NOS. 08-3287, 08-3338, 08-3345

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAMUEL K. LIPARI,
Appellant

v.

U.S. BANCORP and U.S. BANK NATIONAL ASSOCIATION,
Appellees

Appeal from the United States District Court
for the District of Kansas,
District Court Case No. 2:07-CV-02146-CM-DJW
Hon. Carlos Murguia

ANSWER BRIEF OF APPELLEES U.S. BANCORP AND U.S. BANK NATIONAL ASSOCIATION

ORAL ARGUMENT NOT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

1. Appellee U.S. Bancorp does not have a parent corporation, and 10% or more of its stock is not owned by a publicly held corporation.

2. Appellee U.S. Bank National Association is a national banking association, and it is wholly owned by U.S. Bancorp.

STATEMENT OF PRIOR APPEALS

There are no prior appeals of this case. Lipari filed three separate Notices of Appeal in this Court (Case Nos. 08-3287; 08-3338; & 08-3345) which the clerk consolidated on December 19, 2008.

Lipari also identifies numerous other actions, some in which he or his former company (Medical Supply Chain, Inc.) have been involved. Appellees U.S. Bank National Association and US Bancorp (collectively "U.S. Bank") do not have any other cases to add.

JURISDICTIONAL STATEMENT

The district court's jurisdiction existed under 28 U.S.C. § 1332 in that complete diversity exists between the plaintiff-appellant and defendants-appellees. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291, 1294. The appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A) in that the district court entered its final judgment on December 12, 2009 [Doc. No. 171] and Lipari filed his Notices of Appeal on October 16, 2008 [Doc. No. 148]; December 3, 2008 [Doc. No. 163]; and December 17, 2008 [Doc. No. 174].

STATEMENT OF THE ISSUES

U.S. Bank is not filing a cross-appeal and, thus, the issues in this response are those raised by Lipari's brief which are as follows:

1. Whether the district court had jurisdiction [Lipari's Brief, at 9];

2. Whether the district court could entertain successive Rule 12(b)(6) motions to dismiss [*id*., at 14];

3. Whether a written contract recognized under state law is implausible in federal court [*id.*, at 16];

4. Whether the district court could nullify the Electronic Records in Global and National Commerce Act, 15 U.S.C. §§ *et seq.* ("E-SIGN") [*id.*, at 28];

5. Whether the district court's dismissal of bad faith or tortious interference violated Missouri state law [*id*., at 31];

6. Whether the Complaint stated a claim for *prima facie* tort [*id.*, at 33];

7. Whether U.S. Bancorp's invocation of an automatic protective order as a blanket against all production and depositions could properly deprive the plaintiff of all scheduled Rule 26 discovery without trial court review [*id.*, at 38];

8. Whether the district court could restrict discovery for state law based claims beyond the relevancy established in Missouri state court discovery precedents [*id.*, at 40];

9. Whether the district court was required to answer the affidavit of bias [*id.*, at 46].

STATEMENT OF THE CASE

A. Nature of the Case

Appellant Samuel Lipari ("Lipari") sued U.S. Bank below alleging multiple state law claims. Lipari brought this suit after two earlier lawsuits brought by his company (Medical Supply Chain, Inc.), which alleged substantially similar claims, were dismissed by the district court. Both cases were appealed. This Court affirmed one of the dismissals and sanctioned Medical Supply for filing a frivolous appeal. The other appeal was dismissed as untimely. The present lawsuit asserts state law claims that were previously alleged in the prior actions but dismissed by the district court without prejudice. On September 4, 2008, the district court dismissed all but one of Lipari's claims [Lipari Appx. pp. 76-89] and Lipari later

stipulated to dismissal of his remaining claim [Doc. No. 147; Aplee App. pp. 24-27]. Lipari now files this appeal raising the issues as stated above.

B. Course of Prior Proceedings

Because the matters are factually similar, a chronology of the litigation brought by Mr. Lipari or his company is helpful.

On October 22, 2002, Medical Supply filed a Complaint in the United States District Court for the District of Kansas alleging numerous claims arising from the alleged refusal of U.S. Bank to provide certain escrow account services. (*Medical Supply Chain, Inc. v. U.S. Bancorp NA, et al.* D. Kan. 02-2539-CM, "*Medical Supply I*").

