

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI**

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-CV-0210-CV-ODS
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

**SUGGESTIONS IN SUPPORT OF DEFENDANTS'  
MOTION TO TRANSFER, DISMISS AND/OR STRIKE**

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## **I. INTRODUCTION**

Plaintiff first filed this case in the United States District Court for the District of Kansas, where part of the case remains pending. *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM. Plaintiff chose the Kansas District Court in originally bringing this action and plaintiff's attempt to now avoid the numerous and negative rulings from that court, as affirmed by the Tenth Circuit, is blatant forum shopping. This case should be transferred to the Kansas District Court for further handling because that court is familiar with it and with plaintiff's counsel. 28 U.S.C. § 1404. In the alternative, should transfer not be ordered, defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff should be dismissed from this case. Plaintiff's allegations fail to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Further, many of plaintiff's claims and causes of action are barred by the doctrines of collateral estoppel and *res judicata*. Plaintiff has also failed to properly serve the defendants in this case. Fed. R. Civ. P. 12(b)(4), (5). Finally, plaintiff's allegations regarding or referencing Magistrate James P. O'Hara and the law firm of "Shughart, Thomson Kilroy Watkins Boulware, P.C." are immaterial, impertinent and scandalous and should be stricken. Fed. R. Civ. P. 12(f).

## **II. PLAINTIFF'S CLAIMS SHOULD BE TRANSFERRED TO THE DISTRICT OF KANSAS FOR FURTHER ADJUDICATION.**

Defendants request this case be transferred to the United States District Court for the District of Kansas. 28 U.S.C. § 1404(a).<sup>1</sup> Plaintiff filed a lawsuit against most of these same defendants in the United States District Court for the District of Kansas in 2002, styled *Medical Supply Chain, Inc.*

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<sup>1</sup> Title 28 U.S.C. Sec. 1404(a), states in its entirety:

(a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

*v. US Bancorp, NA, et al.*, Case No. 02-2539-CM, and asserted virtually identical claims arising out of the same transactions and same set of operative facts as area alleged in this 600-plus paragraph Complaint. With the exception of plaintiff's Missouri antitrust claim, breach of fiduciary duty and *prima facie* tort claims, plaintiff filed all of the same claims and causes of action in the Kansas District Court case. That case remains pending before Kansas District Court on defendants' motion for attorneys' fees awarded by the Tenth Circuit. (Exs. B, H.)

Federal courts have consistently and uniformly ordered section 1404(a) transfers to other federal district courts when related lawsuits are pending in the transferring court, and have used quite strong language in so doing. For example, in *Prudential Insurance Co. of America v. Rodano*, 493 F. Supp. 954 (E.D. Pa. 1980), the court ordered transfer, stating:

“The most compelling reason for transfer is that it would best serve the interests of justice. The presence of two related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served when federal cases arising out of the same issues are allowed to proceed separately.”

*Id.* at 955. *See also Islamic Republic of Iran v. Boeing Co.*, 477 F. Supp. 142, 144 (D. D.C. 1979) (“Most importantly, litigation of liability issues closely similar to issues pending for over two years in another federal court would be a grossly inefficient use of judicial resources. Litigation of such related claims in the same forum is strongly favored.”).

As in *Republic of Islam*, the lawsuit plaintiff filed in the District of Kansas has also been pending for over two years, having been filed in 2002. The Kansas District Court previously ruled on the sufficiency of the same allegations and claims plaintiff asserts in this lawsuit. Further, conserving judicial resources and the interests of justice by avoiding the possibility of conflicting rulings from different courts strongly favors transferring this lawsuit to the District of Kansas.

