SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KRISTINA M. ARMSTRONG,

Plaintiff,

- against -

BLANK ROME LLP, NORMAN S. HELLER, DYLAN S. MITCHELL,

Defendants.

Index No.: 651881/2013

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE AND DISMISS

HINSHAW & CULBERTSON LLP
Attorneys for Defendants
800 Third Avenue, 13th Floor
New York, New York 10022
Tel. (212) 471-6200
Fax (212) 935-1166

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

PRELIMINARY STATEMENT

Defendants Blank Rome LLP ("BR"), Norman S. Heller ("Heller") and Dylan S. Mitchell ("Mitchell") (BR, Heller and Mitchell are collectively referred to as "Blank Rome" or "Defendants") respectfully submit this Memorandum of Law and the accompanying Affirmation of Philip Touitou (hereinafter the "Touitou Aff.") in support of their motion to strike the scandalous, prejudicial and unnecessary allegations relating to a purported conflict of interest contained in the complaint (the "Complaint")[1] of Plaintiff Kristina M. Armstrong ("Plaintiff") pursuant to N.Y. C.P.L.R. 3024(b), and to dismiss her statutory-based fraud claims under Judiciary Law § 487 and General Business Law § 349 pursuant to N.Y. C.P.L.R. 3016(b) and 3211(a)(7).

* * * *

After a 20-year marriage from which two children were born, Plaintiff caught her former husband, R. Michael Armstrong ("Armstrong"), having an affair with another woman. She commenced divorce proceedings in 2009 that sought, in part, some measure of retribution against Armstrong for his betrayal and mistreatment of her. No attorney or law firm, no matter how well-regarded, could satisfy her desire to make her husband "pay" for his wrongs. After first engaging Eleanor Alter, a highly-regarded matrimonial attorney at the firm of Kasowitz, Benson, Torres & Friedman LLP ("Kasowitz"), she discharged Kasowitz after apparently concluding it was not sufficiently aggressive in securing retribution against Armstrong.

She then engaged Heller and Mitchell of Blank Rome, two respected and experienced matrimonial trial attorneys, who identified the full scope of Armstrong's assets and engaged a forensic accounting expert to quantify and advise on the development of Plaintiff's economic strategy on issues pertaining to equitable distribution, spousal maintenance and child custody

[1] A copy of the Complaint is attached to the Touitou Aff. as Exh. 1.

expenses. Extensive time and effort was spent by Blank Rome and the expert evaluating the financial information obtained from Armstrong, and formulating a strategy to assist Plaintiff in determining whether it was in her best interests to settle the financial issues with him, or prepare for a trial. At least two private mediations were held with Armstrong and his attorneys. In the course of those mediations and subsequent settlement communications authorized by Plaintiff, Heller and Mitchell advised her of the advantages and disadvantages of a settlement, and the risks of proceeding to trial. Plaintiff knew that a valuation of intangible assets, such as securities licenses held by Armstrong, would be vulnerable to attack at trial. Faced with the decision on how best to proceed, Plaintiff chose to pursue a strategy that would maximize her spousal maintenance, and, at the pre-trial conference on September 21, 2010, she knowingly executed a stipulation of undisputed facts memorializing that strategy. In doing so, she specifically agreed to waive her right to value Armstrong's securities licenses.

But, as the Complaint in this case shows, despite her financial success in her divorce action, her thirst for retribution was apparently still unslaked. She has turned against those who worked assiduously on her behalf and who gave her their honest, experienced advice, claiming they too betrayed her by favoring the interests of Armstrong and his former employer, Morgan Stanley. Plaintiff should not be permitted to continue her misdirected quest for retribution.

SUMMARY OF THE ALLEGED RELEVANT FACTS

This motion is directed at the factual allegations that are improperly inserted in the Complaint and the statutory-based fraud causes of action that are facially deficient as a matter of law. Defendants firmly believe that, after discovery is conducted, the weaknesses and deficiencies of Plaintiff's legal malpractice cause of action will also be readily apparent, and, likewise, subject to summary dismissal.

I. Plaintiff's Action For Divorce Against Armstrong

On June 4, 2009, Plaintiff commenced an action for divorce against Armstrong, in the Supreme Court of the State of New York, County of Westchester. *See* Touitou Aff., Exh. 1, paras. 10, 15, and Exh. 2. Plaintiff alleges that, during the course of their marriage, Armstrong had "essentially 'risen to the top'" at Morgan Stanley, a publicly traded banking and financial institution, as he was a member of its management committee. *Id.* at paras. 13, 14.

