UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JENNIFER S. FISCHMAN, Plaintiff, v. MITSUBISHI CHEMICAL HOLDINGS AMERICA, INC. et al., Defendants.	:	CIVIL ACTION NO.: 18-CV-08188

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO MOVING DEFENDANTS' MOTION TO DISMISS

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Introduction

Plaintiff Jennifer S. Fischman ("**Ms. Fischman**"), by and through her attorneys Valli Kane & Vagnini LLP, submits this memorandum of law in opposition to the Motion to Dismiss (the "**Motion**") filed by moving Defendants Mitsubishi Chemical Holdings America, Inc. ("**MCHA**"), Nicholas Oliva ("**Mr. Oliva**") and Donna Costa ("**Ms. Costa**") (collectively, "**Defendants**").[1] The Motion seeks to dismiss Plaintiff's complaint (the "**Complaint**," ECF No. 3), with prejudice, purportedly for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

The issues raised in Defendants' Motion are largely duplicative of those raised in two of their prior submissions: (i) a letter motion; and (ii) a motion to reconsider, as follows.

First, Defendants filed a letter motion seeking to seal (or, alternatively, to redact) the Complaint (the "**Letter Motion**," ECF No. 24), which identified certain information (the "**Information**") that Defendants claim is protected as privileged and/or confidential. They identified the Information in the form of a redacted complaint, annexed as Exhibit A to the Letter Motion (ECF No. 24-1), and also on pages 9-11 of Defendants' [Unredacted] Memorandum of Law in Support of Moving Defendants' Motion to Dismiss ("**Def. Mem.**,"), which they submitted to Chambers via e-mail on December 3, 2018 (the redacted version of this brief was docketed as ECF No. 25-8). The Court entered an Order (ECF No. 26) denying the Letter Motion with respect to sealing the Complaint and granting it with respect to review by the Court of Defendants' proposed redactions.

Second, a week later, Defendants filed a motion to reconsider (ECF No. 28) covering substantially the same issues. Plaintiffs filed a memorandum of law in opposition ("**Pl. Mem.**,"

[1] Two additional non-moving corporate defendants, located in Japan, are named in the Complaint. The Court entered an Order on December 3, 2018 (ECF No. 23) appointing an international process server to serve the Complaint upon them. They have not yet appeared.

ECF No. 30), to which Defendants replied (ECF No. 31), and the matter is now fully briefed and submitted.

Defendants have now rehashed the same arguments from their Letter Motion and motion to reconsider and repackaged them again in the form of a motion to dismiss. For the reasons set forth herein, and those set forth previously in our opposition to the motion to reconsider, the instant Motion should be denied. Plaintiff also respectfully requests, in the alternative, leave to amend the Complaint should any portion of Defendant's motion be granted.

Key Factual Allegations of the Complaint

Plaintiff Jennifer Fischman, a female attorney formerly working "in house" for defendant MCHA, alleges in her Complaint (among other things) the following pertinent facts:

Despite years of experience (¶¶21-24)[2] and exemplary performance in the roles of Corporate Counsel, Assistant General Counsel, and Acting General Counsel and Chief Compliance Officer (¶¶34-48), she was denied a promotion to [non-interim] General Counsel and Chief Compliance Officer because she is female (¶¶49-59);

Plaintiff was qualified for the promotion (¶58, but Defendant gave the position to a lesser qualified male (¶60, ¶69, ¶71);

During her employment, Plaintiff endured disparate treatment(¶¶60-64), including being paid less than a comparable male (defendant Oliva) for identical work under identical conditions (the General Counsel and Chief Compliance Officer job) (¶61);

Plaintiff engaged in protected conduct when she made complaints about disparate treatment gender discrimination (¶¶64-75), including multiple complaints to Pat Saunders, MCHA's Human Resources (¶64), about the Company's decision to hire Mr. Oliva before he was

[2] Citations in the form of "¶_" are to paragraphs of the Complaint.

hired to replace her as General Counsel and Chief Compliance Officer (¶¶69-70), and additional complaints to Mr. Oliva in March and April of 2016 (¶¶73) and in August of 2016 (¶¶74-76);

Defendants retaliated against Plaintiff for complaining by demoting her (¶¶69-72, ¶79) and, ultimately, terminating her in a manner which foreseeably would be distressing, humiliating, and would destroy all of her prospects for subsequent employment as an attorney (¶¶78-86); and

Defendants' proffered reason for terminating Plaintiff – that she breached her ethical obligations as an attorney by making a purportedly unauthorized offer of settlement – was pretextual (¶¶87-90) because, among other reasons, Defendants knew that Plaintiff had received actual authority to make the settlement offer (¶¶77, 83-84).