Several federal courts have also recognized that avoiding multiplicity of litigation is given great, even decisive, weight in deciding whether to transfer a case under § 1404(a). *See Cali v. East*

*Coast Aviation Services, Ltd.*, 178 F. Supp.2d 276, 295 (E.D. N.Y. 2001), (“ . . . courts have given great weight to the need to avoid multiplicity of litigation . . . litigation of related claims in the same tribunal is strongly favored. . . .”); *Goggins v. Alliance Capital Management L.P.*, 279 F. Supp.2d 228, 234 (S.D. N.Y. 2003) (“ . . . there is a strong policy favoring the litigation of related claims in the same tribunal. . . .”); *Dahl v. Hem Pharmaceuticals Corp.*, 867 F. Supp. 194, 197 (S.D. N.Y. 1994) (“It would be a patent misuse of judicial resources to require another Federal District Court (and perhaps another Court of Appeals) to review and become familiar with facts and circumstances already extensively excavated by another Federal Court”) (emphasis added); *Monsanto Technology, Inc. v. Syngenta Crop Protection, Inc.*, 212 F. Supp.2d 1101, 1103 (E.D. Mo. 2002) (In cases where issues substantially overlap, transfer is necessary if there is a serious danger of District Courts making inconsistent determinations on material issues); *see also* Wright & Miller, *Federal Practice and Procedure*, Sec. 3854, pp. 441-442 and numerous cases cited therein.

Significantly, plaintiff originally chose the Kansas District Court as the forum for its lawsuit. Now, plaintiff engages in the most egregious form of “forum-shopping” in a baseless attempt to avoid further negative rulings from that Court and the Tenth Circuit. Such disregard for the courts, the judicial system, the interests of justice and the rights of these defendants should not be rewarded.

### **III. IN THE ALTERNATIVE, PLAINTIFF’S COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE ANY CLAIM UPON WHICH RELIEF CAN BE GRANTED**

#### **A. Standard for Dismissal**

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. However, the “court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). Stated

differently, this 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). Plaintiff’s allegations are conclusory, invite unwarranted inferences and the various tort and statutory claims asserted are meritless on their face, even when viewed in the light most favorable to plaintiff. Accordingly, dismissal is appropriate in this case.

**B. Plaintiff’s Claims and Causes of Action are Barred by the Doctrines of Collateral Estoppel and/or *Res judicata*.**

Many of plaintiff’s claims and causes of action asserted here are barred by the doctrines of collateral estoppel and/or *res judicata*. Plaintiff’s earlier lawsuit (Ex. A)<sup>2</sup> was based upon the same conduct, transaction, set of operative facts and claims alleged here. Not only were the federal claims asserted by this same plaintiff rejected and dismissed by the Kansas District Court (Ex. D), but the Tenth Circuit Court of Appeals also affirmed the District Court’s decision. (Ex. E).

Federal law governs the collateral estoppel and/or *res judicata* effect of an earlier federal judgment based on federal law. *Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir. 1982). The plaintiff’s 2002 lawsuit was filed in the federal District Court of Kansas and the Court decided the issues based upon federal law. *See Roach v. Teamsters Local Union No. 688*, 595 F.2d 446 n.3 (8th Cir. 1979). Collateral estoppel bars the relitigation of factual or legal issues that were determined in a prior court action, and applies to bar relitigation in federal court of issues previously determined. *In re Elisabeth Scarborough*, 171 F.3d 638, 641 (8th Cir. 1999). The preclusion principle of *res judicata* prevents “the relitigation of a claim on grounds that were raised or **could have been raised** in the prior suit.” *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990) (emphasis added), *cert. denied*, 498 U.S. 823 (1990). Under federal law, the doctrine of *res judicata* bars relitigation of a

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<sup>2</sup> Plaintiff also filed another suit in Kansas District Court, *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM (Ex. C) which was also dismissed. Many of the same allegations are included in this Complaint.

claim if: “(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases.” *Id.*; *see also Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997), *cert denied*, 522 U.S. 1090 (1998); *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987).<sup>3</sup>

