

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
AT INDEPENDENCE

SAMUEL K. LIPARI,	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
	)	
Plaintiff,	)	
v.	)	Case No.: 0816-CV-04217
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

**SUGGESTIONS IN SUPPORT OF MOTION  
OF HUSCH BLACKWELL SANDERS LLP TO  
DISMISS PETITION FOR FAILURE TO STATE A CLAIM**

**Introduction**

Plaintiff filed this *pro se* action against twenty-seven defendants, including HBS, seeking \$3.2 billion in damages for alleged acts which plaintiff claims constitute antitrust violations, tortious interference with business relationships, fraud, and *prima facie* tort. Plaintiff contends that the numerous and widely-varied defendants joined together and formed a "hospital supply cartel" to prevent him from entering the Missouri hospital supply market. Although plaintiff's petition is, to say the least, voluminous, it does not set out even the minimal facts necessary to state any valid legal claim upon which relief can be granted as to HBS. All counts and claims asserted against HBS must, therefore, be dismissed pursuant to Missouri Supreme Court Rule 55.27(a)(6).

**I. Pleading Standard**

Missouri courts require *pro se* plaintiff to meet the minimum pleading standards set forth in the rules of procedure established by the Missouri Supreme Court, just like any other

litigant. *Scher v. Sindel*, 837 S.W.2d 350,351 (Mo. Ct. App. 1992). The Court is thus required to review plaintiffs' pleadings, like all others, "to determine whether they invoke principles of substantive law." *Weems v. Montgomery*, 126 S.W.3d 479,484 (Mo. Ct. App. 2004). "The pleadings are given their broadest intendment, all facts alleged are treated as true, and all allegations are construed favorably to plaintiff." *Scher*, 837 S.W.2d at 351. "However, the conclusions of the pleader are not admitted." *Id.* If the pleaded facts do not establish the presence of all elements of a valid claim, the petition must be dismissed. *See Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. Ct. App. 1997).

II. Plaintiff's Antitrust Claims Must Be Dismissed Because He Failed To Plead Them "With Enough Fact To Raise A Reasonable Expectation That Discovery Will Reveal Evidence Of Illegal Agreement"

A. Antitrust Claims Must be Supported By Plausible Pleadings

Missouri courts construe Missouri's antitrust statutes in "harmony with ... judicial interpretations of comparable federal antitrust statutes." Mo. REV. STAT. § 416.141 (2001); *Metts v. Clark Oil & Refining Corp.*, 618 S.W.2d 698, 703 (Mo. Ct. App. 1981). Missouri's antitrust statute and the Sherman Act are analogous. (*See, e.g., Zipper v. Health Midwest*, 978 S.W.2d 398, 418 (Mo. Ct. App. 1998). As such, the Court should follow federal decisions when interpreting Missouri's antitrust statute. *Id.*

The United States Supreme Court requires an antitrust plaintiff to support a claim with "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007) (interpreting the Sherman Act). This "plausibility" requirement prevents a plaintiff with "a largely groundless claim from taking up the time of a number of other people ...." *Id.* at 1966 ("The cost of modern ... antitrust litigation and the increasing caseload of the ... courts counsel against sending the

parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint" (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Thus, plaintiffs antitrust claims must be dismissed unless the Court believes that the petition contains "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."

Plaintiff appears to try to describe three apparently separate antitrust claims against HBS. First, he alleges in Count I that HBS "contracted, combined, or conspired" with the twenty-six co-defendants to restrain the hospital supply trade in violation of Mo. REV. STAT. § 416.031.1. (pet. pp. 93-98.) In Count II, he alleges that HBS and the co-defendants have a monopoly or have attempted to monopolize the relevant markets in violation of Mo. REV. STAT. § 416.031.2. (pet. pp. 98-103.) Then, in Count III, he alleges that HBS and the co-defendants have attempted to monopolize the hospital supply market in violation of Mo. REV. STAT. § 416.031(2). (Pet. p.103). A review of the petition, however, shows that none of these claims rises to the "plausibility" level as to HBS.

