

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2005

5 (Argued: September 8, 2005; Last Submission: June 16, 2006)
6 (Decided: September 25, 2006)

7
8 Docket No. 04-5473-cv

9 -----X

10 JOSEPH ACHTMAN, SHIRLEY ACHTMAN, BLAIR AMBACH, THEODORE
11 ANDREOZZI, SONDR A BAER-MILLER, for the estate of JENNY BAER,
12 SANDY BERKOWITZ, JOSEPH BERLINGER, ELISSA BERLINGER, GUSTAVE
13 BIRNBERG, FAITH BIRNBERG, GEORGE CAGEN, YVETTE COHEN, SELMA
14 DAUBER, MARTIN DAUBER, ISABEL EZERSKY, PAUL EZERSKY, DOROTHY
15 FEIGENBAUM, RICHARD FLYNN, individually and for the estate of
16 HERBERT FLYNN, DOROTHY GATSON, ERWIN GATSON, GUNTHER GLASER,
17 GRACE GLUCK, SAUL GLUCK, BERNARD GREENBERG, RONA GREENBERG, BRIAN
18 HENRY, ALBERT HODES, ANROLD JACOBS, HAGOP JAMGOCHIAN, SHAMIRAM
19 JAMGOCHIAN, HARRY KAISERMAN, LAWRENCE KESSLER, CARL KEVORKIAN,
20 LINDA TABRIS, for the estate of BERNICE KRAMERA, FREDERICK H.
21 KROLL, WILLIAM LENNEY, SYLVIA LEVINE, SIDNEY LEVINE, DORIS LEVY,
22 LAWRENCE LINDY, ANTHONY LONGO, JOSEPH A. LONGO, HARRY MANDELBAUM,
23 BLANCHE MANDELBAUM, HENRY MEDVIN, SELMA MEDVIN, CAROL PEYSER,
24 RENEE PFAU, HYMAN ROCK, PHILLIP ROSS, LLOYD SCHILDCROUT, ALBERT
25 SHERIDAN, ELEANOR SILVERSTEIN, STANLEY SINGER, JOE SINGER,
26 KENNETH SMITH, HAROLD SOMMERS, MELVIN SPENCER, BEN SPENCER,
27 RUSSELL STOTT, ANNE STOTT, PAUL TRUSIK, HARRIET WALLSHEIN, S.
28 JOSEPH WALLSHEIN, ELEANOR WEIDEMEYER, HARRY WEINSTEIN, EDITH
29 WEINSTEIN, ELAINE ZINBERG, GENIA ZWIRN, and DAVID ZWIRN,

30
31 Plaintiffs-Appellants,

32 - v. -

33 KIRBY, MCINERNEY & SQUIRE, LLP and BERNSTEIN, LITOWITZ, BERGER &
34 GROSSMAN, LLP,

35
36 Defendants-Appellees.

37 -----X

1 Before: CARDAMONE, McLAUGHLIN, and POOLER, Circuit Judges.

2
3 Plaintiffs initially appealed from the dismissal of their
4 legal malpractice action by the United States District Court for
5 the Southern District of New York (Sprizzo, J.). The district
6 court concluded that the complaint failed to state a claim upon
7 which relief could be granted. We remanded to the district court
8 to explore whether it had subject matter jurisdiction over the
9 suit. The district court has now done so, and we agree that
10 subject matter jurisdiction exists and that the malpractice
11 claims were properly dismissed pursuant to Federal Rule of Civil
12 Procedure 12(b)(6).

13 AFFIRMED.

14 ARNOLD E. DiJOSEPH, III, DiJoseph &
15 Portegello, P.C., New York, N.Y.,
16 for Plaintiffs-Appellants.

17 BERTRAND C. SELLIER, Proskauer Rose
18 LLP, New York, N.Y. (Tom Stein, on
19 the brief), for Defendants-
20 Appellees.

21
22 McLAUGHLIN, Circuit Judge:

23 Plaintiffs brought a putative class action against their
24 former attorneys, Kirby, McInerney & Squire, LLP ("Kirby") and
25 Bernstein, Litowitz, Berger & Grossman, LLP ("Bernstein") in the
26 United States District Court for the Southern District of New York
27 (Sprizzo, J.). Both firms had served as class counsel in a

1 separate earlier securities class action and it is the firms'
2 conduct in litigating the securities action that is now alleged by
3 the plaintiffs to have constituted malpractice. The district court
4 dismissed the malpractice complaint for failure to state a claim
5 after determining that defendants' actions were reasonable as a
6 matter of law.

