepresented various products or services as their own and argues that such misrepresentations constitute false advertising.

Plaintiff's claim, however, is more accurately described as one for "passing off," as her allegations make clear. The TAC identifies the May 3, 2003 *New York Times* article (TAC ¶52), as well as various website advertisements and press releases (TAC ¶¶55-59) that describe technology and a business plan allegedly similar to those developed by Plaintiff. While Plaintiff attempts to label this as "false and misleading statements of fact in advertising" (TAC ¶83.), the pleadings make clear that Plaintiff's claim is aimed at Defendants' holding out as their own that which is allegedly Plaintiff's.[8]

Plaintiff's claim of "passing off" is not properly brought under the Lanham Act, as it disputes the "origin" of an idea. "[A]s used in the Lanham Act, the phrase 'origin of goods' is...incapable of connoting the person or entity that originated the ideas or communications that 'goods' embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent." Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 32, 123 S.Ct. 2041, 2047 (U.S. 2003).

A failure to attribute the authorship of an idea simply does not amount to the misrepresentation of the "nature characteristics, qualities, or geographic origin of...goods, services, or commercial activities" as required under section 43(a) of the

[8] One particularly relevant section of the TAC is in fact entitled "Defendants Live Nation and Clear Channel Pass Off as Their Own The Trade Secrets Misappropriated from Plaintiff." (TAC s.H.)

A63

Lanham Act. See Antidote International Films, Inc. v. Bloomsbury Publishing, PLC, 467 F.Supp.2d 394 (S.D.N.Y. 2006) (dismissing false advertising claim alleging misrepresentations relating to authorship of a novel); see also Thomas Publishing Co., LLC v. Technology Evaluation Centers, Inc., No. 06 Cv 14212(RMB), 2007 WL 2193964 (S.D.N.Y. July 27, 2007) (dismissing false advertising claim "premised upon the assertion that Defendant passed off Plaintiff's work as its own," where defendant misrepresented itself as the developer, creator or owner of materials comprising a software directory, because "a failure to attribute authorship to Plaintiff does not amount to misrepresentation of 'the nature, characteristics, qualities or geographic origin' of ... [Defendant's] goods.").

Plaintiff's allegations do not describe a violation of the Lanham Act and this claim is therefore DISMISSED as against all Defendants.

D. Tortious Interference with Prospective Economic Relations

In order to state a claim for tortious interference with prospective economic relations under New York law, a plaintiff must allege: "(1) that [she] had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." Friedman v. Coldwater Creek, Inc., No. 08-cv-979, 2009 WL 932546, at * 1 (2d Cir. April 8, 2009); Kirch v. Liberty Media Corp., 449 F.3d 388, 400 (2d Cir.2006). The New York Court of Appeals has explained that, "as a general rule, a defendant's conduct must amount to a crime or an independent tort" in order to amount to tortious interference with a prospective economic advantage. Carvel Corp. v. Noonan, 3

N.Y.3d 182, 190 (2004). A defendant who has not committed a crime or independent tort or acted solely out of malice may nevertheless be liable if he has employed "wrongful means." "'Wrongful means' include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions," Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183 (1980) (quotation and citation omitted) and "'extreme and unfair' economic pressure." Carvel, 3 N.Y.3d at 190.

Here, Plaintiff has alleged that she "lost the opportunity to complete a private placement offering of securities to be issued by her own company which was to have served as seed money for the development of technologies utilizing her trade secrets and inventions." (Compl. para. 146.) In addition to the evident vagueness of this pleading, Plaintiff neglects to allege that Defendants knew of this private placement opportunity and wrongfully interfered with it.[9] The allegations therefore do not state a claim for tortious interference with prospective economic relations and must be DISMISSED as against all Defendants.

