

1 **UNITED STATES COURT OF APPEALS**

2 **FOR THE NINTH CIRCUIT**

3
4 P. STEPHEN LAMONT, individually,
5 AND AS NOMINEE FOR 100% OF THE
6 CAPITAL SHARES OF IVIEWIT
7 HOLDINGS, INC.,

8 Plaintiffs-Appellants,

9 v.

10 TIME WARNER INC.

11 Defendant

12 and

13 WARNER BROS. ENTERTAINMENT
14 INC.,

15 Defendant-Appellee.
16
17
18

No. 13-55263

D.C. No. 2:12-cv-08030 CAS VBK
U.S. District Court for Central
California, Los Angeles

REPLY BRIEF

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20 **REPLY BRIEF**
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1 **I. PRELIMINARY STATEMENT**

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3 1. Plaintiffs-Appellants rely on its arguments in the Opening Brief and on all the
4 pleadings in the District Court indicated in the Corrected Excerpt of Record.

5
6 2. By virtue of U.S. patent application 09/522,730 filed June 7, 1999, among
7 others, Plaintiffs-Appellants stake the claim as the inventors of scaled video by the
8 320x240 frame size which, among those skilled in the art, is without dispute. It is
9 the knowledge transfers and technology disclosures from this invention that
10 flowed to Defendant-Appellee and which allows Warner Bros. to deliver DVD and
11 HD quality video with 75% savings in storage requirements, a 75% savings in
12 bandwidth requirements, lower processing power, thus becoming the underlying
13 subject matter of this Appeal.
14
15

16
17 3. By virtue of U.S. patent application 09/522,721 filed June 3, 1999, among
18 others, Plaintiffs-Appellants stake the claim as the inventors of streaming video
19 which, among those skilled in the art, is without dispute. It is the knowledge
20 transfers and technology disclosures from this invention that flowed to Defendant-
21 Appellee which allows Warner Bros. to stream DVD and HD quality video with a
22 smooth flow, video and audio delivery on the fly, correctly synced audio and
23 video, thus becoming the underlying subject matter of this Appeal.
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1 4. By virtue of U.S. patent application 09/587,734 filed March 24, 1999, among
2 others Plaintiffs-Appellants stake the claim as the inventors of digital zoom which,
3 among those skilled in the art, is without dispute. It is the knowledge transfers and
4 technology disclosures from this invention that flowed to Defendant-Appellee
5 which allows Warner Bros. to zoom and pan on a digital video file without
6 pixelation, thus becoming the underlying subject matter of this Appeal.
7
8

9 5. One of the first recipients of the disclosures was MPEG LA, LLC, the
10 proprietors of the compression standard for digital TV with a revenue run rate of
11 approximately \$3 billion per annum, who remarked “I missed that”...”I never
12 thought of that”....and, finally “This changes everything.”
13
14

15 6. At the same time Plaintiffs-Appellants made the disclosures to Warner Bros.,
16 the same knowledge transfers and technology disclosures were made to engineers
17 at Intel Corporation who exclaimed “we could have put 10,000 engineers in a
18 room for 10,000 years and they would have never come up with these ideas;”
19 hence, a new era had begun, a “game changer,” the encoding, delivery, and
20 rendering of full screen, full frame rate¹ digital video.
21
22

23 7. Plaintiff-Appellant, P. Stephen Lamont, is the Chief Executive Officer of
24 Iviewit Holdings, Inc., the holder of a B.S. in Engineering from S.U.N.Y.
25
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¹ It is desirable that broadcast quality video be capable of delivering “full” frame rates of 24 to 30 frames per second.

1 Binghamton, an M.B.A. in Finance from Columbia Business School, and a J.D.
2 from Columbia Law School.

3 8. What follows is where Defendant-Appellee's Answering Brief avoids more
4 facts than it attempts to answer.
5

6 7 **II. STATUTE OF LIMITATIONS**

8 **A. No Genuine Dispute**

9
10 9. Defendant-Appellee's counsel failed to address the facts where Plaintiffs-
11 Appellants requested claims to violations that have occurred within the purported
12 prescription period, September 19, 2008 to September 18, 2012 (please see Cal. Civ.
13 Proc. Code § 337(1)) which includes a Royalty Agreement to continue use.
14

15 10. According to Rule 56(a) of the Federal Rules of Civil Procedure ("FRCP")
16 and Rule 56(e)2 of the FRCP:
17

18 (a)... The court shall grant summary judgment if the [appellant] shows that
19 there is no genuine dispute as to any material fact and the [appellant] is
20 entitled to judgment as a matter of law....