In the midst of her divorce action, Plaintiff grew dissatisfied with the legal services provided by Kasowitz, and on November 17, 2009, she terminated their attorney-client relationship. *See* Touitou Aff., Exh. 3. On or about November 18, 2009, Plaintiff formally retained Defendants to replace Kasowitz and represent her in her divorce action. *See* Touitou Aff., Exh. 1, para. 17, and Exh. 3. The parameters of Defendants' representation of Plaintiff were set forth in a retainer agreement:

> THIS AGREEMENT is entered into between Blank Rome LLP as "the Law Firm", or as "the firm", and Kristina Armstrong, ... referred to in this agreement as "client."
>
> * * * *
>
> The client retains the Law Firm to render services in connection with the prosecution or defense of a divorce action, including the attempt to negotiate a settlement.
>
> * * * *
>
> The client understands that expert witnesses are frequently required to prepare matrimonial matters for settlement or judicial determination. It may, therefore, be necessary to engage the services of experts to provide valuation and appraisal testimony or reports.
>
> * * * *
>
> Possible Contribution by Client's Spouse.

> In the event that the client's spouse makes a contribution toward the client's legal expenses, whether by agreement or as a result of judicial direction, such contribution shall be credited to the client's account, when and if actually paid to the Law Firm by the client's spouse.
>
> * * * *
>
> The client acknowledges that she has read this agreement in its entirety, has had full opportunity to consider its terms, and has had a full and satisfactory explanation of it, and fully understands its terms and agrees to such terms.

See Touitou Aff., Exh. 4.

After taking over as counsel for Plaintiff in the divorce action, Blank Rome immediately began reviewing her voluminous file in order to prepare for a status conference on December 9, 2009. *See* Touitou Aff., Exh. 5, and Exh. 6. At the December conference, a scheduling order was issued directing the parties to exchange document discovery by December 31, 2009, and to serve sworn statements of net worth by January 9, 2010. *Id.* After numerous in-person and telephone conferences with Plaintiff, and reviewing 11 banker's boxes of documents produced by Plaintiff's former counsel, Blank Rome served her initial document production and net worth statement. Shortly thereafter, Blank Rome had meetings with Plaintiff in order to trace, locate and value the parties' marital assets, including, among other things, their private equity, hedge fund, and pension interests. *See* Touitou Aff., Exh. 1, para. 44.

To assist them in resolving the financial issues and solidifying a litigation and settlement strategy, Blank Rome sought the services of an expert. On April 7, 2010, Blank Rome engaged Martin I. Blaustein, a certified public accountant, to provide advice concerning the marital spending and lifestyle, Armstrong's securities licenses, and the components of Armstrong's income. *See* Touitou Aff., Exh. 1, paras. 33, 52. Numerous in-person meetings and telephone conferences with the retained expert, Mr. Blaustein, were held, during which various financial

aspects of the divorce action were discussed, including the risks associated with supporting a valuation of Armstrong's securities licenses. Plaintiff participated in many of those meetings and conferences (she also met and conferred with Mr. Blaustein independently). Based on their decades of legal experience and Mr. Blaustein's advice, Blank Rome advised, and Plaintiff agreed to, pursue and maximize long-term spousal maintenance. *Id.* at para. 33. Consistent with that strategy, settlement demands and proposals seeking long-term maintenance in excess of $300,000 per year, child support of $75,000 per year, and an even division of marital assets were exchanged between the parties on numerous occasions (and at a mediation) during Blank Rome's eleven-month representation of Plaintiff. *Id.* at para. 45. Demands and proposals were prepared with the assistance of Mr. Blaustein, and were expressly approved by Plaintiff.

While settlement proposals and demands were being exchanged between the parties, Blank Rome was simultaneously preparing Plaintiff's case to be tried. For example, Blank Rome deposed Armstrong, circulated additional document requests, drafted a statement of joint disposition, and prepared for the September 21, 2010 pre-trial conference. *See* Touitou Aff., Exh. 6, and Exh. 7. In accord with the *Westchester Matrimonial Part Rules*, Blank Rome and Armstrong's counsel prepared a stipulation of undisputed facts for submission at the pre-trial conference. *See* Touitou Aff., Exh. 8, p. 14, para. 4(b). That document was the culmination of numerous communications with Plaintiff and Mr. Blaustein, and in part, it memorialized their agreed-to strategy: to pursue and maximize long-term spousal support. *See* Touitou Aff., Exh. 1, para. 26 (referring to paragraph 10 of the stipulation of undisputed facts). It was not, as Plaintiff alleges, a "covert[ly]" drafted document that was "unwittingly" executed by her to protect (or further) some unspecified interest that Armstrong's former employer, Morgan Stanley, had in her divorce action. *Id.* at paras. 26, 31.

Despite tirelessly advocating for Plaintiff during their eleven-month stint as her counsel, on October 5, 2010, Blank Rome was terminated. *Id.* at para. 50. Plaintiff retained new counsel, Kramer Kozek LLP, to prosecute her divorce action. *Id.* Approximately, seven months after being terminated, on May 20, 2011, the divorce action was settled at trial. *See* Touitou Aff., Exh. 6.

