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I. INTRODUCTION

Although the Court has ruled that *res judicata* does not immediately compel dismissal of plaintiff Lipari's state law claims, those causes of action nevertheless are subject to dismissal on other grounds at this time. The facts contained in plaintiff's Complaint—assumed for this Motion as true—do not plausibly show plaintiff may recover. Additionally, Plaintiff's Complaint violates the notice pleading requirements of Fed. R. Civ. P. 8 in that the Complaint—like the Court found in *Medical Supply II*—"falls miles from Rule 8's boundaries." *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1331 (D. Kan. 2006). The Court should therefore dismiss plaintiff's Complaint with prejudice.

II. CHOICE OF LAW

Missouri law likely applies to plaintiff's claims. Lipari originally filed this case in the Circuit Court of Jackson County, Missouri. The defendants thereafter removed the matter to the United States District Court for the Western District of Missouri, on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. The Western District of Missouri then transferred the matter to this Court.

Because this is a diversity matter, the Court will apply the substantive law of the forum state, including its choice of law provisions. *Advantage Homebuilding, LLC v. Maryland Cas. Co.*, 470 F.3d 1003, 1007 (10th Cir. 2006). Although this matter was transferred from the Western District of Missouri, "The transfer of a case to another district does not alter the applicable law. The transferee court must apply the same law applicable in the transferor court." *Hill's Pet Products, a Div. of Colgate-Palmolive Co. v. A.S.U., Inc.*, 808 F. Supp. 774, 776 n.3 (D. Kan. 1992). Kansas law applies the law of the state where the contract was formed or the tortious conduct occurred. *See, Foundation Property Investments, LLC v. CTP, LLC*, 159 P.3d 1042, 1046 (Kan. Ct. App., 2007); *Ling v. Jan's Liquors*, 703 P.2d 731, 735 (Kan., 1985). Missouri law applies the law of the state with

the most significant relationship to the action. *Superior Equipment Co., Inc. v. Maryland Cas. Co.*, 986 S.W.2d 477, 480 (Mo. App. E.D., 1998).

While the Complaint does not identify which state's law applies, the allegations indicate the supposed contract was negotiated in Missouri; the alleged tortious conduct occurred in Missouri; Lipari resides in Missouri; and his dissolved entity (Medical Supply Chain, Inc.) was incorporated and its principal business location was in Missouri. In addition, Lipari asserts a cause of action for violation of the Missouri Trade Secret Act. (Complaint, Count III.) Therefore, under either Missouri or Kansas' choice of law rules, Missouri law likely applies to the substantive causes of action.

III. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED

A. Plaintiff's Complaint does not contain facts that show a right to relief beyond a speculative level and, therefore, his claims must be dismissed under Fed. R. Civ. P. 12(b)(6).

In deciding a motion to dismiss, this Court must accept the well-pled factual allegations in the Complaint as true and grant the plaintiff the benefit of any inferences that are reasonably supported by those factual allegations. *See Yoder v. Honeywell*, 104 F.3d 1215, 1224 (10th Cir. 1997). But the court is free to ignore legal conclusions, unsupported factual conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). The Court need not "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

The United States Supreme Court has recently clarified the standard for reviewing a Complaint under Fed. R. Civ. P. 12(b)(6). In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) the Supreme Court abrogated its prior holding in *Conley v. Gibson* 355 U.S. 41 (1957). Under the *Conley* analysis, a plaintiff's Complaint could only be dismissed under Rule 12(b)(6) if there were

“no set of facts” under which the plaintiff could recover. In *Twombly*, the Court held that the standard for review under Rule 12(b)(6) requires the plaintiff to plead sufficient facts which, if taken as true, show a “plausible” entitlement to relief above mere speculation. See *Twombly*, 127 S. Ct. at 1965. In quoting *Wright and Miller*, the Court noted that “the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Id.*

While *Twombly* involved an antitrust action, the “plausibility” standard has since been applied to other causes of action. See, e.g., *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (applying “plausibility” standard to claims in tort and violation of civil rights). When analyzed under this “plausibility” standard, plaintiff’s claims in this action fail to rise above mere speculation, are legally insufficient and should be dismissed.

1. Count I: Damages for Breach of Contract

- a. Plaintiff’s Complaint purports to allege a cause of action for breach of written contract, but the allegations in his Complaint admit that no written contract existed between the parties. Therefore, plaintiff has not shown a plausible entitlement to recovery and dismissal is appropriate.**

Plaintiff alleges the following “facts” in paragraph 201 regarding his breach of contract claim for defendants’ alleged failure to perform under a purported escrow agreement:

The Defendant’s Vice President Brian Kabbes and Samuel Lipari came into formation of a *written contract* for escrow account services when both had agreed upon *some or all* of the terms in exchanges of email including: the composition of the escrow form, the language limiting the liability of US BANK and the escrow agent, the language designating US BANK’s compensation for its duties in any legal disputes arising between the parties, the directions for US BANK’s investment of long term held funds, the directions for US BANK’s investment of short term held funds, the selection of investment vehicles for both funds respectively, the name and address of BRIAN KABBES as escrow agent on the escrow form, the name and address of US BANK as escrow depository on the escrow form, the price term US BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.

Complaint ¶ 201 (emphasis added).

