



Fair Dealing; and (9) Attorney's Fees. (CAC, Doc. No. 128.) Plaintiff's claims stem from her assertion that her name was improperly left off as an inventor of nine U.S. Patents, Nos. 5,675,507; 5,870,549; 6,350,066; 6,564,321; 6,857,074; 7,895,306; 7,836,141; 7,895,313; and 7,934,148 (collectively, the "patents-in-suit"), which currently list Defendant Charles R. Bobo ("Defendant Bobo") as the sole inventor.

In 1994, after identifying a need for police detectives to be able to share faxes in digital form, Ms. Huster "conceived the idea of transmitting and storing telefax messages digitally, via e-mail rather than as packets via the switched telephone network, to afford wider access to information provided initially by telefax." (CAC ¶ 14.) Later that year, and "[o]n her own time and not for any client," Ms. Huster "built a prototype for a system to allow voicemail and faxes to be centrally received, stored, and then distributed . . . to facilitate one or more people's access to the information in those faxes and voicemails." (Id.)

In December 1994, Defendant Bobo operated a business called NetOffice, Inc., and he retained Ms. Huster as a consultant and shareholder.<sup>1</sup> (Id. ¶ 15.) According to Ms. Huster, Defendant Bobo was, at the time, a Lotus Notes administrator for the Coca Cola Company and had not developed any commercial software or applications, but he could write code at her direction. (Id. ¶ 16.) Ms.

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<sup>1</sup> Ms. Huster received stock in NetOffice, Inc. on December 31, 1994. (CAC ¶ 15.)

Huster prepared hand-sketched drawings of her concept and visited a law firm called Hopkins and Thomas with Defendant Bobo on January 4, 1995. (Id. ¶ 18.) At this meeting, “it was agreed that [Ms. Huster] and [Defendant] Bobo would be named as co-inventors in the patent filing.” (Id.) Ms. Huster contends that Defendant Bobo was “very reluctant” to file any patent applications due to cost and time limitations, so Ms. Huster arranged financing for the cost of the application and conducted all initial contacts with counsel. (Id. ¶ 19.)

Shortly thereafter, Ms. Huster began working elsewhere in Atlanta and later moved to New Jersey and, several years later, to Seattle. (Id. ¶ 20.) During this time, Defendant Bobo and counsel stopped communicating with Ms. Huster, with her e-mails and phone calls going unanswered. (Id. ¶ 21.) The patent attorney ultimately did file patent applications, but listed Defendant Bobo as the sole inventor. (Id. ¶ 22.) Ms. Huster contends that she “trusted her counsel and [Defendant] Bobo to keep her informed of any filings” and “concluded from the silence from [Defendant] Bobo and from her counsel that any patent application activity had ceased.” (Id. ¶ 23.)

In 1998, Defendant Bobo assigned several of his patent rights to NetOffice Solutions, LLC. (Id. ¶ 24.) Approximately six years later, Defendant j2 Global Communications, Inc. (“Defendant j2”) acquired the rights to several of the

patents-in-suit “despite [its] knowledge then of Ms. Huster’s role in inventing or co-inventing the claimed subject matter.” (Id. ¶ 25.)

Defendant Advanced Messaging Technologies, Inc. (“Defendant AMT”) is a wholly-owned subsidiary of Defendant j2. (Id. ¶ 2.) Defendant AMT “was and currently is assignee of all the patents here in suit.” (Id. ¶ 5.) Defendant Acacia Patent Acquisition, LLC (“Defendant Acacia”) was purportedly an assignee and assignor of one or more of the patents in suit (Id. ¶ 7), with its subsidiary, Defendant Unified Messaging Solutions, LLC (“Defendant UMS”) holding exclusive license over one or more of the patents-in-suit. (Id. ¶¶ 3, 5.)

Ms. Huster contends that through these various assignments, Defendant Bobo has received millions of dollars without notice to Ms. Huster. (Id. ¶ 26.) Similarly, Defendant j2 and “its affiliates have received \$27 million . . . for a paid-up license under the patents now in suit.” (Id. ¶ 27.) Indeed, Ms. Huster claims that the patents-in-suit resulted in a substantial increase in Defendant j2’s net income. (Id. ¶ 28.) From licensing revenues alone, Ms. Huster claims that Defendant j2 has received at least \$827,599,000. (Id.)