**B. Count I: The Facts Pleaded In The Petition Raise No Expectation That Discovery Will Reveal Evidence That HBS Contracted, Combined Or Conspired With The Co-Defendants To Restrain The Trade Of Hospital Supplies.**

Plaintiff alleges that HBS violated Mo. REV. STAT. § 416.031.1 by contracting, combining, and conspiring with the other defendants to restrain the hospital supply trade. (pet. 93.) The only conduct that plaintiff claims links HBS to the "hospital supply cartel" is recited in paragraphs 201-215 and paragraph 229 of the petition. Only three actions by HBS are alleged: first, HBS, through a predecessor firm, provided legal representation to other alleged co-conspirators, and, according to the petition, an HBS lawyer failed to show up for court hearings or participate in mediation. (Pet. 201-03.) Second, HBS "installed" a one-time employee as

Director of the Missouri Department of Health and Senior Services. (Pet., 229.) Finally, HBS lied to its malpractice carrier about its liability to the client it poorly represented in one of plaintiffs earlier suits. (Pet." 214-15.) These facts, while impugning the quality of HBS's legal services, have nothing whatsoever to do with cartels or hospital supplies. These pleaded facts cannot be said to give rise to any expectation that discovery will reveal that HBS contracted, combined, or conspired with the co-defendants to restrain the hospital supply trade.

In fact, none of the pleaded facts connect HBS to any scheme involving hospital supplies. At most, plaintiff links HBS to one of the supposed co-conspirators by pointing out that HBS, in its performance as a law firm, provided legal representation to that company in another lawsuit filed by plaintiff. Plaintiff says HBS provided inadequate representation, but this does not give rise to a claim by plaintiff, let alone an anti-trust claim.

The fact that a one-time associate at HBS was selected to head the state of Missouri's Department of Health and Senior Services in no way links HBS to the hospital supply business. Though plaintiff claims that HBS "installed" the former employee in this position, he gives no explanation as to how this could be or how a private law firm could have any role in the selection of gubernatorial appointments. \

Likewise, a reader of the petition is left befuddled as to how the alleged provision of inadequate legal services to a client had any effect on hospital supplies or plaintiffs ability to enter the market for such goods. The reality is that nowhere in Count I or any part of the petition does plaintiff show any connection whatsoever between HBS and the market for hospital supplies, let alone show that there is a reasonable expectation that discovery would reveal any

HBS respectfully requests that the Court take judicial notice that such appointments are made by the governor of Missouri, not private law firms.

evidence whatsoever of an attempt by HBS to illegally monopolize that market. Count I must thus be dismissed because it pleads no claim against HBS for which relief may be granted.

C. Count II: Plaintiff Raises No Expectation That Discovery Will Reveal Evidence That HBS Monopolized Or Attempted To Monopolize The Hospital Supply Industry.

Plaintiff alleges in Count II that HBS violated Mo. REv. STAT. § 416.031.2 when it monopolized or attempted to monopolize the hospital supply trade. (pet. p. 98.) The method used by HBS to establish this control over hospital supplies is never explained. The only conduct that allegedly links HBS to such a monopoly or the "hospital supply cartel" is that described above in paragraphs 201-215 and paragraph 219 of the petition which has nothing to do with cartels or hospital supplies. The pleaded facts show only that HBS represented a client in a lawsuit, albeit poorly, and that a state official once worked at an HBS predecessor firm. None of these facts in any way connects HBS to a medical supplier, to a market, or anything harmful to plaintiff's business interests. Most certainly, these facts cannot be said to raise the Court's expectation that discovery will reveal that HBS monopolized or attempted to monopolize the hospital supply trade. Thus, Count II must be dismissed for failing to state a claim against HBS for which relief may be granted.

D. Count III: Plaintiff Raises No Expectation That Discovery Will Reveal Evidence That HBS Conspired With The Co-Defendants To Violate Missouri's Antitrust Act.

Count III alleges that HBS violated Mo. REv. STAT. § 416.031.2 when it conspired with the co-defendants to restrain the hospital supply trade in violation of Mo. REv. STAT. §§ 416.011 to 416.161. (pet. 93.) Again, the only conduct that allegedly links HBS to the "hospital supply cartel" is the provision of legal services and the prior employment of a state official. As noted above, these facts don't even connect HBS to the hospital supply market, let alone raise an expectation that discovery will reveal that HBS conspired with anyone to restrain the hospital

supply trade in violation of Missouri's antitrust act. Count III must also be dismissed for failing to state a claim.

**III. Plaintiff's Fraud Claim Must Be Dismissed Because He Failed To Plead "Each Element Of Fraud With Particularity"**

**A. A Plaintiff Must Plead Each Element of Fraud With Particularity.**

"The rules governing the pleading of fraud are more precise than those which generally govern pleading a claim for relief." *Arnold v. Erkmann*, 934 S.W.2d 621,626 (Mo. App. 1996). Fraud claims must be pleaded with particularity. Mo. Sup. Ct. Rule 55.15; *Arnold*, 934 S.W.2d at 626. "If any essential element of fraud is not properly pleaded, the petition is fatally defective and subject to dismissal." *Bohac v. Walsh*, 223 S.W.3d 858, 863 (Mo. Ct. App. 2007).

