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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AMY R. GURVEY,)	Case No.: 3:09-cv-00942 AJB (BGS)
)	
Plaintiff,	)	Order Denying Plaintiff’s Ex Parte
	)	Applications, [Doc. Nos. 148 and 149],
v.	)	Granting Defendants’ Motion for Summary
	)	Judgment, [Doc. No. 118], Denying
	)	Plaintiff’s Motion for Summary Judgment,
LEGEND FILMS, INC. <i>formerly known as</i>	)	[Doc. No. 132], Denying Plaintiff’s Motion
LEGEND FILMS, LLC, JEFFREY B. YAPP,	)	to Vacate, Transfer to SDNY for Trial, and
BARRY B. SANDREW, LEGEND3D, INC.,	)	for Extension of Time to File Pre-Trial
and LEGEND FILMS, LLC,	)	Documents, [Doc. No. 157], Denying
	)	Plaintiff’s Motion to Stay Preliminary Pre-
Defendants.	)	Trial Memo and Witness Lists, [Doc. No.
_____	)	161].

The Defendants have filed a motion for summary judgment (Doc. No. 118) on all of the causes of action in Plaintiff’s First Amended Complaint (“FAC”), (Doc. No. 78). The Plaintiff filed a cross motion for summary judgment, (Doc. No. 132), seeking a variety of sanctions and summary judgment on the issue of Plaintiff’s 3% interest in Legend Films. The Plaintiff filed ex parte applications, (Doc. Nos. 148 and 149), on January 19, 2012 seeking: (1) an extension of time to obtain counsel to file her reply brief, and (2) leave to file an amended complaint. The Plaintiff also filed a motion to vacate a prior stipulation and transfer the case to SDNY for trial, and for an extension of time to file pre-trial documents, (Doc. No. 157). Plaintiff also filed a motion for a stay on the preliminary pre-trial memo and witness lists, (Doc. No. 161). For the reasons set forth below, the Plaintiff’s ex parte applications,

1 (Doc. Nos. 148 and 149), are DENIED; Plaintiff’s motion for transfer and for extension of time to file
2 pre-trial documents, (Doc. No. 157), is DENIED; Plaintiff’s motion to stay preliminary pre-trial memo
3 and witness list (Doc. No. 161), is DENIED AS MOOT; Defendants’ motion for summary judgment,
4 (Doc. No. 118), is GRANTED; and Plaintiff’s cross motion for summary judgment, (Doc. No. 132), is
5 DENIED.

6 **Background**

7 ***I. The Parties***

8 Plaintiff, Amy Gurvey, is an attorney licensed to practice in the states of California and New
9 York with experience and training in entertainment and intellectual property law.¹ She was a resident of
10 New York until 2002, at which time she moved her residence to New Jersey. Ms. Gurvey contends that
11 she performed legal services for Defendant Legend Films, Inc. as well as individual Defendants between
12 2000 and 2002.

13 Defendant Legend Films, Inc. (“Legend”) is a San Diego-based company specializing in the
14 restoration and colorization of old black-and-white films and television shows for DVD, HDTV, and
15 theatrical release. Legend Films, LLC (“LLC”), the predecessor to Legend, was formed in 2001 by
16 Defendants Yapp and Sandrew, and was incorporated in Nevada. In 2003, Legend was incorporated in
17 California, and the LCC ceased to exist.

18 Defendant Barry Sandrew, Ph.D., is a California resident, and is currently serving as President
19 and Chief Operating Officer of Legend. Sandrew is the inventor of an all-digital process for colorizing
20 black and white films.

21 Defendant Jeffrey Yapp is currently a California resident and serves as Chairman of Legend’s
22 Board of Directors. In 2001, when the LLC was formed, Yapp was a resident of Oregon. Subsequently,
23 in 2001, Yapp began working for Cablevision Systems Corporation (“Cablevision”) in New York. In
24 late 2002, Yapp moved from Oregon to New York, where he remained until early 2006.

25 Defendant David Martin, a California resident, is Legend’s Chief Executive Officer and a
26 member of the company’s Board of Directors.

27
28 ¹The following facts here and in the “Background” section are taken from the FAC and the parties moving papers.

1 **II. Factual Background**

2 In late 1999, Plaintiff began performing legal services for Defendants Sandrew and Yapp in
3 connection with breach of fiduciary duty claims against certain board members of the American Film
4 Technologies, Inc. (“AFT”). At that time, both Sandrew and Yapp were AFT board members.

5 Sandrew and Yapp resigned from AFT on November 7, 2000. At that time, Plaintiff was
6 working on various projects for Sandrew, including review of patents, contracts, and employment
7 agreements pertaining to Sandrew and potential outsourcing companies. Plaintiff continued providing
8 legal services to Yapp and Sandrew, and allegedly at their request also began providing legal services to
9 Legend. Plaintiff’s “General Counsel” services included aid in: formation of the company, drafting and
10 reviewing contracts, proposals to film studios, intellectual property issues, and capital-raising activities.
11 The Plaintiff contends that at all relevant times, Legend allegedly held Plaintiff out to the public (e.g., in
12 its prospectus, business plan, and executive summary) as its General Counsel and part of its
13 management team.

