

IN THE CIRCUIT COURT OF JACKSON COUNTY
ATKANSAS CITY

SAMUEL K. LIPARI,)
)
 Plaintiff,)
)
 ~) Case No. 0916-CV38273
)
 CHAPEL RIDGE MULTIFAMILY LLC, *et al.*,)
)
 Defendants.)


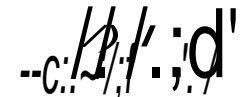
GE DEFENDANTS' AND JEFFREY IMMELT'S MOTION TO DISMISS
PLAINTIFF'S AMENDED PETITION

Defendants General Electric Company ("GE"), General Electric Capital Business Asset Funding Corporation ("GE Capital") and GE Transportation Systems Global Signaling, LLC ("GE Transportation") (collectively, the "GE Defendants") and Defendant Jeffrey Immelt (the Chief Executive Officer of GE) seek dismissal of Plaintiffs Amended Petition pursuant to Mo. R. Civ. P. 55.27(a)(6) because it fails to state a claim upon which relief can be granted. Specifically, Plaintiff has failed to properly plead a breach of contract claim against the GE Defendants and Mr. Immelt in that: (1) the purported "contract," as pled by Plaintiff, does not satisfy the Statute of Frauds; and (2) Plaintiff fails to allege, and cannot allege, that Mr. Immelt was a party to any "contract" with Plaintiff.

Similarly, Plaintiffs tortious interference claims are also deficient. Specifically, Lipari fails to state a valid claim for tortious interference in that: (1) he fails to properly plead the element of causation; (2) he fails to properly plead the absence of justification; and- (3) he is attempting to recover lost profits for a non-established business. Thus, Plaintiff's Amended Petition must be dismissed.

WHEREFORE. and for the reasons set forth in the accompanying Suggestions in Support, the GE Defendants and Mr. Jeffrey Immelt request that this Court grant their Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2010, a copy of the foregoing was sent to Plaintiff Samuel K. Lipari by e-mail and also served by U.S. Mail, postage prepaid, and properly addressed to the following:

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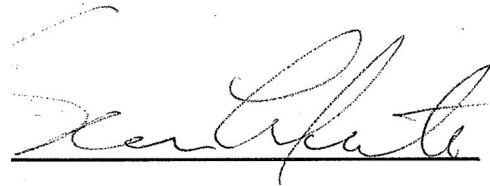
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IN THE CIRCUIT COURT OF JACKSON COUNTY
AT KANSAS CITY

SAMUEL K. LIPARI,)
)
Plaintiff,)
)
v.) Case No. 0916-CV38273
)
CHAPEL RIDGE MULTIFAMILY LLC, *et al.*,)
)
Defendants.)

MEMORANDUM OF LAW IN SUPPORT OF THE GE DEFENDANTS' AND
JEFFREY IMMELT'S MOTION TO DISMISS PLAINTIFF'S AMENDED
PETITION

Defendants General Electric Company ("GE"), General Electric Capital Business Asset Funding Corporation ("GE Capital") and GE Transportation Systems Global Signaling, LLC ("GE Transportation") (collectively, the "GE Defendants") and Defendant Jeffery Immelt (the Chief Executive Officer of GE) hereby move the Court to dismiss Plaintiff s Amended Petition for failure to state a claim.

I. INTRODUCTION

Plaintiff Samuel Lipari, in Count III of his Amended Petition, alleges that the GE Defendants and Mr. Immelt breached a "contract" to finance and lease to him a \$6.5 million dollar office complex in Blue Springs, Missouri. However, Plaintiffs has failed to properly plead a breach of contract claim against the GE Defendants and Mr. Immelt in that: (1) the purported "contract," as pled by Plaintiff, does not satisfy the Statute of Frauds; and (2) Plaintiff fails to allege, and cannot allege, that Mr. Immelt was a party to any "contract" with Plaintiff

Lipari also claims, in Count IV of his Amended Petition, that the GE Defendants and Mr. Immelt tortiously interfered with several of his business expectancies. Plaintiffs

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pleadings with respect to this claim are also deficient. Specifically, Lipari fails to state a valid claim for tortious interference in that: (1) he fails to properly plead the element of causation; (2) he fails to properly plead the absence of justification; and (3) he is attempting to recover lost profits for a non-established business.

