



state a claim upon which relief can be granted for *prima facie* tort because the Kansas Supreme Court's disbarment of Medical Supply Chain, Inc.'s former lawyer is not actionable.

Just as with the failed federal law claims that have been dismissed twice, these state law allegations are not plausible, are not cognizable and should be dismissed.

**A. Breach of Contract**

**1. Plaintiff has failed to state a claim for breach of a written contract.**

The elements of a cause of action for breach of a written contract are: (1) a written 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 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).<sup>1</sup>

Despite plaintiff's contentions, Lipari has not alleged a breach of contract claim upon which relief can be granted. In *Yoest v. Farm Credit Bank of St. Louis*, 832 S.W.2d 325 (Mo. App. W.D. 1992), the plaintiffs filed suit against their bank for breach of contract alleging that the bank agreed to roll their short term-promissory notes into a Federal Land Bank long term note. The Yoests alleged that the agreement was in writing but no copy of the written agreement was located. *Id.* at 327. The bank moved to dismiss the count under the Missouri equivalent to Fed. R. Civ. P. 12(b)(6) alleging that the plaintiffs failed to properly plead a cause of action for breach of contract. The trial court dismissed the action and the appeals court affirmed stating:

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<sup>1</sup> Plaintiff cites to *Britvic Soft Drinks, Ltd v. ACSIS Techs Inc.*, 265 F. Supp.2d 1179, 1187 (D. Kan. 2003) to set forth the elements for breach of contract. Although Missouri law applies to this matter, the elements set forth under Kansas law in *Britvic* are the same elements under Missouri law.

The Yoests have not pleaded a contract with any measure of definiteness and certainty. The petition does not give the terms of the membership contract, the obligations of the respective parties or the measure of damages determined by the contract. There is no copy of the contract, and no way to determine the respective rights and duties of [the bank] and members of the organization.

*Id.* at 329.

Lipari's Complaint suffers from the same flaws. Lipari did not attach any written agreement to his Complaint; nor does he plead its supposed terms with any degree of preciseness. There is no way to determine what the parties' respective duties or obligations were under the supposed written agreement, let alone rights or obligations upon a breach. Nevertheless, Lipari argues in his Response (p. 6) that paragraphs 92, 93 and 94 set forth his allegations that Medical Supply "partially performed" on the contract. At most, these paragraphs allege that, on October 5, 2002, Medical Supply altered its draft escrow agreement at the request of U.S. Bank Vice President Brian Kabbes (§ 92); Brian Kabbes and U.S. Bank were identified as the escrow agent in the draft agreement (§ 93); and on October 8, 2002 Mr. Lipari spoke with U.S. Bank employee Becky Hainje about a business line of credit (§ 94).

Medical Supply's offer to alter the draft contract is not partial performance of the written agreement itself. *See Gegg v. Kiefer*, 655 S.W.2d 834, 839 (Mo. App. E.D. 1983) (anticipatory, preparatory, collateral and ancillary acts are not part performance to establish a contract). The alteration was part of the continuing *negotiations* between the parties which is plainly not actionable. *Brandenburg v. Life and Health Ins. Co.*, 2004 WL 5500119 \*4-5 (E.D. Mo. 2004); *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. App. S.D. 2002).

Plaintiff's further allegations belie his partial performance theory. There could be no partial performance on October 5, 2002 (as alleged in paragraph 92) because there was no final agreement on that day. Plaintiff admits in paragraph 97 that on October 9, 2002—several days after the October 5 date Lipari alleges Medical Supply "partially performed" by altering the contract—Brian

Kabbes called again to request an additional change to the draft escrow contract. This allegation shows that on October 9, 2002 the parties were still negotiating and no final agreement had been formed. Thus, if the contract had not been finalized by October 9, 2002 as plaintiff alleges, then there could not plausibly have been any partial performance by Medical Supply on October 5, 2002 pursuant to an agreement that did not yet exist. Lipari's arguments do not hold water.