14 On November 15, 2001, Plaintiff allegedly entered into an Employment Agreement (the
15 “Agreement”) with the LLC to serve as the company’s General Counsel. The Agreement was for an
16 initial term of two years commencing January 1, 2002, with an annual base salary of \$125,000 plus
17 other remuneration and benefits, including an ownership stake in Legend. The Agreement also
18 contained a provision that Plaintiff could only be terminated upon ninety days prior written notice with a
19 reasonable opportunity to cure any alleged failure to perform. Additionally, upon termination Plaintiff
20 would be entitled to salary, accrued time off, earned bonuses, stock options, and deferred compensation.
21 Any termination without cause would obligate Legend to pay Plaintiff \$100,000 as severance. Finally,
22 the Agreement allegedly contained a “Choice of Law/Forum” clause providing:

23 This Agreement is to be construed and enforced in accordance with the laws of the
24 State of New York, irrespective of the principles of conflicts of law. Any action
25 brought pursuant to this Agreement must be instituted in the federal or state courts of
26 the State of New York.
(Employment Agreement attached to Sandrew Decl., Ex. A, ¶ 10 (June 25, 2009).)

26 Although Plaintiff’s complaint appears to assert that the alleged Agreement was signed by both
27 parties, no signed agreement has been produced. Defendants included a copy of the “proposed” version
28 of the Agreement with their Motion to Dismiss, (Doc. No. 8), which they allege has been supplied by

1 Gurvey and was never signed by Legend or any of its employees. In her opposition to Defendants’
2 motion to dismiss, Gurvey concedes that the Agreement was never signed.² However, she continues to
3 maintain that a valid “contract” existed between the parties. *Id.*

4 In February of 2002, shortly after allegedly entering into the Agreement, Plaintiff joined the law
5 firm of Cowan, Liebowitz, & Latlaw, P.C. (“Cowan”) in an “of counsel” capacity. Under her
6 employment contract with Cowan, however, Plaintiff states that she was permitted to continue working
7 as general counsel to Legend, and Cowan held no rights to her 3% stock interest in Legend.

8 Ms. Gurvey claims that she continued to perform legal services for Legend through October of
9 2002. In November of 2002, Mr. Yapp allegedly informed her by phone she was to be terminated
10 without cause. Since then, Yapp has allegedly admitted that the company terminated Plaintiff because it
11 lacked funds to pay her. In September of 2008, however, it was reported that Legend had successfully
12 raised \$13 million in venture capital funding.

13 Plaintiff now claims she still has not been paid the \$125,000 salary, stock interest, and
14 \$100,000 severance owed to her under the Agreement, as well as for services rendered to individual
15 Defendants prior to the formation of the LLC. The Plaintiff contends that Mr. Yapp allegedly made
16 repeated representations to her that she would be paid under the Agreement that never came to fruition.
17 Moreover, in 2005, the Plaintiff alleges that in order to dissuade her from filing suit for breach of
18 contract, Defendants allegedly offered her 40,000 shares of Legend stock, but did not provide her with
19 requested due diligence documentation, so she was never able to ascertain the value of the offered
20 shares and therefore did not accept Defendants offer.

21 ***III. Procedural Background***

22 Plaintiff brought the instant action in the United States District Court for the Southern District of
23 New York on October 29, 2008. On December 8, 2008, Defendants moved to dismiss the complaint for
24 lack of personal jurisdiction or, in the alternative, to transfer the case. Before the New York court could
25 rule on the motion, however, the parties stipulated to the transfer of the action to the United States
26

27 ² According to Gurvey, “Although the parties never signed a contract, there was a meeting of the
28 minds about the terms of the contract and plaintiff had in fact performed under, and in reliance upon the
contract. The meeting of the minds on the terms is reflected in various documents none of which were
ever signed by both parties.” (Pl. Opp. to Def. MTD at 4-5.)

1 District Court for the Southern District of California. The case was transferred to this Court on May 1,
2 2009. (Doc. No. 1, p. 99-100).

3 The Plaintiff's complaint stated seven causes of action against Defendants as follows: (1) the
4 first cause of action is brought in Quantum Meruit against Defendants Sandrew and Yapp for services
5 rendered to these defendants in their capacity as directors of American Film Technologies ("AFT"); (2)
6 the second cause of action is brought in Quantum Meruit against Sandrew and Yapp for services
7 rendered to these individual defendants before the formation of Legend Films; (3) the third cause of
8 action is brought in Quantum Meruit against Legend Films for services rendered to Legend Films; (4)
9 the fourth cause of action is for breach of contract against Legend Films; (5) the fifth cause of action is
10 for breach of contract as to all Defendants; (6) the sixth cause of action is a claim of promissory estoppel
11 against all Defendants; and (7) the seventh cause of action seeks specific performance against Legend
12 Films.

13 The Defendants filed a motion to dismiss, (Doc. No. 8), which was granted-in-part and denied-
14 in-part by this Court's order of January 4, 2010, (Doc. No. 37). The Court granted Defendants' motion
15 to dismiss the first and second cause of action without leave to amend, finding these claims to be barred
16 by the statute of limitations.

17 The Plaintiff filed her FAC on March 30, 2011, in which she alleges the following six causes of
18 action: (1) Quantum Meruit against Legend Films; (2) breach of contract against Legend Films; (3)
19 breach of contract as to all Defendants; (4) promissory estoppel against all Defendants; (5) specific
20 performance against Legend Films; and (6) failure to pay wages pursuant to New York labor law section
21 198 against Legend Films.

22 The Defendants have filed a motion for summary judgment (Doc. No. 118) on all of the causes
23 of action in Plaintiff's First Amended Complaint ("FAC"), (Doc. No. 78). The Plaintiff filed a cross
24 motion for summary judgment, (Doc. No. 132), seeking a variety of sanctions and summary judgment
25 on the issue of Plaintiff's 3% interest in Legend Films. The Plaintiff filed ex parte applications, (Doc.
26 Nos. 148 and 149), on January 19, 2012 seeking: (1) an extension of time to obtain counsel to file her
27 reply brief, and (2) leave to file an amended complaint. The Plaintiff also filed a motion to vacate a
28 prior stipulation and transfer the case to SDNY for trial, and for an extension of time to file pre-trial

1 documents, (Doc. No. 157). Plaintiff also filed a motion for a stay on the preliminary pre-trial memo
2 and witness lists, (Doc. No. 161).