Causes of Action Asserted in the Complaint

The Complaint thus asserts multiple causes of action sounding in gender discrimination and tort, including: (1) discrimination in violation of Title VII of the Civil Rights Act of 1964 ("**Title VII**"); (2) retaliation and wrongful termination in violation of Title VII; (3) retaliation and wrongful termination under the Sarbanes-Oxley Act; (4) pay discrimination in violation of the Equal Pay Act ("**EPA**"); (5) discrimination in violation of the New York State Human Rights Law ("**NYSHRL**"); (6) discrimination in violation of the New York City Human Rights Law ("**NYCHRL**"); (7a) pay discrimination under the New York State Equal Pay Act ("**NYEPA**"); (7b) retaliation in violation of section 215 ("**§215**") of the New York Labor Law ("**NYLL**"); (7c) intentional infliction of emotional distress; (8) negligence; (9) aiding and abetting discrimination and retaliation in violation of the NYSHRL; and (10) aiding and abetting discrimination and retaliation in violation of the NYCHRL. *See* Complaint, at ¶¶ 91-153.[3]

[3] Plaintiff voluntarily withdrew her cause of action under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (ECF No. 13) and dismissal of the claim was granted by the Court (ECF No. 14). Plaintiff also acknowledges that her counsel made an error in numbering the causes of action such that three claims are each entitled "Seventh Cause of Action."

Applicable Legal Standards

Rule 8(a) of the Federal Rules of Civil Procedure ("**FRCP**") governs the required contents of a pleading. It states:

> A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds of the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a). In addition, Rule 8(e) requires that "Pleadings must be construed so as to do justice." Fed. R. Civ. P. 8(e).

The Supreme Court clarified and restated the applicable pleading standards in two important cases: *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Iqbal*, the Court explained that to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), "a claim must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court announced that "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. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, at 678 (citing *Twombly*, at 556).

The notice pleading standards articulated by Rule 8 of Federal Rules of Civil Procedure still survive under the *Iqbal-Twombly* analysis. *See Ohuche v. Merck & Co., Inc.*, 2011 WL

For the purposes of this brief, we will adopt the numbering of the causes of action utilized by Defendants and will identify these causes of action as numbers 7a, 7b, and 7c.

2682133, *2 (S.D.N.Y. Jul. 7, 2011) (explaining that Rule 8 requires only a "short and plain statement of the claim showing that the pleader is entitled to relief."; *id*. at n.34 (quoting Fed. R. Civ. P. 8(a)(2))); *accord Boykin v. KeyCorp.*, 521 F.3d 202, 212-13 (2d Cir. 2008) (vacating dismissal and explaining that Rule 8(a)'s notice pleading requirements still govern the sufficiency of complaint).

Moreover, in assessing the sufficiency of a pleading, the Court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). Although *Twombly* has introduced a "flexible plausibility standard" into motions to dismiss, *ATSI Commc'ns, Inc. v. The Sharr Fund, Ltd.,* 493 F.3d 87, 98 n. 2 (2d Cir. 2007), this standard does not mean a court should weigh competing fact allegations and determine which is more credible. As the Supreme Court observed in *Twombly,* "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts [alleged] is improbable, and 'that a recovery is very remote and unlikely.'" 127 S. Ct. at 1965 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). The standard "is heavily weighted in favor of the plaintiff," and the Court must "read a complaint generously." *Lee v. Sony BMG Music Entm't, Inc.*, 557 F. Supp. 2d 418, 423 (S.D.N.Y. 2008).

Furthermore, in discrimination cases, the Second Circuit has held that a heightened pleading standard does not apply and that "a discrimination complaint need not allege facts establishing each element of a prima facie case of discrimination to survive a motion to dismiss." *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 254 (2d Cir. 2014), citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) and holding that *Bell Atlantic Corp. v. Twombly* endorsed *Swierkiewicz's* rejection of a heightened pleading standard in discrimination

cases. Rather, a discrimination complaint "must at a minimum assert nonconclusory factual matter sufficient to nudge [its] claims across the line from conceivable to plausible [in order to] proceed." *E.E.O.C. v. Port Authority, supra,* at 254 (internal quotations of *Iqbal* and *Twombly* omitted).