All the while, Ms. Huster contends that she had no idea that the patents were ever filed or that her name was omitted as inventor. (Id. ¶¶ 25–26, 29.) She did not learn of this omission until counsel for a defendant litigating with Defendant j2 informed her of the patents. (Id. ¶ 29.)

Now before the Court are several motions to dismiss.<sup>2</sup> First, all Defendants have jointly filed an Amended Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim.<sup>3</sup> (Doc. No. 135.) Additionally, Defendant j2 filed a Motion to Dismiss Count I for failure to state a claim. (Doc. No. 134.) Defendant Acacia also moved to dismiss Count I, asserting a lack of subject matter jurisdiction and failure to state a claim. (Doc. No. 136.) Finally, Defendant Bobo moved to dismiss Plaintiff's complaint for failure to state a claim. (Doc. No. 137.)

## **II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

### **A. Legal Standard**

There are two types of challenges to a district court's subject matter jurisdiction: facial attacks and factual attacks. A facial attack on a complaint "require[s] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [her] complaint are taken as true for the purposes of the motion." Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (citation and internal quotation omitted, first and second alteration in original). Alternatively, a factual attack "challenge[s] the existence of

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<sup>2</sup> Plaintiff has moved for an extension of time to respond to Defendants' Motions to Dismiss. (Doc. No. 146.) Defendants do not oppose Plaintiff's motion for an extension of time to respond, but take issue with Ms. Huster's filing a supplemental response in addition to her response. The Court will consider Ms. Huster's supplemental response.

<sup>3</sup> Defendants first filed a joint Motion to Dismiss (Doc. No. 133). In light of the Amended Joint Motion to Dismiss, the first Motion to Dismiss (Doc. No. 133) is denied as moot.

subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.” Id. (internal quotation marks and citation omitted). When factual attacks are made,

the trial court may proceed as it never could under 12(b)(6) or FED. R. CIV. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Id. (internal quotation marks and citation omitted). “Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1).” Stalley v. Orlando Reg'l Healthcare Sys., Inc., 524 F.3d 1229, 1232 (11th Cir. 2008) (quoting Cone Corp. v. Fla. Dep't of Transp., 921 F.2d 1190, 1203 n.42 (11th Cir. 1991)).

**B. Correction of Inventorship Under 35 U.S.C. § 256<sup>4</sup>**

Ms. Huster seeks to correct inventorship of the nine patents-in-suit, claiming that she invented, in whole or in part, each of them.<sup>5</sup> Ms. Huster further alleges that

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<sup>4</sup> Section 256(a) provides:

Whenever through error a person is named in an issued patent as the inventor, or through error an inventor is not named in an issued patent, the Director may, on application of all the parties and assignees, with proof of the facts and such other requirements as may be imposed, issue a certificate correcting such error.

“each of the defendants in this case has an economic stake in the validity of the patents involved and hence in the correct inventorship designations on the patents-in-suit.” (CAC ¶ 42.) Defendants argue that (1) Ms. Huster lacks standing to assert this claim and (2) the doctrine of laches bars Ms. Huster’s claim.<sup>6</sup> Because the Court finds that Ms. Huster lacks standing to assert a § 256 claim, it does not address Defendants’ laches argument.

“Whether the plaintiff has Article III standing ‘is the threshold question in every federal case, determining the power of the court to entertain the suit.’” Larson v. Correct Craft, Inc., 569 F.3d 1319, 1325 (Fed. Cir. 2009) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). “That is, [Ms. Huster] must show that she has suffered an injury-in-fact, that the injury is traceable to the conduct complained of, and that the injury is redressable by a favorable decision.” See Chou v. Univ. of Chicago, 254 F.3d 1347, 1357 (Fed. Cir. 2001) (citing U.S. CONST. art. III, § 2). “The plaintiff has the burden to clearly and specifically set forth facts sufficient to satisfy Art. III standing requirements.” Bochese v. Town of Ponce Inlet, 405 F.3d 964, 976 (11th Cir. 2005) (internal quotation and alteration omitted).