II. There Is No Actual Conflict Of Interest

Now, approximately three years after she terminated their attorney-client relationship, Plaintiff's Complaint seeks to raise questions concerning Heller's and Mitchell's loyalty in an effort to recover millions-of-dollars in damages. *See* Touitou Aff., Exh. 1, paras. 25, 31, 40, 56, 63, 67. According to Plaintiff, from day one, their attorney-client relationship was "shrouded under a veil of conflict" because Blank Rome was "simultaneously" representing Armstrong's then-employer, Morgan Stanley, in two, unrelated debt financing transactions in the Commonwealth of Pennsylvania. *Id.* at 19, 20, 24, 25, 42. She concedes that neither Heller nor Mitchell—the principal attorneys handling her divorce action—had any involvement with those purported transactional matters, and fails to plead how, if at all, those two matters were related—factually, legally or otherwise—to her divorce action. *Id.* at paras. 20, 24, 42. Despite her failure to allege any clear connection between them, she concludes that Defendants were ethically precluded from representing her because there was "an actual debilitating conflict of interest." *Id.* at paras. 19, 21.

Plaintiff's conflict of interest allegations are plainly based on speculation. Other than generically alleging that Defendants "could control ... [the] divorce litigation in a manner designed to protect Morgan Stanley," there is no factual support for Plaintiff's bald legal conclusion that an actual conflict existed. *Id.* at paras. 20, 25, 31, 43, 46. Specifically, she alleges that Blank Rome:

> Threw her under the bus to protect Armstrong's employer, Morgan Stanley;
>
> Designed a strategy to protect Armstrong's employer, Morgan Stanley;
>
> Covertly prepared the stipulation of undisputed facts to protect Armstrong's employer, Morgan Stanley; and
>
> Was more interested in protecting Armstrong's employer, Morgan Stanley.

Id. at paras. 18, 25, 31, 40, 43. Plaintiff does not plead why or how Morgan Stanley had an interest in the divorce action that needed to be "protect[ed]." Nor can she. Morgan Stanley is a publicly traded international financial institution, with tens of thousands of employees, one of whom was Armstrong, who, for a brief period of time, was on its management committee prior to being demoted during the course of the divorce action. *Id.* at paras. 13, 25. Armstrong's former elevated employment status, however, does not establish that Morgan Stanley had an interest in the unresolved issues in his (and Plaintiff's) private family matter: child custody, child support, equitable distribution, enhanced earning capacity, and spousal maintenance. *Id.* at para. 25.

Nor is a conflict of interest established by characterizing it as "fraudulent." To support her statutory-based deceit claims, Plaintiff alleges that Defendants "fraudulent[ly]" failed to disclose their conflict of interest. *Id.* at para. 21. According to Plaintiff, the litigation and settlement strategy was intentionally developed and effectuated by Defendants to "protect" Morgan Stanley's supposed stake in the divorce action, not hers. *Id.* at paras. 25, 31, 43, 46. Specifically, by advising her to "waive" her right to value Armstrong's securities licenses, Plaintiff appears to imply that an *unspecified* benefit was conferred on Morgan Stanley. *Id.* at

paras. 26, 31, 40. Plaintiff, of course, fails to articulate how Morgan Stanley could conceivably benefit from the agreed-to strategy implemented in the divorce action.

III. Plaintiff's Action Against Blank Rome

In addition to questioning Blank Rome's undivided loyalty, Plaintiff's Complaint seeks to raise questions concerning the well-reasoned judgment and agreed-to litigation strategy utilized in her divorce action. The answer to both questions is unfavorable to Plaintiff. Despite Plaintiff's best efforts to manufacture a conflict of interest, it is clear none existed. Even accepting the conclusory allegations as sufficient, the ethical rules establish that Plaintiff and Morgan Stanley's interests were not adverse, and that neither an actual nor potential conflict was present during Blank Rome's representation of Plaintiff in her divorce action. The answer to the second question will have to be deferred temporarily. Inevitably, however, the evidence obtained during discovery will demonstrate that Blank Rome's advice concerning the financial aspect of Plaintiff's matrimonial action was not negligent, but, instead, was prudent and reasonable.

As further demonstrated below, the allegations of a conflict of interest should be struck because, in addition to being scandalous, prejudicial and unnecessary, they are based on a misinterpretation (and self-serving expansion) of the New York Rules of Professional Conduct ("RPC"). They further demonstrate that Plaintiff has failed to state a claim under Judiciary Law § 487 and General Business Law § 349.

ARGUMENT

I. The Court Should Strike The Allegations Of A Purported Conflict Of Interest

The Complaint's allegations concerning a purported conflict of interest are based on a false premise that a conflict existed. Because a conflict cannot be demonstrated, and the

continued inclusion of the allegations of a conflict of interest in the Complaint is prejudicial to Blank Rome, they should be stricken under N.Y. C.P.L.R. 3024(b).

For example, Plaintiff alleges that:

> Blank Rome [was] the *ultimate 'puppet master,'* as Blank Rome could control Ms. Armstrong's divorce litigation in a manner designed to protect Morgan Stanley....
>
> * * * *
>
> Given *their subservience to Morgan Stanley* ..., Blank Rome, Attorney Heller and Attorney Mitchell *'threw Ms. Armstrong under the bus'* as a sacrifice to their *more lucrative master* and undisclosed client—Morgan Stanley.
>
> * * * *
>
> At the inception Blank Rome, Attorney Heller and Attorney Mitchell should have never represented Ms. Armstrong in the first place, and thus the entire relationship is *shrouded under a veil of conflict [and] fraud....*

Id. at paras. 19, 25, 40 (emphasis added). Those sensational allegations are harmful and unnecessary to support the principal negligence cause of action pled by Planitiff. Moreover, they are premised on a misapplication of the RPC.