Likewise, plaintiff's arguments fail as to the utter lack of any consideration exchanged between the parties—a point not even opposed. According to plaintiff's allegations, the alleged contract called for U.S. Bank<sup>2</sup> to provide escrow services to Medical Supply for a fee. But never, in 264 paragraphs of allegations, does the plaintiff allege he paid *anything* to U.S. Bank as compensation for the putative escrow services; or that U.S. Bank accepted any of the funds for escrow. There is simply nothing in the Complaint to show consideration or partial performance by any party.

In the face of these allegations, Lipari still suggests he sufficiently alleged the breach of a written contract in paragraph 201 of his Complaint (Response, p. 8). Yet this paragraph illustrates the pleading deficiencies that were fatal to the plaintiff's claims in *Yoest*. Paragraph 201 alleges that the parties formed a written contract and “agreed to *some or all* of the terms in exchanges of email.” Plaintiff's Complaint, ¶ 201 (emphasis added). There can be no written contract if the parties supposedly agreed to “some or all” of its terms.

Like *Yoest*, the plaintiff's Complaint fails to allege the terms, obligations, or measure of damages of the agreement. While in paragraph 201 Lipari alleges that the parties agreed to “some or all” terms of a *written* contract, on page 53 of his Complaint, Mr. Lipari quotes a former attorney

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<sup>2</sup> Defendants again note that nowhere does plaintiff allege a breach of contract against defendant U.S. Bancorp. Therefore, the breach of contract claim against U.S. Bancorp should be dismissed as well.

who admits the supposed escrow contract was *oral*. There is no copy of a signed written agreement and there is “no way to determine the respective rights and duties of [the parties]” from plaintiff’s Complaint. *Yoest*, 832 S.W.2d at 329. Therefore, the plaintiff has failed to allege an actionable claim for breach of a written contract and the Court should dismiss his breach of contract claim with prejudice.

**2. The Missouri Statute of Frauds bars plaintiff’s alternative claim for breach of oral contract.**

The plaintiff argues that the Missouri Statute of Frauds does not apply because: (1) the supposed agreement contained an “electronic signature” (Response, pp. 2, 15); (2) the plaintiff “partially performed” on the contract thereby creating an “oral exception” to the statute of frauds (Response, p. 8); and (3) the Statute of Frauds is not applicable pursuant to R.S.Mo. § 435.045.3(1) (Response, p. 16). All of these arguments fail as a matter of law.

**a. Alleged electronic mails do not constitute the agreement.**

Plaintiff argues, without any documents attached to his Complaint, that he and Brian Kabbes of U.S. Bank in St. Louis, Missouri negotiated their escrow agreement via telephonic communications and electronic mail messages. He also argues that the electronic mail messages include the “electronic signature” of Brian Kabbes (on behalf of U.S. Bank) which thereby completes the agreement. Lipari is wrong.

While an agreement need not be reduced to a single written document, there must still be an “agreement.” *Toghiyany v. AmeriGas Propane, Inc.*, 309 F.3d 1088, 1091 (8th Cir. 2002). And it must be signed. *Id.* Here, just as in *Toghiyany*, there is no assertion of a handwritten signature signifying a final agreement with all essential terms.

The cases upon which plaintiff relies discuss the Uniform Electronic Transactions Act, a Missouri statute found at R.S.Mo. § 432.200 *et seq.* However, plaintiff’s reliance on this law is

fateful because the Missouri statute did not apply to transactions created until August 28, 2003, R.S.Mo. § 432.215, well after the alleged escrow agreements were supposedly formed in October 2002. *See* Complaint, ¶¶ 83-107. This statute is also inapplicable because there is no contract, electronic or otherwise. Defendants are not arguing any supposed contract is unenforceable merely because of the absence of a signature. There simply is no agreement. Moreover, plaintiff does not allege that Mr. Kabbes affixed his electronic signature to the agreement itself. Rather, he argues that Mr. Kabbes sent an *e-mail* that contained a copy of the draft agreement.