Plaintiff’s federal antitrust claims (Counts I-IV) were considered and rejected by the District Court in Kansas and the Tenth Circuit Court of Appeals. (Exs. D, E.) As such, plaintiff’s Sherman Act claims are barred completely by collateral estoppel and/or *res judicata*. Plaintiff’s Missouri antitrust claims likewise should also be barred by collateral estoppel and/or *res judicata*. The Missouri Antitrust Act closely parallels provisions of the Sherman Act. *Defino v. Civic Center Corp.*, 718 S.W.2d 505, 510 (Mo. Ct. App. 1986). Missouri state antitrust claims are “construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.” Mo. Rev. Stat. § 416.141; *Fischer, et al. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. banc 1979). Because the plaintiff’s Sherman Act claims were considered and rejected by the Kansas District Court and the Tenth Circuit Court of Appeals, plaintiff’s identical Missouri antitrust claim—being one that “could have been raised in the prior suit,” *see Lane*, 899 F.2d at 741—is likewise barred by collateral estoppel and/or *res judicata*. Additionally, plaintiff’s claim under Section 8 of the Clayton Act (Count V) is barred by collateral estoppel and/or *res judicata* because it “could have” been raised in the prior suit and, in fact, plaintiff alleged that defendants violated antitrust laws by participating in interlocking directorates. (Ex. A ¶ 82.)

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<sup>3</sup> Section 24 of the Restatement (Second) of Judgments also provides that : When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar[,] . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Thus, “a claim is barred by *res judicata* if it arises out of the same nucleus of operative facts as the prior claim.” *Lane v. Peterson*, 899 F.2d at 742.

Plaintiff's claims under the USA Patriot Act (Count XVI) were also considered and rejected by the District Court in Kansas and the Tenth Circuit Court of Appeals. (Exs. D, E.) As such, plaintiff's Patriot Act claim here is barred by collateral estoppel and/or *res judicata*. Additionally, plaintiff's RICO claim (Count XV) should be dismissed under collateral estoppel and/or *res judicata*. In plaintiff's Answer to Defendants' Reply Memorandum in Support of Motions to Dismiss filed in the United States District Court for the District of Kansas on April 28, 2003, plaintiff argued its Hobbs Act claim was a RICO claim. (Ex. F, p. 40.) Plaintiff posited that its Amended Complaint asserting violations of the Hobbs Act were sufficient to state an actionable RICO claim for "racketeering extortion." (*Id.* at 40-41.) The Kansas District Court dismissed the Hobbs claim outright and the Tenth Circuit Court of Appeals affirmed. (Exs. D, E.)

Plaintiff's RICO claim in the present case is based upon the same conduct, transaction and set of operative facts. Plaintiff actually asserted (or "could have" asserted) its RICO claim in the Kansas federal case. *See Lane*, 899 F.2d at 741. Plaintiff's argument that its Hobbs Act claim was a RICO claim is ample evidence that it did bring or "could have" brought this claim in the Kansas case and it is now barred under the doctrine of *res judicata*. Alternatively, the RICO claim asserted here should be dismissed under the doctrine of collateral estoppel because it was considered and finally determined against plaintiff in the District Court of Kansas as affirmed by the Tenth Circuit.

In dismissing the 2002 complaint, the District Court of Kansas determined that plaintiff failed to state a claim for relief under each of the federal antitrust acts alleged in the Complaint and that there was no private right of action under the USA Patriot Act. (Ex. D.) The Tenth Circuit concluded that the District Court correctly decided the case and affirmed the decision for the same reasons stated by the District Court. (Ex. E.) The Missouri antitrust claim, "interlocking

directorate” claim and RICO claim also “could have” been brought before and are subject to dismissal for the same reasons. The claims are barred by collateral estoppel and/ or *res judicata*.

**C. Plaintiff’s Remaining State Law Claims Should Be Dismissed For Failure to State a Claim under Rule 12(b)(6).**

**1. Count X- Damages for “Tortuous” Interference with Contract or Business Expectancy**

Count X of plaintiff’s Complaint alleges that “defendants” interfered with “trust accounts with U.S. Bank” and some unknown putative sale or lease arrangement with “General Electric Transportation Co.” (Complaint, ¶ 530.) Tortious interference with a contract or business expectancy requires plaintiff to plead the following elements: (1) a contract or valid business expectancy; (2) defendant’s knowledge of the contract or relationship; (3) an intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and (5) damages. *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. E.D. 1996). “[N]o liability arises if the defendant had an unqualified legal right to do the act complained of.” *Id.* Further, “[t]he mere fact that defendant’s conduct may have had a negative effect on plaintiffs’ business expectancies does not, *a fortiori*, establish an absence of justification.” *Community Title Co. v. Roosevelt Federal Sav. and Loan Ass’n*, 796 S.W.2d 369, 373 (Mo. 1990).