For these reasons, the Court should dismiss with prejudice Counts III and IV of Plaintiffs Amended Petition, the only claims brought by Plaintiff against the GE Defendants and Mr. Immelt.

II. PROCEDURAL HISTORY

Unfortunately, this is not the first time that substantial time, expense and judicial resources have been spent addressing Plaintiff's lengthy and wholly unsupported allegations. Judges in the U.S. District Court for the District of Kansas, the Western District of Missouri, and Missouri state courts have been forced to wade through many of these same prolix and incomprehensible claims asserted by the Plaintiff over the last seven years. These claims are summarized below.

A. US Bancorp I Lawsuit.

On November 12, 2002, Medical Supply Chain, Inc.¹ ("MSC"), filed suit against US Bancorp (and a host of others) in federal court in Kansas. *See Medical Supply Chain, Inc. v. US Bancorp, NA, et al.*, Civil Action No. 02-2539-CM (Judge Carlos Murguia) ("US Bancorp I"). In that suit, MSC claimed that in March of 2002 it sought to establish a banking relationship with US Bancorp. US Bancorp, however, refused to establish the escrow accounts requested by MSC because of the "know your customer" requirements of the USA Patriot Act. In addition to asserting various state law claims in its Complaint,

¹ Medical Supply Chain, Inc. is the dissolved corporation of which Lipari was the chief executive officer. Lipari now purports to bring the current lawsuit as "the sole assignee of the dissolved corporation Medical Supply Chain, Inc."

MSC alleged antitrust claims under the Sherman Act and Clayton Act, as well as violations of the Hobbs Act. Essentially, MSC was alleging that the defendants refused to provide financing to MSC in order to prevent MSC from entering the healthcare supply market, thereby perpetuating their monopoly over this market. MSC alleged damages in excess of \$943 million and sought declaratory relief.

On June 16, 2003, the United States District Court for the District of Kansas dismissed MSC's Complaint in US Bancorp I. The Court stated in the dismissal Order that some of MSC's allegations were "completely divorced from rational thought." *Medical Supply Chain, Inc. v. US Bancorp NA, et al.*, 2003 WL 21479192, at *8. The Court further admonished MSC's counsel "to take greater care in ensuring that the claims he brings on his client's behalf are supported by the law and the facts." *Id.* at *6. Following the dismissal by the district court, MSC appealed to the Tenth Circuit. Not only did the Tenth Circuit affirm the dismissal of MSC's Complaint, it remanded the case to the district court to impose sanctions against MSC and its counsel for the prosecution of a frivolous appeal. *See Medical Supply Chain, Inc. v. US Bancorp NA, et al.*, 2004 WL 2504653 (10th Cir. Nov. 8, 2004); *see also Medical Supply Chain, Inc. v. US Bancorp NA, et al.*, 2005 WL 2122675 (D. Kan. May 13, 2005).²

B. GE I Lawsuit.

On June 18, 2003 (just two days after the District Court dismissed MSC's claims in the US Bancorp I lawsuit), MSC filed a lawsuit against the GE Defendants in federal

² On November 28, 2006, Lipari filed another lawsuit against US Bancorp NA and U.S. Bank NA in the Circuit Court of Jackson County, Missouri, alleging the same state law claims that were dismissed without prejudice in U.S. Bancorp I. This lawsuit was subsequently removed to the Western District of Missouri, and then transferred to the U.S. District Court for the District of Kansas, where it was styled as Case No. 07-2146-CM. ("US Bancorp II"). In U.S. Bancorp II, the District Court dismissed all of Lipari's claims except for one, and Lipari voluntarily dismissed that remaining claim. The Tenth Circuit ultimately affirmed the District Court's dismissal on July 16, 2009, in appellate Case No. 08-3287.