The elements of fraud which must be pleaded with particularity are: "1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity, or his ignorance of its truth; 5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; 6) the hearer's ignorance of the falsity of the representation; 7) the hearer's reliance on the representation being true; 8) his right to rely thereon; and, 9) the hearer's consequent and proximately caused injury." *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. 1988).

**B. Plaintiff Failed To Plead the Essential Elements of Fraud.**

Plaintiff alleges that the "Defendants" committed fraud. (pet. 105-106.) HBS can only assume that plaintiff intended to assert Count V against it. Plaintiff claims that the facts recited in the first ninety-two pages of his petition support a claim of fraud against the "defendants." (pet. pp. 105-106.) But nothing in those pages describes anything like fraud by HBS.

There is no allegation of any statement or omission by HBS which even suggests fraud. Although the first ninety-two pages of the petition mention four alleged statements by HBS, the

petition does not state how any of these statements were false or constituted fraud. An HBS lawyer is said to have told counsel for plaintiff (it is unclear whether the alleged statement occurred before or after the lawyer was disbarred) that his house and all his property would be taken from him if he did not stop seeking redress for plaintiff. (pet.' 505). An HBS lawyer is claimed to have told unnamed judicial branch officials, in ex parte conversations, and officials of the city of Blue Springs that the General Electric Company is "rich and powerful with the ability to control court outcomes and that the petitioner, because he did not have money, was not entitled to have his contract rights enforced." (pet.' 506). HBS is alleged to have somehow communicated to attorney David Sperry that any agreement by him to represent petitioner "would likely result in ethics complaints and in the case being transferred to a distant venue where it would be impossible for him to economically prosecute the case and his property rights in the contingent fee representation of the petition would be forfeited." (pet.' 510). Finally, plaintiff claims HBS contacted attorney Jim Wirken and placed him in fear of representing plaintiff, falsely stating that petitioner had been repeatedly sanctioned for baseless claims, and that the "GE defendants were so powerful that no law firm could stand up to them." (Pet., 514).

With the sole exception of the alleged statement regarding plaintiff having been sanctioned for baseless claims, none of these statements is alleged to be false. (pet." 505, 510, 513-14, and 577-78.) More specifically, plaintiff did not plead: 1) that HBS knew that these representations were false; 2) that the representations were material; 3) that HBS intended the representations to be acted on by the person in the manner reasonably contemplated; 5) the hearer's ignorance of the falsity of the representation; 6) that anyone relied on the representation being true; 7) that the hearer had a right to rely thereon; or, 8) that any statement caused a loss. Plaintiff thus failed to particularly plead the elements of fraud. Count V must therefore be

dismissed because it fails to state a claim against HBS for which relief can be granted.

*Hanrahan v. Nashua Corp.*, 752 S.W.2d 878,882 (Mo. Ct. App. 1988) (dismissing fraud claim for failing to plead with particularity); *Green v. Green*, 606 S.W.2d 395, 398 (Mo. Ct. App. 1980) (dismissing fraud claim for failing to plead with particularity).

#### **IV. Plaintiff's Claims For Tortious Interference Must Be Dismissed Because He "Failed To Allege Facts Essential To Recovery"**

Plaintiff next asserts six claims of tortious interference against HBS. He does not, however, allege any of the facts essential to a cognizable tortious interference claim. "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. Ct. App. 1993). The court presumes that all averments in the petition are true and determines "if the facts alleged meet the elements of a recognized cause of action ...." *Anderson v. Village of Jacksonville*, 103 S.W.3d 190, 193 (Mo. Ct. App. 2003). A court will grant a motion to dismiss for failure to state a claim when "the petition fails to allege facts essential to a recovery." *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. Ct. App. 1997).

The essential elements of a claim for tortious interference are as follows: "(1) a valid business expectancy; (2) defendant's knowledge of the relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages." *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 316 (Mo. Ct. App. 1993).

##### **A. Interference With Business Relationship With Bret D. Landrith.**

Plaintiff alleges that HBS tortiously interfered with some undefined business expectancy involving Bret D. Landrith, plaintiff's disbarred former legal counsel. (Pet. at 505-06.) Specifically, plaintiff contends that an HBS partner informed Landrith that HBS would "have his house taken from him and all his property if [Landrith] did not stop seeking redress for [plaintiff]

· ... " (Pet.' 505.) Even if the Court assumes that these facts are true, plaintiff failed to plead the essential elements of tortious interference.