Here, beyond plaintiff’s conclusory and unsupported allegations of wrongful conduct on the part of defendants, there are no facts supporting this claim. There are no facts that any defendant wrongfully interfered with any of plaintiff’s alleged contracts or business expectancies. There are no facts indicating in any way that defendants were unjustified in declining to provide trust account services. The mere fact that plaintiff claims harm because of U.S. Bank’s legitimate business decision to decline services to plaintiff is not enough to support liability on the part of *any* defendant in this case. Moreover, defendants cannot be sued for interfering in their own purported contract to provide trust accounts. *See Wigley v. Capital Bank*, 887 S.W.2d 715, 720 (Mo. Ct. App. 1994).

Plaintiff's interference claims also are not cognizable under Missouri law, as the party in contract with the plaintiff claiming tortious interference must have committed the breach or termination, not the party suing for tortious interference. See *Xavier v. Bumbarner & Hubbell Anesthesiologists*, 923 S.W.2d 428 (Mo. App. 1996); *Schlichtig v. Reichel*, 770 S.W.2d 493 (Mo. App. 1989); *Birdsong v. Bydalek*, 953 S.W.2d 103 (Mo. App. 1997) ("the party whose performance [under the contract] is prevented has a remedy *other than* a cause of action for tortious interference with the performance of the contract") (emphasis added). The first paragraph of the applicable Missouri verdict director requires the existence of a contract between the plaintiff and a third party, which was breached or terminated by the third party. MAI 23.11. "The term 'third party' means the one with whom plaintiff had a contract *and* the one who, at defendant's request, breached or terminated the contract." MAI 23.11, n.2 (emphasis added). In other words, plaintiff must show that its "individual representative candidates" breached their agreement with plaintiff, not the other way around. *Birdsong* clearly shows that plaintiff in this case is not the "third party" who can make a tortious interference claim.

## **2. Count XI: Damages for Breach of Contract**

Plaintiff's breach of contract claim is without merit. The elements of a breach of contract claim 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 S.W.2d 350, 354 (Mo. App. E.D. 1992).

The basis for plaintiff's breach of contract claim is that plaintiff's representative, Samuel Lipari ("Lipari") spoke with Brian Kabbes of U.S. Bank about plaintiff's desire for escrow accounts; that Kabbes e-mailed Lipari a contract; that Lipari and Kabbes agreed to lower the normal fees for escrow agent services (Complaint at ¶ 265); that on or about October 5, 2002, Kabbes indicated that

paragraph 10 of the agreement would need to be changed to create a security interest in the portion of an escrow account upon any part of it becoming plaintiff's property; that plaintiff made these changes and e-mailed the revised document back to Kabbes for review (*id.* at ¶ 266); that on or about October 8, 2002, a U.S. Bank employee told Lipari that she had been told by Kabbes that the escrow accounts were a "slam dunk" (*id.* at ¶ 267); that on or about October 9, 2002, Kabbes again requested a change in the escrow contract and also indicated that there would be no more changes (*id.* at ¶ 268); that Kabbes also requested corporate good standing documentation from plaintiff; and that Kabbes "made no statement that U.S. Bank had yet to approve MSCI's escrow accounts and sought no additional information." (*Id.* at ¶ 269.)

Plaintiff identifies various terms of the alleged oral agreement as further evidence of a contract. These include the escrow form, the name and address of Kabbes as escrow agent on the escrow forms, the price U.S. Bank would charge, and fund investment language. (*Id.* at ¶ 266, 268.) Clearly, plaintiff's allegations are insufficient to state a claim for breach of contract because no contract, oral or otherwise, was formed. There is no allegation of a final document signed by both plaintiff and U.S. Bank.

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 *Hammons* 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. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. E.D. 1994) (emphasis supplied). Plaintiff and U.S. Bank were *negotiating* a potential written

contract which never came to fruition. Obviously, had there been a meeting of the minds between the parties, the contract the parties were negotiating would have been executed. Plaintiff's supposition that an oral contract was formed based on the negotiation of the terms of a potential written agreement is insufficient to support its claim. *Hammons*, 63 S.W.3d at 325.