Although found nowhere in his Complaint, plaintiff also suggests that the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq.*, supports that Brian Kabbes electronically signed the escrow agreements. This argument fails because the statute applies only to interstate transactions. 15 U.S.C. § 7001(a). Lipari admits in the allegations that the e-mails and drafts were exchanged solely within the State of Missouri and the putative escrow accounts would be in Missouri.

**b. There was no partial performance of the alleged contract to create an “oral exception” to the Statute of Frauds.**

The plaintiff next argues that “[T]he complaint alleges and no one has disputed that the plaintiff performed under the contract as required until US Bancorp’s repudiation.” Response, p. 9, Doc. No. 52. Therefore, the plaintiff believes that an oral exception to the Statute of Frauds applies.<sup>3</sup>

Certainly defendants dispute this, but that is not the point. As made clear above, there was no performance of any part of a completed agreement because the contract did not exist. The alleged contract was for U.S. Bank to provide escrow services in exchange for a fee. Plaintiff does not allege that he deposited any funds into escrow with U.S. Bank, nor does he allege that he paid

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<sup>3</sup> Missouri law is also clear that, to satisfy the Statute of Frauds, a writing must itself be complete. Contrary to Lipari’s view, he cannot add to an agreement by parol to avoid the statute of frauds. *Fields v. R.S.C.D.B., Ind.*, 865 S.W.2d 877, 879 (Mo. App. E.D., 1993).

U.S. Bank any fee for providing the escrow service. There is nothing alleged in the Complaint that shows any party performed any part of this alleged final agreement. Again, supposed “performance” of a ministerial act to change a draft agreement during negotiations falls far short of meeting the exception upon which plaintiff relies. *See Gegg v. Kiefer*, 655 S.W.2d 834, 839 (Mo. App. E.D. 1983). Missouri law also provides that the part performance doctrine has no application to an action for damages. *See Whaling v. Little Piney Oil Co.*, 623 S.W.2d 589, 592 (Mo. App. S.D. 1981); *see also Gegg*, 655 S.W.2d at 840.

**c. R.S.Mo. § 432.045.3 does not exclude this agreement from the Statute of Frauds.**

Plaintiff also suggests that the proposed agreement did not comply with R.S.Mo. § 432.045.3(1) because certain language was not included thereby precluding defendants’ reliance on it. Lipari makes this statement even though the supposed agreement was not attached to the Complaint and his Complaint contains allegations that the contract was oral. But plaintiff overlooks the requirement that, for § 432.045.3(1) to apply, a *written* credit agreement must have already been signed. As repeatedly stated, there is no written credit agreement in the record. Accordingly these arguments are insufficient for plaintiff to escape the Statute of Frauds.

Plaintiff also argues that his breach of contract claim can survive because the defendants have never rejected his loan application and therefore breached a contract to provide him with a line of credit. Once again, Missouri law requires a *written contract* to create a binding credit agreement. Moreover, plaintiff’s Complaint does not claim breach of any contract to provide his former company a loan.<sup>4</sup> All of plaintiff’s allegations under Count I relate to the alleged escrow agreements. *See* Complaint, ¶¶ 195-207.

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<sup>4</sup> Plaintiff’s cases all pre-date the enactment of R.S.Mo. § 432.045. Even if Lipari had alleged an oral agreement to loan money as part of his claim, Missouri statutes specifically require written agreements.

The Statute of Frauds prevents the plaintiff from alleging breach of an oral contract. Because Lipari may not maintain an action for breach of an oral contract and has failed to allege an actionable claim for breach of a written contract, the Court should dismiss his breach of contract claim with prejudice.

**B. Fraud**

Lipari does not cite a single case to support his theory of “fraud” arising out of U.S. Bank’s refusal to agree to an escrow services contract. His arguments in support of his fraud claim differ from the allegations pled in the Complaint. Additionally, plaintiff’s new argument that defendants and their attorneys have committed “fraud on the court” is unrelated to the claims pleaded and not worthy of response.

