IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALFRED PIRRI, JR., **Plaintiff** **-against-** **LORI CHEEK, LOCKE RAPER, CHARLES KICKHAM, JOANNE RICHARDS, and CHEEKD INC.,** **Defendants**	**Civil Action No. 1:19-cv-00180-PAE**

NOTICE OF DEFENDANTS CHEEK, CHEEKD INC. AND RICHARDS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

PLEASE TAKE NOTICE that, upon the accompanying Memorandum in Support of Defendants Cheek, Cheekd Inc. and Richards' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), Defendants Cheek, Cheekd Inc. and Richards will move this Court before the Honorable Paul A. Engelmayer, United States District Judge, at the United States District Courthouse, 40 Foley Square, New York, New York, on a date and time to be determined by the Court, for an order granting Defendants' motion to dismiss, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 15, 2019

Respectfully submitted,

LAWRENCE B. GOODWIN, PLLC

Lawrence B. Goodwin, Esq.
525 East 86th Street, St. 5H
New York, NY 10028
Telephone: (212) 988-1076
Facsimile: (646) 619-4161
Email: LawrenceGoodwinPC@gmail.com
Attorney for Defendants Cheek and Cheekd Inc.

KAUFMAN DOLOWICH & VOLUCK, LLP

David Group
40 Exchange Place, 20th Floor
New York, New York 10005
Telephone: (212) 485-9600
Facsimile: (212) 485-9700
Email: DGroup@kdvlaw.com

Attorneys for Defendant Joanne Richards

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALFRED PIRRI, JR., **Plaintiff** **-against-** **LORI CHEEK, LOCKE RAPER, CHARLES KICKHAM, JOANNE RICHARDS, and CHEEKD INC.,** **Defendants**	**Civil Action No. 1:19-cv-00180-PAE**

JOINT MEMORANDUM IN SUPPORT OF DEFENDANTS CHEEK, CHEEKD INC. AND RICHARDS' PARTIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER FED. R. CIV. P. 12(b)(6)

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Statutes

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALFRED PIRRI, JR., **Plaintiff** **-against-** **LORI CHEEK, LOCKE RAPER, CHARLES KICKHAM, JOANNE RICHARDS and CHEEKD INC.,** **Defendants**	**Civil Action No. 1:19-cv-00180-PAE**

JOINT MEMORANDUM IN SUPPORT OF DEFENDANTS CHEEK, CHEEKD INC. AND RICHARDS' PARTIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER FED. R. CIV. P. 12(b)(6)

Defendants Cheek and Cheekd Inc. ("the Cheekd defendants"[1]) and Richards submit this joint memorandum in support of their motion to dismiss the New York State causes of action asserted against them in plaintiff's complaint of January 13, 2019.

I. INTRODUCTION

Plaintiff, through new counsel, tries again to assert several causes of action against defendants, after having his first case dismissed. Plaintiff's actions in this case, as they were in the first case, are misguided and futile. This action, like the first one, never should have been filed, for at least the reasons stated below.

[1] Lawrence Goodwin is representing defendants Lori Cheek and Cheekd Inc. in this matter, but unlike the prior case, Mr. Goodwin is not representing defendants Raper or Kickham herein.

A. The First Case

Plaintiff's first case, Civil Action 1:17-cv-07089-PAE, filed September 18, 2017, asserted a declaratory judgment of invalidity of Cheekd patent 8,543,465, and six causes of action under New York law for: (1) unjust enrichment, (2) breach of a medical professional's fiduciary duty of confidentiality, (3) misappropriation of trade secrets, (4) unfair competition under, (5) conversion, and (6) fraud (Dtk. 1). The Cheekd defendants moved to dismiss the declaratory judgment action as lacking subject matter jurisdiction, and the state claims as time-barred (Dkt. 28, 39). In response, plaintiff amended his complaint (Dkt. 34) and in doing so, abandoned three of the state causes -- unjust enrichment, misappropriation of trade secrets, and conversion. The Cheekd defendants again moved to dismiss the declaratory judgment action as lacking subject matter jurisdiction, and the state claims as time-barred (Dkt. 41, 42). The Court granted the motion to dismiss the declaratory judgment action, and dismissed the remaining state causes of action without prejudice, on April 5, 2018. (Dkt. 63)