3 **Legal Standard**

4 “The court shall grant summary judgment if the movant shows that there is no genuine dispute as
5 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A
6 genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a
7 verdict for the non-moving party. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006).

8 In order to prevail, a party moving for summary judgment must show the absence of a genuine
9 issue of material fact with respect to an essential element of the nonmoving party's claim, or to a defense
10 on which the nonmoving party will bear the burden of persuasion at trial. *Nissan Fire & Marine Ins.*
11 *Co. v. Fritz Cos. Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the nonmoving party would bear the
12 burden of proof at trial, the moving party may satisfy its burden on summary judgment by simply
13 pointing out to the Court an absence of evidence from the nonmoving party. *Miller*, 454 F.3d at 987.
14 “The moving party need not disprove the other party's case.” *Id.*

15 Once the movant has made that showing, the burden shifts to the opposing party to produce
16 “evidence that is significantly probative or more than ‘merely colorable’ that a genuine issue of material
17 fact exists for trial.” *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9th Cir. 2009) (citing *FTC v.*
18 *Gill*, 265 F.3d 944, 954 (9th Cir. 2001)); *see also Miller*, 454 F.3d at 988 (“[T]he nonmoving party must
19 come forward with more than ‘the mere existence of a scintilla of evidence.’”) (quoting *Anderson v.*
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

21 The Court must review the record as a whole and draw all reasonable inferences in favor of the
22 nonmoving party. *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 736, 738 (9th Cir. 2000). However,
23 unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. *Id.*;
24 *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008). “Thus, ‘[w]here the record taken
25 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
26 issue for trial.’” *Miller*, 454 F.3d at 988 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*
27 *Corp.*, 475 U.S. 574, 587 (1986)).

1 Discussion

2 **I. Plaintiff's Ex Parte Applications**

3 As a preliminary matter, the Court will first address the Plaintiff's ex parte applications seeking:
4 (1) an extension of time to obtain counsel and file a reply brief, (Doc. No. 148); (2) leave to file a
5 Second Amended Complaint ("SAC") (Doc. No. 149); (3) the transfer of this case to the Southern
6 District of New York for trial and to vacate orders and further extend pretrial deadlines, (Doc. No. 157).

7 **A. Plaintiff's Ex Parte Application for an Extension of Time**

8 Ex parte applications for extensions of time are proper only if the prescribed time period has not
9 yet expired and if the party can show good cause. Fed. R. Civ. Pro. 6(b)(1)(A). Once the time has
10 expired, a noticed motion for relief, based on a showing of excusable neglect, is required. Fed. R. Civ.
11 Pro. 6(b)(1)(B).

12 The Plaintiff states in her ex parte applications³ that she is seeking additional time to find
13 counsel and file a reply brief due to her medical conditions, however, the Plaintiff's application
14 discusses medical conditions⁴ that occurred in 2009 through October 2011. See Doc. No. 148, pp. 3-6,
15 ¶¶ 1-7. None of the Plaintiff's discussion provides any justification for her failure to timely file her reply
16 brief by the November 28, 2011, deadline. Since the Plaintiff was able to file an opposition to
17 defendants' summary judgment motion and a cross-motion for partial summary judgment⁵ on October
18 22, 2011 and has not articulated any reason or demonstrate good cause for why she could not have
19 timely file a reply brief, the Plaintiff's request for an extension of time is hereby DENIED.

20 With regard to the Plaintiff's request for additional time to retain new counsel, the Court notes
21 that: (1) the Plaintiff is an experienced attorney; and (2) the Plaintiff has twice in the course of this case

22
23 ³ In reviewing the Plaintiff's applications, the Court notes that the Plaintiff has incorporated
24 arguments responsive to the Defendants' motion for summary. Despite their untimely nature, the Court
will accept and consider these arguments as Plaintiff's reply.

25 ⁴ The Plaintiff attached a doctor's note to her application, Doc. No. 148-3, p. 1, however, the
26 doctor's note does not appear to assist Plaintiff with her argument as it indicates only that she was under
27 the care of a doctor on December 29, 2011, and it is dated more than one month after Plaintiff's reply
was due.

28 ⁵ The Court notes that it accepted the Plaintiff's opposition and cross motion for summary
judgment despite the fact that they were filed late and exceed the allowable page limit without leave of
Court.

1 either discharged or refused to communicate with prior counsel, thereby causing counsel to file motions
2 to withdraw, Doc. Nos. 43 and 82. In light of the Plaintiff's request to substitute herself as counsel in
3 this case in June of 2011, Doc. No. 93, and the Plaintiff's failure to demonstrate any efforts in the
4 preceding months to retain counsel, the Plaintiff's request for additional time to obtain counsel to
5 prepare and file her reply is DENIED.

6 ***B. Plaintiff's Ex Parte Application for Leave to File a SAC***

7 The Plaintiff seeks leave to file a SAC to add new allegations and one new cause of action
8 against the current Defendants, as well as David Martin, a Defendant that was previously dismissed by
9 the Court. The Plaintiff does not allege that these allegations or cause of action are based on newly
10 discovered information. The Plaintiff states that she became aware of the supposed fraud that forms the
11 basis of her new allegations and cause of action at her deposition on March 23, 2011. *See* Doc. No. 148,
12 p. 16, ¶ 42-43. However, the Plaintiff filed her first amended complaint on March 30, 2011, which was
13 one week after her deposition, and did not include the new allegations of cause of action or seek leave
14 shortly thereafter to do so.