7 We remanded to the district court for the limited purpose of
8 having it explain its basis for exercising subject matter
9 jurisdiction over the action. The district court subsequently
10 identified three possible bases for subject matter jurisdiction:
11 (1) the terms of an injunction it entered in the underlying
12 securities class action pursuant to its authority under 28 U.S.C.
13 § 1651; (2) diversity jurisdiction if non-diverse plaintiffs are
14 dismissed as unnecessary parties; and (3) supplemental jurisdiction
15 under 28 U.S.C. § 1367(a). While we are querulous as to the first
16 two contentions, we agree that supplemental jurisdiction exists.
17 Accordingly, we now reach the merits and affirm the judgment of the
18 district court.

19 **BACKGROUND**

20 In April 1996, the first of several class action complaints
21 were filed in federal courts against the Bennett Funding Group
22 ("BFG"), an equipment finance company based in Syracuse, New York.
23 The complaints alleged that BFG and other entities had committed
24 securities fraud by swindling investors out of more than \$500

1 million through an elaborate "Ponzi" scheme involving sham
2 contracts and chimerical financial statements. The various BFG
3 actions were ultimately referred by the Judicial Panel on Multi-
4 District Litigation to the United States District Court for the
5 Southern District of New York for pre-trial consolidation before
6 Judge John E. Sprizzo.

7 In August 1996, Kirby and Bernstein were appointed co-lead
8 counsel in the consolidated BFG action, and several months later
9 the district court certified a class of over 20,000 investors in
10 BFG securities. A Notice of Pendency was mailed to the class,
11 advising them of the nature of the suit and listing all parties
12 named as defendants. Conspicuously absent from the catalog of
13 alleged wrongdoers was the accounting firm of Arthur Andersen & Co.
14 ("Andersen"), which had audited BFG's allegedly misleading 1989 and
15 1990 financial statements.

16 The district court ultimately approved a \$125 million
17 settlement with BFG's insurers and a \$14 million settlement with
18 the accounting firm of Mahoney Cohen & Co. ("Mahoney Cohen"), which
19 had succeeded Andersen as BFG's auditor. On three occasions in
20 approving fee applications by Kirby and Bernstein, the district
21 court repeatedly lauded the "novel and creative" approach of the
22 firms, which produced an "exceptional result for the class."
23 Plaintiffs here—who were also plaintiffs in the BFG securities

1 class action-did not object to either settlement or the award of
2 attorneys' fees.

3 Meanwhile, since 1996, other law firms had been bringing
4 individual actions against Andersen on behalf of BFG investors and
5 had met some success. When some of these firms eventually
6 attempted to bring a class action against Andersen in the Southern
7 District of New York in May 1999, the district court dismissed the
8 claims on statute of limitations grounds.

9 In April 2002, the law firm of Chikovsky & Shapiro began
10 contacting BFG litigation class members about pursuing a possible
11 malpractice action against Kirby and Bernstein, specifically for
12 their failure to sue Andersen. Kirby and Bernstein quickly moved
13 for an injunction prohibiting Chikovsky & Shapiro and related firms
14 from contacting class members without court approval. In July
15 2002, Judge Sprizzo issued an injunction (the "Injunction") barring
16 such communications and prohibiting Chikovsky & Shapiro, related
17 firms, and members of the BFG securities class from "[f]iling
18 and/or proceeding with any legal malpractice claim against Class
19 counsel relating to losses incurred in Bennett Funding securities
20 in courts other than in this Court."

21 Foreclosed by the statute of limitations from suing Andersen
22 itself, plaintiffs brought the present malpractice putative class
23 action in December 2002 on behalf of BFG litigation class members

1 against Kirby and Bernstein in the Southern District of New York.¹
2 Plaintiffs alleged that defendants failed to: (1) name Andersen as
3 a defendant in the BFG class action litigation; (2) list Andersen
4 as a party who could be sued-but was not-in the Notice of Pendency;
5 and (3) advise the plaintiffs as to the statute of limitations on
6 claims against Andersen.