Thus, in discrimination claims, and contrary to Defendants' contentions (*see* Def. Mem. at 12, 16), a plaintiff "need not prove a prima facie *McDonnell Douglas* case to survive a motion to dismiss." *Barrett v. Forest Laboratories, Inc.*, 39 F. Supp.3d 407, 432 (S.D.N.Y. 2014)(emphasis added). "The prima facie case under *McDonnell Douglas* ... is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002). "This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss…. Consequently, the ordinary rules for assessing the sufficiency of a complaint apply." *Id*. at 511.

"In holding that plaintiffs need not prove a prima facie *McDonnell Douglas* case to survive a motion to dismiss, the Supreme Court in *Swierkiewicz* emphasized that a complaint need only 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests' and that '[t]his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.'" *Barrett v. Forest Labs., Inc.*, 39 F. Supp. 3d 407, 432 (S.D.N.Y. 2014) (quoting *Swierkiewicz*, supra, at 512). "Reconciling *Swierkiewicz, Twombly,* and *Iqbal,* a complaint need not establish a prima facie case of employment discrimination to survive a motion to dismiss; however, the claim must be facially plausible and must give fair notice to the defendants of the basis for the claim." *Skalafuris v. City University of New York,* 2010 WL 1050299, *2 (S.D.N.Y. Mar. 22, 2010)(internal quotation omitted).

Argument

Rather than arguing that Plaintiff has failed to meet the pleading standards applicable to her causes of action, Defendants argue that Plaintiff, as an attorney, is prohibited from making allegations which include information she learned during the course of her employment. Indeed, they devote twenty-one pages of their twenty-five page brief to this argument. *See* Memorandum of Law in Support of Moving Defendants' Motion to Dismiss ("**Def. Mem.**"), at 1-21. Defendants are wrong.

As a threshold matter, Defendants' argument *must* be rejected, for policy reasons, because if their argument was to prevail, no woman working professionally as an attorney would be able to protect herself from an employer's gender discrimination and retaliation. Their argument fails for two other reasons. *First*, Defendants are essentially seeking summary judgment on the assumption that Plaintiff's evidence will be inadmissible, but the Court cannot make such a finding at the pleading stage of the case. *Second*, none of the information qualifies for protection as "privileged" or "confidential," but even if it was protected, Plaintiff would still be permitted to use the information because the rules of attorney conduct expressly provide that a lawyer may reveal such information in a controversy between the lawyer and the client where Defendants have put Plaintiff's ethical conduct at issue by terminating Plaintiff based upon a purported breach of legal ethics.

Almost as an afterthought, the final four (4) pages of Defendants' brief seek dismissal of Plaintiff's claims for: (i) retaliation under New York Labor Law §215 (Cause of Action 7b, Complaint ¶¶ 133-136); (ii) intentional infliction of emotional distress (Cause of Action 7c, Complaint ¶¶ 137-140); and (iii) negligence (Cause of Action 8, Complaint ¶¶141-145). As shown below, these claims meet the applicable pleading standards, too. Accordingly, Defendants' Motion should be denied in its entirety.

I. Defendants' Motion Asserts No Valid Basis For Dismissal At The Pleading Stage – This Isn't a Motion for Summary Judgment

Application of the legal standards set forth above requires denial of the Motion. Defendants have not met their burden of showing that Plaintiff has failed to plead a claim for relief that is plausible on its face. Defendants do not contend that the Complaint omits elements required by FRCP Rule 8(a). They don't claim that the Complaint fails to: (1) allege jurisdiction; (2) provide a "short and plain statement"; or (3) demand relief. Nor do they contend that Plaintiff's claims fail to meet the "plausibility" requirements of *Iqbal* and *Twombly.* Accordingly, while they purport to advance their motion under Rule 12(b)(6), that cannot be the case. Rule 12(b)(6) applies only when a party advances a defense, by motion, of "failure to state a claim upon which relief can be granted." Defendants do not present such a motion.

Instead of arguing that Plaintiff hasn't *stated* a claim, Defendants are arguing that Plaintiff's claims *cannot be proven with admissible evidence*. The Court cannot make such a determination (which would be tantamount to a ruling on a motion for summary judgment) based upon Defendants' naked, conclusory assertions that it is impossible for Plaintiff to prove her case. Indeed, the Supreme Court's decision in *Twombly* teaches that "once a claim has been stated adequately, it may be supported by showing *any set of facts* consistent with the allegations in the complaint" *Bell Atlantic Corp. v. Twombly, supra,* at 563 (emphasis added). Similarly, the Second Circuit stated that "[i]t is a longstanding rule that, '[w]hen dealing with ethical principles, … we cannot paint with broad strokes. The lines are fine and must be so marked…. [T]he conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent." *Fund of Funds, Ltd. v. Arthur Andersen & Co.,* 567 F.2d 225, 227 (2d Cir. 1977) (quoted in *Schaefer v. General Elec. Co.,* 2008 WL 649189, * 7 (S.D.N.Y. Jan. 22, 2008).