E. Tortious Interference with Contract (against the CLL Defendants)

In New York, the statute of limitations for a tortious interference with contract claim is three years. See N.Y. C.P.L .R. § 214(4); Norris v. Grosvenor Marketing Ltd., 803 F.2d 1281, 1287 (2d Cir.1986). The TAC describes a series of events occurring in early 2002, culminating in the alleged usurpation of Plaintiff as counsel to Legend Films. (TAC ¶29(f).) Defendants were made aware of this claim for the first time in the Amended Complaint filed on June 5, 2006 and served on June 16, 2006. The three year

[9] Although the parties further submit arguments concerning the statute of limitations applicable to this cause of action, the TAC's allegations on this cause are too vague to determine when, precisely, Plaintiff alleges that the tortious interference occurred. Because this same vagueness disposes of Plaintiff's claim under the Rule 12(b)(6) motion, the Court need not make a final conclusion on the issue of timeliness.

A65

statute of limitations on this claim has therefore lapsed, and the claim is hereby DISMISSED.

Moreover, even if the claim were not time-barred, it would be subject to dismissal pursuant to Rule 12(b)(6), for failure to state a claim.

To state a claim for tortious interference with contract under New York law, a plaintiff must allege: (1) "the existence of a valid contract between the plaintiff and a third party"; (2) the "defendant's knowledge of the contract"; (3) the "defendant's intentional procurement of the third-party's breach of the contract without justification"; (4) "actual breach of the contract"; and (5) damages. Kirch v. Liberty Media Corp., 449 F.3d 388, 401-02 (2d Cir.2006) (quoting Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 646 N.Y.S.2d 76, 668 N.E.2d 1370, 1375 (N.Y.1996)).[FN21] In addition, a plaintiff must assert, with respect to each defendant, that the defendant's actions were the "but for" cause of the alleged breach-in other words, that there would not have been a breach but for the activities of the defendant. Sharma v. Skaarup Ship Mgmt. Corp., 916 F.2d 820, 828 (2d Cir.1990) (citing Special Event Entm't v. Rockefeller Ctr., Inc., 458 F.Supp. 72, 78 (S.D.N.Y.1978)).

Plaintiff has alleged that "shortly after [she] became 'of counsel' to CLL, CLL attorney Mark Montague was introduced to plaintiff's client, Legend Films, whom plaintiff had also served as General Counsel up to 2002. CLL orchestrated plaintiff's ouster from Legend and induced Legend to renege on its obligation to pay plaintiff for her services." (TAC para. 29(f).) It is insufficient to merely state, without more, that Defendants "orchestrated" Plaintiff's ouster. "[T]he law requires some factual specificity in pleading tortious interference." World Wide Commc'ns, Inc. v. Rozar, No. 96 Civ.

A66

1056, 1997 U.S. Dist. LEXIS 20596, at *7, 1997 WL 795750, (S.D.N.Y. December 30, 1997) (citation omitted). As such, Plaintiff has failed to adequately plead that the Defendants intentionally procured, without justification, the breach in question, and Plaintiff's claim on this issue is DISMISSED.

F. Legal Malpractice (against the CLL Defendants)

"To state a claim for legal malpractice under New York law, a plaintiff must allege: (1) attorney negligence; (2) which is the proximate cause of a loss; and (3) actual damages." Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328, 337 (2d Cir.2006) (citing Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 573 N.Y.S.2d 981, 986 (App.Div.1991)).

In order to establish negligence in a legal malpractice case, a plaintiff must allege that the attorney's conduct "fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession." Achtman, 464 F.3d at 337 (quoting Grago v. Robertson, 49 A.D.2d 645, 370 N.Y.S.2d 255 (N.Y.App.Div.1975)). "A complaint that essentially alleges either an error of judgment or a selection of one among several reasonable courses of action fails to state a claim for malpractice...Generally, an attorney may only be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action." Achtman, 464 F.3d at 337 (quotations omitted) (citing Rosner v. Perry, 65 N.Y.2d at 738, 492 N.Y.S.2d 13, 481 N.E.2d 553 (NY 1985); Bernstein v. Oppenheim & Co., 160 A.D.2d 428, 430, 554 N.Y.S.2d 487 (1990)).