7 In September 2004, the district court dismissed plaintiffs'
8 complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for
9 failure to state a claim. Achtman v. Kirby, McInerney & Squire,
10 LLP, 336 F. Supp. 2d 336, 338 (S.D.N.Y. 2004). The court
11 acknowledged that some individual BFG investors had already sued
12 Andersen in separate actions and had reached settlements. It
13 determined, however, that because of the doctrinal uncertainty
14 surrounding auditor securities fraud liability and because BFG
15 securities issued during Andersen's tenure had been largely paid
16 down by the time the BFG litigation started, defendants' decision
17 not to sue Andersen was reasonable as a matter of law. Id. at 340-
18 41.

¹ As the district court properly noted in response to our query, the complaint indicates that the malpractice action was brought by "CHIKOVSKY & SHAPIRO, P.A.," one of the firms subject to the Injunction. Achtman v. Kirby, McInerney & Squire, LLP, 404 F. Supp. 2d 540, 544 (S.D.N.Y. 2005). Plaintiffs' counsel on this appeal, DiJoseph & Portegello, P.C., was also their "Trial/Local Counsel" before the district court, and so was subject to the Injunction as an entity acting in concert with Chikovsky & Shapiro. Id.

1 When plaintiffs appealed to this court, we expressed some
2 doubt as to whether subject matter jurisdiction existed over the
3 malpractice claims. We instructed the parties to supplement their
4 merits briefs with letter briefs on the jurisdictional issue.
5 Concerned that the complaint based jurisdiction solely on the
6 Injunction's requirement that any legal malpractice action be
7 brought in the Southern District of New York, we remanded to allow
8 the district court to clarify its basis for exercising subject
9 matter jurisdiction over this suit. See Achtman v. Kirby,
10 McInerney & Squire, LLP, 150 Fed. Appx. 12, 15 (2d Cir. 2005).

11 On remand, the district court identified three possible bases
12 for subject matter jurisdiction:

- 13 • First, the district court stated that it had the
14 authority to issue the Injunction under 28 U.S.C. § 1651
15 (the "All Writs Act"), and it "therefore, under the terms
16 of the Injunction Order, . . . has subject matter
17 jurisdiction over the [malpractice] action." Achtman v.
18 Kirby, McInerney & Squire, LLP, 404 F. Supp. 2d 540, 544-
19 45 (S.D.N.Y. 2005).
- 20 • Second, the court noted that diversity jurisdiction could
21 be salvaged pursuant to Federal Rule of Civil Procedure
22 21 if all non-diverse plaintiffs were dismissed as
23 unnecessary parties. Id. at 547-48.

- 1 • Third, the district court analogized the present
2 malpractice action to a fee dispute and found that
3 supplemental jurisdiction existed pursuant to 28 U.S.C.
4 § 1367. Id. at 546-47.

5 Plaintiffs raise both the jurisdictional argument and the
6 dismissal of their complaint for failure to state a claim. We (a)
7 find that supplemental jurisdiction exists over the malpractice
8 claims, and (b) affirm the district court's dismissal on the
9 merits.

10 **DISCUSSION**

11 I. Subject Matter Jurisdiction

12 _____ "In reviewing a district court's determination of whether it
13 has subject matter jurisdiction, we review factual findings for
14 clear error and legal conclusions de novo." Gualandi v. Adams, 385
15 F.3d 236, 240 (2d Cir. 2004) (citing London v. Polishook, 189 F.3d
16 196, 198 (2d Cir. 1999)).

17 _____ "The power of the inferior federal courts is 'limited to those
18 subjects encompassed within a statutory grant of jurisdiction.'" Bechtel v. Competitive Tech., Inc., 448 F.3d 469, 471 (2d Cir.
19 2006) (quoting Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de
20 Guinee, 456 U.S. 694, 701 (1982)). Although an exercise of
21 "judicial power [may be] desirable or expedient," a suit may not
22 proceed absent statutory authorization. United States v. Town of
23

1 N. Hempstead, 610 F.2d 1025, 1029 (2d Cir. 1979). In short,
2 jurisdiction cannot simply be “expanded by judicial decree.”
3 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377
4 (1994).

5 _____The district court here identified three bases for subject
6 matter jurisdiction. We address each in turn.²

7 A. Jurisdiction Based on the Terms of the Injunction

8 The district court appears to have held that the mere
9 existence of the Injunction establishes subject matter jurisdiction
10 over this malpractice action because the Injunction requires the
11 malpractice claims to be brought there. We are not persuaded.