No reasonable person reviewing the facts as set forth in plaintiff's Complaint could conclude that a contract was formed between plaintiff and U.S. Bank or any other defendant. Nowhere in the Complaint does plaintiff allege that any U.S. Bank representative, including Kabbes, stated or even implied that the escrow accounts had been approved by U.S. Bank. It is clear that the changes allegedly suggested by Kabbes and agreed to by plaintiff were indicative of parties negotiating a potential contract. Any assertion that a contract was formed based on a statement by a U.S. Bank employee that Kabbes told her the escrow accounts were a "slam dunk" is patently unreasonable. Such a statement, even if made, is insufficient to establish the existence of a contract. Additionally, plaintiff never heard this from Kabbes, and by its own admission, continued to negotiate with Kabbes regarding the content of the proposed agreement the day after this statement was allegedly made. (*Id.* at ¶¶ 268-69.)

Plaintiff likewise cannot rely on its claim that Kabbes did not tell Lipari that U.S. Bank had yet to approve the escrow accounts. In essence, plaintiff asserts that it had a legal right to assume that the accounts were approved and a contract was formed unless and until it was told otherwise. This position is untenable. Plaintiff's bare assertion of a contract, based on the allegations set forth in the Complaint, fails to sufficiently plead a claim for breach of contract. *Scher*, 837 S.W.2d at 354. Accordingly, Count XI should be dismissed.

### **3. Count XII: 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. Ct. App. 2000). 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. Ct. App. 1990). Plaintiff cannot, however, 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. Ct. App. 1996). Nor does a business relationship give rise to a fiduciary relationship. *Kratky v. Musil*, 969 S.W.2d 371, 377 (Mo. Ct. App. 1998).

No fiduciary relationship between plaintiff and defendants ever existed. Accordingly, Count XII should be dismissed.

#### **4. Count XIII: Damages for Fraud and Deceit**

Count XIII of the Complaint purports to claim damages for fraud and deceit. Plaintiff generally claims that all of the “acts, practices, misrepresentations, violations and other wrongs complained of” set forth in 553 separate paragraphs form its fraud claim. (Complaint ¶ 555.) This claim is utterly nonsensical and insufficient as a matter of Missouri law and pleading under the Federal Rules of Civil Procedure, namely Fed. R. Civ. P. 9(b).

The elements of fraudulent misrepresentation are: (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). There must be more than mere suspicion, surmise and speculation. *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo. Ct. App. 1997).

Plaintiff's fraud claim delineated in Count XIII is legally insufficient. Not only does it fail to provide the explicit detail contemplated in Fed. R. Civ. P. (9)(b), it also fails to plead sufficient facts under Missouri law. For example, plaintiff nowhere alleges the precise misrepresentation(s) at issue. Plaintiff nowhere alleged in Count XIII that it relied on any misrepresentations or was ignorant of the supposed falsity. Finally, plaintiff's claim is nonsensical because it could not have been damaged by any alleged misrepresentation since the escrow accounts were never offered or provided to plaintiff in the first place. There was no reversal on the part of U.S. Bank with respect to these services. For these reasons, Count XIII should be dismissed.

#### **5. Count XIV: Damages for *Prima Facie* Tort**

Count XIV of the plaintiff's complaint should be dismissed for failure to plead each one of the required four elements of a *prima facie* tort. *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1983). 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. *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc). Failure to plead a defendant committed an intentional lawful act is fatal to a claim for *prima facie* tort. *Bradley v. Ray*, 904 S.W.2d 302 (Mo. Ct. App. 1995).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is both intentional and lawful. In fact, plaintiff specifically alleges the "acts and activities of defendants are

still *unlawful and fraudulent*.” (Complaint ¶ 564) (emphasis added).) For these reasons, Count XIV should be dismissed.