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<sup>5</sup> More specifically, Ms. Huster claims that she conceived all of the subject matter for U.S. Patent Nos. 5,870,549; 7,895,306; and 7,895,313. (CAC ¶¶ 34, 38, & 40.) Ms. Huster claims that she conceived significant portions of the subject matter claimed in U.S. Patent Nos. 5,675,507; 6,350,066; 6,564,321; 6,857,074; 7,836,141; and 7,934,148. (Id. ¶¶ 33, 35-37, 39, & 41.)

<sup>6</sup> Defendants Acacia and j2 independently moved to dismiss, arguing that they do not have an economic stake in the patents-in-suit. Because the Court finds that Ms. Huster lacks standing to assert Count I, it need not address these additional arguments. Therefore, the Court denies as moot their motions to dismiss.

Defendants contend that Ms. Huster lacks standing to assert a Section 256 claim because she no longer has an economic interest in the patents-in-suit. More specifically, Defendants show that Ms. Huster assigned her “entire right, title and interest” in all the patents-in-suit, including the right “to collect for all past, present and future damages,” to Phyllis Anke Technologies, LLC in August 2012. (Doc. No. 135, Ex. A.) Moreover, Defendants show that Ms. Huster’s former attorney, John Crossan, obtained a judgment against her for unpaid attorneys’ fees and, on June 12, 2014, a Washington Superior Court issued a Charging Order whereby Mr. Crossan was awarded “all of the Debtor’s interest, whether direct or indirect, in PA Technologies LLC.” (Doc. No. 135, Ex. B.) Defendants contend that PA Technologies LLC is “a d/b/a of Phyllis Anke Technologies, LLC” (Doc. No. 135-1 at 15 n.8), a fact which Ms. Huster does not contest in brief.

Ms. Huster simply responds (1) by quoting Chou, 254 F.3d at 1358, that a plaintiff “should have the right to assert her own interest, both for her own benefit and in the public interest of assuring correct inventorship designations on patents”; and (2) by stating “[t]he Federal Circuit in Chou also held that reputational interest alone may be enough to satisfy the requirements of Article III standing.” (Doc. No. 149 at 2.)

While Ms. Huster is correct that the Chou court held that one need not have an ownership interest to satisfy Article III’s standing requirements, Chou is



factually distinguishable. There, Dr. Chou, a post-doctoral research assistant at the University of Chicago, sought to correct the inventorship on a number of patents. 254 F.3d at 1353. Under university policy, Dr. Chou was obligated to assign her inventions to the University of Chicago. Id. at 1356. Thus, Dr. Chou assigned away any ownership interest in the patents. However, university policy also required that “inventors receive 25% of the gross royalties and up-front payments from licensing of the patents, as well as 25% of the stock of new companies that are based on their inventions.” Id. at 1353. Because Dr. Chou would be entitled to these licensing fees if declared the inventor, the court found that she “alleged a concrete financial interest in the patent, albeit an interest less than ownership.” Id. at 1359.

The present case is more analogous to Larson. Mr. Larson worked as a designer for Correct Craft, a boat manufacturer. Larson, 569 F.3d at 1322. At issue were several patents Correct Craft ultimately received for a wakeboard tower, which Mr. Larson claimed he co-invented. Id. Over the course of three years, Mr. Larson transferred all his interest in the wakeboard tower to Correct Craft. Id. Mr. Larson filed suit against Correct Craft, seeking, *inter alia*, rescission of the assignments and correction of inventorship pursuant to § 256. Id. at 1323. The Federal Circuit, eight years after Chou, found that Mr. Larson was in a different position than Dr. Chou, who stood to benefit financially from a preexisting licensing arrangement. Id. at 1326. Mr. Larson had “affirmatively transferred title

to the patents to Correct Craft” without any preexisting financial arrangement and therefore stood “to reap no benefit” from suit. Id. Indeed, “[h]is only path to financial reward under § 256 . . . involve[d] him first succeeding on his state-law claims and obtaining rescission of the patent assignments.” Id. at 1326–27. This contingent interest precluded Mr. Larson from having standing to assert his claim to correct inventorship.