12 As a threshold matter, we note that neither party to the
13 malpractice suit has appealed the issuance of the Injunction
14 itself. Thus, the Injunction is relevant only on the
15 collateral-but important-question as to whether it may establish an
16 independent basis for subject matter jurisdiction over the present
17 malpractice suit.

18 The All Writs Act empowers federal courts to issue “all writs
19 necessary or appropriate in aid of their respective jurisdictions
20 and agreeable to the usages and principles of law.” 28 U.S.C.

² We do not address whether ancillary enforcement jurisdiction would also exist over these claims. See, e.g., Garcia v. Teitler, 443 F.3d 202, 210 n.3 (2d Cir. 2006) (noting that such jurisdiction may sometimes be “more appropriately characterized as an exercise of a court’s inherent power”).

1 § 1651(a). We have recognized that the Act authorizes injunctions
2 barring state court actions that could impinge upon a federal
3 court's "jurisdiction or authority over an ongoing matter." In re
4 Baldwin-United Corp., 770 F.2d 328, 335 (2d Cir. 1985). However,
5 the All Writs Act "does not, by its specific terms, provide federal
6 courts with an independent grant of jurisdiction." Syngenta Crop
7 Prot., Inc. v. Henson, 537 U.S. 28, 33 (2002). Instead, it limits
8 a court to "issuing process 'in aid of' its existing statutory
9 jurisdiction; the Act does not enlarge that jurisdiction." Clinton
10 v. Goldsmith, 526 U.S. 529, 534-35 (1999) (quoting § 28 U.S.C.
11 1651(a)).

12 Therefore, even assuming arguendo that the Injunction properly
13 prohibited the commencement of malpractice actions in other fora,
14 the Injunction cannot itself furnish jurisdiction over claims that
15 do not fall within one of the traditional statutory grants. See,
16 e.g., 28 U.S.C. §§ 1331 (federal question), 1332 (diversity of
17 citizenship). To hold otherwise would make mincemeat of the
18 limited grants of jurisdiction bestowed upon us. See Owen Equip.
19 & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978) ("The limits
20 upon federal jurisdiction, whether imposed by the Constitution or
21 by Congress, must be neither disregarded nor evaded.").

22 B. Diversity Jurisdiction

23 The district court also maintained that it could "salvage"
24 subject matter jurisdiction by creating diversity jurisdiction

1 through the dismissal of thirteen non-diverse named plaintiffs.
2 See Achtman, 404 F. Supp. 2d at 547-48. This is unclear from the
3 record.

4 It is true that in a class action only the named plaintiffs
5 need be diverse with the defendants to establish diversity
6 jurisdiction. See Snyder v. Harris, 394 U.S. 332, 340 (1969). A
7 federal court may "salvage jurisdiction by removing, pursuant to
8 Fed. R. Civ. P. 21, a dispensable non-diverse party from a suit."
9 Herrick Co. v. SCS Commc'ns, Inc., 251 F.3d 315, 330 (2d Cir.
10 2001). This may be done on appeal as well. See Newman-Green, Inc.
11 v. Alfonzo-Larrain, 490 U.S. 826, 837-38 (1989).

12 Nevertheless, at least one remaining named plaintiff must meet
13 the \$75,000 amount-in-controversy requirement for the exercise of
14 diversity jurisdiction. See Exxon Mobil Corp. v. Allapattah Sevs.,
15 Inc., 125 S. Ct. 2611, 2615 (2005). Once that requirement is met,
16 supplemental jurisdiction exists over the claims of the remaining
17 diverse plaintiffs. Id.

18 On remand, the parties stipulated to the citizenship
19 information for all the named plaintiffs and defendants. The
20 stipulation concluded in paragraph two that "[t]hirteen (13) of the
21 seventy-three (73) named plaintiffs are not diverse . . . [but]
22 sixty (60) of the named plaintiffs are citizens of states other
23 than the states of which the defendants are citizens." The parties
24 also agreed that "[o]ne or more of the named plaintiffs referred to

1 in paragraph 2 has asserted claims in this action in excess of
2 \$75,000, exclusive of interest and costs.”