On June 16, 2003, the district court dismissed the *Medical Supply I* Complaint. *Medical Supply Chain, Inc. v. U.S. Bancorp, et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003). Medical Supply appealed and this Court subsequently affirmed the dismissal and ordered Medical Supply's counsel to show cause why he should not be sanctioned for filing a frivolous appeal. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished). On December 30, 2004, this Court found that Medical Supply's counsel had filed a frivolous appeal and remanded the matter to the district court for a determination of the sanctions amount. *Id.*[1]

[1] During this time frame, Medical Supply also filed a lawsuit asserting similar causes of action against other parties. The district court likewise dismissed that suit and this Court affirmed. *See Medical Supply Chain, Inc. v. General Elec.*

While the district court considered the sanctions issue in *Medical Supply I* (*see* 2005 WL 2122675 (D. Kan., May 13, 2005)), Medical Supply filed another action against U.S. Bank and other defendants in the United States District Court for the Western District of Missouri (W.D. Mo 05-210-CV-W-ODS, "*Medical Supply III*"), which reasserted Medical Supply's previously dismissed federal and state law claims. Pursuant to the defendant's motion, the Missouri district court transferred *Medical Supply III* to the District of Kansas and on March 7, 2006, the Kansas district court dismissed the lawsuit and again sanctioned Medical Supply and its former counsel. *Medical Supply Chain Inc. v. NeoForma, Inc.*, 419 F. Supp.2d 1316, 1335-36 (D. Kan. 2006). Medical Supply also appealed this decision but this Court dismissed the appeal as untimely. *Medical Supply Chain Inc. v. NeoForma, Inc.*, 508 F.3d 572 (10th Cir. 2007).

On November 28, 2006, during the pendency of the *Medical Supply III* appeal, Lipari filed the present lawsuit in the Circuit Court of Jackson County, Missouri. [Complaint, Doc. No. 1 "*Lipari I"*]. U.S. Bank removed the case to the United States District Court for the Western District of Missouri and asked for dismissal or, alternatively, transfer to the District of Kansas. (W.D. Mo. 4:06-cv-01012-FJG, Doc. No. 16.)

Co., 2004 WL 956100 (D. Kan., Jan. 29, 2004), *aff'd in part, rev'd in part*, 144 Fed. Appx. 708 (10th Cir. 2005). This suit is referred herein as *"Medical Supply II.*"

Lipari moved to remand the matter back to the Circuit Court of Jackson County, Missouri but the Western District of Missouri denied his request and found that diversity jurisdiction existed. The Western District then transferred the case to the District of Kansas [*id.*, Doc. No. 21] where it was dismissed in part on September 4, 2008, and in full on December 12, 2008 [Lipari Appx. pp. 76-89; Aplee App. pp. 24-27].[2] In granting Lipari's "stipulation" for dismissal with prejudice [Doc. No. 171], the district court also awarded U.S. Bank attorney's fees for Lipari's discovery abuses in the case. [Doc. Nos. 103, 115, 158.]

STATEMENT OF FACTS

This lawsuit represents one of the more recent efforts by Lipari (or his former company, Medical Supply Chain, Inc.) to recover damages arising out of what he alleges to be a business relationship with U.S. Bank that failed in 2002. Lipari's history in this Court is reflected in several prior opinions mentioned above.

Like those previous lawsuits, this case centers around Lipari's allegations that U.S. Bank wrongly refused to set up escrow accounts for his business in October 2002. The accounts were related to Lipari's start-up company which he allegedly formed to provide "medical supplies" to hospitals and nursing homes.

[2] Lipari has filed yet another lawsuit in the Circuit Court of Jackson County, Missouri on February 25, 2008. (Case No. 0816-CV04217, "*Lipari II.*") Most of the defendants have been dismissed from that action as well.

Lipari alleges that the accounts were to hold "tuition" money for his prospective students, who would learn how to sell these supplies, and to provide the necessary start-up capital for the company. Thus, Lipari alleges that when U.S. Bank wrongfully refused to open the accounts, it destroyed his business potential and has prevented him from entering the hospital supply market.

In his Complaint, Lipari asserted claims for breach of contract (Count I), fraud (Count II), misappropriation of trade secrets under R.S.Mo. § 417.450 (Count III), breach of fiduciary duty (Count IV) and *prima facie* tort (Count V). [Complaint, Doc. No. 1.] On September 4, 2008 the district court dismissed all of Lipari's claims except for his claim for misappropriation of trade secrets. [Lipari Appx., pp. 76-89]. On October 15, 2008 Lipari filed a "stipulation" of dismissal seeking to terminate this count and to obtain a judgment as to his entire case. [Doc. No. 147.] On December 12, 2008, the district court entered an order dismissing the trade secrets claim and awarding U.S. Bank its attorneys' fees due to Lipari's discovery violations during the case. [Aplee App. pp. 24-27.] This appeal followed.[3]

Because the dismissals were based on the legal sufficiency of Lipari's Complaint, this appeal does not involve any evidentiary facts.

[3] Lipari's brief does not discuss the trial court's dismissal of his fraud claim. His failure to appeal the dismissal of that claim combined with his voluntary dismissal of his misappropriation of trade secrets claim exempt those two issues from this appeal.

SUMMARY OF THE ARGUMENT

Lipari's appeal brief is disjointed and difficult to understand. In many of his claimed points of error, he offers numerous complaints about rulings and procedure, but he fails to indicate which specific ruling he is appealing and how it affected the merits of his case. In many instances, Lipari violates 10th Cir. R. 28.2(C)(2) by failing to provide a specific citation to the record where his claimed point of error was raised and ruled upon in the district court. Likewise, Lipari oftentimes fails to offer any analysis of the district court's ruling or explain the error in the decision. Finally, Lipari fails to specify the type of relief sought as required by Fed. R. App. P. 28(a)(10).