Ms. Huster does not challenge any of the facts regarding the assignment of her interest in the patents nor does she present any evidence of her own in this regard. Moreover, the Court has reviewed exhibits attached to Defendants’ Motion to Dismiss, which confirm the assignment. (Doc. No. 135, Exs. A & B.) Like Mr. Larson then, Ms. Huster has affirmatively transferred the entirety of her interest, without a preexisting licensing arrangement in place, to another entity.<sup>7</sup> “Because [Ms. Huster] lacks an ownership interest, and because being declared the sole [or co-] inventor will not generate any other direct financial rewards as in Chou, [Ms. Huster] has no constitutional standing to sue for correction of inventorship in federal court.” See id. at 1327.

As to the reputational interest, Ms. Huster’s argument fails for two reasons. First, the court in Chou expressly held that it need not decide whether reputational interest alone is sufficient to satisfy standing requirements because Dr. Chou was

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<sup>7</sup> And any interest she might have in that entity appears to have been awarded to her former attorney, John Crossan.

able to show “a concrete financial interest in the patent, albeit an interest less than ownership.” Chou, 254 F.3d at 1359. Even if a reputational interest was sufficient, however, Ms. Huster has failed to plead any facts in her Corrected Amended Complaint relating to a reputational interest, and this Court cannot “create jurisdiction by embellishing a deficient allegation of injury.” See Bochese, 405 F.3d at 976; see also Larson, 569 F.3d at 1327 (“Larson claims no reputational injury, and so that cannot be a basis on which to find standing.”).

Accordingly, the Court finds that Ms. Huster has failed to meet her burden of establishing standing and dismisses Count I of the Corrected Amended Complaint for lack of jurisdiction.

### **III. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

#### **A. Legal Standard**

When considering a 12(b)(6) motion to dismiss, the Court must accept as true the allegations set forth in the complaint drawing all reasonable inferences in the light most favorable to the plaintiff. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007); U.S. v. Stricker, 524 F. App’x 500, 505 (11th Cir. 2013) (per curiam). Even so, a complaint offering mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” is insufficient. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555); accord Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1282–83 (11th Cir. 2007).

Further, the complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (citing Twombly, 550 U.S. at 570). Put another way, a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. This so-called “plausibility standard” is not akin to a probability requirement; rather, the plaintiff must allege sufficient facts such that it is reasonable to expect that discovery will lead to evidence supporting the claim. Id.

Even if it is extremely unlikely that a plaintiff will recover, a complaint may nevertheless survive a motion to dismiss for failure to state a claim, and a court reviewing such a motion should bear in mind that it is testing the sufficiency of the complaint and not the merits of the case. Twombly, 550 U.S. at 556; see Wein v. Am. Huts, Inc., 313 F. Supp. 2d 1356, 1359 (S.D. Fla. 2004).

**B. Counts II, III, V, VI, and VIII: Fraudulent Concealment, Breach of Fiduciary Duty, Breach of Contract, Breach of Private Duty, and Breach of the Duty of Good Faith and Fair Dealing**

As a preliminary matter, Ms. Huster has not clearly articulated which counts apply to which Defendants. However, a review of the allegations in the Corrected Amended Complaint reveals as follows. The allegations in Count II (Fraudulent Concealment), Count III (Breach of Fiduciary Duty), Count V (Breach of Contract), Count VI (Breach of a Private Duty), and Count VIII (Breach of the

Duty of Good Faith and Fair Dealing) apply only to Defendant Bobo and reference no other Defendants. Accordingly, Counts II, III, V, VI, and VIII are dismissed as to all Defendants *except* Defendant Bobo.

As it pertains to Defendant Bobo, he asserts a statute of limitations defense as to each of these counts and additionally moves to dismiss based on the sufficiency of the pleadings. As will be discussed *infra* in Section F, the Court intends to convert the portions of the motions to dismiss relating to the statute of limitations defenses into motions for summary judgment. Accordingly, the Court defers addressing those issues at this time. Before converting to summary judgment, however, the Court addresses Defendant Bobo's arguments related to the sufficiency of the complaint.

*i. Count II: Fraudulent Concealment*

In Count II, Ms. Huster asserts a claim for fraudulent concealment. Specifically, she alleges that Defendant Bobo fraudulently concealed from her the fact that he filed the patent applications for the patents-in-suit, listing himself as the sole inventor. (CAC ¶ 44.) Ms. Huster claims that Defendant Bobo did so with intent to deceive in order to mislead and prevent her from seeking to be named as an inventor, despite knowing that he was not the sole inventor. (*Id.* ¶¶ 44–45.) Ms. Huster alleges that based on her relationship of trust with Defendant Bobo, she

reasonably relied on his silence regarding any patent application for her inventions.