3 Unhappily, the stipulation does not state which plaintiffs
4 have asserted claims in excess of \$75,000. There are two
5 categories of plaintiffs mentioned in paragraph two of the
6 stipulation: diverse plaintiffs and non-diverse plaintiffs. If
7 the only claims in excess of \$75,000 were made by non-diverse
8 plaintiffs, there is no basis for diversity jurisdiction in this
9 case. Therefore, it is not clear from the record that diversity
10 jurisdiction can be salvaged.

11 C. Supplemental Jurisdiction

12 Finally, the district court found that it had supplemental
13 jurisdiction over the malpractice claims because it “has original
14 jurisdiction over the underlying [securities] action.” Achtman,
15 404 F. Supp. 2d at 546. We agree.

16 The relevant portion of the supplemental jurisdiction statute
17 provides as follows:

18 [I]n any civil action of which the district
19 courts have original jurisdiction, the
20 district courts shall have supplemental
21 jurisdiction over all other claims that are so
22 related to claims in the action within such
23 original jurisdiction that they form part of
24 the same case or controversy under Article III
25 of the United States Constitution. Such
26 supplemental jurisdiction shall include claims
27 that involve the joinder or intervention of
28 additional parties.

1 28 U.S.C. § 1367(a).

2 As a threshold matter, we recognize that some district courts
3 have refused to rely on the existence of subject matter
4 jurisdiction in one action to provide supplemental jurisdiction
5 over claims in a related action. See, e.g., Keene v. Auto Owners
6 Ins. Co., 78 F. Supp. 2d 1270, 1274 (S.D. Ala. 1999) (“[S]ection
7 1367 applies only to claims within a single action and not to
8 claims within related actions.”); Sebring Homes Corp. v. T.R.
9 Arnold & Assocs., Inc., 927 F. Supp. 1098, 1101-02 (N.D. Ind. 1995)
10 (“Section 1367 provides no original jurisdiction over a separate .
11 . . . but related suit.”). This distinction, however, has never
12 troubled us. See, e.g., Alderman v. Pan Am World Airways, 169 F.3d
13 99, 101-02 (2d Cir. 1999) (supplemental jurisdiction over contract
14 dispute based on jurisdiction over settled wrongful death action).

15 Turning to the terms of the statute, we have held that
16 disputes are part of the “same case or controversy” within § 1367
17 when they “derive from a common nucleus of operative fact.”
18 Promisel v. First Am. Artificial Flowers Inc., 943 F.2d 251, 254
19 (2d Cir. 1991) (internal citation omitted). The “common nucleus”
20 standard hails originally from United Mine Workers of America v.
21 Gibbs, 383 U.S. 715 (1966), a pre-§ 1367 case addressing pendent
22 jurisdiction. When both pendent and ancillary jurisdiction were
23 codified in 1990 as § 1367, however, the “common nucleus” test was
24 retained by nearly all the Circuits to interpret the statute’s

1 "case or controversy" language. See, e.g., 16 Moore & Pratt,
2 Moore's Federal Practice § 106.21[1] (3d ed. 1998) (collecting
3 cases).

4 In determining whether two disputes arise from a "common
5 nucleus of operative fact," we have traditionally asked whether
6 "the facts underlying the federal and state claims substantially
7 overlapped . . . [or] the federal claim necessarily brought the
8 facts underlying the state claim before the court." Lyndonville
9 Sav. Bank & Trust Co. v. Lussier, 211 F.3d 697, 704 (2d Cir. 2000)
10 (internal citations omitted). "This is so even if the state law
11 claim is asserted against a party different from the one named in
12 the federal claim." Briarpatch Ltd. v. Phoenix Pictures, Inc., 373
13 F.3d 296, 308 (2d Cir. 2004).

14 Even before the enactment of § 1367, we had recognized the
15 existence of some form of derivative subject matter jurisdiction
16 over analogous state law fee disputes arising from proper federal
17 controversies. In Cluett, Peabody & Co, Inc. v. CPC Acquisition
18 Co., 863 F.2d 251 (2d Cir. 1988), we affirmed a district court's
19 exercise of common law ancillary jurisdiction over state law claims
20 regarding entitlement to legal fees that accrued during the course
21 of "poison pill" litigation in federal court. Id. at 256. We
22 noted that "[i]t is well settled that '[a] federal court may, in
23 its discretion, exercise ancillary jurisdiction to hear fee
24 disputes . . . between litigants and their attorneys when the

1 dispute relates to the main action.'" Id. (quoting Petition of
2 Rosenman Colin Freund Lewis & Cohen, 600 F. Supp. 527, 531
3 (S.D.N.Y. 1984) (internal citation omitted)); see also Chesley v.
4 Union Carbide Corp., 927 F.2d 60, 65 (2d Cir. 1991) (ancillary
5 jurisdiction available over fee disputes when initial litigation is
6 no longer before the court).