21 (e) (2) consider the fact undisputed for purposes of the [Brief]...

22 11. Should the Court consider the facts undisputed for purposes of the Briefs,
23 Plaintiffs-Appellants respectfully request this Court to reverse, in part, the Order of
24 the District Court.
25

26 **B. The Contracts Are Divisible and Partially Integrated**

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1 12. Where Defendant-Appellee steadfastly claims that the Colter NDA, the
2 WBOL I NDA, and the WBOL II NDA (collectively, herein “NDAs” and please see
3 Complaint, p.4 and p.9) and the February 15, 2001 Binding Term Sheet (“Business
4 Agreement” and please see Plaintiff’s Opposition to Motion to Dismiss, p. 11) are
5 non-divisible contracts, this assertion would be contrary to any deposition testimony
6 of Gregory B. Thagard former VP of Advanced Technology of Warner Bros., Jim
7 Bannister former President of Warner Bros. Digital, James Armstrong former VP of
8 Business Development of Iviewit Holdings, Inc., David Colter former VP of
9 Advanced Technology of Warner Bros., and Anthony Frenzen former encoding
10 engineer of Iviewit Holdings, Inc.
11
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13
14

15 13. As stated in numerous pleadings, and most recently in the Opening Brief,
16 Plaintiffs-Appellants advised the Court and attest that (please see Opening Brief,
17 p.10):
18

19 the parties have addressed the fundamentality of Plaintiffs-Appellants’
20 Technologies and their critical importance across a BROAD SPECTRUM of
21 applications including, but not limited to encoding for its filmed
22 entertainment division, encoding for its television programming, replication
23 of DVD discs, transmission of WB content, and rendering and decoding of
WB content on electronic devices (emphasis supplied).

24 14. Accordingly, the NDAs are divisible, where they include five separate and
25 distinct uses, where Warner Bros did use and still continues to use, in the
26 commercial business of Defendant-Appellee.
27
28

1 15. According to the exceptions to the parol evidence rule of the Restatement
2 (Second) of Contracts § 213 (“Restatement”), the NDAs are partially integrated
3 where terms and extrinsic evidence that supplement the writing are admissible (i.e.,
4 the many times pled contents of this paragraph 13).

6 16. According to the Restatement:

8 The parol evidence rule prevents a party to a written contract from presenting
9 extrinsic evidence that contradicts or adds to the written terms of the contract
10 that appears to be whole...A final agreement is either a partial or complete
11 integration. If it contains some, but not all, of the terms as to which the parties
12 have agreed then it is a partial integration...for a partial integration, terms that
13 supplement the writing are admissible... numerous exceptions to the parol
evidence rule, and in those jurisdictions, extrinsic evidence may be admitted
for the following purposes:

- 14 a. The court may first determine if the agreement was in fact totally
15 reduced to a written document. In the case of *State Rail Authority of*
16 *New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170,
17 NSW Court of Appeal, at 191, per McHugh JA, the parol evidence rule
has 'no operation until it is first determined' that all the terms of the
contract are in writing;
- 18 b. To prove a condition precedent. In *Pym v Campbell* (1865) 119 ER
19 903;
- 20 c. To prove that the written document is only part of the contract as in
21 *Hospital Products Limited v United States Surgical Corporation* [1984]
156 CLR 41 where the court found for a written contract to be only part
of an agreement;
- 22 d. To show, particularly in California, that (1) in light of all the
23 circumstances surrounding the making of the contract, the contract is
24 actually ambiguous (regardless of whether the contract's meaning
25 appears unambiguous at first glance), (2) thus necessitating the use of
26 extrinsic evidence to determine its actual meaning (please see *Pacific*
Gas & Elec. Co. v. G. W. Thomas Drayage Co., 69 Cal. 2d 33, 39, 69
Cal. Rptr. 561, 442 P.2d 641 (1968);
- 27 e. To imply or incorporate a term of the contract; and
- 28 f. To make changes in the contract after the original final contract has
been agreed to. That is, oral statements can be admitted unless they are

1 barred by a clause in the written contract (please see Wollner KS.
2 (1999). How to Draft and Interpret Insurance Policies, p 10. Casualty
3 Risk Publishing LLC).