(Id. ¶ 46.)

Defendant Bobo argues that Ms. Huster has failed to meet the standards of Rule 9(b).

Allegations of fraud implicate the heightened pleading standards of Rule 9(b). A complaint satisfies Rule 9(b) if it sets forth precisely what statements or omissions were made in what documents or oral representations, who made the statements, the time and place of the statements, the content of the statements and manner in which they misled the plaintiff, and what benefit the defendant gained as a consequence of the fraud.

Goodson v. Boston Sci. Corp., No. 1:11-CV-3023-TWT, 2011 WL 6840593, at \*5 (N.D. Ga. Dec. 29, 2011) (citation and internal quotations omitted).

Upon consideration, the Court finds that Ms. Huster has alleged the who, what, when, where, and why necessary to satisfy Rule 9(b)'s pleading requirements. Ms. Huster asserts that (1) on January 4, 1995 at the law offices of Hopkins and Thomas she and Defendant Bobo agreed to be named as co-inventors on the patent filing (CAC ¶ 18); (2) Defendant Bobo and counsel eventually stopped communicating with Ms. Huster without explanation (Id. ¶ 21); (3) based on Defendant Bobo's silence she assumed that he elected not to pursue the patents (Id.); and (4) Defendant Bobo eventually received millions of dollars for assigning the patents-in-suit (Id. ¶ 26). Moreover, Ms. Huster contends that she and Mr. Bobo had a relationship of trust, which would impose upon him a duty to disclose

these facts. Thus, the Court denies Defendant Bobo's motion to dismiss this count, but again, reserves ruling on the issue of the statute of limitations defense.

*ii. Count III: Breach of Fiduciary Duty*

Defendant Bobo claims that Ms. Huster failed to plead a legitimate contract existed, and therefore she fails to state a claim for breach of fiduciary duty. To state a claim for breach of fiduciary duty, a plaintiff must show: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach. Bienert v. Dickerson, 624 S.E.2d 245, 248 (Ga. Ct. App. 2005). Notably absent is any requirement for a contractual relationship. Indeed, O.C.G.A. § 23-2-58 provides:

Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc.

“Because a confidential relationship may be found whenever one party is justified in reposing confidence in another, the existence of a confidential or fiduciary relationship is generally a factual matter for the jury to resolve.” Bienert, 624 S.E.2d at 248–49. Ms. Huster alleges that a fiduciary duty existed with Defendant Bobo based on trust and their business relationship, particularly given her status as a shareholder in NetOffice, Inc. Because the Court finds no independent

contractual requirement necessary, Defendant Bobo's motion to dismiss Count III on this ground is denied.

*iii. Counts V, VI, and VIII: Breach of Private Duty, Breach of Contract, Breach of Duty of Good Faith and Fair Dealing*

Unlike the breach of fiduciary duty claim, a contractual relationship—either express or implied—is required for Counts V, VI, and VIII. Defendant Bobo contends that Ms. Huster has failed to allege what, if any, agreement the parties made. However, a review of Ms. Huster's complaint reveals that she has sufficiently alleged an oral agreement between herself and Defendant Bobo. She states that on January 4, 1994, she and Defendant Bobo agreed to be named as co-inventors of the patent filing. (CAC ¶ 18.) Accordingly, the Court denies Defendant Bobo's motion to dismiss Counts V, VI, and VIII on this basis as well.

**C. Count IV: Unjust Enrichment**

“Under Georgia law, ‘the theory of unjust enrichment applies when there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated.’” Clark v. Aaron's, Inc., 914 F. Supp. 2d 1301, 1309 (N.D. Ga. 2012) (quoting Smith Serv. Oil Co. v. Parker, 549 S.E.2d 485, 487 (Ga. Ct. App. 2001) (alteration omitted). “The concept of unjust enrichment in law is premised upon the principle that a party cannot induce, accept, or encourage another to furnish or render something of value to such party and avoid payment for the value received.” Reidling v. Holcomb, 483 S.E.2d 624,



626 (Ga. Ct. App. 1997). “[T]he essential elements of [unjust enrichment] are that (1) a benefit has been conferred, (2) compensation has not been given for receipt of the benefit, and (3) the failure to so compensate would be unjust.” Clark, 914 F. Supp. 2d at 1309. “If the person holding legal title to the property is a bona fide purchaser without notice, no unjust enrichment takes place and no trust is implied.” Jonas v. Jonas, 633 S.E.2d 544, 551 (Ga. Ct. App. 2006) (citing cases holding the same).