B. The Present Case

The present case differs from the first in two respects: (i) plaintiff has substituted its action for a declaratory judgment of invalidity of the Cheekd patent with an action under 35 U.S.C. 256 to add plaintiff as an inventor on the Cheekd patent, and (ii) plaintiff reasserts only five of the six state causes originally asserted in the prior case (unjust enrichment, misappropriation of trade secrets, conversion, breach of a medical professional's fiduciary duty of confidentiality, and fraud), having dropped its claim for unfair competition. These

causes of action are asserted selectively against individual defendants by plaintiff. *See* Dkt. 32.[2]

None of the causes of action asserted in the complaint have merit, and the New York State causes of action fail to state a claim as they are time barred under New York's statutes of limitations. Additional infirmities exist for certain of the actions, as discussed below. Accordingly, the Cheekd defendants and Richards move to dismiss the New York State claims based on Fed. R. Civ. P. 12(b)(6) as failing to state a claim upon which relief can be granted.

Although this motion does not seek dismissal under Rule 12(b)(6) of the action for a change in inventorship under 35 U.S.C. 256, the Cheekd defendants note that that action is based entirely upon an absurd notion, that plaintiff's idea – "online dating in reverse" – was stolen from him by the defendants, *i.e.*, that he related his idea to his mental health counselor, defendant Richards, that Richards revealed this information to defendant Cheek, who then incorporated it into a patent application which led Cheek to achieve fabulous wealth. Neither Ms. Cheek, nor her co-inventors Raper and Kickham, prior to this case, had ever heard of, spoken with, or otherwise communicated with Ms. Richards, and Ms. Richards, prior to this case, had never heard of, spoken with, or otherwise communicated with Ms. Cheek or her co-inventors. It is black letter law that at least some collaboration between alleged inventors is required for them to be joint inventors. *See Vanderbilt University v. ICOS Corp.*, 601 F.3d 1297, 1303 (Fed. Cir. 2010) ("Individuals cannot be joint inventors if they are completely ignorant of what each other has done until years after their individual efforts. They cannot be totally independent of each other and be joint

[2] Plaintiff has withdrawn the First and Second claims against Richards for correction of inventorship of U.S. Patent No. 8,543,465 and for unjust enrichment, and has withdrawn the Fifth claim against Defendants Cheek, Raper, Kickham, and Cheekd Inc. for breach of fiduciary duty of confidentiality.

inventors.") And such collaboration must be proved through clear and convincing evidence. *Id.* at 1305.

Thus, since Ms. Cheek had never even heard of Ms. Richards, much less collaborated with plaintiff Pirri, there can be no genuine dispute that Pirri is not a joint inventor with Cheek. And the notions that plaintiff is the only person in the world to have thought about "online dating in reverse," and that Ms. Cheek has become fabulously wealthy because of her patent, are fantasies.[3]

The Cheekd defendants will address the Sec. 256 inventorship action at the appropriate time.

II. RELEVANT FACTS AS ALLEGED IN THE COMPLAINT

Plaintiff alleges that he conceived "novel ideas for his dating website application," that he committed the same to paper in September 2006, and that he retained patent counsel in October 2006. Complaint (Dkt. 8), ¶¶ 30, 31. Plaintiff has not and cannot allege that he has ever filed a patent application for his alleged invention, or made, used, sold or offered for sale, at any time, any system or method that utilizes his alleged invention.