Here, Plaintiff offers only vague and non-actionable challenges to CLL's legal representation. Plaintiff first pleads that CLL "failed to protect and safeguard her trade

A67

secrets." TAC ¶120(1). This allegation appears to refer either to the presence of non-attorney CLL employees at the initial presentation of Plaintiff's inventions or to the misappropriation at the heart of Plaintiff's TAC. However, neither instance is premised on anything more than speculation, and neither presents a challenge to the actual quality of CLL's legal representation Plaintiff also alleges that CLL "fail[ed] to properly advise [her] with respect to the opportunities for commercial exploitation of [her] inventions and trade secrets" (TAC ¶120(2)). This allegation again does not address CLL's legal representation and merely challenges the "selection of one among several reasonable courses." Finally, Plaintiff alleges that CLL failed to eliminate a conflict of interest to its representation of Plaintiff TAC ¶¶120(3) and (4). Because this allegation includes no detail, even in speculation, as to the supposed conflict, the allegation does not provide a basis for a malpractice claim.

Moreover, the TAC fails to identify the precise damages suffered or how the Defendant's legal representation of her actually caused these damages. A plaintiff must properly plead that, "'but for' the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages." Trautenberg v. Paul, Weiss, Rifkind, Wharton & Garrison, LLP, No. 06 Civ. 14211(GBD), 2007 WL 2219485, *3 (S.D.N.Y. Aug. 2, 2007) (citing Weil Gotshal & Manges v. Fashion Boutique of Short Hills, 780 N.Y.S.2d 593, 596 (2004)). "Notwithstanding counsel's purported negligence, the client must demonstrate his or her own likelihood of success; absent such a showing, counsel's conduct is not the proximate cause of the injury. Nor may speculative damages or conclusory claims of damage be a basis for legal malpractice." Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass,

LLP, 301 A.D.2d 63, 67, 750 N.Y.S.2d 277 (N.Y.App.Div.2002). See also Morgan, Lewis & Bockius, LLP v. IBuyDigital.com, Inc., 2007 N.Y. Slip Op 50149U, at 6 (N.Y.Misc.2007). The TAC fails to allege that CLL's legal representation constitutes 'but for' causation of some ascertainable and actionable damage.

For these reasons, Plaintiff's claim of legal malpractice against the CLL Defendants is DISMISSED.

G. Breach of Fiduciary Duty (against the CLL Defendants)

To state a claim for breach of fiduciary duty in New York, "plaintiff must allege three elements: (1) the existence of fiduciary relationship; (2) knowing breach of a duty that relationship imposes; and (3) damages suffered." Nay ex. rel. Thiele v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 05 Civ. 10264, 2006 WL 2109467, at *6 (S.D.N.Y. July 25, 2006) (quoting Carruthes v. Flaum, 388 F.Supp.2d 360, 380 (S.D.N.Y.2005)) (internal quotation marks omitted).

Here, it appears that the same set of speculative allegations that comprised the legal malpractice claim is also relied upon for Plaintiff's fiduciary duty claim. As discussed above, the TAC does not identify with any more than broadly-worded speculations what duty was breached or what damage was caused by that breach.

This claim is hereby DISMISSED.

H. Unjust Enrichment

In order to state a claim for unjust enrichment, "plaintiff must establish 1) that the defendant benefited; 2) at plaintiff's expense; and 3) that 'equity and good conscience' require restitution." Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir.2000). (citing *Dolmetta v. Uintah Nat'l Corp.*, 712 F.2d 15, 20 (2d Cir.1983)). As with her other

A69

claims, Plaintiff has provided only assertion and speculation as to the benefit that was taken from her by Defendants. Even under the low threshold that plaintiffs must meet under Rule 12(b)(6), the unjust enrichment claim must be DISMISSED as against all Defendants.

H. Accounting

Plaintiff attempts to state a claim for "accounting." "Accounting" is a remedy available in certain circumstances, not a claim in itself. That cause of action is therefore DISMISSED as against all Defendants.

CONCLUSION

Plaintiff's claims against all Defendants are hereby DISMISSED. The Clerk of Court is hereby directed to close this case.

SO ORDERED:

Barbara S. Jones
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
April 23, 2009

A70

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY R. GURVEY

Plaintiff,

v.