**1. Plaintiff’s new fraud argument is not found in the Complaint.**

Recognizing his fraud allegations fail as a matter of law, Lipari now attempts to change his fraud claim. On page 18 of his Response, Lipari now argues that the defendants originally told him the USA Patriot Act was the reason for the denying the escrow agreement but later gave other justifications. Lipari states:

This is the lie described in the complaint. US Bank Trust Department used as a pretext a deliberately false misrepresentation of the USA PATRIOT Act law and then committed the fraud of claiming they did not use the USA PATRIOT Act and instead some other criteria selected after the breach was claimed to be the valid justification. The tapes prove fraud, deceit and pretext not legal misrepresentation.

Lipari Response, p. 18.<sup>5</sup>

Plaintiff’s fraud allegations pled in the Complaint do not contend that U.S. Bank defrauded him by initially misrepresenting the Patriot Act to deny his claim only to subsequently set forth other

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<sup>5</sup> Lipari concedes his alleged false statement is a misrepresentation of law: “deliberately false misrepresentation of the USA Patriot Act law.” But a misrepresentation of law is not actionable fraud. *McMullin v. Community Sav. Serv. Corp.*, 762 S.W.2d 462, 464 (Mo. App. E.D. 1988).

reasons. The *sole* basis for his fraud claim is that the defendants informed him that the “Know Your Customer” provisions of the Patriot Act prevented them from creating the escrow accounts. *See* Complaint, ¶¶ 210, 213. Plaintiff then alleges that he relied upon this alleged fraudulent statement “to not enforce US BANK’s promise with the defendants’ officer Brian Kabbes upon learning that US BANK was not going to provide the escrow services.” Complaint, ¶ 216. Finally, the plaintiff alleges that the defendants made the alleged fraudulent misrepresentation “with knowledge of its falsity or reckless disregard as to whether true or false 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. *Nowhere* in Count II does the plaintiff allege the defendants later gave him a contrary reason for denying the escrow accounts and that “this is the lie” as he now argues.

Fraud is never presumed. *Toghiyany*, 309 F.3d at 1092. It must be based upon more than speculation. *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo. App. E.D. 1997). To allege an actionable fraud claim, plaintiff must allege (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). Allegations to support a fraud claim must be pled with particularity. Fed. R. Civ. P. 9(b). Lipari does not identify who made these later statements; what the subsequent reasons were for denying the escrow accounts; whether the reasons were false or valid; whether the reasons were made with the

intent for Medical Supply to rely on them; how Medical Supply detrimentally relied on these undisclosed false statements; and how it was injured by them.<sup>6</sup>

Even if the plaintiff had pled these facts sufficiently to meet the above elements, the fraud claim alleged is founded upon the existence of a valid contract (the supposed escrow agreement) that supposedly was not performed, rather than some independent tort. *Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438, 453 (Mo. App. W.D. 1994) (holding 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.”); *see also Hyatt v. Trans World Airlines, Inc.*, 943 S.W.2d 292, 295-96 (Mo. App. E.D. 1997) (supposed breach of promise does not create action in fraud). And, at the risk of being repetitious, there simply is no allegation of detriment or injury because Lipari suffered no harm. The “agreement” was never consummated, so there is no loss of a “benefit of the bargain.” And, because plaintiff did not pay U.S. Bank any fees or deposit funds in any yet-to-be-created escrow accounts, there are no rescission damages. *See Toghiyany*, 309 F.3d at 1093; *see also MProve v. KLT Telecom, Inc.*, 135 S.W.3d 481, 490 (Mo. App. W.D. 2004) (plaintiff must show some causal connection between the alleged misrepresentation and the damages sustained).

No “plausible” fraud claim is alleged.