In the fall of 2008, plaintiff began mental health counseling with defendant Richards, which continued to May 2013. *Id,* ¶¶ 36, 37. In the course of his counseling

[3] The Cheekd defendants have documentary evidence that they began working on and commercializing the system allegedly stolen from Mr. Pirri before Mr. Pirri even started therapy sessions with Ms. Richards. Such evidence includes, *inter alia*, documents relating to commercialization of Cheekd Inc. that predate Mr. Pirri's therapy sessions, and declarations under penalty of perjury from Ms. Cheek, Ms. Richards, Mr. Kickham, Mr. Raper, and a third party involved in early discussions predating Mr. Pirri's therapy sessions regarding Cheekd Inc. There also is substantial, publicly available evidence that others conceived "online dating in reverse" systems before Mr. Pirri's claimed conception in September 2006 (Complaint ¶ 30). *See, e.g.*, Ramsey U.S. Patent Publication 2007/0156497 (available at https://patentimages.storage.googleapis.com/3e/fd/4c/797c03f8ff091c/US20070156497A1.pdf) (claiming the benefit of an application dated December 21, 2005) and Romney U.S. patent 7,788,183 (available at https://patentimages.storage.googleapis.com/6c/a3/b0/a4ef8afdb4a04a/US7788183.pdf) (claiming the benefit of an application dated April, 2005). Moreover, defendant Cheek has not become wealthy from her company, Cheekd Inc.; on the contrary, Cheekd Inc. has made a total of under $80K since its launch in May of 2010 and has operated at a loss for years.

sessions with Ms. Richards, plaintiff allegedly revealed his idea for online dating in reverse. *Id,* ¶ 39. Plaintiff alleges that Ms. Richards disclosed plaintiff's idea for online dating in reverse to Ms. Cheek, and that plaintiff became aware of this around October 2008. *Id,* ¶ ¶ 41, 42. Then, plaintiff alleges that Ms. Cheek, along with defendants Kickham and Raper, took his idea and claimed it as their own, filing a patent application that led to Cheek Patent 8,543,465. *Id.*, ¶¶ 50, 51; *see* Complaint, Ex. B. Plaintiff claims to have discovered this alleged theft in or about July, 2015. *Id.*, ¶ 58. Finally, plaintiff filed this case in January 2019.

Thus, the following briefly summarizes the chronology of plaintiff's activities, and utter lack of diligence in pursuing his rights:

- Plaintiff alleges that he conceived of his idea in 2006 (*id.*, ¶ 30), but he did nothing to pursue his rights to his invention in the ensuing 13 years.[4] Indeed, as noted by the Court in the prior case, "plaintiff has taken no action whatsoever relating to the patent for more than ten years. Although in 2006 to 2007, plaintiff allegedly committed his idea to paper and conducted a patentability search, since that time, he has moved no closer to implementing his idea." Transcript of Proceedings re: Decison held on 4/5/2018 ("Transcript"), Dkt. 64, S.D.N.Y. 1:17-cv-07089-PAE, at p. 8.

[4] The time periods referenced herein are measured to the filing of the present lawsuit, in January 2019, not the prior lawsuit filed in September 2017. As will be appreciated, however, whether the filing date of the present or prior case is used makes no difference with respect to the outcome.

- Plaintiff retained patent counsel in 2006 (*id.*, ¶ 31) and could have filed a patent application (which would have revealed the allegedly interfering Cheek patent application in 2010[5], possibly allowing correction of inventorship under 35 U.S.C. 116(c)[6]) but he never did so. Further, and as noted by the Court in the prior case, "Indeed, had the plaintiff here been an active participant in this market, he might have noticed the issuance of the patent, and within nine months, sought post-grant review of the patent's validity with the Patent and Trademark Office under 35 U.S.C. §321." Transcript, pp. 10-11.

- Plaintiff alleges that he was aware that Ms. Richards allegedly disclosed his idea to a third party in 2008 (Complaint, ¶ 42), but did nothing to seek redress, from any of the defendants, in the ensuing eleven years.

- The application for the Cheek et al. patent was published (publication No. US 2012/0054053) on Mar. 1, 2012, and would have been found after a simple patent search, but Plaintiff does not and cannot allege that either he, or his patent counsel, did any such search in the ensuing seven years.

- Plaintiff alleges he saw Ms. Cheek on "Shark Tank" in July of 2015 (*id.*, ¶ 58), but he did nothing for more than three and a half years.