COWAN, LIEBOWITZ & LATMAN, PC., CLEAR CHANNEL COMMUNICATIONS, INC., INSTANTLIVE CONCERTS, LLC, LIVE NATION, INC., NEXTICKETING, INC. DALE HEAD, STEVE SIMON, and DOES I-VIII, INCLUSIVE,

Defendants.

06 Civ. 1202
Opinion & Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Defendants Clear Channel Communications, Inc. ("Clear Channel") and Live Nation, Inc. ("Live Nation") move to dismiss Plaintiff Amy Gurvey's claims against them for lack of personal jurisdiction. That motion is GRANTED.

BACKGROUND

Plaintiff, in its Third Amended Complaint ("TAC"), has brought seven claims against Clear Channel, Live Nation, and various other Defendants. Plaintiff alleges that the law firm Cowan, Liebowitz and Latman, P.C. learned of Plaintiff's (it's client's) proprietary technology and confidential business models and then improperly and illegally misappropriated them to Clear Channel (another client). (TAC 2, 34-41.) Plaintiff alleges that Defendant Clear Channel then used and advertised as its own Gurvey's confidential business model's, creating defendants Instant Live, Next Ticketing and Live Nation for such purposes. (TAC 52-57, 78.) Plaintiff alleges also that Clear

A71

Channel used its monopoly power to exclude competitors, including plaintiff, from entering the relevant market. (TAC 70.)

Plaintiff brings claims under the Sherman and Lanham Acts, as well as claims of misappropriation of ideas, labor or skill, interference with prospective economic relations, unjust enrichment, and accounting. Defendants Clear Channel and Live Nation move to dismiss for lack of personal jurisdiction. That motion is GRANTED.

DISCUSSION

Defendant Clear Channel is a corporation formed under the laws of Texas, with its principal place of business in Texas. Defendant Live Nation is organized under the laws of Delaware, with its principal place of business in California. Both Defendants are holding companies whose sole purpose is to hold stock in subsidiaries and other companies.

At this point, there has been no evidentiary hearing concerning personal jurisdiction over the Defendants. Prior to such a hearing, "the plaintiff need only make a prima facie showing of jurisdiction, and "all pleadings and affidavits must be construed in the light most favorable to [the plaintiff] and all doubts must be resolved in the [plaintiff's] favor." Landoil Res. Corp. v. Alexander & Alexander Servs., Inc., 918 F.2d 1039, 1043 (2d Cir. 1990). Even under this standard, the TAC inadequately pleads a basis for asserting personal jurisdiction over Clear Channel and Live Nation.

I. General Jurisdiction

The TAC proposes various grounds under CPLR 301 for asserting general personal jurisdiction over Defendants Clear Channel and Live Nation, but offers only vague factual assertions in arguing how those theories should be applied to Defendants.

A72

The TAC further fails to distinguish between the activities of the holding companies and those of the subsidiaries, or to establish a ground for imputing subsidiary activities to the holding company for purposes of personal jurisdiction.

(i) Licensed to do Business in New York

Under CPLR 301, courts may exercise general jurisdiction over a foreign company where that company is licensed to do business in New York. In her Opposition to this Motion to Dismiss, Plaintiff states that the moving Defendant is a "licensed foreign corporation," and points to an information sheet found on the New York Department of State's website (Exhibit A, Ciccia Declaration, Plaintiff's Response). That information sheet, however, fails to support Plaintiff's argument---it lists a "Clear Channel Communications Inc." as a "domestic business corporation," rather than a licensed foreign corporation. Where the parties do not dispute that the moving Defendant---"Clear Channel Communications, Inc." (with a comma)---was formed under the laws of Texas, it appears that Plaintiff has provided in Exhibit A information concerning some other entity. According to the Declaration of Hamlet T. Newsom, Jr. in support of Clear Channel's Motion to Dismiss, Clear Channel Communications, Inc. is not registered to do business in New York. (Hamlet Declaration, at para. 7.)