4 17. The NDAs will be found to be a final and complete integration if only
5 through the inclusion of a merger clause, which recites that the contract is, in fact,
6 the whole agreement between the parties; neither of the NDAs included a merger
7 clause.
8

9 18. The Business Agreement clearly states: permissible use by Defendant Time
10 Warner Inc. and Defendant-Appellee Warner Bros. Entertainment Inc. consisted of:
11

12 “the websites located at URL www.warnerbros.com; and any other...Time
13 Warner website; and any other website launched or serviced by...WBOL; and
14 ANY PLACE WHERE THE...TIME WARNER BRAND APPEARS
(emphasis supplied).”

15 (please see Plaintiff’s Opposition to Motion to Dismiss, p. 11)

16 19. Accordingly, the Business Agreement is divisible, by Warner Bros. own
17 demands and designs in the negotiations, in that Defendant-Appellee bargained for
18 use, and did use and still continues to use the Technologies, in the same five and
19 distinct segments of their commercial business and “any place where the ...Time
20 Warner Brand appears.”
21

22 20. Where the NDAs are divisible and partially integrated and the Business
23 Agreement is divisible, under *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas*
24 *Co.*, 116 Cal. App. 4th 1375 (Ct. App. 2004), the theory of continuous accrual must
25 hold. Violations of divisible and partially integrated contractual obligations, such as
26
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1 the NDAs and the Business Agreement, yields separate causes of action, each of
2 which may be brought within their periods of limitation.

3
4 21. As Plaintiffs-Appellants have pled many times, the Business Agreement
5 ONLY allowed use with the payment of royalties for the encoding of feature film
6 motion picture “trailers” (please see Opening Brief, p. 15).

7
8 22. Should the facts of the Complaint and Appeal merely consist of Defendant-
9 Appellee incorporating the Technologies² into its encoding process and uploading
10 trailers in 2001, Plaintiffs-Appellants would not be before this Court today.

11
12 23. However, these are not the facts of the Complaint and Appeal, where Warner
13 Bros. not only encodes, but it stores, transmits, stores again, and decodes across all
14 three of the Technologies’ value propositions. The Business Agreement:

- 15
16 a. did not allow use for the encoding of an entire feature film without the
17 payment of royalties;
18
19 b. did not allow use for the transmission of an entire feature film to 1,500
20 theaters upon release without the payment of royalties;
21
22 c. did not allow use for the decoding of a feature film at theaters for
23 exhibition where the theater is an agent of Defendant-Appellee as the
24 copyright owner without the payment of royalties;
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² Please see Complaint p.3

- 1 d. did not allow for the replication of DVDs (and now Blu-ray discs) without
2 the payment of royalties;
- 3 e. did not allow use of transmitting to a service provider for purposes of
4 video on demand (“VOD”) without the payment of royalties where upon
5 information and belief Defendant-Appellee accrues revenues through a
6 sharing arrangement on VOD;
7
8
- 9 f. did not allow for use in transmitting to a streaming video service for
10 download by end users without the payment of royalties where upon
11 information and belief Defendant-Appellee accrues revenues through a
12 sharing arrangement on streaming video;
13
14
- 15 g. did not allow transmission to networks for purposes of airing on free TV
16 without the payment of royalties;
17
- 18 h. did not allow for use by a multiplicity of electronic devices to decode such
19 video where the OEMs are agents of Defendant-Appellee as the copyright
20 owner without the payment of royalties;
21
- 22 i. did not allow transmission for overseas release; and
23
- 24 j. did not allow for re-release as WideScreen or 3D³.

25 In other words, a “tsunami” of divisible, partially integrated unauthorized uses
26 without payment of royalties.
27

28 ³ Plaintiffs-Appellants maintain that Warner Bros. goes back to the original 35 millimeter film and encodes according to the Technologies and the cycle starts all over again as claimed by a. to i. above.

1 24. Contrary to the assertion of Defendant-Appellee, upon information and belief,
2 Plaintiffs-Appellants were called upon to act under the Business Agreement, and did
3 act and earned royalties from roughly April to June 2001 where Warner Bros.
4 abruptly commenced its own encoding of video using the Technologies without
5 authorization and payment of royalties -- why buy the cow when the milk is free?
6

7
8 25. Plaintiffs-Appellants were not in the possession of the Business Agreement
9 on the filing date and once it was discovered they introduced it in their Opposition
10 to Motion to Dismiss.
11

12 26. According to Rule 402 of the Federal Rules of Evidence:
13
14 Relevant evidence is admissible unless any of the following
15 provides otherwise:
16 the United States Constitution;
17 a federal statute;
18 these rules; or
19 other rules prescribed by the Supreme Court.