15 The deadline to amend the pleadings set by this Court's scheduling orders was February 22,
16 2011. *See* Doc. No. 69. The Plaintiff has failed to demonstrate good cause for: (1) the delay in
17 requesting amendment; or (2) her failure to follow the rules of this Court requiring Plaintiff to request
18 and obtain a hearing date for motion to amend. Based upon the foregoing and the fact that the Court
19 finds these new allegations and cause of action legally untenable and therefore futile, the Plaintiff's
20 improper, ex parte request seeking leave to amend is hereby DENIED.

21 ***C. Plaintiff's Motion to Transfer***

22 This case was transferred to this Court per a joint motion of the parties more than three years
23 ago. (Doc. No. 1, p. 99-100). In light of the parties stipulation to transfer to this Court and the
24 advanced stage of the litigation, this Court finds a transfer unwarranted and prejudicial as it would cause
25 undue delay. Accordingly, Plaintiff's motion to transfer is DENIED.

26 ***II. The Motions for Summary Judgment***

27 There are two motions for summary judgment presently before the Court, the Defendants'
28 motion for summary judgment, Doc. No. 118, and the Plaintiff's cross-motion for summary judgment,

1 Doc. No. 132. The Defendants' motion seeks summary judgment or, in the alternative, partial summary
2 judgment or, an order specifying material facts not in dispute pursuant to Rule 56 of the Federal Rules
3 of Civil Procedure. The Defendants argue that the Plaintiff's causes of action are barred by the statute
4 of limitations because any alleged agreement ended when plaintiff went to work at Cowan, Liebowitz &
5 Latlaw, P.C. ("Cowan") in or about February 2002.

6 Alternatively, the Plaintiff's cross-motion for summary judgment seeks Rule 11 sanctions, as
7 well as other sanctions in the form of leave to file an amended pleading, attorney's fees, denial of the
8 Defendants' motion for summary judgment and unconditional issuance of 3% of the shares of Defendant
9 Legend's stock.

10 ***A. All of Plaintiff's Claims Are Time-Barred by the Statute of Limitations***

11 The Plaintiff alleges in her FAC that she entered into a contract with Defendants on November
12 15, 2001. (FAC, ¶ 20.) Plaintiff claims that the terms of the contract entitled her to a 3% share in
13 Legend, as well as compensation at the rate of \$125,000 per year. *Id.* Although Defendants
14 emphatically dispute that any contract was ever formed (as more fully discussed below), even if a
15 contract was formed, Defendants argue that the Plaintiff breached the contract, and/or the contract ended
16 by mutual consent, shortly thereafter in February of 2002.

17 The Defendants contend that the accrual date for the Plaintiff's claims is the date that the
18 Plaintiff went to work full-time at Cowan in February 2002, because on that date, the Defendants
19 contend that the Plaintiff either breached the alleged employment agreement with Defendants or the
20 parties mutually consented to terminate the agreement. The Defendants argue that because the Plaintiff
21 did not file her complaint in the Southern District of New York until October 29, 2008, the six year
22 statute of limitations on the Plaintiff's claims has already run and the Plaintiff is precluded from
23 recovering the 3% share in Legend and compensation at the rate of \$125,000 per year.

24 Accepting Plaintiff's factual allegations as true, the contract was breached in November 2002,
25 while Plaintiff filed her Complaint in October 2008. However, Plaintiff's assertions are without merit.
26 The statute of limitations issue was decided by Judge Gonzalez in a previous motion. *See* Doc. No. 37.
27 Judge Gonzalez determined that New York had personal jurisdiction over Defendants and, therefore,
28 New York choice of law rules should be applied. *Id.* at 16:7-8. New York follows the "traditional

1 definition of accrual—a cause of action accrues at the time and in the place of injury. *Id.* at 19:4-5 citing
2 *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529 (1999). Judge Gonzalez determined that
3 Plaintiff’s causes of action all accrued in New Jersey, as Plaintiff was a New Jersey resident in October
4 2002. *Id.* at 19:8-9.

5 All six of Plaintiff’s claims have a six-year statute of limitations. *See* N.J. Stat. An. §2A:14-1;
6 *see also Iwanowa v. Ford Motor Co.*, 67 F.Supp. 2d 424, 473 (D.N.J. 1999) (citing *Miller v. Bd. of*
7 *Chosen Freeholders of Hudson County*, 10 N.J. 389, 409 (1952) (applying the six year statute of
8 limitations to “claims sounding in restitution/unjust enrichment or quantum meruit”).⁶

9 Defendants allege, and this Court agrees, that if any contractual relationship ever existed, that
10 relationship was terminated in February of 2002 when Plaintiff began working at Cowan law firm. By
11 starting work at Cowan, any alleged contract between plaintiff and defendants came to an end, as
12 Plaintiff either breached the alleged agreement or the parties terminated the alleged agreement by
13 mutual consent. *Lubliner v. Helmsley-Spear, Inc.*, 642 N.Y.S.2d 240, 241 (1996) (“It is settled that
14 where an employee under contract agrees to change positions, the previous employment contract comes
15 to an end[.]”); *Prillaman v. Century Indemnity Co. of Hartford, Conn.*, 138 F.2d 821, 823 (4th Cir.
16 1943) (“It is well established that the right to terminate contract by mutual consent exists independent of
17 any provision in the contract permitting the parties to do so[.]”).