(ii) "Simple and Pragmatic"

Under CPLR 301, courts may also exercise general jurisdiction under what parties have referred to as the "simple and pragmatic" test, which examines several indicia, including: (1) the existence of an office in New York; (2) the solicitation of business in New York; (3) the presence of bank accounts or other property in New York; and (4) the presence of employees or agents in New York. Indemnity Ins. Co. of N.Am. v. K-Line

A73

Am., Inc., 2007 WL 1732435 (S.D.N.Y. 2007). Although Plaintiff recites these factors, it has not alleged their existence in this case. What facts it does offer on this count do not appear to relate to the holding companies, but again to the subsidiaries. Personal jurisdiction on this ground, therefore, is improper.

(iii) Activities of the Subsidiary

Under CPLR 301, personal jurisdiction over a parent or holding company may be established by the activities of and relations to subsidiary companies. However, the presence of a subsidiary in New York alone is not enough to establish the parent's presence in the state. Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120 (2d Cir. 1984); SEB S.A. v. Montgomery Ward & Co., Inc., No. 99 Civ. 9284, 2002 WL 31175244, at *3 (S.D.N.Y. Sept. 30, 2002). For New York courts to exercise jurisdiction in this situation, the subsidiary must be either a "mere department" or an agent of the foreign parent. Jazini v. Nissan Motor Co., 148 F.3d 181, 184 (2d Cir. 1998).

(a) "Mere Department" Theory

Plaintiff argues that personal jurisdiction should be asserted over Defendant Clear Channel (and potentially Defendant Live Nation, if jurisdictional discovery were granted) based upon the "mere department" theory.

In conducting the "mere department" analysis, New York courts examine (1) common ownership (2) the financial dependency of the subsidiary; (3) interference in the selection of the subsidiary's executive personnel and failure to observe corporate formalities; and (4) control over the subsidiary's marketing and operational policies. Beech Aircraft, 751 F.2d at 120-22 ("New York courts regard one factor as

A74

essential...and three others as important. The essential factor is common ownership.") ("[N]early identical ownership interests must exist before one corporation can be considered a department of another corporation for jurisdictional purposes."); Stratagem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535, 546 (S.D.N.Y. 1994).

A simple business relationship is insufficient to impute jurisdiction. Beech Aircraft, 751 F.2d at 120 ("[T]he presence of a local corporation does not create jurisdiction over a related, but independently managed, foreign corporation."); Delagi v. Volkswagenwerk A.G., 29 N.Y.2d 426, 432 (N.Y. 1972) ("The control over the subsidiary's activities... must be so complete that the subsidiary is, in fact, merely a department of the parent."). A corporate entity is a "mere department" of a parent company where the parent's control is pervasive enough that the corporate separation is "more formal than real." Jacobs v. Felix Bloch Erben Verlag fur Buhne Film und Funk KG, 160 F. Supp. 2d 722, 734 (S.D.N.Y. 2001).

In her Opposition to Defendants' Motion to Dismiss, Plaintiff attempts to provide some basis for finding that Clear Channel may be subject to personal jurisdiction under the "mere department" theory, excerpting a 2004 decision by a District Court in Colorado. That Court listed several factors that influenced its determination that, in that case, Clear Channel dominated various subsidiaries (though Plaintiff does not appear to allege that those are the same subsidiaries at issue in this case). Plaintiff then asserts in a footnote that, based on general statements taken from various Forms 10-K, the entities here may currently share some officers, and that there is reason to believe that the circumstances described by the District Court in Colorado have not changed. (Opp'n at 5-6, fn.9.) Such broad assertions are inadequate even at this stage and provide no basis for

A75

determining that the corporate form between Clear Channel and the relevant subsidiary entities is "more formal than real." Id.. In order to plead prima facie personal jurisdiction, the allegations in the TAC itself must discuss the actual entities in question here---Clear Channel, Live Nation, and their subsidiaries operating in New York---and allege that the relations between them amount to complete control under common ownership. Absent such pleadings, this Court has no basis to assert personal jurisdiction over Clear Channel under the "mere department" theory.