20 27. Therefore, the Business Agreement was properly before the District Court and
21 is properly before this Court (please also see California Evidence Code §350 and
22 California Evidence Code §351).

23 28. Should the Court determine that the NDAs and the Business Agreement are
24 divisible and that the NDAs are partially integrated, Plaintiffs-Appellants
25 respectfully request this Court to reverse, in part, the Order of the District Court.
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1 **III. ISSUE PRECLUSION**

2 **A. Status of Plaintiff-Appellant Lamont in *Bernstein*.**

3
4
5 29. The purported amended complaint in *Bernstein v. State of New York*, 591 F.
6 Supp. 2d 448, 469 (S.D.N.Y. 2008) (please see Appellee’s Brief Volume 2, p. 37)
7 does not caption Plaintiff-Appellant Lamont as an individual plaintiff.

8
9 30. According to Rule 10 (a) of the FRCP:

10 Caption; Names of Parties. Every pleading must have a caption with the court's
11 name, a title, a file number, and a Rule 7(a) designation. The title of the
12 complaint must name all the parties [and their status]...

13 31. According to Rule 10 (a) where Plaintiff-Appellant Lamont does not appear
14 individually, Lamont as a plaintiff is a nullity as to the caption.

15
16 32. Should the Court consider that the caption nullifies Lamont as a plaintiff,
17 Plaintiffs-Appellants respectfully request this Court to reverse, in part, the Order of
18 the District Court.

19
20
21 **B. Original Signature of Plaintiff-Appellant Lamont in *Bernstein*.**

22
23 33. Should the Court determine that the lack of the individual status of Plaintiff-
24 Appellant Lamont is of no moment, the purported amended complaint in *Bernstein*
25 does not include the original signature of Lamont (respectfully, any knowledgeable
26 forensic expert can look at the signature page and determine that is a fraudulent
27
28

1 signature; for instance, see the much lighter purported signature of Lamont
2 compared with plaintiff Bernstein of Exhibit “A”).

3
4 34. According to Rule 11 (a) of the FRCP:

5 (a) Signature... Every pleading, written motion, and other paper must be
6 signed...by a party personally if the party is unrepresented. The court must
7 strike an unsigned paper unless the omission is promptly corrected after being
8 called to the attorney's or party's attention.

9 Lamont is prepared to testify under oath and under the penalty of perjury which is
10 far worse than most other egregious conducts, that the signature on the purported
11 amended complaint in *Bernstein* is not the original signature of Plaintiff-Appellant
12 Lamont.
13

14 35. Therefore, a pleading, the amended complaint in *Bernstein* lacking an original
15 signature renders the pleading a nullity.
16

17 36. Should the Court consider that the lack of an original signature in *Bernstein*
18 renders the pleading a nullity, Plaintiffs-Appellants respectfully request this Court to
19 reverse, in part, the Order of the District Court.
20

21
22 **C. Order of the Southern District of New York in *Bernstein*.**
23

24 37. Should the Court determine that the lack of Lamont’s status as an individual
25 plaintiff and a pleading that lacks his original signature are of no moment, a United
26 States District Judge, Shira A. Scheindlin, wrote a dispositive order (please see
27
28

1 Appellee's Excerpt of Record, Volume 2, p. 23) about a pleading, the purported
2 amended complaint in *Bernstein* that was never served.

3
4 38. According to Rule 5 of the FRCP:

5 (a) Service: When Required.

6 (1) In General. Unless these rules provide otherwise, each of the following
7 papers must be served on every party:...

8 (B) a pleading filed after the original complaint, unless the court orders
9 otherwise under Rule 5(c) because there are numerous defendants...

10 39. Where Judge Scheindlin wrote an order to a pleading that was never served
11 and made no mention of a Rule 5(c) exemption to the FRCP, respectfully, the order
12 of Judge Scheindlin is disqualified from the record in this action, and all of what
13 followed in *Bernstein* was contrary to the designs of the FRCP.

14
15 40. Should the Court determine that the Scheindlin order be disqualified from the
16 record, Plaintiffs-Appellants respectfully request this Court to reverse, in part, the
17 Order of the District Court.