7 With the codification of much of common law ancillary
8 jurisdiction into § 1367, we repeated in Alderman v. Pan Am World
9 Airways, 169 F.3d 99 (2d Cir. 1999), that fee disputes still
10 remained proper subjects of derivative jurisdiction. We now simply
11 treated it under a new rubric: supplemental jurisdiction. In
12 Alderman, we affirmed the district court's exercise of § 1367
13 supplemental jurisdiction over a contingency fee contract dispute
14 arising from a wrongful death action properly within the court's
15 subject matter jurisdiction. Id. at 101-02. Although we did not
16 conduct an explicit "common nucleus" analysis, we noted that the
17 district court was "already familiar with the relevant facts and
18 legal issues." Id. at 101-02 (citing Cluett and Chesley).

19 Similarly, in Itar-Tass Russian News Agency v. Kurier, Inc.,
20 140 F.3d 442 (2d Cir. 1998), we assumed that the district court had
21 the power to exercise supplemental jurisdiction over a fee dispute
22 because it had already "obtained total familiarity with the subject
23 matter of the [underlying] suit and the professional services of
24 the moving parties thereon and of the virtual totality of all the

1 compensation arrangements contended for and disputed.” Id. at 445.
2 After identifying these clear hallmarks of a common nucleus of
3 operative fact, we focused exclusively on the district court’s
4 discretionary decision to decline jurisdiction. Id. at 445-448.

5 We are compelled by this unbroken line of cases to find that
6 the facts underlying the present malpractice claims and the
7 underlying securities claims “substantially overlap[,]” creating a
8 common nucleus of operative fact. Lyndonville Sav. Bank & Trust,
9 211 F.3d at 704. The district court has managed the consolidated
10 BFG securities class actions since 1996 and has approved a series
11 of settlements totaling more than \$166 million since that time. In
12 the course of approving those settlements and the resulting fee
13 awards, the court found defendants’ representation reasonable and
14 adequate several times. See Fed. R. of Civ. P. 23(h).

15 The district court was thus well-placed to consider the issues
16 that would arise in the malpractice action, including questions as
17 to whether Kirby and Bernstein asserted all appropriate claims. In
18 addition, the district court was intimately familiar with Kirby and
19 Bernstein’s overall strategy and the time it spent pursuing its
20 clients’ interests. As we noted in Cluett, “the lower court’s
21 familiarity with the subject matter of the suit lent support to the
22 exercise of jurisdiction . . . [because] familiarity with the
23 amount and quality of work performed by [counsel] would enormously
24 facilitate rapid disposition of a fee dispute, while a great deal

1 of the record would have to be considered anew and relitigated in
2 a state court unfamiliar with the proceedings." 863 F.2d at 256.
3 The same is true here.

4 While there would surely be some facts at issue in the
5 malpractice action that were not directly implicated in the BFG
6 securities litigation itself, e.g., the substance of communications
7 between class counsel and the named plaintiffs, the same was true
8 in our fee dispute cases. We therefore follow their lead and find
9 supplemental jurisdiction over these claims.³

10 II. Merits of the Malpractice Claims

11 Having established that supplemental jurisdiction exists over
12 this action, we now turn to the bottom line question of whether the
13 plaintiffs have stated a claim upon which relief can be granted.
14 We agree with the district court that they have not.

15 "We review de novo the grant of a motion to dismiss under Rule
16 12(b)(6), accepting as true the factual allegations in the
17 complaint and drawing all inferences in the plaintiff's favor."
18 Allaire Corp. v. Okumus, 433 F.3d 248, 249-50 (2d Cir. 2006)
19 (internal citation omitted). However, "[c]onclusory allegations or
20 legal conclusions masquerading as factual conclusions will not
21 suffice to [defeat] a motion to dismiss." Smith v. Local 819

³ It may not be amiss to note that the constitutional language conferring federal jurisdiction speaks of "cases," not questions. See U.S. Const. art. III, § 2.