court in Kansas. *See Medical Supply Chain, Inc. v. General Electric Company, et al.*, Civil Action No. 03-2324-CM (Judge Carlos Murguia) ("GE I Lawsuit"). Shortly after the case was filed, MSC named Mr. Immelt, in his individual capacity, as an additional defendant. In that suit, MSC claimed the GE Defendants prevented MSC's entry into the health care supplier/distribution market by refusing to sublease a building and provide financing to MSC. More specifically, MSC alleged that the GE Defendants (and Mr. Immelt) violated federal antitrust laws pursuant to the Sherman Act and the Robinson-Patman Act. MSC also asserted state common law claims against the GE Defendants and Mr. Immelt, including breach of contract. At its core, MSC's claim was that the Defendants refused to sublease a building and provide necessary financing to MSC in order to prevent MSC from entering the healthcare supply market, thereby ensuring that Defendants' "cartel" would continue to dominate the market. Among other remedies, MSC sought monetary damages in the amount of profits "that it would have made for the next four years of operations had it been allowed to enter the market," as well as the equity it would have gained by purchasing the building, and the cash payment it would have received from GE for the buy-out of its lease.

On January 29, 2004, the District Court dismissed MSC's antitrust claims with prejudice, and declined to retain jurisdiction over the state law claims. *See Medical Supply Chain, Inc. v. General Electric Company, et al.*, 2004 WL 956100 (D. Kan. Jan. 29, 2004). MSC appealed the District Court's ruling to the Tenth Circuit. On July 26, 2005, the Tenth Circuit affirmed the district court ruling and remanded the matter to the district court for a determination of the proper sanctions to impose against MSC for filing

suit against Mr. Immelt in his individual capacity. *See Medical Supply Chain, Inc. v. General Electric Company, et al.*, 2005 WL 1745590 (10th Cir. July 26,2005).

C. Neoforma Lawsuit.

On March 9,2005, MSC filed a lawsuit in the U.S. District Court for the Western District of Missouri against Neoforma, Inc., Novation, LLC, US Bancorp, and various other corporate entities and individuals. *See Medical Supply Chain, Inc. v. Neoforma, Inc., et al.*, No. 05-2010-CV-W-ODS. On June 15,2005, Judge Ortrie D. Smith granted the defendants' motion to transfer the case to the District of Kansas, and it was subsequently transferred and assigned to Judge Carlos Murguia. *See Medical Supply Chain, Inc. v. Neoforma, Inc., et al.*, No. 05-2299-CM ("Neoforma Lawsuit"). In this lawsuit, MSC alleged that the defendants conspired to restrain trade in the hospital supply market. MSC asserted claims under the Sherman Act, Clayton Act, the Declaratory Judgment Act, RICO, the Hobbs Act and the USA PATRIOT Act, in addition to numerous common law claims. Similar to its previous lawsuits, MSC was alleging that the defendants improperly prevented MSC from obtaining the necessary financing (from US Bancorp and GE Capital) and office space (from GE) to enter the hospital supply market. Although not named as defendants in that action, MSC specifically alleged that GE, GE Capital and GE Transportation (i.e., the GE Defendants in the present lawsuit) were co-conspirators with the named defendants in the Neoforma case.

On March 7, 2006, the District Court dismissed MSC's federal claims against all defendants with prejudice, and declined to retain jurisdiction over the state law claims. *See Medical SupplyChain, Inc. v. Neoforma, .Inc., et al.*, 419 F.Supp.2d 1316, 1335-36 (D. Kan. 2006). The Court determined that MSC's Complaint, as a whole, violated the

pleading guidelines set forth in Federal Rule of Civil Procedure 8(a) and 8(e)(1). *Id.* at 1331. Specifically, the Court found that MSC's 115-page, 613-paragraph Complaint "falls miles from Rule 8's boundaries." *Id.*

The District Court also imposed sanctions on MSC's attorney, Bret Landrith/ as well as MSC's CEO and sole shareholder, Lipari. *Id.* at 1333-35. In setting forth the basis for its decision to sanction Lipari, the Court noted that Lipari "[took] responsibility for the decisions to knowingly bring the instant lawsuit after the result of plaintiff's previous attempts at litigation." *Id.* at 1334. The Court hoped that sanctioning Lipari, in addition to Landrith, would "serve[] to deter both from future frivolous filings." *Id.* at 1335. It did not.