18
19
20 **D. Court of Appeals for the Second Circuit in *Bernstein*.**

21
22 41. As Lamont was not an individual plaintiff, and acting only on behalf of the
23 shareholders of Iviewit Holdings, Inc., Lamont filed an appellant brief (please see
24 Appellee Brief, footnote 4) on November 17, 2008, where contrary to the assertion
25 of Defendant-Appellee, Lamont captioned such brief along the lines of the original
26 complaint.
27
28

1 42. Notwithstanding the case title in the Federal Supplement, the scheduling order
2 and the dispositive order of the Second Circuit captioned the appeal according to the
3 original complaint, as did the answering briefs and moving papers of appellees that
4 captioned the appeal according to the original complaint, *Bernstein, et. al. v.*
5 *Appellate Division First Department Disciplinary Committee, et. al* and not
6 *Bernstein, et. al. v. State of New York* of the amended complaint true copies of
7 which are attached herein as Exhibit “B.”
8

9
10 43. In captioning the appellant brief along the lines of the original complaint,
11 orders of the Second Circuit captioning along the lines of the original complaint, and
12 the answering brief and moving papers of the appellees captioning along the lines of
13 the original complaint, it meets the “duck test.” If the aforementioned papers
14 captioning along the lines of the original complaint look like a duck, swim like a
15 duck, and quack like a duck, then it is a duck -- the original complaint is the duck,
16 not the amended complaint.
17
18
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20 44. In captioning the brief along the lines of the original complaint, it is an
21 oxymoron for Defendant-Appellee to state “Lamont made perfectly clear that the
22 Amended Complaint was the operative pleading” (please see Appellee’s Brief, p.3)⁴.
23
24

25 45. Judge Scheindlin, in the stay order, even said so herself when she stated:
26

27 _____
28 ⁴ The Court should view Lamont as a representative party for shareholders and an employee. When his Board of Directors directed Lamont to appeal the order of Judge Scheindlin, where else would he start, but the order of Scheindlin that should be disqualified.

1 “Service of any amended complaint shall be stayed until such time as the
2 scheduled motions to dismiss have been decided.”

3 (Please see Appellee’s Excerpt of Record, Volume 2, p. 23).

4 Soon thereafter, by granting the motions to dismiss that ended the proceedings, the
5 purported amended complaint was still never served to *Bernstein’s* additional 180
6 defendants, including the United States Attorney General and the entire judicial
7 machinery of the New York State Supreme Court, Appellate Division First
8 Department⁵, and there was still no claim of a Rule 5(c) exemption to the FRCP. At
9 this juncture, Warner Bros. tries to claim the purported amended complaint became
10
11 “operative.”
12

13
14 46. This is made even CLEARER in the April 9, 2009 letter of Proskauer Rose
15 LLP to the Second Circuit in Exhibit “B” (“Proskauer Letter”) where Gregg
16 Mashberg claimed representation of only those attorneys in the original complaint,
17
18 and not the multitude of other Proskauer attorneys in the purported amended
19
20 complaint.

21 47. Should the Court determine that the parties captioned the Second Circuit
22 orders and pleadings along the lines of the original complaint, Plaintiffs-Appellants
23 respectfully request this Court to reverse, in part, the Order of the District Court.
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28 ⁵ Lamont, having already described his background, this Court should not conceivably consider him to be a part of
the purported amended complaint in *Bernstein*.

1 **E. *Lamont v. Proskauer Rose*, 881 F. Supp. 2d 105 (D.D.C. 2012)**

2 48. Still further, should the Court determine that any of the arguments of this
3 Section, Subsection A-D are of no moment, even Hon. Barbara J. Rothstein of the
4 U.S. District Court for the District of Columbia does not cite to the purported
5 amended complaint in *Bernstein*, much in the same way as the Second Circuit and
6 the defendants-appellees in *Bernstein* (please see Rothstein Order, p.2 attached in
7 Exhibit “B”).

8
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10 49. Should the Court determine that the order of Judge Rothstein fails to cite to
11 the purported amended complaint in *Bernstein*, Plaintiffs-Appellants respectfully
12 request this Court to reverse, in part, the Order of the District Court.
13
14

15 **IV. FRAUD ON THE DISTRICT COURT**

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18 50. Plaintiffs-Appellants leave this issue to the Court’s discretion. Plaintiffs-
19 Appellants have stated their position in the Opening Brief and this Reply and
20 Warner Bros. has provided its defense in their Answering Brief.
21

22 51. Either way, Warner Bros., represented by California’s Lawyer of the Year in
23 2008, Mr. Neubauer, and the 1993 Managing Editor of The Yale Law Journal, Mr.
24 Herrington, still put forth a purported amended complaint pointing to Issue
25 Preclusion without following that thread and noticing either the District Court or
26 now this Court, *inter alia*, of the existence of a stay order that lacked a 5(c)
27
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1 exemption and the Proskauer letter that followed along the lines of the original
2 complaint, documents in their OWN Excerpt of Record.