**2. Plaintiff’s argument that defendants or counsel have committed fraud on the court is outside the scope of the pleadings and offensive.**

Lest Mr. Lipari consider a failure to respond as some “admission” by silence, this brief mention is all that should be required. Plaintiff’s fraud on the court argument, like the rest of his

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<sup>6</sup> Plaintiff does reference a supposed voice message left by Becky Hainje on October 24, 2002. (Complaint ¶ 214, pp. 50-51.) But there are no allegations of reliance, causation or damage related to this phone message. Moreover, Medical Supply Chain had already filed its suit on October 22, 2002, Case No. 02-2539-CM.

Complaint, is meritless. *See King v. First American Investigations, Inc.*, 287 F.3d 91, 95-96 (2nd Cir. 2002) (“In those claims, [plaintiff] does no more than complain that the defendants disputed his version of the law and facts. This type of dispute is exactly what is expected in the normal adversary process.”)

**C. Misappropriation of Trade Secrets**

As stated in defendant’s original Memorandum, the plaintiff has failed to allege how the defendants misappropriated his alleged trade secrets. Even assuming the truth of the allegations, the only parties the plaintiff claims received the supposed trade secrets are other U.S. Bank employees and their then-affiliate Piper Jaffray. But disclosure within a corporate group does not create a claim of the trade secret misappropriation. *See Rogers Corp. v. Arlon, Inc.*, 855 F. Supp. 560, 572 (D. Conn. 1994). Moreover, plaintiff voluntarily gave his business plan to the defendants and previously voluntarily submitted an executive summary of this plan to Piper Jaffray. There was no actionable “misappropriation.” Thus, there could be no actionable trade secret violation absent misappropriation or without disclosure to a third party.

Plaintiff has not alleged a plausible misappropriation of trade secrets claim and it should be dismissed with prejudice.

**D. Breach of Fiduciary Duty**

Similar to his fraud claim, the plaintiff now attempts to change the theory of his fiduciary duty claim through his Response. Plaintiff argues that defendants breached their fiduciary duty to the plaintiff by making misrepresentations in their Motion to Dismiss. The plaintiff argues:

The defendants through the current misrepresentations in this dismissal motion and in refusing to turn over the written escrow agreement, the email where Brian Kabbes affixes his names and address for a signature, the loan application and line of credit agreement, and other documents possessed by the plaintiff . . . are still committing fraud and violating the escrow fiduciary duty.

Response, p. 22.

Like his new “fraud on the court” allegations, Lipari has not pled any of these allegations as a basis for the breach of fiduciary duty claim in Count IV. Moreover, it cannot seriously be argued that the defendants owe any current fiduciary duty to the plaintiff.

Contrary to this whole cloth creation, plaintiff’s fiduciary duty claim, as alleged in the Complaint, arises out of the defendants’ supposed breach of an alleged agreement to provide escrow services and misappropriation of plaintiff’s trade secrets. But Lipari does not allege sufficient facts to show that a fiduciary relationship existed between the parties. For a fiduciary relationship to exist, the plaintiff must allege that (1) the plaintiff had become subservient to the defendants “because of age, state of health, illiteracy, mental disability or ignorance”; (2) his property came into defendants’ possession or management; and (3) the plaintiff placed his trust and confidence in the defendants and was manipulated by the defendants. *Yoest v. Farm Credit Bank of St. Louis*, 832 S.W.2d 325, 328 (Mo. App. W.D. 1992).

In *Yoest*, the plaintiffs alleged the bank breached its fiduciary duty by failing to abide by an agreement to roll over short term notes into long term notes and attempting to manipulate how the plaintiffs utilized their property. *Yoest*, 832 S.W.2d at 327. After setting forth the elements for a breach of fiduciary claim, the court stated:

The Yoests do not plead that they had become subservient to the dominant will of CPCA because of their age, health, illiteracy or ignorance. Their pleadings reveal that they were experienced borrowers, borrowing money from CPCA over the course of many years. The facts do not demonstrate subservience. To the contrary, the Yoests challenged the appraised value of their property, obtained a loan from an institution other than CPCA, and farmed their own land over the objections of the CPCA branch manager.