Based upon this allegation, Mr. Lipari rests his breach of contract claim upon a supposed written contract. But further allegations in Lipari's Complaint show he cannot recover under this theory.

In paragraph 215, Mr. Lipari begins his eight-page quote of a supposed telephone conversation between himself, then MSCI attorney Bret Landrith, and defendants' employees Lars Anderson, Brian Kabbes and Susan Anderson.¹ At the bottom of page 52 and continuing on to page 53, plaintiff pleads that the following exchange ensued:

Lars Anderson US Bancorp: "Where did we ever accept the transaction, we never provided you pricing, we never provided you a bid and we certainly never signed off on the escrow agreement."

Bret Landrith MSCI: "we (*sic*) had pricing *and its oral*, and this is Missouri, and this is a business contract in your regular line of business and we relied and depended on your excretion that it was ok and we sent it our to our best people."

(Emphasis added.)

Taking these allegations as true, Lipari admits there was no executed written contract between the parties. Therefore, plaintiff's factual allegations do not show a plausible chance of recovery for breach of a *written* contract.

Separate from plaintiff's admission that no written contract signed by the parties existed, plaintiff's facts further fail to allege a legally cognizable breach of contract claim. The elements of a breach of contract cause of action are: (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder with respect to a definite subject matter; (3) a valid consideration; (4) part performance by one party and prevention of further performance by the other; and (5) damages measured by the contract and resulting from its breach. *Scher v. Sindel*, 837

¹ Defendants do not admit that plaintiff's "quotes" in ¶ 215 are accurate, admissible or lawful to have been recorded. But the analysis under Rule 12(b)(6) requires that plaintiff's allegations be taken as true, and defendants do so solely for the purpose of this Motion and Memorandum.

S.W.2d 350, 354 (Mo. App. E.D. 1992); *E.A.U., Inc. v. R. Webbe Corp.*, 794 S.W.2d 679, 685 (Mo. App. E.D. 1990).

The basis for plaintiff's breach of contract claim is that Lipari and Brian Kabbes of U.S. Bank exchanged email negotiations regarding Medical Supply's desire for escrow services; the fees for the escrow agent services; U.S. Bank's compensation; the investment of long and short term held funds; the name of the escrow agent; and the payment schedule. (Complaint at ¶ 201.) Plaintiff further alleges that defendants performed diligence to determine whether to contract with Medical Supply (*id.* at ¶ 202); and that Mr. Kabbes also requested corporate good standing documentation from Medical Supply which was provided (*id.* at ¶ 203).²

It is hornbook law that the existence of a valid and enforceable contract is dependent upon agreement of the parties—or meeting of the minds—upon the terms of that contract. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. App. S.D. 2002). As the *Smith* court stated:

“Negotiations or preliminary steps towards a contract do not constitute a contract. The existence of a contract necessitates a ‘meeting of the minds’ which the court determines by looking at the intention of the parties as expressed in their words or acts. Whether a contract is made and, if so, what the terms of that contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties.”

Id. (quoting *Gateway Exteriors, Inc. v. Suntime Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. E.D. 1994) (emphasis supplied). At most, the allegations here show that Medical Supply and U.S. Bank were *negotiating* a potential written escrow agreement that never came to fruition. Had there been a meeting of the minds between the parties, a written contract memorializing all of these terms would exist. Although plaintiff alleges that he proposed to Mr. Kabbes a written escrow contract (Complaint, ¶ 87), nowhere does he allege that defendants signed this—or any other—agreement. Nor

² Defendants note that plaintiff nowhere pleads the existence of a purported contract with U.S. Bancorp. It is also clear that the supposed contract is alleged to have been between U.S. Bank and Medical Supply, not Lipari or U.S. Bancorp.

is a signed written agreement attached to the Complaint. Lipari even admits there is no written agreement between the parties. *Supra*, p. 4. Moreover, plaintiff alleges incongruously that the parties agreed to “some or all of the terms in exchanges of email” (Complaint, ¶ 201 (emphasis added); *see also* Complaint at p. 57 (in response to a supposed statement by Mr. Kabbes that the proposed agreement required further U.S. Bank approvals, Lipari stated: “OK, well then let me ask you this Brian, why won’t you just set the escrow up?”) (emphasis added)). Plaintiff’s supposition that a written contract was formed based on the negotiation of some terms of a possible agreement is insufficient to support his claim. *Smith*, 63 S.W.3d at 325.

Moreover, plaintiff fails to plead another fundamental element of his claim: the existence of *any* consideration exchanged by either U.S. Bank or Medical Supply. “[C]onsideration is a necessary element of establishing the existence of a valid contract.” *Allison v. Agribank, FCB*, 949 S.W.2d 182, 188 (Mo. App. S.D. 1997). Absent valid consideration, no contract can exist. *Id.* Here, there is plainly no allegation of consideration. Thus, the contract claim fails as a matter of law.

In *Yoest v. Farm Credit Bank of St. Louis*, 832 S.W.2d 325 (Mo. App. W.D. 1992), the court found that the plaintiffs did not plead a contract with any measure of definiteness and certainty for several reasons: (1) the petition did not give the terms of the contract, or the obligations of the respective parties or the measure of damages determined by the contract; (2) there was no copy of the contract, no way to determine the respective rights and duties; (3) there was nothing in the pleading to show whether or not the alleged contract was oral or written, nothing to show the terms of the notes, the amounts involved or time period of the terms. *Id.* at 329-30. In short, the court found that the pleading was so indefinite and uncertain that no cause of action for breach of contract was stated. *Id.* at 330. The same result is compelled here.