A. RPC 1.7 Establishes That There Is No Conflict Of Interest

The law is clear that a concurrent conflict of interest arises, and disclosure and consent is required, only when:

> (1) [T]he representation *will* involve the lawyer in representing differing interests; or
>
> (2) [T]here is a *significant* risk that the lawyer's professional judgment on behalf of a client *will be* adversely affected by the lawyer's own financial, business, property or other personal interests.

See RPC 1.7 (2013) (22 N.Y.C.R.R. § 1200.7) (emphasis added). Even under the most generous construction of RPC 1.7, Blank Rome's alleged concurrent representation of Plaintiff in her

matrimonial action, and her former husband's employer, Morgan Stanley, in *concededly* unrelated matters, did not give rise to an actual or potential conflict. *Id.* at paras. 20, 24, 25, 42.

The alleged "simultaneous" representation of Plaintiff and Morgan Stanley did not involve Blank Rome representing "differing interests." The Plaintiff fails to plead that her interests were either directly or indirectly adverse, in any way, to Morgan Stanley's. *Id.* at paras. 19, 20, 21, 22, 23, 24, 25, 26, 31, 42. Indeed, she pleads that those representations were disparate and unrelated. *Compare Id.* at para. 20 (retaining Blank Rome to render services in connection with her private and confidential divorce action) *with* paras. 24 and 42 (serving as underwriters' counsel in two debt financing transactions involving public authorities).

A comparison of the two alleged representations demonstrates beyond dispute that the interests involved in representing Plaintiff in a private divorce action were unconnected to the success or failure of the bond transaction work. *Id.* at paras. 20, 24, 42. Even assuming the allegations as true, the fact that Blank Rome was engaged by Morgan Stanley, and Plaintiff's former husband was one of its employees, is not a conflict of interest because there were no actual "differing interests" involved. *See* Macy's Inc. v. J.C. Penny Corp., Inc., 107 A.D.3d 616, 968 N.Y.S.2d 64, 66 (1st Dep't 2013) (holding that the defendant's concurrent representation of clients was not a conflict because the interests involved were unrelated); Develop Don't Destroy Brooklyn v. Empire State Dev. Corp., 31 A.D. 3d 144, 816 N.Y.S.2d 424, 431 (1st Dep't 2006) (concluding counsel was not representing "differing interests" because the "only simultaneous representation ... involve[d] totally unrelated cases...."); Asset Alliance Corp. v. Ervine, 279 A.D.2d 365, 719 N.Y.S.2d 247, 248 (1st Dep't 2001). Plaintiff should not be permitted to convert what is nothing more than a random coincidence into an opportunity to transform her claims of negligence into ones based on the commission of a fraud.

Plaintiff's conclusory allegations[2] cannot create a client-to-client conflict based on adversity. Morgan Stanley, an international financial institution, had no interest—financial, political, personal or otherwise—in the outcome of Plaintiff's, and its former employee's, family dispute. Any agreed-to litigation or settlement strategy employed by Blank Rome and any distribution of marital assets, spousal support, child support or child custody award to Plaintiff would have no impact, whatsoever, on Morgan Stanley. The allegations in the Complaint do not establish that Plaintiff's interests were at odds, either completely or marginally, with Armstrong's former employer.

Likewise, Plaintiff has not pled (and cannot plead) that Blank Rome's professional judgment was impinged by their own "financial, business, property or other personal interests." There are no alleged facts establishing that Blank Rome's judgment was compromised by the unrelated transactional matters where attorneys in Blank Rome's Philadelphia office—not Heller or Mitchell—allegedly served as underwriting counsel for Morgan Stanley. *Id.* at paras. 24, 42. Contrary to Plaintiff's false unverified statements, Blank Rome zealously represented her in her divorce action and employed a well-reasoned strategy—which she agreed to—after retaining a financial expert, that sought to maximize her award of marital assets, long-term maintenance, and child support. *Id.* at para. 33. While Plaintiff may believe she was wrongly advised by Blank Rome, that advice is not the product of a fraudulent motive or a nefarious intent to protect a claimed (yet unspecified) interest held by Morgan Stanley.[3] Evidence adduced during

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[2] Plaintiff's "upon information and belief" and "as if" allegations also do not establish that Blank Rome's alleged representation of Morgan Stanley presented a conflict of interest. *Id.* at paras. 44 (alleging, upon information and belief, that Blank Rome failed to engage in discovery to verify that all assets, accounts and earnings were disclosed), 46 (alleging that Blank Rome started to communicate and attempt to direct Ms. Armstrong "as if" they were acting to protect Morgan Stanley's interests).