18 Plaintiff argues that the statute of limitations should be tolled with respect to the quantum meruit
19 claim because of the alleged reassurances by Defendants that she would eventually be payed. However,
20 this exact argument was already rejected by Judge Gonzalez. (Doc. No. 37, p. 22:20-26). Judge
21 Gonzalez cited the Third Circuit in *Baer* which stated “[t]he essence of a quasi-contract claim is not the
22 expectancy of the parties, but rather the unjust enrichment of one of them.” 392 F.3d at 622. As a
23 result, Judge Gonzalez concluded, it would be “inappropriate” to look at Plaintiff’s expectations of
24 payment, rather than the services she provided to Defendants. *See id.* (Noting that the plaintiff’s belief
25

26 ⁶ Judge Gonzalez also noted that even if the pro-resident section of New York’s borrowing
27 statute applied, the result would be the same. Similar to New Jersey, New York would apply a six-year
28 statute of limitations to all of Plaintiff’s claims. *See* N.Y. C.P.L.R. §213.2 (applying a six-year statute
of limitation to all actions “upon a contractual obligation or liability, express or implied,” except for
several exceptions not applicable here); *see also Cohen v. City Co. of New York*, 283 N.Y. 112 (1940)
(applying the six-year statute of limitations to a quantum meruit claim). Doc. No. 37, p. 19:10-14, fn. 17.

1 “that he was going to get paid if and when the show was a success” was irrelevant). Plaintiff stopped
2 providing services to Defendants in her individual capacity in February 2002 and all of her clients
3 became clients of the Firm per her employment agreement she executed with the Firm upon accepting
4 an of counsel position in February of 2002. (Doc. No. 118-1, p. 4:4-8). Any alleged reassurances by
5 Defendants cannot defeat the statute of limitations for this claim.

6 Accordingly, the statute of limitations began to run at the latest in February 2002. *Schmidt v.*
7 *McKay*, 555 F.2d 30, 36 (2d Cir. 1977) (promissory estoppel claim accrues at the time of the promise);
8 *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993) (breach of contract claim accrues
9 at time of breach); *Franconia Associates v. United States*, 536 U.S. 129, 142 (2002) (same).

10 Furthermore, to the extent any such contract includes the stock options, Plaintiff contends those were
11 due to her “immediately” in January 2002. (Doc. No. 118-1, p. 10). By Plaintiff’s own admission,
12 therefore, any claim related to the stock options accrued in January 2002. Plaintiff filed the instant
13 action on October 28, 2008; at least eight months after the statute of limitations had run on all claims.
14 Based upon the foregoing, Plaintiff’s claims one through six are time-barred and Defendants’ motion for
15 summary judgement is GRANTED as to these claims.

16 ***B. Even if the Plaintiff’s Claims Were Not Time-Barred, These Claims Fail as a Matter***
17 ***of Law***

18 ***1. Plaintiff’s Claim for Quantum Meruit Fails as a Matter of Law***

19 To prove a claim for quantum meruit, the Plaintiff must show: (1) performance of services in
20 good faith; (2) acceptance of services by the person to whom they are rendered; (3) expectation of
21 compensation therefore; and (4) reasonable value of services rendered. *Evans-Freke v. Showcase*
22 *Contracting Corp.*, 926 N.Y.S.2d 140, 141 (2011); *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 437-38
23 (1992); *Liddle & Robinson, LLP v. Garrett*, 720 F.Supp.2d 417, 422 (S.D.N.Y. 2010). Plaintiff’s claim
24 fails for the following reasons: (1) Legend paid her for the performance of her services, as did her
25 employer Cowan; and (2) Plaintiff had no expectation of compensation.

26 Plaintiff was paid \$10,000 by Legend for the services she performed prior to February of 2002
27 when she commenced employment with Cowan. (Doc. No. 118-1, p. 17:14-20). Shortly thereafter,
28 Plaintiff began working for Cowan where her compensation included payment for work provided to

1 Legend. *Id.* at 17:23-24. As such, the Plaintiff has already been reasonably compensated for the work
2 she performed for Defendants. Plaintiff conceded that any work she performed for Defendants after
3 commencing working at Cowan was “included in [her] stock interest.” *Id.* at 17:27. Therefore, to the
4 extent Plaintiff argues she performed services for Legend after her employment at Cowan ended, she
5 admits that she did not expect any compensation for those services. *Id.* at 18:1-2. In fact, the contract
6 that she entered into with Cowan expressly stated that any payment she received from her clients
7 belonged to the firm. (Doc. No. 118-1, p. 4:4-8). Plaintiff was also receiving compensation from
8 Cowan for her work at the firm, which included work for the Defendants. This salary was verified in a
9 contractual dispute between Plaintiff and Cowan. *See Gurvey v. Cowan, Leibowitz & Latman, PC*, 06-
10 cv-1202 (BSJ)(SDNY); 2d Cir. Consolidated Appeal Nos. 9-2185; 10-4111 (February 10, 2012).

11 Plaintiff has failed to raise an issue of material fact regarding her claim for quantum meruit.
12 Even if this claim were to survive the statute of limitations, it fails on the merits. Accordingly, summary
13 judgment is GRANTED in favor of Defendants on Plaintiff’s quantum meruit claim.

14
15 **2. Plaintiff’s Breach of Contract Claims Against Legend Films and Individual Defendants**

16 Plaintiff’s second and third causes of action are for breach of contract against Legend Films and
17 the individual Defendants. Here, Plaintiff cannot prove that a contract existed between the parties, and
18 even if it did, the claim is barred by the statute of frauds. Additionally, if the parties entered into any
19 agreement, such an agreement would be in violation of the professional rules of conduct and
20 unenforceable.