Plaintiff's facts—taken as true—do not show a plausible chance of recovery. His allegations admit that no written contract existed between the parties. There is no plausible allegation that the parties ever did anything more than discuss the possibility of doing business together but that U.S. Bank then declined the opportunity. Nor are there any facts purporting to allege the actual exchange of any consideration. Because of these critical pleading failures, the Court should dismiss Count I of plaintiff's Complaint with prejudice.

b. The statute of frauds prevents a party from asserting a breach of an oral contract to perform escrow services. Because Lipari's pleadings admit there was no written contract, any alternative claim for breach of an oral contract must be dismissed.

Under Missouri law, no party may maintain an action or a defense to an action upon a credit agreement unless the credit agreement is in writing and sets forth the specific terms of the agreement. R.S.Mo. § 432.045.2. A credit agreement is defined as “an agreement to lend or forbear repayment of money, to otherwise extend credit, *or to make any other financial accommodation.*” § 432.045.1 (emphasis added).

Plaintiff's breach of contract action asserts the defendants' alleged failure to provide escrow services at their banking institution. While no Missouri court has addressed the precise issue, an escrow agreement would likely meet the definition of a “credit agreement” under R.S.Mo. § 432.045.1 in that it is an agreement “to make any other financial accommodation.” Interpreting a virtually identical provision under an Illinois statute, the Illinois Court of Appeals has held that an escrow agreement meets the definition. *R and B Kapital Dev., LLC v. North Shore Comm. Bank and Tr. Co.*, 832 N.E.2d 246, 253 (Ill. App. 2005). As in *R and B Kapital*, plaintiff intended the proposed escrow agreement as part and parcel of a commercial loan. *See, e.g.*, Complaint ¶¶ 91, 108.

In his Complaint, plaintiff admits there is no written contract and that the agreement is “oral.” See Complaint, bottom of p. 52 to top of p. 53. Because plaintiff’s allegations show there is no written contract, and the statute of frauds precludes plaintiff from maintaining an action for breach of an oral credit agreement, his breach of contract claim must be dismissed. R.S.Mo. § 432.045.2; see also *Block v. NASB*, 59 S.W.3d 567, 572 (Mo. App. W.D. 2001).

2. Count II: Damages for Fraud and Deceit

- a. To recover on a fraud theory, the plaintiff must plead and prove that the defendant made a false representation with the intent to cause the plaintiff to act or refrain from acting. Plaintiff has failed to allege that defendants made any false representation or that defendants intended to cause the plaintiff to act or refrain from acting. Therefore, plaintiff’s claim for fraud must be dismissed.**

Count II of the Complaint purports to claim damages for fraud and deceit. In order to recover for fraud, plaintiff must plead the following elements: (1) a false, material representation; (2) the speaker’s knowledge of its falsity or his ignorance of its truth; (3) the speaker’s intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer’s ignorance of the falsity of the statement; (5) the hearer’s reliance on its truth, and the right to rely thereon; and (6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002); see also *Bracht v. Grushewsky*, 448 F. Supp.2d 1103, 1110 (E.D. Mo. 2006). A fraud claim must be based upon something more than mere suspicion, surmise and speculation. *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo. App. E.D. 1997). Further, all averments of fraud must be stated with particularity. Fed. R. Civ. P. 9(b); *Hanrahan v. Nashua Corp.*, 752 S.W.2d 878, 883 (Mo. App. E.D. 1988).

- (1) Plaintiff has failed to plead that defendants made a false representation.**

Plaintiff alleges that Brian Kabbes falsely represented that U.S. Bank would not provide escrow services to Medical Supply because of the “know your customer” provisions of the USA Patriot Act. (Complaint ¶¶ 210, 208 (*sic*) and 211.) Plaintiff further alleges that defendants made these “fraudulent misrepresentations” with knowledge (or in reckless disregard) of the fact that “the duties for ‘know your customer’ for new account holders had not been enacted.” (Complaint ¶¶ 217, 218.)

These allegations are insufficient as a matter of law to support a claim for fraudulent misrepresentation because plaintiff fails to plead a false statement. Rather, plaintiff alleges that defendants were simply incorrect in their interpretation of the “know your customer” provisions of the Patriot Act by making such representations “to the point of not checking and realizing that the increased duties of the ‘know your customer’ for new account holders had not been enacted.” (Complaint ¶ 217.) In essence, plaintiff’s theory is that defendants lied when they *declined* the escrow agreement because of the “know your customer” provisions of the Patriot Act. Defendants are not alleged to have at any time taken money or property under false pretenses. Moreover, it is clear from plaintiff’s allegations that, even if the supposed representation was false, Lipari certainly was not ignorant of it—among other things, both Lipari and his counsel disputed the supposed Patriot Act representation.

Further, even if defendants misinterpreted the “know your customer” provisions of the Patriot Act, a fraud claim cannot rest on a misrepresentation of law. *See McMullin v. Community Sav. Service Corp.*, 762 S.W.2d 462, 464 (Mo. App. E.D. 1988) (“Missouri courts have consistently applied the principle that an action for fraud cannot be based upon a misrepresentation of law.”); *Lucas v. Enkvetchakul*, 812 S.W.2d 256, 260 (Mo. App. S.D. 1991).