3 52. As a result, the present Plaintiffs-Appellants continue to see an
4 unconscionable scheme calculated to interfere with the judicial system's ability to
5 impartially adjudicate a matter by improperly influencing the trier of fact or unfairly
6 hampering the presentation of the opposing party's claim or defense according to
7 *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir.1989), *Herring v. U.S.*, 424
8 F.3d 384 (3d Cir. Sep. 22, 2005), and *Bulloch v. United States*, 763 F.2d 1115, 1121
9 (10th Cir. 1985).

13 14 **V. CONCLUSION**

15
16 53. By the above analysis, it is clear that the NDAs are divisible and partially
17 integrated according to the Restatement (Second) of Contracts.

18
19 54. It is clear that the Business Agreement is divisible by Warner Bros. own
20 demands and designs.

21
22 55. By the above analysis, it is clear that the purported amended complaint in
23 *Bernstein* was not the operative pleading by virtue of, *inter alia*: the Scheidlin
24 order that lacked a Rule 5(c) exemption to the FRCP, the Second Circuit's
25 scheduling order, the Proskauer letter, the Second Circuit's dispositive order, and
26
27
28

1 the Rothstein order in *Lamont* of Exhibit “B;” an “operative” amended complaint in
2 *Bernstein* is not even a remote possibility considering the facts at hand.

3
4 56. Accordingly, Plaintiffs-Appellants respectfully request this Court to live out
5 the true meaning of its creed and hold these truths to be self evident that all
6 inventors and their respective assignees must be afforded the relief of barring the
7
8 unauthorized use of their innovations without payments of royalties.

9 57. Lastly, where the Reverend Martin Luther King, Jr. often cited that “The arc
10 of the moral universe is long, but it bends toward justice,⁶” and so it must be in this
11
12 Court.

13 **WHEREFORE**, for all the foregoing reasons, Plaintiffs-Appellants, respectfully
14 request this Court to reverse in full the Order of the District Court and move the
15 proceedings to mediation under the supervision of this Court, or, in the alternative,
16 void the District Court’s Order based on Defendant-Appellee counsel’s fraud on the
17
18 District Court and move the proceedings to mediation under the supervision of this
19
20 Court, and such further relief as it deems appropriate.

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22 Dated: August 30, 2013
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⁶ Of Justice and the Conscience, Theodore Parker (1857)

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Respectfully submitted,
/s P. Stephen Lamont, Pro Se

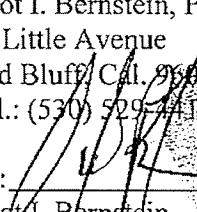
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EXHIBIT "A"

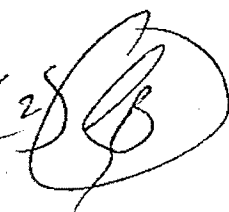
Attorney for Petitioners

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Red Bluff, Cal. 95080
Tel.: (530) 529-7410

By: 
Eliot I. Bernstein

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35 Locust Avenue
Rye, N.Y. 10580
Tel.: (914) 217-0038

By: 
P. Stephen Lamont

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EXHIBIT "B"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Catherine O'Hagan Wolfe
CLERK



Date: 10/15/08
Docket Number: 08-4873-cv
Short Title: Bernstein v. Appellate Division First Department Discipline
DC Docket Number: 07-cv-11196
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Shira Scheindlin

PRO SE APPEAL SCHEDULING ORDER #1
MAKE ALL TELEPHONE INQUIRES TO (212) 857 - 8550

Noting that *appellant* has filed a notice of appeal, *pro se*:

IT IS HEREBY ORDERED that the district court shall be responsible for filing the record on appeal on or before N/A .

IT IS FURTHER ORDERED that appellant's brief and appendix, which shall be filed in typewritten form, shall be served and filed on or before **11/17/2008**. If appellant's brief does not exceed ten (10) pages, it shall be filed in memorandum form.

IT IS FURTHER ORDERED that the appellee's brief shall be served and filed on or before **12/17/2008**. If appellee's brief does not exceed 10 pages, it shall be filed in memorandum form.

IT IS FURTHER ORDERED that 10 copies of each brief, memorandum or appendix shall be filed with the Clerk.

IT IS FURTHER ORDERED that the appellee may, without further order of the court, file 10 copies of an appendix to its brief, or 10 copies of attached to its memorandum.