21 **a. No Contract Existed Between the Parties**

22 To recover for a breach of contract, a plaintiff must prove: (1) the existence of a contract; (2) the
23 plaintiff’s performance under the contract; (3) the defendants breach under the contract; and (4)
24 resulting damages. *JP Morgan Chase v. J.H. Elec. of New York*, 893 N.Y.S.2d 237, 239 (2010);
25 *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 421 F.Supp.2d 831, 833 (D.N.J. 2006). A
26 party seeking to enforce the contract has the burden of proving a valid and enforceable contract existed.
27 *Allen & Company v. Occidental Petroleum Corp.*, 382 F. Supp. 1052, 1055 (S.D.N.Y. 1974). Here,
28

1 Plaintiff cannot show that a valid contract existed between her and any of the corporate or individual
2 defendants.

3 First, there is no dispute that the parties never entered into a written agreement. (Doc. No. 118-1
4 p. 14:15-16; Gurvey depo. 160:14-16). Although Plaintiff provided Legend with a proposed contract,
5 that contract was never signed. *Id.* at 14:16-17. In New York, “unsigned writings prepared by a
6 plaintiff, without more, do not suffice to bind a defendant.” *Karlin v. Avis*, 457 F.2d 57, 62 (2d Cir.
7 1972). Even if Plaintiff alleges the formation of an oral agreement, that argument cannot survive
8 summary judgment because Plaintiff cannot show that there was any meeting of the minds as to the
9 material elements of the contract.

10 Contract formation requires an offer, acceptance, and consideration. *N.F.L. Ins. Ltd. v. B & B*
11 *Holdings, Inc.*, 874 F. Supp. 606, 610 (S.D.N.Y. 1995). The formation of a contract also requires that at
12 least two parties mutually assent to the material terms of the contract. *International Paper Co. v.*
13 *Suwyn*, 966 F. Supp. 246, 254 (S.D.N.Y. 1997) (contract enforceable under New York law only if there
14 is a “meeting of the minds between the parties regarding the material elements of the agreement.”). A
15 mere agreement to agree renders the contract unenforceable. *Mar Oil, S.A. v. Morrissey*, 982 F.2d 830,
16 840 (2d Cir. 1993) (“[A] purported contract that leaves the compensation term to be determined by
17 future negotiations is a mere ‘agreement to agree,’ and under New York law is deemed too indefinite to
18 be enforceable.”).

19 In the instant case, the Court finds that there was no meeting of the minds as to the material
20 terms of the alleged agreement such as dilution of the stock options, the amount and the vesting period.
21 The Plaintiff acknowledges disagreement over the material terms of the offer to provide her shares in
22 Legend. (Doc. No. 118-1, p. 14:23-24). The Plaintiff’s complaint explains that “shares were not to be
23 issued with any required vesting period. The parties never agreed that the shares would or could be
24 diluted.” (Doc. No. 78, p. 7:12-17.) However, dilution is the standard practice at Legend. (Doc. No.
25 118-1, p. 15:3). Every common share of stock at Legend since its inception, including the shares
26 belonging to Legend’s founders, have been subject to dilution. *Id.* at 15:4-6. Such a significant
27 deviation from the norm would lend itself to said terms being in writing. Plaintiff cannot demonstrate
28 and has failed to offer any evidence to dispute the fact that no meeting of the minds occurred with

1 respect to Plaintiff's alleged entitlement to stock options. Based upon the foregoing, the Court finds that
2 the Plaintiff has failed to demonstrate as a matter of law that there was a meeting of the minds as to
3 material elements of the alleged Agreement to issue a 3% interest in Legend's stock .

4 ***b. Plaintiff's Claim for Breach of Contract is Barred By the Statute of***
5 ***Frauds***

6 The statute of frauds provides that any agreement is void if, "[b]y its terms [it] is not to be
7 performed within one year from the making thereof" unless that agreement is in writing and 'subscribed
8 by the party to be charged therewith.'" N.Y. Gen. Oblig. Law 5-701; *City of Yonkers v. Otis Elevator*
9 *Company*, 649 F. Supp. 716, 726 (S.D.N.Y. 1986).⁷ Plaintiff's FAC alleges that she had an agreement
10 to work for Legend "for an initial term of two (2) years commencing January 1, 2002." (Doc. No. 78,
11 p.7:4-5). This agreement could not have been completed within a year and therefore falls within the
12 statute of frauds. Because defendants never signed the alleged Agreement with Plaintiff, any claim for
13 breach of the alleged Agreement is barred by the statute of frauds.

14 Plaintiff refers in her opposition to a series of emails exchanged between her and Defendants
15 throughout the time period. Plaintiff does not allege these emails comprise the contract, but merely that
16 they refer to an understanding previously established by the parties. However, none of these emails
17 discuss the specifics of any contract, nor do they outline any material terms necessary to create a valid
18 contract. Such writings are not sufficient to establish the elements of a valid contract or survive the
19 statute of frauds. The statute of frauds exists to protect against such understandings forming the basis of
20 valid contracts as a means of preventing fraud in legal transactions particularly susceptible to deception,
21 mistake and perjury. *Shaftel v. Dadras*, 39 F.Supp.2d 217, 228 (1999). Contracts for a period greater
22 than one year is such a context. Thus, any alleged contract is unenforceable due to the statute of frauds.

23 ***c. Plaintiff's Alleged Contract With Legend Violated the Rules of***
24 ***Professional Conduct, And Is Unenforceable***

25 The Rules of Professional Conduct in California, New Jersey and New York all require Plaintiff
26 to advise Legend to seek independent counsel before entering into a business transaction with them

27 ⁷ New York law applies because Plaintiff alleges the agreement was made while she lived there.
28 N.Y. Gen. Oblig. Law 5-701 (focused on "the making" of an agreement; FAC, ¶20 (alleged agreement
formed in November 2001); Doc. No. 37, p. 18-19 (noting that Plaintiff resided in New York until April
2002)).