[3] Plaintiff's assertion that Armstrong's payment of a portion of her legal fees "evidence[s]" Blank Rome's agreement to "thr[ow her] under a bus as a sacrifice to their more lucrative master ... Morgan Stanley" seeks to mischaracterize the usual payment of counsel fees by the monied spouse into something more sinister. *Id.* at para.

discovery will show that Blank Rome's advice was well-intentioned and appropriate, and that it was accepted by Plaintiff. For present purposes, however, Blank Rome should not be prejudiced in the defense of Plaintiff's negligence claim by contentions of unethical conduct that have no basis in fact or in law.

B. The Court Should Strike The Allegations Of A Conflict Of Interest

The Court should strike the scandalous and prejudicial allegations of a purported conflict that were unnecessarily inserted in the Complaint. *See* N.Y. C.P.L.R. 3024(b) (McKinney 2013)[4] (establishing the procedural mechanism to strike allegations in a pleading); Ciccolo v. Chicago Research & Trading Group Ltd., 161 A.D.2d 364, 555 N.Y.S.2d 318, 319 (1st Dep't 1990) (affirming the trial court's decision to strike the scandalous and prejudicial matter that was unnecessarily inserted in the pleading). The essential inquiry in determining whether an allegation should be struck is whether it is necessary to support a claim. *See* Soumayah v. Minneli, 41 A.D.3d 390, 839 N.Y.S.2d 79, 82 (1st Dep't 2007) ("In reviewing a motion pursuant to CPLR 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action...."); Wegman v. Dairylea Coop., Inc., 50 A.D.2d 108, 376 N.Y.S.2d 728, 733 (4th Dep't 1975) (striking the prejudicial allegations relating to violations of statutes and regulations because they were unnecessary to support the plaintiff's breach of contract claim).

Allegations that are unnecessary to or otherwise beyond the scope of the causes of action pled are routinely stricken from a pleading. *See* JC Mfg., Inc. v. NPI Elec., Inc., 178 A.D.2d

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41. There is no merit to that allegation. Where, as here, there is a financial disparity between the parties, an interim payment of fees by the monied spouse is typical and statutorily-authorized. *See* N.Y. Dom. Rel. Law § 237(a) (McKinney 2013); Yan v. Wang, 106 A.D.3d 662, 662-663, 965 N.Y.S.2d 723 (1st Dep't 2013); DeCabrera v. DeCabrera-Rosete, 70 N.Y.2d 879, 524 N.Y.S.2d 176, 177 (1987).

[4] By virtue of the parties' agreement to extend Blank Rome's time to "answer, move or otherwise respond to the Complaint," this motion to strike conforms with the requirement of N.Y. C.P.L.R. 3024(c). *See* Touitou Aff., Exh. 9.

505, 577 N.Y.S.2d 145, 146 (2d Dep't 1991) (affirming the lower court's decision to strike certain allegations in the appellants' third-party complaint because they were "not necessary for the sufficiency" of their claims as pled); Wegman, 376 N.Y.S.2d at 733; Baychester Shopping Ctr., Inc. v. Llorente, 175 Misc.2d 739, 669 N.Y.S.2d 460, 461 (Sup. Ct. New York County 1997).

The allegations in the Complaint describing a purported conflict of interest serve no legitimate purpose. *See* Touitou Aff., Exh. 1, paras. 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 40, 41, 42, 43, 44, 45, 46, 60, 65, 70. Indeed, as stated above, the premise upon which they rest—the existence of differing interests—is conclusory and unfounded. *See* RPC 1.7 (2013). No conflict of interest has been or can be demonstrated between Plaintiff and Morgan Stanley. Additionally, the allegations are entirely extraneous and lend no support to the causes of action pled in the Complaint. *See* Schafrann v. N.V. Famka, Inc., 14 A.D.3d 363, 787 N.Y.S.2d 315, 316 (1st Dep't 2005) ("A conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action...."); Schwartz v. Olshan Grundman Frome & Rosenzweig, 302 A.D.2d 193, 753 N.Y.S.2d 482, 487 (1st Dep't 2003) (holding that violations of the disciplinary rules do not generate a cause of action); Gonzalez v. Gordon, 233 A.D.2d 191, 649 N.Y.S.2d 701, 702 (1st Dep't 1996) (holding that allegations of an undisclosed conflict of interest are insufficient to state a claim under Judiciary Law § 487); Burton v. Emanuela Lupu, Esq., 2012 WL 3646819 (Sup. Ct. New York County 2012); Denenberg v. Rosen, 71 A.D.3d 187, 897 N.Y.S.2d 391, 396 (1st Dep't 2010) (dismissing the General Business Law § 349 claim because it did not involve conduct affecting the consuming public at large).

The allegations of a conflict are also scandalous and prejudicial. They discredit Blank Rome's professional reputation and standing in the legal community. *See* Markus v. Rock & Republic Enters., 2007 WL 2176272 (Sup. Ct. New York County 2007) (explaining that material is prejudicial when it causes harm to the party); JC Mfg., Inc., 577 N.Y.S.2d at 146. Indeed, in any other context, such statements would be defamatory. Plaintiff's allegations and unfounded conclusion relating to the existence of a conflict has harmed (and continues to harm) Defendants' reputation, and, if they are not stricken from the Complaint, that harm will be exacerbated. *See* Touitou Aff., Exh. 10 (likening Blank Rome partners to "muppets" for Morgan Stanley). For the reasons set forth above, the following paragraphs referencing the purported conflict are scandalous, prejudicial and unnecessary and should be stricken from the Complaint: 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 40, 41, 42, 43, 44, 45, 46, 60, 65, and 70.