IT IS FURTHER ORDERED that the argument of the appeal may be heard as early as the week of **02/02/2009**. All counsel should immediately advise the Clerk by letter of the dates thereafter that they are unavailable for oral argument. The time and place of oral argument may be separately noticed by the Clerk to counsel.

Re: 08-4873-cv Bernstein v. Appellate Division First Department

IT IS FURTHER ORDERED that in the event of default by appellant in timely filing the record on appeal, or the appellant's brief and appendix, or memorandum and appendix, or upon default by appellant regarding any other provision of this order, the appeal may be dismissed forthwith without further notice.

IT IS FURTHER ORDERED that if the appellee fails to file a brief or memorandum within the time directed by this order, the appellee may be subject to such sanctions as the court may deem appropriate.

Dated: 10/15/200

Catherine O'Hagan Wolfe, Clerk

By: _____

Atasha Joseph

Deputy Clerk, USCA

PROSKAUER ROSE LLP

1585 Broadway
New York, NY 10036-8299
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Gregg M. Mashberg
Member of the Firm

Direct Dial 212.969.3450
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April 9, 2009

By E-Mail and Overnight Mail

Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals
For the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Attn.: Deborah Holmes, Deputy Clerk

Re: *Bernstein et al. v. Appellate Division First Department Departmental
Disciplinary Committee, et al*, Index No. 08-4873-cv

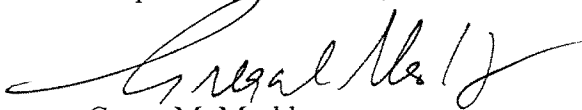
Dear Ms. Holmes:

We represent Defendants-Appellees Proskauer Rose LLP, Kenneth Rubenstein, Steven C. Krane, and the Estate of Stephen R. Kaye (the "Proskauer Appellees") in this appeal. I write in accordance with the Court's *Pro Se* Appeal Subsequent Scheduling Order #3, dated April 2, 2009, regarding my availability for oral argument after June 15, 2009.

Please be advised that I will be unavailable for oral argument during the week of Monday June 29, 2009 through Friday July 3, 2009.

Additionally, I would note that neither the Proskauer Appellees nor any of the other Defendants-Appellees have requested oral argument of this appeal.

Respectfully submitted,



Gregg M. Mashberg

cc: See Attached List

PROSKAUER ROSE LLP

April 9, 2009

Page 2

(via e-mail and U.S. Mail)

Eliot I. Bernstein
Plaintiff-Appellant Pro Se

P. Stephen Lamont
Plaintiff-Appellant Pro Se

Patrick J. Walsh, Esq.
Counsel for the New York State Defendants-Appellees

Kent K. Anker, Esq.
Counsel for the Foley Lardner Defendants-Appellees

John W. Fried, Esq.
Counsel for Defendant-Appellee Raymond Joao

Richard M. Howard, Esq.
Counsel for Meltzer Lippe

Stephen M. Hall, Esq.
Counsel for the Virginia Defendants-Appellees

M. Hope Keating, Esq.
Counsel for the Florida Bar Defendants-Appellees

08-4873-cv

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ELIOT I. BERNSTEIN, individually and P. STEPHEN LAMONT, on behalf of SHAREHOLDERS OF IVIEWIT HOLDINGS, INC., IVIEWIT TECHNOLOGIES, INC., UVIEW.COM, INC., IVIEWIT.COM, INC., I.C.,INC., IVIEWIT.COM LLC, IVIEWIT LLC, IVIEWIT CORPORATION, IVIEWIT, INC., and PATENT INTEREST HOLDERS,

Plaintiffs-Appellants,

- against -

APPELLATE DIVISION FIRST DEPARTMENT DEPARTMENTAL DISCIPLINARY COMMITTEE, THOMAS J. CAHILL, in his official and individual capacity,

(Caption Continued on Next Page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**DEFENDANT-APPELLEE RAYMOND A. JOAO
OPPOSITION TO MOTION FOR RECONSIDERATION**

Raymond A. Joao, Esq., Pro Se
122 Bellevue Place
Yonkers, New York 10703
(914) 969-2992