At best plaintiff merely alleges that the defendants misinterpreted the requirements of the Patriot Act. But there is nothing “false” in regard to the allegation about what was represented. Even accepting plaintiff’s allegations as true, the allegations do not plead a plausible theory of fraud. Therefore, plaintiff’s fraud claim should be dismissed with prejudice.

(2) Plaintiff has failed to show justifiable reliance or causation.

Plaintiff’s sole allegation of “reliance” is that he relied on the statements in not seeking to enforce the supposed escrow agreement and not “seeking a reversal of the decision from the St. Louis office of U.S. BANK’s Commercial Trust department and instead contacted U.S. BANCORP NA’s Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.” (Complaint ¶ 216.) Plaintiff has again failed to plead facts that plausibly support a fraud claim.³

On the contrary, plaintiff admits that he, in fact, did *not* rely on the defendants’ representations. Plaintiff alleges that defendants made the alleged false representations on October 24, 2002.⁴ (Complaint ¶ 214.) Plaintiff further alleges these representations were made with the intent to prevent him from enforcing his agreement with defendants. (Complaint ¶ 216.) But according to plaintiffs’ allegations, he *immediately* took the following steps to seek enforcement of the alleged agreement:

³ In Paragraph 214, plaintiff alleges that US Bancorp employee Becky Hainje left a message on the MSCI answering machine on October 24, 2002. According to plaintiff’s allegations, Ms. Hainje set forth *multiple* reasons why the defendants declined the agreement including: (1) MSCI was an unknown start up business; (2) the bank did not have any prior relationship with MSCI; (3) the principals involved with the business were unknown to the bank; and (4) the “know your customer” provisions of the Patriot Act. (Complaint ¶ 214.) The plaintiff makes no allegations as to his reliance on the three non-Patriot Act reasons Ms. Hainje stated for declining the escrow agreement. Therefore, even if the defendants’ reliance on the “know your customer” provisions of the Patriot Act were fraudulent misrepresentations, there is no allegation that the remaining reasons for declining the escrow business constitute any fraudulent action. Therefore, plaintiff cannot show causation.

⁴ In paragraphs 115-123 plaintiff appears to allege that he first learned that defendants declined the escrow agreements on October 15, 2002 and that Ms. Hainje made her call on or about that day. But this conflicts with the facts pled under Count II of plaintiff’s Complaint.

- On or about October 24, 2002, plaintiff and his attorney Bret Landrith had an extended phone conference with defendants’ representatives where plaintiff attempted to enforce the alleged agreement. (Complaint ¶ 215.)
- On Thursday, October 24, 2002 Medical Supply through its attorney filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees. (Complaint ¶ 172.)
- On October 28, 2002 Medical Supply through its attorney sought to schedule a hearing on its petition for injunctive relief. (Complaint ¶ 176.)

Therefore, even assuming that defendants made a false representation with the intent to prevent plaintiff from acting to enforce the supposed (written or oral) agreement, plaintiff’s allegations—taken as true—show that he did not refrain from taking action. In fact, plaintiff took immediate action to seek enforcement of the alleged agreement. As the Court’s record shows, however, plaintiff’s request for injunctive relief was denied. (*See* Complaint ¶¶ 10, 14-17.)

Plaintiff has failed to properly plead any facts to show he justifiably relied on defendants’ representations and that such reliance caused him monetary damage. The fraud claim is nonsensical in the theory it purports to offer. Therefore, plaintiff’s fraud claim should be dismissed with prejudice.

b. Under Missouri law, a party may not maintain a cause of action in tort where breach of the duty is purely contractual. Plaintiff’s fraud claim arises from the same alleged contractual duties upon which plaintiff bases its claim for breach of contract. Because both causes of action stem from the same alleged duties, plaintiff’s fraud claim must be dismissed.

In Missouri a plaintiff may not bring tort claims for breach of contract unless “the party sues for breach of a duty recognized by the law as arising from the relationship or status the parties have created by their agreement.” *Business Men’s Assur. Co. of America v. Graham*, 891 S.W.2d 438, 453 (Mo. App. W.D. 1994). In this action, plaintiff has brought a claim for breach of contract for defendants’ alleged failure to provide escrow services. *See* Complaint, Count I, ¶¶ 201-207.

In his fraud claim, plaintiff alleges that defendants fraudulently used the Patriot Act as a reason for breaching its agreement to provide escrow services:

US BANK and US BANCORP intentionally deceived MSCI and SAMUEL LIPARI over the pretext of the USA PATRIOT Act as a false reason to breach the contract to provide escrow accounts because the defendants knew or should have known that it is well established that a change in federal law does not excuse breach of a banking contract.

Complaint, ¶ 219.

It is therefore clear that plaintiff's fraud claim is part and parcel of his breach of contract claim. The fraud cause of action does not rest on any independent relationship or duty created by the contract but rather on the existence or non-existence of the contract itself. Even if a valid, enforceable contract existed and was breached (which is denied) the pleaded facts show that plaintiff's fraud claim rests on that alleged breach and dismissal is appropriate.