II. Plaintiff's Judiciary Law § 487 And General Business Law § 349 Claims Should Be Dismissed As A Matter of Law[5]

Plaintiff attempts to elevate her principal claim of legal malpractice into two, separate statutory-based fraud causes of action in an effort to recover treble damages, punitive damages and attorney's fees. *See* Touitou Aff., Exh. 1, paras. 67 (seeking to recover "treble damages" based on a purported violation of Judiciary Law § 487), 73 (seeking to recover "attorneys' fees" and "punitive damages" based on a purported violation of General Business Law § 349). Plaintiff's efforts fail. She cannot, based on the facts alleged, circumvent the parameters of Judiciary Law § 487, which requires intentional deceit *and* chronic misconduct, and General Business Law § 349, which has a *public* focus, to recover multiplied and exemplary damages and

[5] A motion to dismiss under N.Y. C.P.L.R. 3211(a)(7) generally assumes the truth of the complaint's material allegations. *See* Ackerman v. 305 East 49th Owners Corp., 189 A.D.2d 665, 592 N.Y.S.2d 365, 366 (1st Dep't 1993). This rule, however, is inapplicable where the allegations "consist[] of bare legal conclusions" or are "flatly contradicted by documentary evidence." David v. Hack, 97 A.D.3d 437, 948 N.Y.S.2d 583, 585 (1st Dep't 2012); Rivietz v. Wolohojian, 38 A.D.3d 301, 832 N.Y.S.2d 505, 506 (1st Dep't 2007). Thus a claim that is supported by generic factual allegations and unsupported legal conclusions is deficient as a matter of law.

fees in this private conflict stemming from Blank Rome's representation of her in an underlying matrimonial action. Both statutory-based fraud claims fail as a matter of law and should be dismissed with prejudice.

A. Plaintiff Has Not And Cannot State A Viable Judiciary Law § 487 Claim

Judiciary Law § 487 allows an injured party to recover treble damages from an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party...." N.Y. Jud. Law. § 487 (McKinney 2013). To state a Judiciary Law § 487 cause of action, a plaintiff must plead with the requisite particularity: (i) intent to deceive the Court or a party; (ii) a chronic and extreme pattern of delinquent conduct; and (iii) consequential damages. *See* Dinhofer v. Med. Liab. Mut. Ins. Co., 92 A.D.3d 480, 938 N.Y.S.2d 525, 528 (1st Dep't 2012); Jaroslawicz v. Cohen, 12 A.D.3d 160, 783 N.Y.S.2d 467, 467 (1st Dep't 2004); Havell v. Islam, 292 A.D.2d 210, 739 N.Y.S.2d 371, 372 (1st Dep't 2002). A viable Judiciary Law § 487 claim is rare, and, as shown below, Plaintiff's falls far short. Accordingly, that claim should be dismissed.

i. Plaintiff Has Not And Cannot Plead Intent To Deceive The Court Or A Party

Plaintiff charges Blank Rome with two, principal alleged acts of deceit: (i) that they fraudulently concealed their existing attorney-client relationship with Morgan Stanley from her in violation of the ethical rules; and (ii) that they fraudulently represented the value of Mr. Armstrong's securities licenses to her in order to protect their existing attorney-client relationship with Morgan Stanley. *See* Touitou Aff., Exh. 1, paras. 21 (alleging that Blank Rome fraudulently failed to disclose their representation of Morgan Stanley in accord with the ethical rules), 31 (alleging that Blank Rome's covert actions relating to the valuation of the securities licenses were motivated by their interest in protecting Morgan Stanley), 40 (alleging that

Defendants "threw Ms. Armstrong under the bus" and were subservient to their undisclosed client, Morgan Stanley). The purported conflict of interest arising from Blank Rome's alleged "simultaneous" representation of Plaintiff in her divorce action, and her former husband's employer, Morgan Stanley, in *concededly* unrelated matters, serves as the foundation for Plaintiff's claim. That foundation, however, is an insufficient factual basis to maintain a Judiciary Law § 487 claim against Blank Rome.