1 whereby she would acquire an ownership interest in the company. Plaintiff was also required to obtain
2 Legend's written consent to any arrangement resulting in her having an ownership interest in the
3 company.

4
5 A lawyer may not enter into a business transaction with a client or knowingly
6 acquire an ownership . . . or other pecuniary interest unless; (1) the transaction
7 and terms in which the lawyer acquires the interest are fair and reasonable to the
8 client and are fully disclosed and transmitted in writing to the client in a manner
9 and terms that should have reasonably been understood by the client; (2) the
10 client is advised of the desirability of seeking and is given a reasonable
11 opportunity to seek the advice of independent counsel of the client's choice on the
12 transaction; and (3) the client consents in writing thereto.

13 N.J. Rules of Prof. Conduct, Rule 1.8; *see also* N.Y. Rules of Prof. Conduct, Rule 1.8; Cal. Rules of
14 Prof. Conduct, Rule 3-300. Plaintiff conceded there was no signed writing between the parties.
15 Furthermore, the Plaintiff has failed to produce any writing indicating that she advised Defendants to
16 seek counsel or that they subsequently consented to the grant of stock options to the Plaintiff.

17 Additionally, the Rules of Professional Conduct in all relevant states further obligate the Plaintiff
18 to communicate the basis, rate and fees to the Defendants in writing. N.J. Rules of Prof. Conduct, Rule
19 1.5(b); N.Y. Rules of Prof. Conduct, Rule 1.5(b). Defendants allege and Plaintiff fails to offer any proof
20 that she did so. Indeed, Plaintiff admits to never having received a retainer agreement from Defendants
21 at any point. (Doc. No. 118-1, p. 11: 20-21).

22 Therefore, even if a contract existed between the parties, the contract would be unenforceable as
23 it violates the rules of professional conduct. *Raphael v. Shapiro*, 587 N.Y.S.2d 68, 72 (1992) (violation
24 of the Rules of Professional Conduct rendered contract void and unenforceable; plaintiff should not be
25 permitted to reap the benefits of a void and unenforceable contract); *Ford v. Albany Medical Center*,
26 724 N.Y.S.2d 795, 797 (2001) (contract unenforceable because attorney violated the Code of
27 Professional Responsibility); *City of New York v. 17 Vista Associates*, 599 N.Y.S.2d 549, 553 (1993)
28 (“Contracts contrary to public policy are unenforceable and courts will not recognize rights purportedly
arising from them.”)

For all of the above mentioned reasons, summary judgement is GRANTED in favor of
Defendants on Plaintiff's second and third causes of action for breach of contract.

1 **3. Plaintiff's Claims of Promissory Estoppel Against All Defendants**

2 Plaintiff's fourth cause of action for promissory estoppel against all Defendants fails even if the
3 claim is not time barred because the individual Defendants never provided a clear and unambiguous
4 promise to her and the Plaintiff has already been compensated for her work at Legend.

5 To establish a claim for promissory estoppel a plaintiff must prove: (1) a clear and unambiguous
6 promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an
7 injury sustained in reliance on the promise. *Rogers v. Town of Islip*, 646 N.Y.S.2d 158, 158 (1996);
8 *Peck v. Imedia, Inc.*, 293 N.J. Super. 151, 165 (1996); *Roberts v. Karimi*, 204 F. Supp.2d 523, 527
9 (E.D.N.Y. 2002). Here, Plaintiff cannot prove that there was a clear and unambiguous promise from
10 either one of the individual defendants or that she suffered an injury. In fact, Plaintiff conceded that
11 there was ambiguity with the alleged promise. (Doc. No. 118-1, p. 18:23-24 [Gurvey depo. 199:16-
12 200:2]). Moreover, Plaintiff received \$10,000.00 for services performed from Legend and an additional
13 salary from Cowan. *Id.* at 19: 3-4; [Gurvey Depo. 177:10-18]. She already received compensation for
14 her work both by Legend and by Cowan and thus has not been injured by any reliance on the promise.
15 Accordingly, Plaintiff cannot prove the necessary elements of the claim for promissory estoppel.

16 Based upon the foregoing, the Court GRANTS Defendant's motion for summary judgment as to
17 Plaintiff's fourth claim for promissory estoppel.

18 **4. Plaintiff's Claims for Specific Performance Against Legend Films**

19 Plaintiff's fifth cause of action is for specific performance against Defendant Legend Films.
20 Because Plaintiff cannot establish the existence of a contract (as discussed above), she cannot compel
21 specific performance. Furthermore, Plaintiff's claim for specific performance is barred by the doctrine
22 of laches. "The defense of laches, in a suit for specific performance, is to be considered wholly
23 independent of the Statute of Limitations." *Richardson v. Vajiradhammapadip Temple*, 807 N.Y.S.2d
24 392, 392 (2005); *Lavin v. Board. of Educ. of City of Hackensack*, 90 N.J. 145, 151 (1982).
25 "Unexplained delay is evidence of waiver an acquiescence in non-performance." *City of New York v.*
26 *New York Cent. R.R. Co.*, 275 N.Y. 287, 293 (1937). "Although the action is brought within the period
27 prescribed by the statute, it may have been delayed as to preclude the granting of equitable relief" if the
28 defendant can show the plaintiff is guilty of an unreasonable, prejudicial delay. *Richardson*, 807

1 N.Y.S.2d at 393; *Lavin*, 90 N.J. at 152-53; *see also Cantrell v. Hayduck*, 45 N.Y.2d 925, 927 (1978)
2 (under doctrine of laches, delay of approximately two months can bar claim).