The Non-Inventor Defendants—all Defendants minus Defendant Bobo—move to dismiss Count IV based on Ms. Huster’s failure to adequately state a claim. They argue that (1) any alleged benefit was conferred many years before any of the Non-Inventor Defendants became involved and (2) Ms. Huster has failed to allege that she conferred any sort of benefit on the Non-Inventor Defendants. On this latter point, the Non-Inventor Defendants argue that they were bona fide purchasers, and a claim for unjust enrichment against them cannot lie. Rather than directly respond to the bona fide purchaser argument, Ms. Huster simply repeats that the non-inventor Defendants “continued to derive an economic benefit from the patents and assert dominion over the patent after knowledge of [her] inventorship claims.” (Doc. No. 149 at 4.) As Ms. Huster claims, “Defendants continue to receive benefits based on [her] inventions instead of disclaiming or compensating [her] for the benefits.” (Doc. No. 151 at 3.)

Turning to the substance of her complaint, Ms. Huster, in one paragraph, alleges that “the [non-inventor] Defendants as owners, assignees, and licensees of the patents-in-suit have unjustly benefited from Ms. Huster’s invention. On information and belief, the defendants have received royalties and other economic benefits based on the patents-in-suit. Under equitable principles, defendants should compensate Ms. Huster.” (CAC ¶ 56.) The only reference whatsoever of any prior notice applies to Defendant j2: Ms. Huster states (1) that Defendant j2 was aware of the inventorship dispute when it acquired the rights to the patents; and (2) that in 2011 her counsel advised Defendant j2 of her interest in pursuing claims of inventorship. However, Ms. Huster’s statement that Defendant j2 was aware of her role in the inventions in 2004 is both unsupported and conclusory. See Ashcroft, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice”); see also MLSMK Inv. Co. v. JP Morgan Chase & Co., 431 F. App’x 17, 20 (2d. Cir. 2011) (“Because the allegation that Appellees had actual knowledge of Madoff’s fraud is purely conclusory, it is insufficient to support a cause of action for negligence.”); Mazuch v. Rosier, No. CV 308-018, 2008 WL 4844730, at \*7 (S.D. Ga. Nov. 7, 2008) (finding that a plaintiff’s conclusory statement that the defendant had knowledge was insufficient because the plaintiff failed to “explain how it is that

[the defendant] had any knowledge”). Moreover, Ms. Huster’s assertion regarding the 2011 notice was long after any alleged benefit was conferred.

“Inherent in unjust enrichment is the requirement that the receiving party knew of the value being bestowed upon them by another and failed to stop the act or to reject the benefit.” Reidling, 483 S.E.2d at 626. Lacking are any non-conclusory allegations that Defendants j2, AMT, UMS, or Acacia were aware of the inventorship dispute when the alleged benefit was conferred. Thus, while Ms. Huster has pled a claim for unjust enrichment against Defendant Bobo—whom she claims knew of her role in the inventions and received millions of dollars as a result of leaving her name off the patent applications—she has failed to state a claim against the Non-Inventor Defendants.

**D. Count VII: Conversion**

To state a claim for conversion, “the complaining party must show (1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property.” Johnson v. First Union Nat’l Bank, 567 S.E.2d 44, 48 (Ga. Ct. App. 2002). Defendants argue that Ms. Huster failed to allege any of the elements of this claim.