As previously explained, a claim for tortious interference requires plaintiff to recite a breach caused or induced by HBS. But plaintiff Lipari fails to allege any such breach. Although plaintiff recites that HBS "caused prejudice against [plaintiff] and his counsel to extort from them their property rights and the right to vindicate [plaintiffs] contract claims ... ," this allegation fails to state in what way Landrith breached his business expectancy with plaintiff or how, given his lack of a law license, Landrith could have been expected to seek redress for plaintiff.

Plaintiff cannot allege that anything done by HBS prevented Brett Landrith from serving as plaintiff's counsel. To the contrary, Landrith cannot represent plaintiff because he is not a licensed attorney. (pet." 498-500). *See also In the Matter of Bret Landrith*, 280 Kan. 619, 124 P.3d 467 (Kan. 2005). This tortious interference claim wholly fails to state any valid claim against HBS, and it must be dismissed.

#### **B. Interference With Business Relationship With David Sperry.**

Plaintiff alleges that HBS, through its *pro hac vice* agent Jonathan Glecken, persuaded attorney David Sperry not to represent plaintiff in this action. (Pet., 510.) Plaintiff also says that HBS's "power ... over [this] [C]ourt" caused Sperry to decline plaintiff's case. (Pet., 510.) Even if the Court assumed HBS had such power over it and that the other allegations are true, the necessary elements of tortious interference are still lacking.

First, plaintiff offers no basis for the claim that Jonathan Glecken (apparently an attorney with Arnold & Porter of Washington, D.C.) was an agent of HBS, let alone explain what a *pro hac vice* agent is.. Moreover, as noted above, a claim for tortious interference requires the

demonstration of a valid business expectancy. Although plaintiff states that he consulted with Sperry about this case, he has failed to give the Court any reason to believe he had a valid business expectancy that Sperry would agree to take this case. (Pet." 507-10.) Attorneys frequently screen prospective clients, but that is far from a commitment to provide representation. Without some allegation that David Sperry actually intended to represent him, plaintiff cannot show this essential plausible element of a tortious interference claim.

Furthermore, a claim for tortious interference requires HBS to have known about plaintiff's business expectancy with Sperry. Although plaintiff alleges that Sperry declined to pursue his case because of HBS's "power ... over [this] [C]ourt," he failed to allege that HBS had any knowledge about any business expectancy with Sperry, including how HBS could have known that plaintiff was even talking to Sperry. (Pet." 507-10.) Without an assertion that HBS knew about this alleged expectancy, an essential element of a tortious interference claim is lacking. Thus, the Court must dismiss this tortious interference claim because no valid claim is pleaded.

**C. Interference with Business Relationship With James C. Wirken And The Wirken Group.**

Plaintiff similarly alleges that HBS persuaded James C. Wirken and The Wirken Group not to represent plaintiff in this action. (Pet., 514.) Plaintiff says HBS "placed the Wirkens in fear of associating with [plaintiff], falsely stating that [plaintiff] had been repeatedly sanctioned for baseless claims." (Pet., 514.) Even these facts were true, which they are not, plaintiff still failed to plead the facts essential to a valid claim of tortious interference.

As with the other lawyers, plaintiff must show that he had some valid business expectancy, as opposed to a mere hope, that James Wirken would represent him. Although plaintiff states that he consulted with Wirken about this case, he failed to give any reason to

believe either that HBS knew about it or that Wirken actually ever intended to provide representation. (Pet. 511-19.) Indeed, though plaintiff says Wirken agreed to look into plaintiff's case **if** plaintiff would pay a retainer (Pet. , 516), he does not say the retainer was paid or that he offered to pay any of the attorneys for their services. Plaintiff then admits that Wirken "charitably offered some constructive criticisms ... but strongly urged [him] to continue *onpro se*". (Pet., 515.) Without some allegation that Wirken actually intended to represent him, plaintiff failed to allege an essential element of a tortious interference claim. Thus, this Court must dismiss the tortious interference claim because plaintiff failed to state a claim against HBS for which relief can be granted.

**D. Tortious Interference With Business Relation By Defendants Jerry Grundhoffer, Richard K Davis, Husch Blackwell Sanders LLP, Shughart Thomson & Kilroy PC.**

Plaintiff appears to link HBS to an allegation that U. S. Bank and U. S. Bancorp persuaded attorney Norman E. Siegel not to represent plaintiff in this action. (Pet., 520-21.) Plaintiff says that an HBS attorney met with attorneys from Shughart Thompson & Kilroy PC "for the purpose of coordinating General Electric's defense of contract and antitrust claims brought by [plaintiff] ... " and thereafter "repeatedly failed to produce" some undefined, but privileged documents. (Pet., 521.) Even if this Court assumes that these facts are true, they have nothing to do with a tortious interference claim.