Here, the only question for the Court to consider is whether Plaintiff has stated plausible claims, not whether Plaintiff can meet the evidentiary standards applicable upon summary judgment or trial. Plaintiff's Complaint easily satisfies the applicable notice pleading and plausibility requirements.

II. The Ethical Rules Governing Attorneys Allow Plaintiff to Use The Information

Defendants attempt to ground their request for dismissal in the attorney-client privilege and in the ethical obligations ensconced in New York Rule of Professional Conduct 1.6 ("Rule 1.6"). In turn, they argue that the inclusion of the Information within Plaintiff's Complaint necessitates dismissal. *See* Def. Mem., at 1-21. Their argument is unavailing for two reasons.

First, as fully briefed in our memorandum of law in opposition to Defendants' motion to reconsider, which we incorporate herein by reference, the protection of the attorney-privilege is inapplicable because:

(a) Defendants have the burden of establishing the existence of the privilege and all of its elements, and they have failed to do so here because they have submitted no affidavits or evidence to make the required showing, have attempted to assert it on behalf of non-clients (only defendant MCHA was Plaintiff's client), or have waived the privilege by putting Plaintiff's ethical conduct at issue (*see* Pl. Mem., at 5-12; *see also In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000) (identifying eight elements required to establish and preserve privilege, citing *United States v. Int'l Bhd. Of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997)); *In re von Vulow v von Vulow*, 828 F.2d 94, 102 (2d Cir. 1987)(privilege may be waived when holder makes assertions placing privileged information at issue))); and,

(b) privilege protects only communications made to seek or provide legal advice and does not protect underlying facts or non-legal (business) advice (*see* Pl. Mem., at 8; *see aso Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) (privilege doesn't protect disclosure of underlying

facts); *accord Gucci America, Inc. v. Guess?, Inc.*, 281 F.R.D. 58, 70 (S.D.N.Y. 2010) ("In the corporate context … communications conveying business (as opposed to legal) advice are excluded from the privilege."); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 145 (2d Cir. 2016) ("The complaint's allegation that [lawfirm] routinely assigns work to unqualified local counsel at the AG's Office's direction relates to a business practice, not to a 'client confidence.'").

Second, also as briefed in our opposition to Defendants' motion to reconsider, the Information is not "confidential information" under Rule 1.6 (*see* Pl. Mem., at 9-12), but even if it was, Plaintiff has the right to use the Information under that rule. Generally, Rule 1.6(a) prohibits an attorney from revealing "confidential information" or using such information to the disadvantage of a client or for the advantage of a lawyer, with an important exception identified in Rule 1.6(b)(5)(i): such information may be used "to the extent that the lawyer reasonably believes necessary" to defend a lawyer against an accusation of wrongful conduct.

Indeed, Rule 1.6 states in its entirety:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j);
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b).
>
> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is

> generally known in the local community or in the trade, field or profession to which the information relates.
>
> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime;
>
> (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
>
> (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
>
> (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
> (ii) to establish or collect a fee; or
>
> (6) when permitted or required under these Rules or to comply with other law or court order.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

NY ST RPC Rule 1.6 (McKinney).

The Comments to Rule 1.6 explain the broad application of Rule 1.6(b)(5)(i)'s exception to the prohibition against disclosure. For instance, Comment 6 illustrates that an attorney has the authority to exercise considerable discretion under Rule 1.6(b) and that the exercise of such discretion "should therefore be given great weight." Likewise, within the context of Rule 1.6(b), Comment 10 explains:

> Where a claim or charge alleges misconduct of the lawyer related to the representation of a current or former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such

> a claim can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, such as a person claiming to have been defrauded by the lawyer and client acting together or by the lawyer acting alone. The lawyer may respond directly to the person who has made an accusation that permits disclosure, provided that the lawyer's response complies with Rule 4.2 and Rule 4.3, and other Rules or applicable law. A lawyer may make the disclosures authorized by paragraph (b)(5) through counsel. The right to respond also applies to accusations of wrongful conduct concerning the lawyer's law firm, employees or associates.

NY ST RPC Rule 1.6 (McKinney), at Comment 10. As set forth in the quote above, Comment 10 *expressly authorizes* the lawyer to make disclosures reasonably believed necessary to establish a defense either directly or through counsel. That is just what Plaintiff here has done.