The provisional application (No. 61/257,035) upon which the Cheek patent et al. was based was filed on November 1, 2009. See Complaint, Exhibit B. Thus, the alleged offending conduct began, and the date of accrual of plaintiff's unjust enrichment, misappropriation of trade secrets, and conversion claims against the Cheekd defendants

[5] *See* 35 U.S.C. § 135 (a) (pre-AIA) Interferences (applicable to patent applications having a filing date prior to March 16, 2013) "Whenever an application is made for a patent which, in the opinion of the Director, would interfere with any pending application, or with any unexpired patent, an interference may be declared and the Director shall give notice of such declaration to the applicants . . .") (emphasis added).

[6] *See* 35 U.S.C. 116(c) Correction of Errors in Application:
"Whenever through error . . . an inventor is not named in an application, the Director may permit the application to be amended accordingly, under such terms as he prescribes."

occurred no later than the filing of the provisional patent application in November of 2009; *see, e.g., id*, ¶¶ 88, 89, 100, 101 (defendants used plaintiff's idea to "to apply for" the Cheekd et al. patent); *cf. Ferring BV v. Allergan, Inc.*, 932 F. Supp. 2d 493, 505, 506, 508-510 and 513 (S.D.N.Y. 2013) (holding that causes of action for patent ownership, breach of common law duty, breach of contract, interference with contractual relations, misappropriation of trade secrets, conversion, and unjust enrichment were barred by the statute of limitations because they accrued no later than the earliest filing of an allegedly improperly filed patent application.)

The dates of accrual of the claims for breach of fiduciary duty and fraud obviously accrued earlier (but certainly no later) than the filing of the patent application in November 2009.

Finally, the alleged fraud was discovered by plaintiff in July 2015. Complaint, ¶ 58.

III. LEGAL STANDARDS ON A MOTION TO DISMISS

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is properly dismissed where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558; *Shak v. JPMorgan Chase & Co.*, 156 F. Supp. 3d 462 (S.D.N.Y. 2016). "Where the facts needed can be gleaned from the complaint, papers integral to the complaint, and publicly disclosed documents, resolution of the limitations issue on a motion to dismiss is appropriate." *Gonzales v. Nat'l Westminster Bank PLC*, 847 F.Supp.2d 567, 570 (S.D.N.Y.2012) (quoting

In re Salomon Analyst Winstar Litig., 373 F.Supp.2d 241, 245 (S.D.N.Y.2005)) (internal quotation marks and brackets omitted).

"Where the complaint clearly shows the claim is out of time, it should be dismissed with prejudice." *Ferring BV*, 932 F. Supp. 2d at 503-504 (internal quotation marks and citation omitted). Dismissal without leave to amend is warranted where amending the complaint would prove futile in curing its deficiencies. *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); *Ferring*, 932 F. Supp. 2d at 504.

Plaintiff is not entitled to any relief on any of his state claims, and a dismissal of those claims with prejudice is appropriate. The Cheekd defendants and Richards will address, in order, each of the state causes of action.

IV. PLAINTIFF'S NEW YORK STATE CLAIMS FOR RELIEF ARE BARRED BY THE NEW YORK STATUTES OF LIMITATIONS

Other than the inventorship action under 35 U.S.C. 256, plaintiff's claims are based on New York State law. As such, the Court must apply the New York statutes of limitations to the state law causes of action. *Guaranty Trust Co. v. York*, 326 U.S. 99, 110, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). Every single one of plaintiff's state claims is barred under New York C.P.L.R. § 2-203 (2016), § 2-213 (2016) or § 2-214 (2016), based on plaintiff's own allegations in the complaint.

N.Y. C.P.L.R. § 2-203 provides, *inter alia*, that "The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed." (Emphasis added.) The plaintiff need not be aware of the breach to start the period running. *Guilbert v. Gardner*, 480 F. 3d 140, 149 (2d Cir. 2007); *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 599 N.Y.S.2d 501, 615 N.E.2d 985, 987 (1993).

N.Y. C.P.L.R. §§2-213 and 2-214 provide that claims must be brought within six years or three years of accrual, respectively, except that § 213(8) provides that an action based on fraud must be commenced within "six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it."