3. Count III: Misappropriation of Trade Secrets under R.S.Mo. § 417.450.

Plaintiff must plead that defendants misappropriated plaintiff's trade secrets and that such misappropriation has caused plaintiff damage. Plaintiff's allegations show that the alleged trade secrets—which defendants allegedly communicated to others at U.S. Bank, U.S. Bancorp or their affiliate U.S. Bancorp Piper Jaffray—were previously provided to Piper Jaffray by the plaintiff. Therefore, plaintiff's allegations fail to show a misappropriation or causation sufficient to maintain a cause of action and his Complaint should be dismissed with prejudice.

Under Missouri law, the misappropriation of trade secrets occurs when one acquires a trade secret through improper means such as theft or bribery; or when one discloses a trade secret without consent or knew or had reason to know that the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy. *See H&R Block Eastern Tax Services, Inc. v. Enchura*, 122 F. Supp.2d 1067, 1074 (W.D. Mo. 2000); R.S.Mo. § 417.453.

The following is a summary of the allegations plaintiff makes to support his misappropriation claim:

- On or about October 10, 2002 plaintiff gave a copy of the Medical Supply business plan and associate program booklets to U.S. Bank employee Douglas Lewis to apply for a line of credit based upon the escrow accounts Medical Supply was seeking. (Complaint ¶ 108);
- The business plan and associate booklets “had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained therein.” (Complaint ¶ 109);
- The letter of introduction also addressed the confidential nature of the documents (Complaint ¶ 110);
- After delivery, Mr. Lipari was given a loan application and agreed to return the next day (Complaint ¶ 114);
- On or about November 6, 2002, Mr. Lipari sought to retrieve the documents given to Mr. Lewis on October 10, 2002 (Complaint ¶ 189);
- Upon retrieving the booklets, he observed the binders and surmised they had been separated and copies or faxes had been made of the associate program and business plans as shown by “tractor marks” from a copy or fax machine (Complaint ¶¶ 192, 193);
- That someone on behalf of the defendants had instructed Mr. Lewis to disassemble the documents and make copies contrary to the notice of limitations and disclosure (Complaint ¶ 229);
- U.S. Bank exceeded its authorized use and supposedly copied and/or transmitted the documents to three U.S. Bancorp employees (Complaint ¶ 230);
- That U.S. Bancorp, its officers, and its subsidiary “U.S. BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI’s trade secrets and made use thereof (Complaint ¶ 232).

Plaintiff’s cause of action for misappropriation of trade secrets fails to state a claim upon which relief can be granted.⁵ While plaintiff alleges that U.S. Bancorp obtained “unconsented knowledge of MSCI’s trade secrets and made use thereof,” it was Medical Supply and Mr. Lipari who selected defendants for the purposes of providing escrow services and a possible loan. *See* Complaint ¶¶ 45, 47. The only entity—outside of defendants—that plaintiff alleges obtained these trade secrets is their affiliate at the time, U.S. Bancorp Piper Jaffray. (Complaint ¶ 232.) But

⁵ Defendants do not concede that the information plaintiff asserts as a “trade secret” is entitled to any protection afforded by the Missouri Act. However, for purposes of this motion and argument, the allegation will be taken as true.

plaintiff's allegations—taken as true—admit that before seeking escrow services from the defendants, plaintiff voluntarily contacted Piper Jaffray and submitted his idea and business plan for consideration of Medical Supply as a venture capital candidate. *See* Complaint, ¶¶ 55-60. Therefore, even assuming that defendants improperly communicated the alleged trade secrets to their affiliate Piper Jaffray, there is no misappropriation, causation or damage either by these defendants or the non-party, because plaintiff had already voluntarily provided this information to Piper Jaffray.

These facts show that plaintiff's claim for misappropriation of trade secrets cannot stand. It was the plaintiff who sought out U.S. Bank; it was the plaintiff who submitted the alleged trade secrets to U.S. Bank; and the alleged trade secrets had already been divulged—by the plaintiff—to Piper Jaffray (U.S. Bancorp's subsidiary at the time) three to four months earlier. Moreover, the plaintiff fails to allege how any of the defendants misused the materials or how he was damaged by the misuse. For these reasons, this Court must dismiss Count III of plaintiff's Complaint with prejudice pursuant to Rule 12(b)(6).

4. Count IV: Damages for Breach of Fiduciary Duty

Plaintiff generally alleges that defendants owed it a “fiduciary duty” but fails to provide any factual basis for this particular allegation. A claim for breach of fiduciary duty has four elements: (1) the existence of a fiduciary relationship between the parties, (2) a breach of that fiduciary duty, (3) causation, and (4) harm. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. App. W.D. 2000); *Preferred Phys. Mut. Group v. Preferred Phys. Mut. Risk Retention*, 918 S.W.2d 805, 810 (Mo. App. W.D. 1996). A fiduciary is a person having a duty to “act primarily for the benefit of another in matters connected with his undertaking.” *See* Restatement (Second) Agency 13 cmt. a (1957); Restatement (Second) of Trusts § 2 (1958). While Missouri has not adopted a precise common-law definition, a “fiduciary relationship” may exist when “a special confidence [is] reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the

interests of the one reposing the confidence.” *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 751 (Mo. App. E.D. 1990). “A confidential relationship is synonymous with a fiduciary relationship, and extends to instances in which a special confidence is reposed on one side and there is resulting *domination and influence* on the other.” *Matlock v. Matlock*, 815 S.W.2d 110, 115 (Mo. App. S.D. 1991) (emphasis in original). While “[t]here is no list of specific factors that must be found in order to determine that a fiduciary relationship existed,” there are “basic elements that exist in a fiduciary relationship between two persons,” including:

(1) as between the parties, one must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person must be possessed or managed by the dominant party; (3) there must be a surrender of independence by the subservient party to the dominant party; (4) there must be an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) there must be a showing that the subservient party places a trust and confidence in the dominant party.