D. GE II Lawsuit.

On March 28, 2006 - less than three weeks after being sanctioned by Judge Murguia - Lipari, now as the purported "Statutory Trustee of Dissolved Medical Supply Chain, Inc.," filed suit against the GE Defendants (and others) in the Circuit Court of Jackson County, Missouri ("GE II"). This lawsuit asserted the same breach of contract claims that were asserted by MSC in the GE I lawsuit, namely, that the GE Defendants failed to sublease a building to MSC and to provide MSC with the financing necessary to purchase the building and capitalize its business. And just as in the GE I lawsuit, Lipari sought monetary damages in the amount of profits that his company "would have made for the next four years of operations had it been allowed to enter the market," as well as the equity it would have gained from the purchase of the building, and the cash payment

³ By the time that this decision was rendered by Judge Murguia, Mr. Landrith had already been disbarred by the Supreme Court of Kansas for, among other things, filing frivolous pleadings and motions. *See In re Landrith*, 124 P.3d 467 (Kan. 2005).

it would have received from GE for the buy-out of its lease. But this time Lipari sought a specific monetary amount from the GE Defendants - \$450,000,000.

Lipari subsequently filed an Amended Petition to add new parties, including Mr. Immelt, and new claims, including claims under RICO and the Hobbs Act. Since Lipari was now asserting federal claims, Mr. Immelt and the GE Defendants removed the case to Missouri federal court.

On July 30, 2008, Judge Fernando Gaitan, Jr. of the U.S. District Court for the Western District of Missouri dismissed Lipari's federal claims, finding them to be "indefinite and unprovable." Judge Gaitan declined to exercise jurisdiction over the state law claims, and dismissed them without prejudice. *See Lipari v. General Electric Company, et al.*, No. 07-0849-CV-W-FJG. Lipari appealed the dismissal to the Eighth Circuit Court of Appeals. On December 4, 2009, the Eighth Circuit affirmed Judge Gaitan's dismissal of Lipari's claims, and the Eighth Circuit issued its mandate formally dismissing all claims on January 28, 2010. Undeterred, Lipari continued to push his meritless claims.

E. The Present Lawsuit ("GE III").

On December 15, 2009, Lipari filed the present lawsuit against Defendants Chapel Ridge Multi-Family, LLC, Swanson Midgley, LLC, Lianne Zellmer, Troppito & Miller, LLC, and Wachovia Dealer Services, Inc. as "latecomers to a racketeering conspiracy with a criminal enterprise to keep the petitioner from competing in hospital supply markets." Essentially, Lipari brought RICO and conspiracy claims against the above named defendants because they evicted him from his apartment and repossessed his car after he stopped making timely payments.

On January 20, 2010, Lipari amended his Petition to add Mr. Immelt and the GE Defendants to the present lawsuit. Once again, Lipari claimed that Mr. Immelt and the GE Defendants breached a contract with him and tortiously interfered with his business expectancy. These are the same claims that were asserted by MSC in the GE I and GE II lawsuits, namely, that Mr. Immelt and the GE Defendants failed to sublease a building to MSC/Lipari and to provide MSC/Lipari with the financing necessary to purchase the building and capitalize its business. And, just as in GE I and GE II, Lipari is seeking \$700,000,000 in "damages" for his "lost future profits" as a result of the Defendants' alleged breach of contract and tortious interference.