As pertains to Live Nation, Inc., Plaintiff acknowledges in her Opposition that she has insufficiently pled the basis for a "mere department" theory of general jurisdiction, but asks the Court for leave to engage in jurisdiction discovery. (Opp'n, 7.) Plaintiff has made few, if any, allegations concerning the factors described in Beech Aircraft. Even at this stage, Plaintiff has made an inadequate effort to describe the activities of the holding company or its relations to the other entities in question here. Because the TAC does not include allegations establishing even prima facie personal jurisdiction, this Court has no reason to ignore the corporate form between the entities and need not order discovery on the issue.

(b) Agency Theory

Plaintiff also argues that the holding companies, specifically Live Nation, may be subject to personal jurisdiction under an agency theory. A subsidiary is considered an agent of the parent corporation if it "renders services that go beyond mere solicitation and are sufficiently important to the foreign [parent] entity that the corporation itself would perform equivalent services if no agent were available." Wiwa v. Royal Dutch Petroleum, 226 F.3d 88, 95 (2d Cir. 2000). One indicator of agency is whether the parent would be

A76

obliged to enter the market directly if the subsidiary was absent because the market is too important to the parent's welfare. Ginsberg v. Gov't Props Trust, Inc., No. 07 Civ. 365, 2007 WL 2981683, at *7 (S.D.N.Y. Oct. 10, 2007)

Plaintiff cites statements made in Defendants' Forms 10-K describing the business activities of various subsidiaries, including those located in New York. The conclusion Plaintiff hopes to derive from these forms, however, is not apparent to this Court. Plaintiff, in her Opposition to this motion, states that if Defendant, "is really a holding company, then the business it says, in its 10-K, it conducts must necessarily be conducted by...subsidiaries." (Opp'n at 4). However, this is not a necessary conclusion under New York law, and more is required to establish personal jurisdiction under an agency theory.

New York courts examining agency look to whether the subsidiaries are carrying out their own business or that of the parent. The situation of holding companies and subsidiary entities has been discussed: "Where a holding company is nothing more than an investment mechanism [--] a device for diversifying risk through corporate acquisitions [--] the subsidiaries conduct business not as its agents but as its investments. The business of the parent is the business of investment, and that business is carried out at the parent level. Where, on the other hand, the subsidiaries are created by the parent, for tax or corporate finance purposes, to carry on business on its behalf, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries." Bellomo v. Penn. Life Co., 488 F. Supp. 744, 746 (D.C.N.Y. 1980); see also Porter v. LSB Indus., Inc., 192 A.D.2d 205, 214-15 (N.Y. App. Div. 4th Dep't 1993) (defendant "is a holding company whose business is investment, which differs from the

A77

business of Summit [the subsidiary], which is distribution of machine tools. The business of the parent is carried out entirely at the parent level, and Summit cannot be deemed to be conducting the parent's business as its agent."); Ginsberg, 2007 WL 2981683, at *7 The type of conclusory pleading found in the TAC does not adequately allege an agency relationship and do not justify setting aside the corporate forms separating the entities in question. Insight Data Corp. v. First Bank Sys., No. 97 Civ. 4896, 1998 WL 146689, at *16 (S.D.N.Y. Mar. 25, 1998) ("Conclusory allegation of an agency relationship...are insufficient to make out a prima facie showing of personal jurisdiction...under § 301."). The Complaint therefore does not allege grounds for the Court to assert personal jurisdiction over Clear Channel or Live Nation.

II. Specific Jurisdiction

Plaintiff has also failed to allege facts concerning Clear Channel's or Live Natin's "transact[ion] [of] business within the state." As described above, Plaintiff has made very little effort to distinguish between the activities of the holding company and those of the subsidiaries and has failed to demonstrate agency or other justification for ignoring the corporate forms between entities. Plaintiff's allegations, therefore, concerning business transactions within New York do not link the operative facts of this case to the holding companies themselves.

The allegations as to specific jurisdiction are insufficient to establish a basis for exercising specific jurisdiction over Clear Channel of Live Nation.

CONCLUSION

A78

Defendants Clear Channel Communications, Inc. and Live Nation, Inc. motion to dismiss for lack of personal jurisdiction is hereby GRANTED. The Clerk of the Court is directed to terminate the following motion: Case No. 06 Civ. 1202, docket entry 51.

SO ORDERED:

Barbara S. Jones
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
March 16, 2009