Id. These indicia are not alleged here.

The only relationship that plaintiff has arguably pleaded between him and defendants is a putative business relationship that might have occurred upon the execution of a written escrow agreement. However, under Missouri law, “the existence of a business relationship does not give rise to a fiduciary relationship, nor a presumption of such a relationship.” *Chmieleski v. City Prods. Corp.*, 660 S.W.2d 275, 294 (Mo. App. W.D. 1983); *Kratky v. Musil*, 969 S.W.2d 371, 377 (Mo. App. W.D. 1998). And plaintiff cannot, unilaterally, foist a fiduciary duty upon a defendant in the absence of some agreement or conduct by the defendants to accept such a responsibility. *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. App. E.D. 1996).

Moreover, plaintiff’s claims for breach of fiduciary duty are subsumed by his breach of contract action and preempted by the Missouri Uniform Trade Secrets Act.

Plaintiff asserts defendants breached their fiduciary duty to Medical Supply in the following manners:

- 1) By improperly using a change in federal law as a pretext to breach its agreement to provide escrow services (Complaint ¶ 242);
- 2) By fraudulently claiming a change in federal law excused their breach to provide escrow services (Complaint ¶ 243);
- 3) By reproducing MSCI's trade secrets and transmitting them to US BANCORP offices outside of the Independence, Missouri office of Douglas Lewis (Complaint ¶ 244);
- 4) By disseminating MSCI's trade secrets to hospital suppliers and GPOs competing with MSCI (Complaint ¶ 245); and
- 5) By requiring the escrow account funds to be deposited in a fund owned by US BANCORP without disclosure of US BANCORP's interests (Complaint ¶ 246).

None of these allegations are sufficient to support a claim for breach of fiduciary duty. Breach of fiduciary duty is a tort under Missouri law. *See State Resources Corp. v. Lawyers Title Ins. Corp.*, 224 S.W.3d 39, 48 (Mo. App. S.D. 2007). As noted above, Missouri law holds that mere breach of contract does not provide for tort liability unless the tort claim is based upon a separate duty created by the contract. *Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438, 453 (Mo. App. W.D. 1994). In paragraphs 242 and 243, plaintiff alleges that defendants breached their fiduciary duties by not providing escrow services due to a change in federal law. These allegations are based on defendants' alleged failure to provide escrow services—the same allegations upon which plaintiff bases his breach of contract claim. Because the allegations in paragraphs 242 and 243 relate to defendants' performance of the alleged contract—rather than some additional duty

created by it—plaintiff’s breach of fiduciary duty allegations in paragraphs 242 and 243 (just as his fraud claims) are insufficient as a matter of law.

Likewise, plaintiff’s allegations in paragraphs 244 and 245 that defendants breached their fiduciary duty by misappropriating plaintiff’s trade secrets fail as a matter of law. Pursuant to the Missouri Uniform Trade Secrets Act (“MUTSA”), the provisions of the MUTSA “displace conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret.” R.S.Mo. § 417.463.1. The MUTSA provides narrow exceptions to this preemptive language, but none of these exceptions apply to a claim for breach of fiduciary duty. *See* R.S.Mo. § 417.463.2.

As noted, breach of fiduciary duty is a tort under Missouri law. *State Resources Corp.*, 224 S.W.3d at 48. Because plaintiff’s allegations in paragraphs 244 and 245 are centered on defendants’ alleged misappropriation of trade secrets, plaintiff is preempted by the MUTSA from asserting these claims as a conflicting tort theory of liability. *See Coulter Corporation v. Leinert*, 869 F. Supp. 732, 734-735 (E.D. Mo. 1994) (analyzing provision of Florida’s Uniform Trade Secrets Act that is identical to § 417.463 of the MUTSA); *Bancorp Services, L.L.C. v. Hartford Life Ins. Co.*, 2002 WL 32727076, *5 (E.D. Mo., 2002) (opinion attached as **Exhibit A**); *Foam Supplies, Inc. v. The Dow Chemical Co.*, 2006 WL 2225392, *15 (E.D. Mo., 2006) (opinion attached as **Exhibit B**). Because the allegations in paragraphs 244 and 245 are preempted by the MUTSA, plaintiff may not rely on those allegations to support his claim for breach of fiduciary duty.