Lipari has once again brought salacious, unsupported and legally deficient allegations against the GE Defendants and Mr. Immelt. As such, his latest attempt to abuse the legal process should meet the same fate each of his previous lawsuits ultimately met - dismissal.

III. STANDARD OF REVIEW

A defendant is entitled to dismissal where the plaintiff has failed to state a claim upon which relief can be granted. Mo. R. CIY.P. 55.27(a)(6). When reviewing a motion to dismiss, "all facts alleged are treated as true, and the pleading is construed in favor of plaintiff to determine whether the averments invoke substantive principles of law which entitle the plaintiff to relief." *L'C. Dev. Co., Inc. v. Lincoln County*, 26 S.W.3d 336, 339 (Mo. App. 2000). In ruling on a motion to dismiss, the petition is to be reviewed by the court in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462 (Mo. bane 2001); *see also Eastwood v. N Cent. Missouri Drug Task Force*, 15 S.W.3d

65, 67 (Mo. App. 2000). But in determining whether a petition sufficiently states a claim, conclusions of the pleader are not considered. *Murray v. Ray*, 862 S.W.2d 931, 934 (Mo. App. 1993). Thus, a petition containing only conclusions, devoid of the ultimate facts or any allegations to infer those facts, fails to state a claim upon which relief can be granted. *Id.*

IV. ARGUMENT & AUTHORITIES

A. Plaintiff's Amended Petition should be dismissed pursuant to Rule 55.27(6).

Missouri is a fact-pleading state. Mo. R. Civ.P. 55.05; *Executive Bd. of Missouri Baptist Convention v. Windermere Baptist Conference Center*, 280 S.W.3d 678, 698-699 (Mo. App. 2009). The failure to state a cause of action upon which relief can be granted requires dismissal of the petition because failing to state a claim essentially deprives the trial court of jurisdiction. Mo. R. Civ. P. 55.27(6); *Townsend v. Eastern Chemical Waste Systems*, 234 S.W.3d 452, 469 (Mo. App. 2007) (citations omitted).

Here, Lipari asserts two claims against Jeffery Immelt and the GE Defendants, neither of which satisfies Missouri's fact-pleading requirement. The first claim, breach of contract, fails because the alleged contract is a contract to sell land and/or lend money, and Lipari fails to allege the purported written agreement was signed by any of these Defendants. Thus, since the alleged contract is unenforceable in that it does not satisfy the Statute of Frauds, Lipari cannot assert a claim for breach of the alleged contract. Further, Lipari's breach of contract claim against Mr. Immelt is clearly deficient because Lipari failed to plead, and cannot plead, that Mr. Immelt was a party to any alleged contract with him. Thus, the Court should dismiss Count III (Breach of Contract) against all of these Defendants.

Lipari's second claim against these Defendants, tortious interference with business expectancy, is similarly flawed. In order to adequately state a claim for tortious interference with business expectancy, a plaintiff must plead, among other things, that: (1) the defendant's actions caused the breach of a third-party contract or business relationship; (2) that the actions of the defendants were without justification; and (3) that he suffered damage as a result of the defendant's actions. Plaintiff's Amended Petition fails to properly plead these essential elements of a tortious interference claim. Thus, the Court should dismiss Count IV in its entirety."

B. Plaintiff's claims against Jeffery Immelt are not only legally deficient, they are frivolous.

A fundamental principle of contract law is that "a contract generally binds no one but the parties thereto, and it cannot impose any contractual obligations or liability on one not a party to it." *Cont'l Cas. Co. v. Campbell Design Group, Inc.*, 914 S.W.2d 43, 44 (Mo. App. 1996). But Lipari never alleges that Mr. Immelt, in his individual capacity, was a party to the contract. Thus, Count III of the Amended Petition fails to state a claim against Mr. Immelt for breach of contract, and therefore it should be dismissed.