An undisclosed, *actual* conflict of interest does not constitute actionable "deceit" under Judiciary Law § 487. *See* Gonzalez, 649 N.Y.S.2d at 702 (holding that an actual, undisclosed conflict of interest is an insufficient basis to support a Judiciary Law § 487 claim); Krouner v. Koplovitz, 175 A.D.2d 531, 572 N.Y.S.2d 959, 961-962 (3d Dep't 1991) (affirming the lower court's holding that a conflict of interest does not give rise to a Judiciary Law § 487 claim); Burton v. Emanuela Lupu, Esq., 2012 WL 3646819 (Sup. Ct. New York County 2012) (finding that a party's misrepresentation of a conflict of interest is insufficient to support a Judiciary Law § 487 claim). For this reason, alone, Plaintiff's Judiciary Law claim fails as a matter of law.[6]

ii. Plaintiff Has Not Alleged A Chronic, Extreme Pattern of Deceit Or Misconduct

Plaintiff's Judiciary Law § 487 claim fails for the independent reason that the Complaint does not plead the pattern of delinquent, wrongful or deceitful conduct that is required in the First Judicial Department. *See* Dinhofer, 938 N.Y.S.2d at 528 (affirming the dismissal of the plaintiff's Judiciary Law § 487 claim because it was "unsupported by evidence of 'the requisite chronic and extreme pattern of legal delinquency....'") (citations omitted); Solow Mgmt. Corp.

[6] This claim also fails because it is not pled with the requisite particularity under N.Y. C.P.L.R. 3016(b). Contrary to Plaintiff's belief, bare legal conclusions are insufficient to satisfy her burden. *See* Weil Gotshal & Manges LLP v. Fashion Boutique, 2006 WL 4682165 (Sup. Ct. New York County 2006) (stating that a Judiciary Law § 487 claim is "[b]asically equivalent to a cause of action in fraud" and must be pled with the "requisite particularity pursuant to CPLR 3016(b)....").

v. Seltzer, 18 A.D.3d 399, 795 N.Y.S.2d 448, 448 (1st Dep't 2005) (affirming dismissal of Judiciary Law § 487 claim because the plaintiff failed to plead a "chronic and extreme pattern of legal delinquency...."); Estate of Steinberg v. Harmon, 259 A.D.2d 318, 686 N.Y.S.2d 423, 423 (1st Dep't 1999) (affirming dismissal of Judiciary Law § 487 claim because the plaintiff failed to allege facts showing a "chronic, extreme pattern of delinquency[.]"); McGivney v. Sobel, Ross, Fliegel & Suss, LLP, 959 N.Y.S.2d 90, 2011 WL 8771851 *1, *4 (Sup. Ct. New York County 2011).

The deceit alleged by Plaintiff in support of her Judiciary Law § 487 claim is that Blank Rome misrepresented the value of a marital asset in order to protect their existing attorney-client relationship with Morgan Stanley. *See* Touitou Aff., Exh. 1, paras. 26 (alleging that the undisclosed conflict of interest is related to Blank Rome's fraud and deception regarding the value of Armstrong's securities licenses), 31 (alleging that Blank Rome fraudulently, misleadingly and incorrectly determined that Armstrong's securities licenses had no value to protect Morgan Stanley). Plaintiff's Complaint does not plead a pattern, let alone a chronic and extreme pattern of legal delinquency or deceit. *See* Galland v. Kossoff, 34 A.D.3d 306, 824 N.Y.S.2d 630, 631 (1st Dep't 2006) ("The Judiciary Law § 487 claim was properly dismissed for lack of allegations sufficient to show that defendants were guilty of a 'delinquency,' let alone one that was part of a 'chronic and extreme pattern[.]'"); Jaroslawicz, 783 N.Y.S.2d at 467 (dismissing Judiciary Law § 487 claim because a pattern of delinquent, wrongful or deceitful behavior was not pled); Havell, 739 N.Y.S.2d at 372 (dismissing Judiciary Law § 487 claim because the allegations failed to establish a "chronic and extreme pattern of legal delinquency....") (citations omitted). Accordingly, for this reason, too, her Judiciary Law claim should be dismissed.

iii. Plaintiff's Judiciary Law § 487 Claim Is Duplicative Of Her Legal Malpractice Claim And, Thus, It Should Be Dismissed

Plaintiff's Judiciary Law § 487 claim should also be dismissed because it is duplicative of her legal malpractice claim. As pled, those claims are indistinguishable, resting entirely on the *same* facts and misconduct, and, for that reason, Plaintiff's Judiciary Law § 487 fails as a matter of law.

New York law prohibits a party from prosecuting both a Judiciary Law § 487 cause of action and a legal malpractice cause of action that arise from the same underlying facts. Dinhofer v. Med. Liab. Mut. Ins. Co., 2010 WL 5775679 (Sup. Ct. New York County 2010) (dismissing the plaintiff's Judiciary Law § 487 claim as duplicative of his legal malpractice claim because they arise from the same facts), *aff'd*, 92 A.D.3d 480, 938 N.Y.S.2d 525, 527 (1st Dep't 2012), *appeal denied*, 19 N.Y.3d 812, 951 N.Y.S.2d 722 (2012); *see* Anderson v. Beranbaum, 2013 WL 4013489 *1, *1 (Sup. Ct. New York County 2013) (dismissing the plaintiff's fraud claim as duplicative of her malpractice claim because it is based on the "same set of operative facts."); Voutsas v. Hochberg, 103 A.D.3d 445, 446, 958 N.Y.S.2d 903 (1st Dep't 2013) ("[T]he fraud ... cause[] of action ... arose from the same facts as the malpractice claim and alleged similar damages, and w[as] therefore properly dismissed as duplicative...."); Carl v. Cohen, 55 A.D.3d 478, 868 N.Y.S.2d 7, 8 (1st Dep't 2008) ("The fraud claim was duplicative of the legal malpractice claim since it was 'not based on an allegation of independent, intentionally tortious' conduct...."). In other words, a party's Judiciary Law § 487 claim cannot merely track the allegations of his or her malpractice claim, but, instead, it must allege *different*, operative facts and conduct.