Plaintiff's view is buttressed by the decision in *Schaeffer v. General Electric Company*, *supra*. In that case General Electric's former in-house legal counsel, Lorene Schaefer, brought a Title VII sex discrimination class action lawsuit against the company, its officers, and directors on behalf of herself and similarly situated female executive employees and female attorneys, and Defendants moved to strike the pleading under Rule 12(f). In considering Defendants' motion, the Court gave extensive treatment to the application of the American Bar Association ("ABA")'s Model Rule of Professional Conduct 1.6, which was codified into law in New York as Rule 1.6.[4]

The Court explained that, based upon an affidavit submitted to it, the ABA's Model Rules expanded the "claim or defense exception" (i.e. the exception to prohibited disclosure codified at Rule 1.6(b)(5)(i)), which had previously been limited to fee disputes and accusations of wrongful conduct under the Model Code of Professional Responsibility (which was the predecessor to the Model Rules). *See Schaefer*, *supra*, at *6. The Court went on to explain that the plain language

[4] *See* American Bar Association List of Jurisdictions Codifying Model Rules, available at: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/

of the Model Rule allowed a lawyer to use the "claim or defense" exception in a controversy between the lawyer and the client, and the Court concluded:

> **There is no question that an in-house counsel may reveal client confidences to the extent necessary to bring a wrongful discharge or other employment discrimination claim on her own behalf. Defendant GE Concedes as much and ample case law supports this contention.**

Id. at *7 (emphasis added)(internal citations omitted). *Schaefer* is on all fours with the instant case, and its logic applies with equal force here.

Interestingly, the Court in *Schaefer* made two observations that are also pertinent to the instant case. *First*, it observed:

> GE has made no showing beyond its conclusory allegations that Plaintiff has disclosed any client confidences or impermissibly based her claims on confidential client information. The Complaint and Ms. Schaefer's affidavits assert that her allegations are based either on publicly available information, on information and belief, or on personal experience and personal knowledge, gathered from non-privileged, non-confidential conversations Ms. Schaefer had with other employees, and not on privileged communications or other confidential information derived from her representation of GE. The absence of any affirmative showing by Defendants of Schaefer's use of confidential information, distinct from her generally observable personal experiences with other employees, precludes a finding that Ms. Schaefer has already violated any client confidences."

Id. at *3. Second, it observed:

> Moreover, it is premature for the Court to make any factual determination about the evidence Ms. Schaefer will offer and whether it will betray any client confidences. Unless the Court makes a series of assumptions about the evidence that Schaefer is likely to use in the future, it is not clear that her relying on informal statements made to her by co-workers or any other facts regarding her own employment experience and prospects at GE would violate her client confidences.

Id. at *4 (citations omitted). These observations apply with equal force here. Defendants have made *no evidentiary showing* to support their assertion that Plaintiff has or will violate Rule 1.6 or to show what evidence she will offer in the future.

Defendants' brief cites to no Supreme Court or Second Circuit authority for the proposition they propound: that (purported) reliance upon privileged and/or confidential information necessitates dismissal. *See* Def. Mem., at iv (Table of Authorities). Instead, Defendants rely on only three cases that could conceivably be viewed as supportive of their argument. The three cases are: (1) *Ackerman v. National Property Analysts*, 887 F. Supp. 510 (S.D.N.Y. 1993); (2) *Eckhaus v. Alfa-Laval, Inc.*, 764 F. Supp. 34 (S.D.N.Y 1991); and (3) *Emle Industries v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). None of these are good law for the point Defendants are attempting to advance. As an initial observation, all three pre-date the Supreme Court's restatement of the applicable pleading standards, articulated in *Iqbal* and *Twombly*. More importantly, each of these cases was decided before the ethical rules governing controversies between lawyers and clients were altered, as set forth above, to expand the "claim or defense" exception to divulging client confidences in a dispute between a lawyer and a client.

Ackerman is additionally inapposite because it was a decision upon a motion to disqualify counsel, *after an evidentiary hearing* and submission of documents for *in camera* review (*see Ackerman, supra*, 887 F. Supp 510, at 513-15). The Court disqualified plaintiff's counsel upon a showing that defendants' former counsel had affiliated himself with plaintiff's counsel to represent investors, adverse to the prior client, in litigation "bearing directly on the subject matter" of the representation. *Id*. at 516. The Court's dismissal was in the context of relief afforded on the motion to disqualify, was *without prejudice*, and plaintiffs were expressly granted leave to re-file their complaint. *Id*. at 521.