Further, Mr. Immelt should be dismissed from this lawsuit because Lipari fails to allege a single fact indicating that Mr. Immelt had any personal involvement with, or took any action against MSC or Lipari. As previously noted, the Tenth Circuit Court of Appeals ordered the District Court of Kansas to issue monetary and filirigsanctions against Lipari and his attorney for filing similarly unsupported claims against Mr. Immelt in his individual capacity. Specifically, the Tenth Circuit held that sanctions were appropriate because "it is clear that at least MSC's claims against Jeffery Immelt in his

⁴ For the sake of clarity, this brief will first address the claims against Mr. Immelt individually. It will then address the claims against the GE Defendants.

individual capacity were frivolous in that no allegation was made that Immelt had any personal connection to MSC's alleged injury or even that he knew it existed." See *Medical Supply Chain, Inc. v. General Electric Company, et al.*, 2005 WL 1745590, *17 (10th Cir. July 26, 2005). The same conclusion is just as true today, and therefore Lipari's current claims against Mr. Immelt cannot stand.

C. Plaintiff's breach of contract claim against the GE Defendants fails because it does not satisfy the Statute of Frauds, and it does not plead the satisfaction of a condition precedent to the contract.

Lipari's breach of contract claim against the GE Defendants fails for several reasons. First, it is clear from the Plaintiffs Amended Petition that the alleged "contract" at issue fails to satisfy Missouri's Statute of Frauds, Mo. Rev. Stat. § 432.010, in that (1) none of the GE Defendants signed the contract that they allegedly breached; and (2) Plaintiff does not allege that George Fricke, the person who purportedly entered into the agreement, had the authority to enter into the alleged real estate agreement on behalf of any of the GE Defendants.

The Statute of Frauds requires that a real estate sales contract must be signed by the party charged with breaching the contract. R.S.Mo. § 432.010. Plaintiff alleges that an email from Fricke constituted a written acceptance of the proposed agreement. In Missouri, an electronic signature in an e-mail satisfies the Statute of Frauds - but only as to the "sender." *International Casings Group, Inc. v. Premium Standard Farms, Inc.*, 358 F.Supp.2d 863 (W.D.Mo. 2005). But here, the only person identified in the sender line of the email is Fricke, an employee of GE Commercial Properties. Am. Pet. ~ 362. Thus, on the face of the Amended Petition, it is clear that Plaintiff has failed to allege,

and cannot allege, that the GE Defendants signed - either electronically or otherwise - the purported contract.

Furthermore, Lipari has not, and cannot, sufficiently allege that Fricke entered into the contract on behalf of any or all of the GE Defendants. Section 432.010 states that "no contract for the sale of lands made by an agent shall be binding upon the principal, unless such agent is authorized in writing to make said contract." Plaintiffs Amended Petition fails to plead that Fricke had written authorization to act on behalf of any of the GE Defendants. Therefore, Lipari fails to state a claim upon which relief can be granted.

Second, Plaintiff fails to make the requisite pleading with respect to a condition precedent related to the purported contract. When an agreement contains a condition precedent, a plaintiff claiming breach of the contract must either plead satisfaction of the condition precedent or must state a reason for the non-performance. *Lowery v. Air Support Int'l., Inc.*, 982 S.W.2d 326, 330 (Mo. App. 1998) (citing *Globe Am. Corp. v. Miller Hatcheries, Inc.*, 110 S.W.2d 393, 396 (Mo. App. 1937)). The alleged "contract" claim between Lipari and the GE Defendants purportedly consists of the May 15, 2003 letter Lipari's attorney sent to Fricke (i.e., the "proposal"), and Fricke's voice mail and e-mail of the same day regarding the proposal. Notably, the proposal stated that the "offer is contingent . . . upon GE Capital securing a twenty year mortgage on the building and the property with a first year moratorium." Am. Pet. ,360. Thus, under the terms of Lipari's offer, the agreement was contingent on GE Capital providing a twenty-year mortgage on the terms stated in the proposal. But Lipari fails to plead the satisfaction of this necessary condition precedent to the contract (i.e., that he obtained approval for

financing from GE Capital for a twenty-year mortgage with a first year moratorium on mortgage payments).