*Id.* The court went on to state that the Yoests did not show their property was in the possession or management of CPCA but that the Yoests continued to make decisions on their property as they saw fit. *Id.*

Lipari's allegations likewise fail to allege a fiduciary relationship. Lipari is not alleged to have been subservient to the defendants and was not manipulated by the defendants. At all times, he was represented by counsel and negotiated on behalf of his corporation. According to his Complaint, he even negotiated a lower rate for the escrow services. Complaint, ¶ 90. It is undisputed that the plaintiff did not deposit any funds into escrow with the defendants. Therefore, it is impossible that the defendants had possession or control over any of the plaintiff's property.<sup>7</sup> The only property the plaintiff alleges he entrusted with the defendants is his business plan. While the plaintiff alleges the defendants breached their fiduciary duty by allegedly misappropriating his business plan, the Missouri Uniform Trade Secrets Act preempts such a cause of action. R.S.Mo. § 417.463.1.

The remainder of plaintiff's breach of fiduciary duty allegations center around the defendants' alleged failure to perform on the escrow account. The sole Missouri case upon which he relies to support his claim that an escrow agent owes fiduciary duties, *Eastern Atlantic Transp. and Mechanical Eng'g, Inc. v. Dingman*, 727 S.W.2d 418 (Mo. App. W.D. 1987), is inapposite. Plaintiff presumes the existence of an escrow arrangement where U.S. Bank is an escrow agent. However, as the pleading makes clear, no such arrangement ever came to fruition. See *State Resources Corp. v. Lawyers Title Ins. Co.*, 224 S.W.3d 39, 48 n.13 (Mo. App. S.D. 2007) (distinguishing *Eastern Atlantic* in light of there being no written escrow document). As above, the plaintiff may not maintain a tort claim for breach of contract. *Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438, 453 (Mo. App. W.D. 1994) (recognizing that 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.").

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<sup>7</sup> Defendants acknowledge that the plaintiff maintained a checking account with U.S. Bank. But the plaintiff makes no allegations that the defendants have mismanaged those funds.

The plaintiff has failed to allege an actionable claim for breach of fiduciary duty. Therefore, the Court should dismiss his breach of fiduciary duty claim with prejudice.

**E. Prima Facie Tort**

Lipari's arguments focus upon the chronology of events leading to the disbarment of Medical Supply's former counsel. He argues that Magistrate Judge James P. O'Hara caused disciplinary proceedings to be initiated against Bret Landrith, and then sets forth an elaborate and contrived theory that a member of this Bench and defendants' counsel engaged in a conspiracy to have Mr. Landrith disbarred. Response, pp. 23-25. Should the Court be inclined to consider Mr. Landrith's disbarment proceedings, the Kansas Supreme Court's lengthy opinion can be found at *In re Landrith*, 124 P.3d 467 (Kan. 2005).

Besides the insolence of these arguments, they still do not support a claim for *prima facie* tort. To plead a cause of action for *prima facie* tort, the plaintiff must allege: (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). Even assuming the disbarment proceedings of Medical Supply's former counsel could rise to the level of a tort, the proceedings were admittedly not instigated by defendants. Moreover, the Supreme Court's opinion provides ample justification.

Finally, Lipari lacks standing for this claim as none of the actions described in his Response were directed towards Medical Supply. The claimed actions occurred in a completely unrelated suit, years after the supposed transaction pleaded in this Complaint. Further, Judge O'Hara had significant justification—and even an obligation—to make a bar complaint if he felt Mr. Landrith violated the Rules of Professional Responsibility.

Like his fraud arguments, Lipari offers no legal authority supporting this novel theory. Nor has plaintiff alleged facts to state a legally cognizable claim for *prima facie* tort. Therefore, the Court should dismiss his *prima facie* tort claim with prejudice.

### **CONCLUSION**

Mr. Lipari has failed to allege sufficient facts to support his claims. For the above stated reasons and the reasons stated in defendants' Motion and Legal Memorandum, this Court should grant Defendants' Motion to Dismiss.

Respectfully submitted,

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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 of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 21<sup>st</sup> day of February, 2008, to:

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