Finally, plaintiff alleges in paragraph 246 that U.S. Bank would have required the deposit of any escrow monies be placed into a fund owned by U.S. Bancorp but did not disclose its interests in the fund. The plaintiff must plead sufficient facts that—if taken as true—show a plausible entitlement to relief. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1555, 1565 (2007) (“[T]he pleading must

contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.”) Plaintiff makes no allegation as to how U.S. Bancorp’s alleged non-disclosure of its “interest” in the fund (whatever this means) caused plaintiff damage or how it constitutes a breach of fiduciary duty. As noted above, no escrow agreement was ever consummated. And it is undisputed that no money was ever placed in escrow or invested in any U.S. Bancorp fund, making it impossible for Lipari to have suffered any financial loss from investment with the fund. Plaintiff’s allegations in paragraph 246 are ambiguous at best, reach unsubstantiated conclusions and fail to show a plausible entitlement to relief. Therefore, plaintiff may not rely on them to support his claim for breach of fiduciary duty.

Plaintiff’s claim for breach of fiduciary duty must be dismissed. His allegations are based on his theory for breach of contract, preempted by the MUTSA and fail to show a plausible entitlement to relief. Therefore, his claim for breach of fiduciary duty must be dismissed.

5. Count V: Damages for *Prima Facie* Tort

Count V of the plaintiff’s Complaint should be dismissed for failure to plead the required elements of a *prima facie* tort. *Lohse v. St. Louis Children’s Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. App. E.D. 1983). The Missouri Supreme Court has held that *prima facie* tort is not “a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort. . . .” *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993). The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant’s act. *Kiphart v. Community Federal Sav. & Loan Ass’n*, 729 S.W.2d 510, 516 (Mo. App. E.D. 1987).

1. Plaintiff’s allegations of *Prima Facie* Tort.

a. Refusing to provide escrow account services ¶ 249(1)(a)

Defendants' refusal to provide escrow account services to plaintiff does not form the basis of *prima facie* tort. As noted, the intentional lawful act must be committed with the intent to cause injury to the plaintiff and without justification. *Kiphart*, 729 S.W.2d at 516. Throughout his Complaint, plaintiff alleges that defendants' reason for not providing escrow services was the defendants' supposed reliance on the "know your customer" provisions of the Patriot Act. *See, e.g.*, ¶¶ 115, 116, 130, 210, 214. Accepting these allegations as true, defendants' decision to not provide escrow accounts was not based on an unjustifiable intent to injure Medical Supply, but rather upon its justified reliance of the "know your customer" requirements of the USA Patriot Act. Therefore, defendants' decision to not provide escrow services cannot serve as a basis for plaintiff's *prima facie* tort claim.

b. Remaining allegations of intentional lawful acts and supposed absence of justification

In paragraphs 249(1)(b-f), plaintiff sets forth the remaining intentional lawful acts he relies upon for his *prima facie* tort claim. These allegations are insufficient. Under the standard set forth by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007), "[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." The plaintiff must plead sufficient facts that show a plausible entitlement to relief. *Id.* In these paragraphs, the plaintiff makes conclusory allegations that fail to address any specifics of when the acts occurred; how the acts caused harm to plaintiff; or any other factual information about the claim. These allegations are nothing more than conclusory, speculative allegations and plaintiff has failed to show a plausible entitlement to relief.⁶ Therefore, dismissal is appropriate. *Twombly*, 127 S. Ct. at 1965.

⁶ Among these, plaintiff claims that the defendants caused a disciplinary complaint to be filed against its former counsel. While this Court is familiar with the prior counsel, defendants merely note that Bret Landrith was disbarred by the Kansas Supreme Court. *In re Landrith*, 124 P.3d 467 (Kan. 2005), *cert. denied* 127 S. Ct. 107 (2006).

Likewise, Lipari's assertions of the absence of justification miss the mark and do not satisfy the plausibility standards in *Twombly*. Whether MSCI had "good credit" or was in "good standing" is immaterial because the escrow and loan agreements were never finalized or consummated. The supposed anti-competitive claims have been ruled against Lipari. And the disciplinary action against Bret Landrith was upheld.

Count V should be dismissed.

B. Plaintiff's Complaint violates the pleading requirements of Rule 8 and should be dismissed with prejudice. Alternatively, at a minimum, the immaterial, scandalous and irrelevant allegations should be stricken.

Plaintiff's Complaint should be dismissed in that it fails to comply with Fed. R. Civ. P. 8. Rule 8(e)(1) requires that "[e]ach averment of a pleading shall be simple, concise, and direct." Here, plaintiff's Complaint is 75 pages long and consists of 264 paragraphs, many of which are nothing more than speculative ramblings and hollow accusations. Consider the following examples:

- Plaintiff includes nearly ten pages of "procedural history" concerning his earlier ill-fated lawsuits before his *Introduction*.
- Under the heading "Procedural History," plaintiff alleges that the Honorable Kathryn H. Vratril participated in *ex parte* discussions "with personnel and justices of the Kansas Supreme Court" which caused Medical Supply's former counsel to be disbarred without the opportunity for Medical Supply counsel's to respond or question Judge Vratril's comments. (Complaint ¶ 25.)
- Under the same heading of "Procedural History" plaintiff accuses this Court of misconduct in that after disbarment of Medical Supply's counsel, this Court "began in earnest making rulings with the visible purpose of dismissing the action for the lack of counsel and completing the removal of representation participated in by the Kansas District court (*sic*) and to further its adversarial interest in the petitioner's proceeding." (Complaint ¶ 31.)
- Paragraphs 61 through 67 contain statements that a venture capital firm visited Medical Supply; that Medical Supply believed much of the assets in venture funds were from overvalued equities in telecom technology; that the collapse of WorldCom would depress these venture markets; that Medical Supply's technology is superior to that of several other companies, including Cerner; and that Medical Supply would not compromise itself by being aligned with an existing healthcare supplier.