3 In terms of the stock options, Plaintiff claims that Legend should have provided her with shares
4 of stock in January 2002. (FAC ¶20(d)(I) [noting that the alleged agreement commenced in January
5 2002 with “Class B shares (600) to be due, owing, and payable immediately for past services”].)
6 Plaintiff alleged that she performed services for Legend after she left to work at Cowan, but later
7 conceded that work was part of her supposed agreement for shares in January 2002. (Doc. No. 118-1, p.
8 16:18-19). Any salary claims arose at the latest in February of 2002, yet Plaintiff waited until October
9 2008 to file this lawsuit. In the meantime, Legend has operated its business, and sought financing for its
10 business, with representations of its ownership that did not include Plaintiff. *Id.* Therefore, laches bars
11 Plaintiff’s claim for specific performance.

12 **5. Plaintiff’s Claim for Violation of New York Labor Law Section 198**

13 Plaintiff’s sixth claim is for failure to pay wages under New York labor law section 198. New
14 York Labor Law, Article 6, which governs an employers payment of wages and benefits to an employee,
15 defines an employee as “any person employed for hire by an employer in any employment.” New York
16 Labor Law §190(2). This definition excludes independent contractors. *Akgul v. Prime Time*
17 *Transportation*, 741 N.Y.S.2d 553, 556 (2002).

18 **a. Plaintiff was Not Employed at Legend**

19 When determining whether an employer-employee relationship exists, the critical inquiry is the
20 degree of control exercised by the purported employer over the results produced or the means used to
21 achieve those results. *Bhanti v. Brookhaven Memorial Hospital Medical Center, Inc.*, 687 N.Y.S.2d
22 667, 669 (1999); *Bynog v. Cipriani Group Inc.*, 770 N.Y.S.2d 692, 695 (2003); *Barry & Sons, Inc. v.*
23 *Instinct Productions LLC*, 783 N.Y.S.2d 225, 235 (2004) (reversed, in part, on other grounds). The
24 factors relevant in assessing such control include whether the worker: (1) worked at her own
25 convenience; (2) was free to engage in other employment; (3) received fringe benefits; (4) was on the
26 employers payroll; and (5) was on a fixed schedule. *Bynog*, 770 N.Y.S.2d at 695; *Barry & Sons, Inc.*,
27 783 N.Y.S.2d at 235.

1 Here, the Court finds for the following reasons that the Plaintiff was not employed by Legend.
2 First, Plaintiff worked at her own convenience, (Doc. No. 118-1, p. 20) and Legend did not supervise
3 her work or work product, but simply received her work product when it was finished. *Id.* at 20:5.
4 Second, Plaintiff was not only free to engage in other employment, she did engage in other, full-time
5 and exclusive employment. Plaintiff started working for Cowan in February of 2002, (FAC ¶25), and
6 was paid a full salary from Cowan, awarded in a lawsuit judgment in Plaintiff's favor. (Doc. No. 118-1,
7 p. 20:20-23). This salary included payment for services rendered to Legend. *Id.* at 20:23-24. Third,
8 Plaintiff did not receive any benefits during the period that she performed work for Legend and was
9 never on Legend's payroll. *Id.* at 20:3-12. Plaintiff admits she never received a paycheck from Legend,
10 although she did receive a lump sum payment in the form of \$10,000.00. *Id.* at 12-14. Finally, Plaintiff
11 did not work on a fixed schedule, but was responsible for completing tasks at her convenience. *Id.* at
12 20:4-5. Based upon the foregoing, the Court finds that the Plaintiff cannot establish that she was
13 employed by Legend. Accordingly, summary judgment is GRANTED for Defendants on the Plaintiff's
14 sixth cause of action.

15 ***b. Summary Judgment is Appropriate Regardless of the Choice of Law***

16 In Defendant's previous motion to dismiss, Judge Gonzalez determined that New Jersey law
17 should be applied to Plaintiff's claims because Plaintiff was a New Jersey resident when the claims
18 arose in October of 2002. (Doc. No. 37, p. 19:8-11). Plaintiff cannot continue to assert a claim based
19 on New York law if the Court has already determined that this claim is governed by New Jersey law.
20 Accordingly, summary judgment is GRANTED as to Plaintiff's claim for failure to pay wages under
21 New York's labor law.

22 Even if Plaintiff were to convince this Court that New York law should govern her claim,
23 summary judgment is still appropriate. Plaintiff last resided in New York in April 2002 and the statute
24 of limitations for this cause of action is six years. *See* N.Y. Lab. Law §198 ("Notwithstanding any other
25 provision of law, an action to recover upon a liability imposed by this article must be commenced within
26 six years.") Plaintiff did not file this cause of action until October 2008 and thus her claim is barred by
27 the statute of limitations.
28

1 Conclusion

2 For the reasons set forth above, the Court rules as follows on the pending motions.

3 1) Plaintiff's ex parte applications, (Doc. Nos. 148 and 149), are DENIED;

4 2) Plaintiff's motion for transfer and for extension of time to file pre-trial documents,
5 (Doc. No. 157), is DENIED;


6 3) Plaintiff's motion to stay preliminary pre-trial memo and witness list (Doc. No. 161),
7 is DENIED AS MOOT;

8 4) Defendants' motion for summary judgment, (Doc. No. 118), is GRANTED;

9 5) Plaintiff's cross motion for summary judgment, (Doc. No. 132), is DENIED.

10 IT IS SO ORDERED.

11
12 DATED: September 14, 2012

13 
14 Hon. Anthony J. Battaglia
U.S. District Judge