Based on plaintiff's allegations, as noted above, the date of accrual of the causes of action for the state claims (*i.e.*, unjust enrichment, misappropriation of trade secrets, conversion, breach of fiduciary duty and fraud) began no later than the filing of the application for the Cheek et al. patent (Complaint, Ex. B), in November of 2009, and the discovery of any alleged fraud occurred no later than July 2015 (*id.*, ¶58). Since this action was filed in January of 2019, both the three and six year periods have long lapsed, and all of the claims are time barred; similarly, the claim based on fraud, which plaintiff alleges to have discovered in July 2015, is also time barred by the alternative, two-year statute of limitations measured from the date of discovery. N.Y. C.P.L.R. § 213(8).

A. Plaintiff's Second Claim for Relief for Unjust Enrichment Is Time-Barred and Otherwise Fails (i) as Duplicative of Plaintiff's Other State Claims, and (ii) for Lack of Relationship between Plaintiff and the Cheek Defendants

Plaintiff's claim for unjust enrichment against defendants Cheek, Cheekd, Inc., Raper and Kickham fails for three reasons: first, it is time barred; second, it is duplicative of plaintiff's other claims; and third, there is no relationship or connection between plaintiff and the Cheekd defendants.

1. The Unjust Enrichment Claim is Time-Barred

"The statute of limitations in New York for claims of unjust enrichment, breach of fiduciary duty, corporate waste, and for an accounting is generally six years. *See* N.Y.

C.P.L.R. §§ 213(1) . . ." *Golden Pacific Bancorp v. FDIC*, 273 F. 3d 509, 518 (2d. Cir. 2001); *Ferring*, 932 F.Supp.2d at 513; *Cohen v. Cohen*, 773 F.Supp. 2d 373, 396-97 (S.D.N.Y.2011). "The limitations period for unjust enrichment claims . . . starts running when the defendant commits the wrongful act that enriches him." *Ferring*, 932 F.Supp.2d at 513; *Cohen*, 773 F.Supp.2d at 397.

In Complaint ¶¶ 72-76, plaintiff alleges the wrongful acts that led to the patenting of the Cheek et al. patent and the alleged unjust enrichment. Any such wrongful acts would necessarily have occurred no later than November 1, 2009, when the Cheekd defendants applied for the Cheek Patent. *See Ferring*, 932 F.Supp.2d at 513 (in dismissing unjust enrichment claim, "To the extent any defendants committed a wrongful act that led to patenting, developing, and/or commercializing certain desmopressin formulations, that act would necessarily have occurred no later than 2003 when Fein first applied for patents covering those formulations.") (internal quotation marks omitted).

Accordingly, the claim for unjust enrichment, which accrued no later than November 2009, and asserted in January 2019, is time-barred and therefore should be dismissed.

2. The Unjust Enrichment Claim is Duplicative of Plaintiff's Other State Claims

To state a claim for unjust enrichment under New York law, a plaintiff must allege that "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004) (citing *Clark v. Daby*, 751 N.Y.S.2d 622, 623 (3d Dep't 2002)). Although unjust enrichment can be pleaded in the alternative, it must be dismissed when it simply duplicates other tort or contract claims. *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790-91 (2012); *see also*

Mahoney v. Endo Health Solutions, Inc., No. 15-cv-9841 (DLC), 2016 WL 3951185, at *11 (S.D.N.Y. July 20, 2016); *see also Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 296-97 (S.D.N.Y. 2015) (suggesting that *Corsello* diminished plaintiff's ability to plead unjust enrichment in the alternative under New York law); *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 483-84 (S.D.N.Y. 2014) (same). Rather, unjust enrichment "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello*, 18 N.Y.3d at 790. "Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." *Id.* (citations omitted).