Eckhaus, similarly, is inapposite, as it was decided under New York Code of Professional Responsibility Disciplinary Rule 4-101, which had a narrowed "claim or defense" exception, and

which was repealed effective April 1, 2009. *See* Code of Prof. Resp., DR 4-101 McK. Consol. Laws, Book 29 App., NY ST CPR DR 4-101.

Emle, likewise, is of no application here, because the decision affirmed a motion to disqualify counsel, not a grant of a motion to dismiss, where the attorney sought to represent a former client's adversary in litigation concerning the *identical* claim that was the subject of the first representation) ("It is clear, therefore, that there are matters in controversy in each case –both the nature and scope of control, if any, exercised by Burlington over Patentex–that are not merely 'substantially related,' but are in fact identical."). *See Emle, supra,* at 572. In other words, it didn't call into play the "claim or defense" exception to disclosure because it didn't concern a dispute between an attorney and their client wherein the attorney was defending against an accusation of wrongful conduct.

In contrast, here, the application of Rule 1.6's "claim or defense" exception to the prohibition against disclosure is triggered because Defendant allegedly terminated Plaintiff "for cause" (¶80) based upon a "supposed ethical breach of her professional ethics related to the *Genomatica* case." (¶83). Indeed, Defendants are specifically alleged to have accused Plaintiff of approving a settlement counter-proposal extended by the Company's outside counsel without first obtaining the required consent and approval of the Company's executives in Japan. (¶83). These allegations permit Plaintiff to disclose confidential information to the extent Plaintiff reasonably believes necessary.

Finally, the dearth of legal support for Defendants' position, along with their complete failure to even acknowledge the holding in *Schaeffer v. General Electric Company, supra,* let alone

differentiate the facts therein from the case at bar, justify an award to Plaintiff's counsel under FRCP Rule 11 for costs and fees incurred in opposition to Defendants' patently frivolous Motion.

III. The Complaint States a Claim Under NYLL §215

In the final pages of Defendants' brief, they argue that Plaintiff has failed to state a claim which can be granted under NYLL §215. Defendants premise their argument on the claim that "Nowhere in her Complaint, however, does Plaintiff allege that she, while an employee of MCHA, complained to Defendants of any NYLL violations." Def. Mem. at 21. Defendants' contention is wrong.

To state a claim for relief under Section 215, a plaintiff must allege that (1) "while employed by the defendant, he or she made a complaint about the employer's violation of New York Labor Law," and (2) he or she was "terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result." *Castagna v. Luceno*, 2011 WL 1584593, at *12 (S.D.N.Y. Apr. 26, 2011), aff'd, 744 F.3d 254 (2d Cir. 2014), and aff'd, 558 F. App'x 19 (2d Cir. 2014).

Here, Plaintiff alleges that she complained to Defendants of violations of the New York Equal Pay Act, codified under the New York Labor Law as NYLL §194. Claims for violations of the Equal Pay Act and the New York State Equal Pay Law may be evaluated under the same standard. *Rose v. Goldman, Sachs & Co.*, 163 F. Supp. 2d 238, 243 (S.D.N.Y. 2001). The New York Equal Pay Act is thus violated when a plaintiff shows that: (1) the employer pays different wages to members of the opposite sex, (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility, and (3) the jobs are performed under similar working conditions. *See Isbell v. City of New York*, 316 F. Supp.3d 571, 588 (S.D.N.Y. 2018).

The Complaint alleges, *inter alia*, that:

(1) "Mr. Oliva received disparately favorable treatment when he occupied the General Counsel title because he was male. For instance, Mr. Oliva received more compensation for the position than Ms. Fischman, even though both of them performed identical duties and responsibilities requiring equal skill, effort, and responsibility, under similar working conditions, during their respective tenures." ¶61.

(2) "Ms. Fischman complained to Pat Saunders, MCHA's Human Resources representative on multiple occasions, about the disparate treatment that Mr. Oliva was receiving in contrast to how Ms. Fischman was treated as Acting General Counsel and Chief Compliance Officer." ¶64.

(3) "Ms. Fischman proceeded to make additional complaints to Mitsubishi leadership about the discriminatory treatment of women. For instance, on March 1, 2016, Ms. Fischman complained to Mr. Oliva that one of the company's female employees was denied a severance package, while her male colleague had been offered a severance package under very similar circumstances. Ms. Fischman told Mr. Oliva that "they are treating Amber differently than they treated Dan, because she's a woman, and I won't be part of it." ¶73.

(4) "In retaliation for Ms. Fischman's complaints of gender discrimination and disparate treatment, described above, on January 30, 2017, upon her return to the office from a week-long trip with Mr. Oliva to California, Mr. Oliva terminated Ms. Fischman's employment." ¶80.