If the petition intended to allege that HBS interfered with any valid expectancy to representation by Norman E. Siegel that plaintiff had, it fails to state a valid claim. Plaintiff did not allege how HBS's alleged refusal to disclose privileged documents tortiously interfered with his alleged business expectancy with Siegel. He did not plead that HBS knew about his alleged business expectancy with Siegel. He did not plead how Siegel breached their alleged business

expectancy. Finally, he failed to plead why HBS lacked justification for refusing to produce potentially privileged documents. As such, he utterly failed to establish the essential elements of tortious interference. Thus, this Court must dismiss this tortious interference claim because plaintiff failed to state a claim against HBS for which relief can be granted.

E. Tortious Interference With Business Relationship Between Petitioner And Senator Claire McCaskill Through Attempted Extortion Over Judy Jewsome For Helping Petitioner's Witness David Price By Defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, And Shughart, Thompson Kilroy PC.

Plaintiff alleges that HBS prevented him from speaking to Congressional aides in the offices of Congresswoman Claire McCaskill and Congressman Emmanuel Cleaver, II. (Pet. ¶¶541-61.) Specifically, he alleges that these Congressional staffs refused to speak with him because HBS prevented Judy Jewsome, an aide to Congresswoman Nancy Boyda, from disclosing who kidnapped the son of David Price. (Pet. ¶ 541-61.) Even if the Court were to assume that these facts make sense, plaintiff did not establish any claim of tortious interference by HBS.

Plaintiff does not allege any business expectancy he had with Judy Jewsome, who is mentioned only in connection with the alleged judicial ring of baby kidnappers described in *In re Bret D. Landrith*, 280 Kan. 619, 124 P.3d 467 (Kan. 2005). Plaintiff failed to allege that HBS knew about his alleged business relationship with any of the other Congressional aides. Furthermore, he failed to allege how any of these Congressional aides breached their business expectancy with plaintiff. As such, plaintiff failed to establish the necessary elements of tortious interference. Given those failures, this aspect of the interference claim must also be dismissed because plaintiff failed to state a claim against HBS for which relief can be granted.

F. Tortious Interference With Business Relationship Between Petitioner And Donna Huffman, The Petitioner's Trusted Advisor, Real Estate

Finance Expert And Potential Replacement Counsel By Defendants  
Lathrop & Gage L.c., Husch Blackwell Sanders LLP, and Shughart,  
Thompson & Kilroy Pc.

Plaintiff alleges that HBS prevented Donna Huffman from representing him at this trial. (pet. 91). Specifically, he contends that HBS caused the Kansas Bar Examiners to deny Hoffman's Kansas Bar application. (Pet." 575-77,582.) Even if this Court assumes that these facts are true, plaintiff failed to establish a claim for tortious interference.

Plaintiff failed to plead the facts essential to this tortious interference claim. First, plaintiff failed to establish that HBS knew about his alleged business expectancy with Hoffman. Second, he failed to establish that Hoffman breached this alleged business expectancy. Lastly, he failed to establish that, even assuming that HBS informed the Kansas Bar Examiners about Hoffman's alleged conduct, which it did not, that it lacked justification for doing so. As such, plaintiff failed to plead the essential elements of this tortious interference claim. Thus, this Court must dismiss this tortious interference claim because plaintiff failed to state a claim against HBS for which relief can be granted.

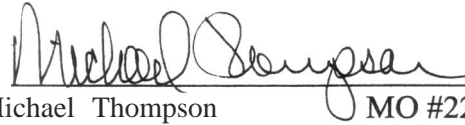
V. Plaintiff Lipari's Claim Of *Prima Facie* Tort Must Be  
Dismissed Because He Failed To Plead The "Facts Essential To Recovery"

A. Plaintiff Did Not Establish The Necessary Elements Of *Prima Facie* Tort.

"A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *Nazeri v. Mo. Valley College*, 860 S.W.2d 303,306 (Mo. banc 1993). The Court presumes that all averments in the petition are true and determines "if the facts alleged meet the elements of a recognized cause of action ...." *Anderson v. Village of Jacksonville*, 103 S.W.3d 190, 193 (Mo. Ct. App. 2003). A Court will grant a motion to dismiss for failure to state a claim when "the petition fails to allege facts essential to a recovery." *Klemme v. Best*, 941 S.W.2d 493,495 (Mo. banc 1997).

*prima facie* tort. The petition must be dismissed as to HBS because it fails to state any claim against HBS for which relief can be granted. -,

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 15th day of May, 2008 to:

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Attorney