**D. Plaintiff Failed to Properly Serve the Defendants Under the Federal Rules of Civil Procedure.**

Plaintiff has failed to effect proper service on any of the defendants. Plaintiff simply mailed each of the defendants a summons by registered mail, return receipt requested. (*See* returns of service, attached hereto as Ex. G.) However, none of the receipts were signed by any of the individual defendants or by an authorized agent of any corporate defendant. *Id.*

A plaintiff may, among other things, notify a defendant of the commencement of the action and request that the defendant waive service of the summons. *See* Fed. R. Civ. P. 4(d)(2). If the defendant returns the waiver, and the plaintiff files the waiver with the court, “the action shall proceed . . . as if a summons and complaint had been served at the time of filing the waiver.” *Id.* at 4(d)(4). “However, if the defendant does not waive service, service has not been effected.” *Larsen v. Mayo Medical Center*, 218 F.3d 863, 867-68 (8th Cir. 2000) (citing *Gulley v. Mayo Found.*, 886 F.2d 161, 165 (8th Cir. 1989) (“[T]he provisions of [Rule 4] are to be strictly complied with . . . therefore, if the acknowledgement form is not returned, the formal requirements of mail service are not met and personal service must be obtained.” (internal quotation marks omitted)); *Alholm v. American Steamship Co.*, 144 F.3d 1172, 1176 (8th Cir. 1998) (noting mail service ineffective when acknowledgement form not returned). Here, plaintiff has failed to seek or to obtain waivers of service and has simply mailed a summons to each of the defendants. This is plainly insufficient to comply with the Federal Rules of Civil Procedure. Because none of the defendants waived service, and none of the defendants has filed or served a consent to mail service, the requirements for service by mail were not met and this action should be dismissed. *Larsen* 218 F.3d at 868.

Further, even if plaintiff were to argue that service is proper on these defendants under Minnesota state law, because none of the defendants signed the return receipt (or for that matter, returned an acknowledgment of service to plaintiff, which was never requested or offered by plaintiff here), plaintiff has still failed to establish proper service. *Gulley*, 886 F.2d at 165-66 (holding service by certified mail was ineffective for two reasons: first, because someone other than defendant signed the green return receipt; and second, because the defendant never returned the acknowledgement of service form); *see also Coons v. St. Paul Companies*, 486 N.W.2d 771 (Minn. App. 1992).

**IV. PLAINTIFF’S CLAIMS REFERENCING MAGISTRATE JAMES P. O’HARA AND THE LAW FIRM OF “SHUGHART, THOMSON KILROY WATKINS BOULWARE, P.C.” SHOULD BE STRICKEN.**

Plaintiff’s claims regarding or referencing Magistrate James P. O’Hara and the law firm of “Shughart, Thomson Kilroy Watkins Boulware, P.C.”, are immaterial, impertinent and scandalous within the meaning of Rule 12(f). Plaintiff makes these allegations solely in an attempt to embarrass and vilify the Magistrate and the law firm engaged to represent these defendants. 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.)”); *Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000) (“Because Rule 12(f) is stated in the permissive, however, it has always been understood that the district court enjoys liberal discretion thereunder.”).

This Court should exercise its discretion and specifically strike paragraphs 399-418, 443, 490, 491, 512, 540, 548, 549, 578-583, 585 and 613 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 the allegations asserted against Magistrate James P. O’Hara and the law firm of “Shughart, Thomson Kilroy Watkins Boulware, P.C.”, is 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).<sup>4</sup>

**V. CONCLUSION**

Defendants request that the Court enter its Order dismissing the plaintiff’s Complaint, to strike plaintiff’s allegations concerning Federal Magistrate James P. O’Hara and the law firm of “Shughart, Thomson Kilroy Watkins Boulware, P.C.” under Rule 12(f), and/or to transfer plaintiff’s Complaint and causes of action to the United States District Court for the District of Kansas.

Respectfully submitted,

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<sup>4</sup> It is apparent from even a cursory review of the Complaint that the law firm and Magistrate O’Hara had no involvement with anything touching upon plaintiff’s claim until the law firm was engaged to provide representation of certain defendants in the Kansas District Court case. Magistrate O’Hara’s first involvement with plaintiff apparently was with a subsequent suit that plaintiff filed. *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM (Ex. C).

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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 4th day of April, 2005, to:

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