Taken together, and construed in the light most favorable to Plaintiff, as they must be on a motion to dismiss, these allegations thus constitute a complaint under New York's Equal Pay Act, NYLL

§194, for which Plaintiff suffered the adverse employment action of termination. Contrary to Defendants' contention (*see* Def. Mem. at 22, stating "Plaintiff, however, does not plead that she raised claims of unequal pay before she filed her Complaint, long after the alleged retaliatory conduct occurred."), the Complaint alleges that Ms. Fischman's complaints of disparate pay were made during the course of her employment, prior to her termination. Accordingly, Defendants' request for dismissal of Plaintiff's NYLL §215 claim has no merit.

IV. The Complaint States a Claim For Intentional Infliction of Emotional Distress

Defendants seek dismissal of Plaintiff's claim for Intentional Inflection of Emotional Distress on the basis that Plaintiff has failed to allege conduct that is sufficiently outrageous to support such a claim (see Def. Mem. at 22). The pertinent allegations are that:

- the Company gave Plaintiff a knowingly false negative review, with actual knowledge of its falsity, and placed it in Plaintiff's personnel file (¶78);
- fired her with no severance package (¶80) despite her being employed with the Company for over nine (9) years (¶10);
- denied her the opportunity to contact any of her colleagues to explain that she was leaving the Company, to wrap up outstanding client matters, and was essentially "frog-marched" out of the building by Human Resources, leaving other employees with the impression that she had committed a serious crime (¶81), and;
- that the Company's actions were motivated by animus with an intention to humiliate her, damage her personal and professional reputation, and silence her from making a claim of discrimination and retaliation (¶82).

Defendants cite *Castro v. New York City Bd. Of Educ. Personnel Dir.*, 1998 WL 108004 (S.D.N.Y. Mar. 12 1998) for the proposition that police escorting a former public school teacher

off school grounds doesn't constitute conduct shocking and outrageous enough to support a claim of intentional infliction of emotional distress. Again, Defendants ignore the difference between a motion to dismiss and a motion for summary judgment. *Castro* was decided on a motion for summary judgment, where Plaintiff was able to *prove* no other facts supporting the claim that plaintiff had been subjected to a "campaign of harassment and intimidation." *Id*. at *10. Here, Plaintiff is at the motion to dismiss stage, has pled other aggravating factors, enumerated above, including a culpable mental state, which plausibly state a claim. *See, e.g.*, *Lewis v. Nationwide Mut. Ins. Co.*, 2003 WL 1746050, *3 (D. Conn Mar. 18, 2003) (denying a motion to dismiss):

> Plaintiff alleges that he was fired on the eve of his family's Christmas vacation, his locked office was broken into while he was away, money he kept in his office was stolen, and his office furniture and other personal possessions were dumped on his front lawn by a moving company, all in violation of an express agreement he made with Nationwide management that he would return to the office and collect his belongings after his vacation. Accepting all these allegations as true, and construing them generously in light of the entire complaint, it is not clear beyond doubt that plaintiff can prove no set of facts consistent with his allegations that would cause a reasonable juror to find in his favor. If a juror were to find that the plaintiff's reasonable expectations were knowingly violated by the Company in a malicious attempt to humiliate him and inflict emotional distress, the juror might well exclaim "Outrageous!" Since that is the test, plaintiff's allegations are sufficient to enable him to proceed with his claim.

So too, here, Plaintiff was operating at the upper echelons of one of the most prestigious multinational companies, and was among the top of her field as in-house counsel. She had a reasonable expectation that she would be treated with grace and dignity and be allowed to preserve client relationships and future employment opportunities, which would be dependent upon references from what had been her only employer over the past nine years. Defendants' treatment of Plaintiff was completely unnecessary, particularly in light of Defendants' malicious motives and *actual knowledge* that Plaintiff had done nothing to merit termination, as well as the foreseeable harm to Plaintiff's employment prospects (and the actual destruction of her legal

career). A reasonable jury could, indeed, find this conduct sufficiently outrageous so as to merit a finding of liability in Plaintiff's favor. Accordingly, the claim should not be dismissed.

V. The Complaint States a Claim for Negligence

For similar reasons, Plaintiff's companion tort of negligence should not be dismissed. Defendants' brief erroneously characterizes Plaintiff's claim as one for tortious interference with prospective business relations (see Def. Mem. at 24), apparently because Plaintiff's counsel styled the cause of action as "Negligent Destruction of Plaintiff's Employment Opportunities." Defendants misconstrue the claim. The relevant allegations of the Complaint are identical to those supporting the claim for intentional infliction of emotional distress, set forth above. Plaintiff pleads, in the alternative, that if these facts do not arise to the level of an intentional tort, they at least meet the requisite levels of negligence to result in liability.