In this case, plaintiff alleges that defendants' alleged unjust enrichment stems from the very same conduct underlying his other claims. All of plaintiff's New York State claims, including his Second claim for unjust enrichment, are based on his alleged conception of his invention (compare Complaint ¶¶ 72, 82, 91, 97, 105), his alleged communication of the invention to Richards (compare Complaint ¶¶ 73, 84, 92, 97, 109), the alleged communication of his invention to Cheek (compare Complaint ¶¶ 75, 86, 92, 99, 110), and the alleged use by Cheek to obtain her patent (compare Complaint ¶¶ 76, 88, 92, 100, 111). Indeed, plaintiff "repeats and realleges the allegations set forth in" his claim for unjust enrichment to support his Third through Sixth claims. Complaint, ¶¶ 81, 90, 94, 104.

Accordingly, the unjust enrichment claim is duplicative of Plaintiff's other state claims and should be dismissed on this basis as well.

3. There Is No Relationship or Connection between Plaintiff and the Cheekd defendants

The claim for unjust enrichment also should be dismissed as to the Cheekd defendants because there is and was no relationship or connection between any of them and plaintiff. As noted, to state a claim for unjust enrichment under New York law, plaintiff must allege, inter alia, that "equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd.*, 373 F.3d at 306. Thus, "[a]lthough a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, there can be no claim where the connection between the plaintiff and defendant is attenuated." *Ferring*, 932 F.Supp.2d at 512-13 (emphasis added; internal quotation marks omitted); quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16, 831 N.Y.S.2d 760, 863 N.E.2d 1012 (2007) (dismissing unjust enrichment claim because parties lacked direct relationship); see also *Georgia Malone & Co., Inc. v. Ralph Rieder*, 86 A.D.3d 406, 408, 926 N.Y.S.2d 494 (1st Dep't 2011) (unjust enrichment claim requires a connection or relationship between the parties that could have caused reliance or inducement on the plaintiff's part).

Plaintiff has not and cannot claim any relationship with any of the Cheekd defendants. By his own admission, the only relationship that is alleged to have existed between plaintiff and any of the defendants was with defendant Richards. Accordingly, plaintiff's claim for unjust enrichment should be dismissed as to the Cheekd defendants for this reason as well.

B. Plaintiff's Third Claim for Relief for Misappropriation of Trade Secrets under New York Common Law Is Time-Barred

Plaintiff's claim against all defendants for misappropriation of trade secrets fails because it is time barred.

Pursuant to N.Y. C.P.L.R. § 214(4), misappropriation claims must be brought within three years of when a defendant (i) discloses the trade secret or (ii) when he first makes use of plaintiff's ideas. *Ferring*, 932 F.Supp.2d at 510; *IDT Corp. v. Morgan Stanley*, 12 NY 3d at 141; *Synergetics USA, Inc. v. Alcon Laboratories, Inc.*, No. 08 Civ. 3669 (DLC), 2009 WL 2016872, at *2 (S.D.N.Y. July 9, 2009). The claim accrued no later than November 1, 2009, when the Cheekd defendants applied for the Cheek et al. patent, allegedly using plaintiff's ideas. See *Ferring*, 932 F.Supp.2d at 510 (in dismissing a claim for misappropriation of trade secrets, "The three-year limitations period began in 2003, when Fein first applied for patents covering desmopressin formulations."). Since the application that led to the Cheek Patent was filed more than nine years before this case was filed, this claim is time barred and should be dismissed.

Alternatively, this claim is also time-barred, and should be dismissed, because the alleged trade secret was disclosed to the public on March 1, 2012, when the application for Cheek et al. patent was published (see Complaint Ex. B), which is also more than three years before filing.

C. Plaintiff's Fourth Claim for Relief for Conversion Is Time-Barred

Plaintiff's claim against all defendants for conversion fails because it is time barred.

The tort of conversion requires that the defendant, "intentionally and without authority, assumes or exercises control over personal property belonging to someone else." *Ferring*, 932 F.Supp.2d at 510, quoting *Marketxt Holdings Corp. v. Engel & Reiman, P.C.*, 693 F.Supp.2d 387, 395 (S.D.N.Y.2010).