In addition, the Amended Petition does not allege that GE Capital told Lipari that Fricke could accept a contract on its behalf, or that Fricke told Lipari that he had such authority. Therefore" Lipari's Amended Petition fails to plead any facts which would suggest that Fricke had the apparent authority to bind GE Capital to any alleged contract. *See Essco Geometric v. Harvard Indus.*, 46 F.3d 718, 726 (Sth Cir. 1995) ("Under Missouri law, apparent authority is created by the conduct of the principal which causes a third person reasonably to believe that the purported agent has the authority to act for the principal, and to reasonably and in good faith rely on the authority held out by the principal. ").

Indeed, Lipari certainly understood that Fricke was not acting for GE Capital because in the May 15 proposal to Fricke, Lipari requested that Fricke provide him with "a contact person for GE Capital or its mortgage agent." *See* Am. Pet. ~ 360. Consequently, Lipari did not, and could not, allege that GE Capital accepted Lipari's offer related to the financing of the property. Thus, a necessary condition precedent was not satisfied, and Lipari's failure to plead satisfaction of the condition precedent is fatal to his breach of contract claim.

D. Lipari's Amended Petition fails to adequately plead the essential elements for tortious interference with business expectancy.

In pleading a claim for tortious interference with a contract or business expectancy, five essential elements must be pled: (1) a contract or a valid business relationship or expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of the contract or

relationship; (4) the absence of justification; and, (5) damages resulting from defendant's conduct. *Friedman v. Edward L. Bakewell, Inc.*, 654 S.W.2d 367,368 (Mo. App. 1983).

Lipari's claim for tortious interference is based upon the Defendants' alleged interference with two of Lipari's business relationships, namely: (1) an oral contract with Michael Lynch to provide services related to finding a potential merger partner for Lipari's company; and (2) a written agreement with U.S. Bank to capitalize Lipari's entry into the medical supply market. Lipari's tortious interference claim, however, fails for three reasons. First, Lipari does not plead that the alleged actions of Mr. Immelt or the GE Defendants caused Michael Lynch to breach his alleged contract with Lipari. Second, Lipari fails to adequately plead that Mr. Immelt's and the GE Defendants' alleged acts were not justified. Finally, Lipari's claim for lost profit damages is deficient.

1. Lipari's Amended Petition fails to plead that Mr. Immelt and the GE Defendants caused Michael Lynch to breach his alleged contract with Lipari.

In his Amended Petition, Lipari alleges that he had an oral contract with Michael Lynch "to obtain and use his services, connections and reputation" to locate "a publically traded company to merge with to underwrite the costs of entering the hospital supply market." *See* Am. Pet. ~ 432.' Lipari then goes on to allege that the GE Defendants participated in various improper (and ridiculously disparate) activities, including "breaking an (sic) entry," "wire tapping," "terrorizing Lynch's wife," and "interfering with the payroll of Lynch's brother's plastics factory." *See* Am. Pet. ~ 433 & 435. However, Lipari never states that these alleged actions caused Michael Lynch to breach the purported contract with Lipari. As such, the Amended Petition fails to plead the essential element of causation. *See generally, Birdsong v. Bydalek*, 953 S.W.2d 103,

(Mo. App. 1997) (holding tortious interference claim fails when plaintiff fails to show a causal connection between the alleged wrongful acts and the alleged breach).

2. The Amended Petition fails to properly plead the absence of justification.

To adequately plead tortious interference with contract, the plaintiff must provide factual support for the claim that the defendant's actions were not justified. *Friedman*, 654 S.W.2d at 369. Simply claiming - without factually supporting the claim - that a defendant acted without justification or excuse is a "mere conclusion of the pleader ... and must be disregarded in determining whether a petition states a claim on which relief can be granted." *Id.* In *Friedman*, the plaintiffs tortious interference claim simply stated that "Defendants acts as aforesaid were intentional and without justification or excuse." *Id.* In upholding the trial court's decision to dismiss the petition for failing to state a claim, the Court of Appeals held the petition failed to state facts which, if proved, would establish the absence of justification. *Id.* The same pleading deficiency is found here.