1 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d. Cir. 2002) (internal
2 citation omitted). The New York Court of Appeals has made it clear
3 that "a cause of action for legal malpractice pose[s] a question of
4 law which [can] be determined on a motion to dismiss." Rosner v.
5 Paley, 65 N.Y.2d 736, 738 (1985).⁴

6 To state a claim for legal malpractice under New York law, a
7 plaintiff must allege: (1) attorney negligence; (2) which is the
8 proximate cause of a loss; and (3) actual damages. Prudential Ins.
9 Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 170 A.D.2d
10 108, 114 (N.Y. App. Div. 1st Dep't 1991). Here, we need proceed no
11 further than the first hurdle, as the plaintiffs have failed to
12 allege negligent conduct by Kirby and Bernstein.

13 To properly plead negligence, a party must aver that an
14 attorney's conduct "fell below the ordinary and reasonable skill
15 and knowledge commonly possessed by a member of his profession."
16 Grago v. Robertson, 49 A.D.2d 645, 646 (N.Y. App. Div. 3d Dep't
17 1975). A complaint that essentially alleges either an "error of
18 judgment" or a "selection of one among several reasonable courses
19 of action" fails to state a claim for malpractice. Rosner, 65
20 N.Y.2d at 738. Generally, an attorney may only be held liable for

⁴ As we have noted, "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law." Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 541 n.1 (2d Cir. 1956). Thus, we apply New York malpractice law, even though our jurisdiction rests solely upon § 1367. See, e.g., United Mine Workers, 383 U.S. at 726.

1 "ignorance of the rules of practice, failure to comply with
2 conditions precedent to suit, or for his neglect to prosecute or
3 defend an action." Bernstein v. Oppenheim & Co., 160 A.D.2d 428,
4 430 (N.Y. App. Div. 1st Dep't 1990).

5 Here, plaintiffs marshal three purportedly negligent acts by
6 defendants: (1) the failure to name Andersen as a defendant in the
7 underlying BFG securities litigation; (2) the failure to list
8 Andersen as a party who could be sued-but was not-in the class
9 action Notice of Pendency; and (3) the failure to advise plaintiffs
10 of the statute of limitations on claims against Andersen. None of
11 these actions constituted negligence under New York law.

12 As the district court recognized, defendants made the decision
13 not to sue Andersen in the BFG securities class action for a number
14 of legitimate reasons. At the time the suit was filed, there was
15 serious doubt as to auditor securities liability under Central Bank
16 of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S.
17 164 (1994). Damages were similarly uncertain because the BFG
18 securities issued on Andersen's watch had been largely paid down by
19 the time of the BFG suits.⁵ Finally, when other law firms brought
20 individual actions against Andersen as part of the BFG litigation,

⁵ This distinguishes defendants' decision to pursue claims against Mahoney Cohen, which succeeded Andersen as BFG's external auditor. Because Mahoney Cohen's retention only shortly preceded the commencement of the securities class action, securities issued during its tenure were not as likely to have been paid down by the time of suit.

1 the district court threatened Rule 11 sanctions. Although Andersen
2 eventually settled some of the individual actions, none of the
3 twenty-five class action suits filed by twenty-five different law
4 firms in the BFG securities litigation named Andersen as a
5 defendant. See Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d
6 Cir. 1991) (judicial notice may be taken of the contents of
7 documents in other legal proceedings). Kirby and Bernstein
8 therefore acted reasonably in not suing Andersen.

9 Similarly, it was reasonable for Kirby and Bernstein not to
10 comment on Andersen in the Notice of Pendency. A Notice of
11 Pendency need only contain "information that a reasonable person
12 would consider to be material in making an informed, intelligent
13 decision of whether to opt out or remain a member of the class."
14 In re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1105 (5th
15 Cir. 1977). Plaintiffs can point to no authority requiring class
16 counsel to describe potential claims against parties not being
17 sued. Cf. Fed. R. Civ. P. 23(c)(2)(B) (reciting notice
18 requirements); 7AA Charles Alan Wright & Arthur R. Miller, Federal
19 Practice & Procedure § 1787 (3d ed. 2005) (same). Andersen's
20 absence from the notice sufficiently alerted class members that any
21 relief against the firm would have to be pursued independently.
22 Thus, defendants' decision not to comment on Anderson was
23 reasonable.