- Paragraphs 252-257 contain roughly three pages of citations to newspaper articles; testimony before the Missouri Legislature; statistics on the cost of health care; and the number of Missouri residents without access to Medicaid. Of note, these allegations are the same type of allegations cited by the Court in its dismissal of *Medical Supply II* pursuant to Rule 8. *See Medical Supply II*, 419 F. Supp.2d 1316, 1331 (D. Kan. 2006).
- Plaintiff's Complaint is full of baseless conspiracy theories and hollow allegations (supposedly involving non-parties) that have no relation to the five causes of action pled. (Complaint ¶¶ 208-24.)
- Plaintiff's Complaint contains eight single-spaced pages of a purported verbatim phone conversation between Medical Supply representatives and defendant's employees. (Complaint ¶¶ 50-59.)

Dismissal for noncompliance with Rule 8 is appropriate here just as it was in *Medical Supply II*. *See Huggins v. Hilton*, 180 Fed. Appx. 814 (10th Cir. 2006); *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 439 (8th Cir. 1983).

In *Medical Supply II*, this Court addressed this same issue and dismissed Medical Supply's Complaint for failing to comply with Rule 8. There, this Court stated that the Complaint "falls miles from Rule 8's boundaries. . . . In sum, plaintiff's Complaint is so exceptionally verbose and cryptic that dismissal is appropriate." *Medical Supply II*, 419 F. Supp.2d 1316, 1331 (D. Kan. 2006). Like *Medical Supply II*, Lipari's Complaint in this matter does not contain a short, concise statement of facts and "falls miles from Rule 8's boundaries." *Id.* at 1331. Mr. Lipari, through Medical Supply, has had countless opportunities to file pleadings but refuses to comply with Rule 8.

The Court should also deny Medical Supply leave to amend its Complaint as it did in *Medical Supply II*. In *Medical Supply II*, this Court observed that the defendants had sought sanctions under Rule 11 and had given Medical Supply's attorneys the required 21 days to amend the Complaint pursuant to Rule 11(c)(1)(A), yet Medical Supply had failed to do so. The Court also found that Medical Supply had recently changed attorneys and the new attorney had chosen not to amend the Complaint and thus adopted it as his own. *Id.* Therefore, Medical Supply's Complaint was dismissed in its entirety. While Mr. Lipari originally filed this action as a *pro se* plaintiff, he has

since retained an attorney to represent him.⁷ When Mr. Hawver entered his appearance on September 11, 2007 (Doc. No. 36), defendants' original Motion to Dismiss was pending and sought dismissal for failure to comply with Rule 8. Plaintiff responded to defendants' Motion to Dismiss, but Mr. Lipari has failed to amend his Complaint. Therefore, Mr. Lipari's counsel—like in *Medical Supply II*—has adopted the Complaint “as his own.” *Id.*

In the alternative, several of Lipari's allegations smack of outright impertinence and should be stricken from the record. Throughout the Complaint, plaintiff makes numerous scandalous comments and allegations directed at Judge Kathryn Vratil, Judge Carlos Murguia, Magistrate James P. O'Hara and the defendants' law firm of Shughart Thomson & Kilroy. These allegations concern the disbarment of Medical Supply's former attorney and are immaterial, impertinent and scandalous within the meaning of Rule 12(f). Plaintiff makes these allegations solely in an attempt to embarrass and vilify these Judges and the law firm engaged to represent these defendants.⁸ Fed. R. Civ. P. 12(f) provides “[u]pon motion made by a party before responding to a pleading . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” The court is afforded broad discretion in ruling on a motion to strike. *See Nationwide Ins. Co. v. Cent. Mo. Elec. Co-op.*, 278 F.3d 742, 748 (8th Cir. 2001) (“[A] district court enjoys liberal discretion under Rule 12(f).”).

This Court should exercise its discretion and specifically strike paragraphs 24-32 and 249(e) of plaintiff's Complaint as these allegations are immaterial to the claims, add nothing to the Complaint and were included solely for a malevolent purpose. Each of these allegations is

⁷ Defendants note that Mr. Hawver is familiar with this litigation in that he is the same attorney who entered his appearance in *Medical Supply II*, after Medical Supply's first counsel was disbarred.

⁸ Defendants note that Kansas Supreme Court Rule 226, consisting of the rules of professional conduct, admonish attacks upon the integrity of the Courts (Rule 8.2). *See also* Rules 3.1 (meritorious claims and contentions); 3.3 (candor toward the tribunal).

immaterial, impertinent and scandalous under Rule 12(f) and should therefore be stricken by this Court. *Young v. Dunlap*, 223 F.R.D. 520, 521-22 (E.D. Mo. 2004); *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp.2d 1255, 1258 (W.D. Mo. 2001).

For these reasons, this Court should dismiss plaintiff's Complaint with prejudice and refuse any request to amend.

IV. CONCLUSION

For all of these reasons, defendants request that the Court enter its Order dismissing plaintiff's Complaint with prejudice and for all other relief to which the defendants are justly entitled.

Respectfully submitted,

/s/ Jay E. Heidrick

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk this 19th day of December, 2007, to:

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