Lipari first claims Mr. Immelt and the GE Defendants interfered with his contract with Michael Lynch. *See* Am. Pet. ~ 430-437. But Lipari simply states that Mr. Immelt and the GE Defendants took actions against Mr. Lynch "in the absence of justification." *See* Am. Pet. ¶ 436. He does not provide a single fact to support this allegation. According to *Friedman*, failing to plead such supporting facts is fatal to a tortious interference claim.

Lipari next claims that Mr. Immelt and the GE Defendants tortiously interfered with his alleged contract with U.S. Bank "to capitalize his entry into the hospital supply market." *See* Am. Pet. ~ 440-441. This interference was allegedly caused by the GE Defendants "coordinat[ing] their defense of Medical Supply's action with the US Bank

defendants⁵ ... to defeat [Lipari's] claims for injunctive and declaratory relief resulting from his first attempt to enter the market for hospital supplies." See Am. Pet. ~ 392. Even assuming, as we must for the purpose of this motion, that Lipari's allegations about the action of the GE Defendants is true (i.e., that the GE Defendants assisted the US Bank defendants in defending against Lipari's claims), there is nothing about such an action which is improper or actionable. In other words, this fact does not establish the absence of justification necessary for a tortious interference claim.

3. A prospective business - as opposed to an established business - is not entitled to lost profits as a measure of damages.

Finally, lost profit damages are only available to an "established" business. *Quality Wig Co., Inc. v. Nichols Co., Inc.*, 728 S.W.2d 611, 616 (Mo. App. 1987) (holding "prospective future profits from a business to be established ... do not constitute an item of damages ... because such damages are speculative, conjectural and subject to the uncertainties of changing future conditions) (emphasis added). This is because Missouri has long held that anticipated profits are too remote, speculative and too dependent upon changing circumstances to warrant a judgment for their recovery, unless the damage is made certain by actual facts. See generally, *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910,923 (Mo. App. 1994).

In this case, Lipari essentially pleads that he is entitled to \$700,000,000 in lost profits because he had an idea for a company. To that end, Lipari affirmatively pleads that he had not yet entered the health care supply market at the time the GE Defendants and Mr. Immelt allegedly interfered with his business expectancy. Accordingly, his

⁵ The US Bank defendants are US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies, and Andrew S. Duff. See Am. Pet. ~ 392.

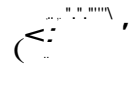
business was not "established," and future profits cannot support the essential damages element of his tortious interference claim."

V. CONCLUSION

This lawsuit is but the latest salvo from Lipari in his nearly eight-year crusade to litigate meritless claims against the GE Defendants, Mr. Immelt and countless others (including lawyers, law firms and judges). Lipari's claims have been analyzed by federal and state judges in both Missouri and Kansas, and each time his claims have met the same fate -- dismissal. The deficiencies in Lipari's claims in this lawsuit require the same result here. Thus, Lipari's Amended Petition, and specifically Counts III and IV of the Amended Petition, should be dismissed with prejudice.

Respectfully submitted,

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6 It is not surprising that in a related case (i.e., *GE II*), Judge Gaitan, in dismissing Lipari's allegations, determined that Lipari's claims for lost profit damages were "indefinite and unprovable." See *Lipari v. General Electric Company, et al.*, No. 07-0849-CV-W-FJG. If Lipari's damages are "indefinite and unprovable" under federal notice pleading requirements, then they are that much more uncertain under Missouri's fact pleading requirement.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2010, a copy of the foregoing was sent to Plaintiff Samuel K. Lipari by e-mail and also served by U.S. Mail, postage prepaid, and properly addressed to the following:

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A handwritten signature in black ink, appearing to read "Sen. [unclear]", written over a horizontal line.