Plaintiff acknowledges that her Judiciary Law § 487 and malpractice claims are duplicative. Indeed, rather than pleading new or separate facts and conduct to support her

Judiciary Law § 487 claim, Plaintiff simply incorporates, wholesale, the same facts and conduct that she believes supports her legal malpractice claim. *See* Touitou Aff., Exh. 1, paras. 59 and 64 (incorporating by reference all of the other acts alleged and described in "Paragraphs 1-58" in support of her legal malpractice and Judiciary Law § 487 claims), 60 and 65 (alleging the same facts as the basis for her legal malpractice and Judiciary Law § 487 claims). Because Plaintiff's Judiciary Law § 487 is plainly redundant, it should be dismissed.

B. Plaintiff Has Not And Cannot State A Viable Claim Under General Business Law § 349

To state a claim under General Business Law § 349, a party must plead three elements: "first, that the challenged act or practice was *consumer-oriented*; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act...." Stutman v. Chemical Bank, 95 N.Y.2d 24, 709 N.Y.S.2d 892, 895 (2000) (citations omitted) (emphasis added); *see* N.Y. Gen. Bus. Law § 349 (McKinney 2013). In order to satisfy the threshold statutory requirement of alleging "consumer-oriented" conduct, the alleged act or practice must "have a broad impact on consumers at large." New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 639 N.Y.S.2d 283, 290 (1995); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 623 N.Y.S.2d 529, 532 (1995); Gin v. Bank of Am., 2013 WL 2391863 *1, *3 (Sup. Ct. New York County 2013).

Plaintiff attempts to satisfy that threshold statutory requirement by alleging, generically, that "Blank Rome, Attorney Heller and Attorney Mitchell are in a business and have a trade practice of providing legal services to consumers and the public generally...." *See* Touitou Aff., Exh. 1, para. 69. That is insufficient to establish "consumer-oriented" conduct. At its core, this action is a private dispute—between lawyers and former client—concerning the sufficiency of the legal services Blank Rome afforded *Plaintiff, alone,* during *her* divorce action against

Armstrong. *See* Touitou Aff., Exh. 4. The Complaint makes it abundantly clear that this dispute is unique to the parties, and *does not* involve any purported harm to the public at large. *See* Touitou Aff., Exh. 1, para. 70 (alleging that Blank Rome failed to disclose a conflict to Plaintiff and recommended that she execute a stipulation to protect Morgan Stanley).

New York Courts consistently dismiss General Business Law § 349 claims where, as here, the alleged misconduct affects a particular individual, rather than consumers at large. *See* Edelman v. O'Toole-Ewald Art Assocs., Inc., 28 A.D.3d 250, 814 N.Y.S.2d 98, 99 (1st Dep't 2006) (affirming dismissal of General Business Law § 349 claim because the alleged "deceptive business practices" were not "aimed at the consumer public at large...."); Denenberg v. Rosen, 71 A.D.3d 187, 897 N.Y.S.2d 391, 396 (1st Dep't 2010); Golub v. Tanenbaum-Harber Co., Inc., 88 A.D.3d 622, 931 N.Y.S.2d 308, 310 (1st Dep't 2011); Gin, 2013 WL 2391863 at *3 ("Plaintiffs are pursuing a grievance that is individual, and they have failed to allege that the specific actions complained of were directed at the public generally, as required under section 349.") (emphasis added). Because the conduct alleged here is not "consumer-oriented," General Business Law § 349 is inapplicable. Accordingly, Plaintiff's statutory claim should be dismissed with prejudice.[7]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion in its entirety, and issue an Order: (i) striking the scandalous, prejudicial and unnecessary allegations contained in the Complaint relating to the purported conflict of interest; (ii) dismissing the cause of action under Judiciary Law § 487; (iii) dismissing the cause of action

[7] Plaintiff's General Business Law § 349 claim also fails because it is duplicative of her legal malpractice claim and pled without the requisite specificity. *See* Dinhofer v. Med. Liab. Mut. Ins. Co., 2010 WL 5775679 (Sup. Ct. New York County 2010), *aff'd*, 92 A.D.3d 480, 938 N.Y.S.2d 525, 527 (1st Dep't 2012), *appeal denied*, 19 N.Y.3d 812, 951 N.Y.S.2d 722 (2012); N.Y. C.P.L.R. 3016(b) (McKinney 2013).

under General Business Law § 349; and (iv) granting them such other, further and different relief as the Court deems just and proper.

Dated: New York, New York
September 20, 2013

Respectfully submitted,

HINSHAW & CULBERTSON LLP

By: _____
Philip Touitou
Joseph G. Silver