JOSEPH WIGLEY, in his official and individual capacity, CATHERINE O'HAGEN WOLFE, in her official and individual capacity, PAUL CURRAN, in his official and individual capacity, MARTIN R. GOLD, in his official and individual capacity, ANGELA M. MAZZARELLI, in her official and individual capacity, RICHARD T. ANDRIAS, in his official and individual capacity, DAVID B. SAXE, in his official and individual capacity, DAVID FRIEDMAN, in his official and individual capacity, LUIS A. GONZALES, in his official and individual capacity, APPELLATE DIVISION SECOND DEPARTMENT, LAWENCE F. DIGIOVANNA, in his official and individual capacity, DIANA MAXFIELD KEARSE, in her official and individual capacity, JAMES E. PELTZER, in his official and individual capacity, A. GAIL PRUDENTI, in her official and individual capacity, STEVEN C. KRANE, in his official and individual capacity, HON. JUDITH S. KAYE, in her official and individual capacity, KENNETH RUBENSTEIN, ESTATE OF STEPHEN KAYE, PROSKAUER ROSE LLP, MELTZER LIPPE GOLDSTEIN & BREITSTONE LLP, LEWIS S. MELTZER, RAYMOND A. JOAO, FOLEY & LARDNER LLP, MICHAEL C. GREBE, WILLIAM J. DICK, DOUGLAS A. BOEHM, STEVEN C. BECKER, STATE OF NEW YORK COMMISSION OF INVESTIGATION, LAWYERS FUND FOR CLIENT PROTECTION OF THE STATE, THE FLORIDA BAR, LORRAINE CHRISTINE HOFFMAN, in their official and individual capacity, ERIC TURNER, in his official and individual capacity, JOHN ANTHONY BOGGS, in his official and individual capacity, KENNETH MARVIN, in his official and individual capacity, THOMAS HALL, in his official and individual capacity, DEBORAH YARBOROUGH, VIRGINIA STATE BAR, ANDREW H. GOODMAN, in their official and individual capacity, NOEL SENDEL, in her official and individual capacity, MARY W. MARTELINO, in her official and individual capacity, and JOHN DOES,
Defendants-Appellees.

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 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the *22d* day of January, two thousand ten.

Before: Richard C. Wesley,
Peter W. Hall,
Debra Ann Livingston,
Circuit Judge.



Bernstein

v.

Appellate Division First Department
Disciplinary Committee

ORDER
Docket No. 08-4873-cv

IT IS HEREBY ORDERED that the motion by Appellant Lamont for reconsideration of the order dismissing the appeal is DENIED.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk

Catherine O'Hagan Wolfe
A circular stamp from the United States Court of Appeals for the Second Circuit, identical to the one in the upper right. It is partially overlaid by the signature of Catherine O'Hagan Wolfe.

Judy Pisanont, Motions Staff Attorney

arguments. Among their arguments, Defendants assert that *pro se* Plaintiff, Mr. P. Stephen Lamont, previously litigated these claims and that they were ruled upon by the United States District Court for the Southern District of New York. The court agrees, and dismisses Plaintiff's sole federal claim under the doctrine of res judicata. Accordingly, the court grants defendants' motions to dismiss. Additionally, the court denies the following motions filed by Plaintiff: motion to disqualify the representative capacity of the New York State Attorney General; motion for leave to file an amended complaint; motion to amend the motion for leave to file an amended complaint; motion to file a surreply; motion to require the United States Marshals Service to serve summons and complaint; motion to require United States Marshals Service to Serve Two New York State Defendants and for Sanctions; and motion for a preliminary injunction.

II. BACKGROUND

A. Factual Background

The following alleged facts are presumed true for purposes of this order. Plaintiff, proceeding *pro se*, alleges that in the fall of 1998, three individuals (none of whom are Plaintiff) "stumbled upon" new technologies that would allow superior digital video. Compl. ¶ 32. According to Plaintiff, these technologies allow for the "encoding and transmission of digital video across all transmission networks," allow the digital zoom feature "on all video capture devices," and, lastly, allow the remote control of video devices. *Id.* ¶ 5. The three inventors soon formed a company called Iviewit, of which Plaintiff is currently the Chief Executive Officer. *Id.*

Sometime after 2000, Iviewit presented this new technology to Time Warner, Corp. and that company began to utilize the new technologies pursuant to specific agreements. *Id.* ¶ 47. In

Petlzer; (5) Defendant Time Warner, Inc.; (6) Raymond A. Joao. For ease, these categories will be used throughout this memorandum opinion.

**Form 6. Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 3661 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using (*state name and version of word processing program*) Microsoft Word 2007 Professional Edition (*state font size and name of type style*) 14 point, Times New Roman, *or*

this brief has been prepared in a monospaced spaced typeface using (*state name and version of word processing program*) _____ with (*state number of characters per inch and name of type style*) _____

Signature

Attorney for

Date

9th Circuit Case Number(s) 13-55263

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format)

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)