In neither Ms. Huster’s Response in Opposition (Doc. No. 149) nor her Supplemental Response in Opposition (Doc. No. 151) does she address this

argument.<sup>8</sup> Ms. Huster's failure to respond to Defendants' argument indicates that she has abandoned this claim. See Files v. DeKalb Cnty. Sch. Dist., No. 1:11-cv-1798-JEC, 2012 WL 716055, at \*5 (N.D. Ga. Mar. 5, 2012) (listing cases for the proposition that the failure to respond to arguments on a particular claim constitutes abandonment of that claim). Accordingly, Count VII is due to be dismissed because Ms. Huster abandoned it. See Morris v. Bessemer Bd. of Educ., No. CV-10-BE-2402-S, 2013 WL 549896, at \*20 (N.D. Ala. Feb. 13, 2013) (dismissing abandoned claims).

Even so, the Court notes that Defendants' arguments as to the pleading deficiencies are persuasive on their merits. Ms. Huster simply states that (1) Mr. Bobo exercised a right of ownership over Ms. Huster's inventions without authority; (2) the other Defendants are liable based on successor liability; (3) Defendants exercised a right of ownership over Plaintiff's inventions knowing that she was the sole or joint inventor; and (4) Ms. Huster was damaged by the conversion. (CAC ¶¶ 67–70.) Notably absent from these allegations is any claim that Ms. Huster demanded for return of the property or that Defendants refused to return the property, with the exception of Ms. Huster's statement that in January

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<sup>8</sup> Ms. Huster's only response in regard to the conversion claim is that her complaint "alleges [] unjust enrichment and conversion claims against the noninventor [defendants] as they continued to derive an economic benefit from the patents and assert dominion over the patent after knowledge of Plaintiff's inventorship claims." (Doc. No. 149 at 4.)

2011 her attorney informed Defendant j2 that Ms. Huster intended to assert her rights of inventorship and ownership.

The Non-Inventor Defendants additionally allege that Ms. Huster has failed to show that they converted anything at all. Ms. Huster first claims that these Defendants are liable for conversion based on successor liability. However, the Supreme Court of Georgia summarized the law of successor liability as follows:

Generally, a purchasing corporation does not assume the liabilities of the seller unless: (1) there is an agreement to assume liabilities; (2) the transaction is, in fact, a merger; (3) the transaction is a fraudulent attempt to avoid liabilities; or (4) the purchaser is a mere continuation of the predecessor corporation.

Bullington v. Union Tool Corp., 328 S.E.2d 726, 727 (Ga. 1985). Ms. Huster has failed to plead facts that would make successor liability applicable in this case and, as noted above, she has failed to respond to this argument in its entirety. Ms. Huster additionally argues that these Non-Inventor Defendants are liable directly because they knew that Ms. Huster was the sole or joint inventor. As stated above, lacking is any support for the allegation that these Defendants knew that Ms. Huster was the sole or joint inventor.<sup>9</sup> See Ashcroft, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice”); Mazuch, 2008 WL 4844730, at \*7. Accordingly, the

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<sup>9</sup> The only exception to this statement is perhaps Ms. Huster’s allegation that her counsel informed Defendant j2 in 2011 that Ms. Huster intended to assert her rights of ownership.

Court dismisses Count VII of Ms. Huster's Corrected Amended Complaint against all Defendants.

**E. Count IX: Attorney's Fees**

With Count IX, Ms. Huster seeks attorney's fees pursuant to O.C.G.A. § 13-6-11, stating that Defendants have been stubbornly litigious and have acted in bad faith. (CAC ¶¶ 75–76.) However, “O.C.G.A. § 13-6-11 does not create an independent cause of action. That statute merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of his damages.” Gardner v. Kinney, 498 S.E.2d 312, 313 (Ga. Ct. App. 1998) (internal citation and quotations omitted). Moreover, in neither Ms. Huster's Response in Opposition (Doc. No. 149) nor her Supplemental Response in Opposition (Doc. No. 151) does she address this argument. Ms. Huster's failure to respond to Defendants' argument indicates that she has abandoned this claim. See Files, 2012 WL 716055, at \*5 (listing cases for the proposition that the failure to respond to arguments on a particular claim constitutes abandonment of that claim). For each of these reasons, the Court grants Defendants' Motion to Dismiss Count IX of the CAC.<sup>10</sup>

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<sup>10</sup> This ruling applies only to Plaintiff's attempt to raise attorney's fees as a standalone cause of action. In no way should this Order be construed as foreclosing on Plaintiff's ability to recover attorney's fees, if permitted by law.