Conversion claims are subject to a three-year statute of limitations, which begins running when the alleged conversion takes place. See N.Y. C.P.L.R. § 214(3); *Grosz v.*

Museum of Modern Art, No. 10-257 (2d Cir. December 16, 2010); *Ferring,* 932 F.Supp.2d at 510. The defendants are alleged to have taken control of plaintiff's property no later than the filing of the Cheek *et al.* patent application in November 2009. S*ee id.* (in dismissing a claim for conversion, "defendant must have had that material prior to 2003, when Fein first filed his patent.") Because the claim for conversion accrued almost ten years before this case was filed, it is time barred and should be dismissed.

D. Plaintiff's Fifth Claim for Relief for Breach of Fiduciary Duty of Confidentiality Is Time-Barred

Plaintiff's claim against Richards for breach of fiduciary duty of confidentiality fails because it is time barred.

New York C.P.L.R. § 213(1) requires that suit be brought within six years of the alleged breach.[7] *See Ferring,* 932 F.Supp.2d at 506 (breach of fiduciary duty claim would have begun to accrue with the filing of the patent application). Since the application that led to the Cheek Patent was filed almost ten years before this case was filed, this claim is time barred and should be dismissed.

E. Plaintiff's Sixth Claim for Relief for Fraud Is Time-Barred and Does Not Apply to the Cheek Defendants

Plaintiff's claim against all defendants for fraud fails because it is time barred, and also fails as to the Cheekd defendants for lack of any material misrepresentation by them to plaintiff.

---

[7] "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. . . . Where the remedy sought is purely monetary in nature, courts construe the suit as alleging "injury to property" within the meaning of CPLR § 214(4), which has a three-year limitations period. . . . Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR § 213(1) applies . . . Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR§ 213(8)." *IDT Corp. v. Morgan Stanley*, 12 NY 3d 132, 139 (2009) (citations omitted). For purposes of this motion, defendant Richards will assume that the six-year limitations period applies to the breach of fiduciary duty claim.

New York C.P.L.R. § 213(8) provides that an action based on fraud must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it."

The alleged fraud claim accrued at the latest in November 2009, with the filing of the application for the Cheek et al. patent, almost 10 years before this case was filed, and was discovered in July of 2015 (Complaint, ¶ 58), almost four years before this case was filed. Thus, the action based on fraud is time barred.

Further, the fraud claim must be dismissed as to the Cheekd defendants. To plead a claim for fraud under New York law, plaintiff must allege (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, justifiable reliance by the plaintiff and (4) damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 558 (2009).

Plaintiff has not (nor can he) allege, inter alia, that any of the Cheekd defendants made any material misrepresentation to plaintiff. The action based on fraud therefore should be dismissed as to them for this reason as well.

V. CONCLUSION

In conclusion, all of Plaintiff's New York State claims are at least time barred, among other infirmities. Accordingly, defendants respectfully request, under Fed. R. Civ. P. § 12(b)(6):

1. dismissal of plaintiff's Second claim, against the Cheekd defendants, for unjust enrichment as time barred, as duplicative of plaintiff's other state claims, and as otherwise failing for lack any relationship between plaintiff and the Cheek Defendants;

2. dismissal of plaintiff's Third claim, against all defendants, for misappropriation of trade secrets as time-barred;
3. dismissal of plaintiff's Fourth claim, against all defendants, for conversion as time-barred;
4. dismissal of plaintiff's Fifth claim, against Richards, for breach of the fiduciary duty of confidentiality as time barred and inapplicable to the Cheekd defendants;
5. dismissal of plaintiff's Sixth claim, against all defendants, for fraud as time barred and as inapplicable to the Cheekd defendants.

Dated: New York, New York
April 15, 2019

Respectfully submitted,

LAWRENCE B. GOODWIN, PLLC

Lawrence B. Goodwin, Esq.
525 East 86th Street, St. 5H
New York, NY 10028
Telephone: (212) 988-1076
Facsimile: (646) 619-4161
Email: LawrenceGoodwinPC@gmail.com
Attorney for Defendants Cheek and Cheekd Inc.

KAUFMAN DOLOWICH & VOLUCK, LLP

David Group
40 Exchange Place, 20th Floor
New York, New York 10005
Telephone: (212) 485-9600
Facsimile: (212) 485-9700
Email: DGroup@kdvlaw.com

Attorneys for Defendant Joanne Richards