Negligence is a cause of action that has long been recognized under New York law:

> At common law, the servant's action against his employer for invasion of the servant's rights by the employer is for negligence. The name given the cause of action by the servant or the differing respects in which he asserts that his employer has wronged him are of no significance. The master owes his servant the duty of reasonable care, and the failure to observe reasonable care is negligence, a **840 wrong, and a tort. There are various classifications of the evidences of negligence, and of the facts that go to establish the perpetration of, and responsibility for, the resultant wrong, but the remedy is nevertheless in negligence.

Schmidt v. Merchants Despatch Transp. Co., 244 A.D. 606, 608 (App. Div. 1935), *aff'd as modified*, 270 N.Y. 287, 200 N.E. 824 (1936). Here, Plaintiff alleges that Defendants breached their duty of reasonable care by terminating Plaintiff's employment in a manner that all but guaranteed she would never work as an attorney again, destroying all of her client relationships and all of her references. We argue that no employer of attorneys would ever hire the former general counsel of a company the size of Defendant MCHA without requiring references from former employers and clients, and Defendant's manner of terminating Plaintiff needlessly

destroyed her employment prospects in this regard, violating Defendants' duty of care. Accordingly, this is a claim for negligence under New York law, not tortious interference, and the claim should be allowed to proceed as such.

VI. Should It Be Warranted, Plaintiff Respectfully Requests Permission To File a Motion for Leave to Amend the Complaint

Notwithstanding Plaintiff's fervent belief that all of her claims have been sufficiently pled at this stage of the litigation, Plaintiff requests permission to file a motion seeking leave to amend the Complaint in the event that any portion of Defendants' motion is granted. In connection with this request, Plaintiff wishes to alert the Court to a relatively recent line of authority which provides that it is improper for a District Court to require Plaintiff's counsel to amend a pleading *before* providing counsel with the benefit of the Court's reasoning as to why claims have not been sufficiently alleged in a pleading.

Undersigned counsel thus respectfully refers the Court to the relatively recent cases of *Lorely Financial v. Wells Fargo Sec., LLC,* 797 F.3d 160 (2d Cir. 2015), and the non-precedential case of *Cresci v. Mohawk Valley Cmty. Coll.*, 693 Fed. Appx .21, 25 (2d Cir 2017).

These cases provide that a plaintiff cannot be compelled to choose between: (i) amending their pleading before the District Court rules on a motion to dismiss; or (ii) not amending the pleading prior to ruling and forfeiting the opportunity to amend in the event that dismissal is granted, in order to further the District Court's interests in judicial economy. Instead, plaintiffs must be afforded the opportunity to amend their pleadings *after* they have received the Court's opinion determining that their pleading is deficient. The *Lorely* court made clear that "[w]ithout the benefit of a *ruling*, many a plaintiff will not see the necessity of amendment or be in a position to weigh the practicality and possible means of curing specific deficiencies." *Lorely*, *supra,* at 190 (emphasis added). Similarly, the *Cresci* court stated: "The proper time for a plaintiff to move to

amend the complaint is when the plaintiff learns from the District Court in what respects the complaint is deficient." *Cresci, supra*, at 25.

This past week, on December 31, 2018, the Second Circuit issued a summary order which again noted that it has rejected a procedure commonly used by District Courts, which requires the plaintiff to amend the pleading before a defendant moves to dismiss and the Court rules the motion, or else to forfeit the opportunity to do so. *See Kopchik v. Town of East Fishkill*, 2018 WL 6767369 (2d Cir. Dec. 26, 2018).

In the instant case, on December 4, 2018, the Court entered an order stating, *inter alia*: "Plaintiff shall file any amended complaint by January 4, 2019. Plaintiff will not be given any further opportunity to amend the complaint to address issues raised by the motion to dismiss." ECF No. 27. The undersigned respectfully requests that, in light of the authority identified above, the Court provide counsel with an opportunity to seek leave to amend the Complaint with the benefit of the Court's analysis in the event that the Court grants any portion of Defendants' motion.

CONCLUSION

For the reasons set forth herein, Defendants' motion should be denied in its entirety. In the alternative, Plaintiff should be granted leave to move to amend the Complaint.

Dated: Garden City, New York
January 4, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2019 a true and correct copy of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss was served via electronic email on all counsel of record.

Date: January 4, 2019

/s/ Matthew L. Berman
Matthew L. Berman, Esq.