**F. Conversion to Summary Judgment**

Defendants jointly move to dismiss Counts IV (Unjust Enrichment) and VII (Conversion) pursuant to Rule 12(b)(6), arguing that those claims are time-barred. For the same reason, Defendant Bobo moves to dismiss Counts II through XIII. Ms. Huster has responded that Defendant Bobo fraudulently concealed her cause of action as contemplated by O.C.G.A. § 9-3-96. Specifically, Ms. Huster alleges that Defendant Bobo fraudulently failed to disclose that the patent applications were filed and that he listed himself as the sole inventor. Moreover, this silence, she contends, is sufficient to toll the statute of limitations because a confidential relationship existed between Defendant Bobo and Ms. Huster. In reply, Defendants attach Ms. Huster's deposition transcripts, as well as other exhibits. (Doc. No. 155, Exs. A–H.)

When deciding a motion to dismiss based on Rule 12(b)(6), “the district court must limit its consideration to the pleadings and exhibits attached thereto . . . .” Lewis v. Asplundh Tree Expert Co., 305 F. App'x 623, 627 (11th Cir. 2008) (quotation and alteration omitted). Where, as here, “the parties present evidence outside of the pleadings, and the district court considers that evidence, then the motion to dismiss is converted into a motion for summary judgment.” Id. “It is clearly the law in this circuit that whenever a district judge converts a 12(b)(6) motion to dismiss into one for summary judgment by considering matters

outside the pleadings the judge must give all parties ten-days notice that he is so converting the motion.” Id. (quoting Donaldson v. Clark, 819 F.2d 1551, 1555 (11th Cir. 1987) and citing FED. R. CIV. P. 56(c)); Barnett S. Corp. v. Nat’l Trust Ins. Co., No. CV 110-74, 2011 WL 611843, at \*3 (S.D. Ga. Feb. 15, 2011) (converting a motion to dismiss into a motion for summary judgment and providing the plaintiff with fourteen days to supplement the record and allowing the defendant ten days to reply).

Upon consideration, the Court hereby **NOTIFIES** the parties of its intent to consider matters outside the pleadings on the statute of limitations issue and convert the pertinent portions of the motions to dismiss into motions for summary judgment pursuant to Federal Rule of Civil Procedure 12(d). Accordingly, the parties shall have twenty-one (21) days to present any material pertinent to the statute of limitations issue.

#### IV. CONCLUSION

- The Court **GRANTS** Plaintiff’s Motion for Extension of Time to File Response (Doc. No. 146).
- The Court **GRANTS IN PART** Defendants’ Amended Joint Motion to Dismiss (Doc. No. 135) and **DISMISSES** Counts I, VII and IX as to all Defendants. The Court further **DISMISSES** Counts II, III, IV, V, VI, and VIII as they pertain to Defendants j2 Global Communication, Inc.; Advanced Messaging Technologies, Inc.; Unified Messaging Solutions, LLC; and Acacia Patent Acquisition LLC. These counts remain as to Defendant Bobo. The Clerk is **DIRECTED** to **TERMINATE** Defendants j2 Global Communication, Inc.; Advanced Messaging Technologies, Inc.; Unified Messaging Solutions, LLC;



and Acacia Patent Acquisition LLC as parties to this action as no claims remain against them.

- Because the Court concludes that Plaintiff lacks standing to raise a § 256 claim, the Court **DENIES AS MOOT** Defendant j2 Global Communications' Motion to Dismiss (Doc. No. 134) and Defendant Acacia Patent Acquisition's Motion to Dismiss (Doc. No. 136).
- Based on Defendants' Amended Joint Motion to Dismiss, the Court **DENIES AS MOOT** Defendants' Joint Motion to Dismiss (Doc. No. 133).
- As to the remainder of the Amended Joint Motion to Dismiss (Doc. No. 135) and Defendant Bobo's Motion to Dismiss (Doc. No. 137), the Court **NOTIFIES** the parties of its intent to convert these motions into motions for summary judgment. The parties shall have **TWENTY-ONE (21) DAYS** to supplement the record with briefing and exhibits pertinent to the issue of the statute of limitations defenses.

**SO ORDERED**, this 12th day of November, 2015.



ELEANOR L. ROSS

UNITED STATES DISTRICT JUDGE