Addressing the merits of Lipari's issues, the district court possessed diversity jurisdiction pursuant to 28 U.S.C. § 1332 because this is not the same case as *Medical Supply I* and *III* and there exists complete diversity between the plaintiff and defendants below.

In addition, U.S. Bank's December 19, 2007 motion to dismiss [Doc. No 43] was proper under the Federal Rules of Civil Procedure, and the district court correctly determined that Lipari's Complaint failed to state a claim for breach of contract, fraud, breach of fiduciary duty or *prima facie* tort and properly dismissed these claims under Fed. R. Civ. P. 12(b)(6).

Finally, the district court did not issue or allow a "blanket protective order." Lipari's complaints about discovery are due to his failure to understand the Federal Rules of Civil Procedure and the District of Kansas local rules. Regardless, because the district court dismissed the claims based on the legal insufficiency of Lipari's Complaint, his alleged points of error relating to discovery—even if they had a scintilla of merit—are irrelevant.

STANDARD OF REVIEW

This Court reviews Lipari's arguments regarding the district court's exercise of federal jurisdiction and dismissal of claims pursuant to Fed. R. Civ. P. 12(b)(6) under a *de novo* standard of review. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007); *Setzer v. Farmers Ins. Co.*, 185 Fed. Appx. 748, 752 (10th Cir. 2006) (unpublished); *Merrigan v. Affiliated Bankshares of Colorado, Inc.*, 956 F.2d 278 (10th Cir. 1992) (unpublished). In determining whether the trial court properly considered U.S. Bank's December 2007 motion to dismiss, this Court applies a *de novo* standard of review since it involves the interpretation of the Federal Rules of Civil Procedure. *Breaux v. American Family Mut. Ins. Co.,* 554 F.3d 854, 869 (10th Cir. 2009). Finally, Lipari's allegations of error concerning discovery are reviewed under an abuse of discretion standard. *Soma Medical Intern. v. Standard Chartered Bank,* 196 F.3d 1292, 1300 (10th Cir. 1999) ("We review discovery rulings for an abuse of discretion").

ARGUMENT

Because U.S. Bank is not filing a cross appeal, it will address Lipari's claimed points of error in the same order and title as they appear in his opening brief.

I. The District Court Had Subject Matter Jurisdiction.

Lipari claims the district court lacked subject matter jurisdiction for the following reasons:

A. This action is the same matter or controversy as *Medical Supply III* which was on appeal at the time of removal to the Western District of Missouri.

B. Complete diversity did not exist in *Medical Supply III* at the time U.S. Bank removed this case.

C. Lipari's 2008 Notice of Appeal in *Medical Supply I* and *III* divested the district court of jurisdiction over this case.

Each of these arguments lacks merit.[4] The premise of Lipari's lack of jurisdiction argument is his belief that this case is the same matter or controversy as *Medical Supply I* and *Medical Supply III*. Lipari reasons that, because each of the cases involves the same factual circumstances, removal was improper, diversity

[4] Lipari fails to cite to any order which addressed the issue of jurisdiction or transfer. Pursuant to 10th Cir. R. 28.2(C)(2), all briefs "must cite the *precise* reference in the record where the issue was raised and ruled on." (emphasis added). While he argues the district court "had notice" that it lacked jurisdiction, Lipari does not cite to the record where the jurisdictional argument was raised and ruled upon by the district court.

jurisdiction does not exist and the district court was divested of jurisdiction due to his appeals in *Medical Supply I* and *III*. These arguments fail.

This matter involves separate and distinct causes of action from *Medical Supply I* and *Medical Supply III*. Lipari filed this suit only after the district court separately dismissed both *Medical Supply I* and *III*. Each of the cases contains a separate case number and the cases were never consolidated. The cases have different plaintiffs. *Medical Supply I* and *III* were brought on behalf the corporate entity "Medical Supply Chain, Inc." and this matter is brought by Mr. Lipari in his personal capacity. There is no support for Lipari's argument that this case (alleging only state law causes of action) is the same as the appeals in *Medical Supply I* and *III* (which involved appeals from the dismissals of federal claims).

Because these are separate cases, Lipari's argument of improper removal and lack of diversity jurisdiction rings hollow. Lipari contends that complete diversity does not exist because the law firm Shughart Thomson & Kilroy ("STK") was a named defendant in *Medical Supply III* and that STK's Missouri residency prevented removal and diversity jurisdiction in this case. But as discussed above, this is not the same case as *Medical Supply III.* STK is not and never has been a defendant in this case. Because it is indisputable that complete diversity exists as between the persons or entities that are actual parties in this case, removal was proper and the district court had diversity jurisdiction under 28 U.S.C. § 1332.

The existence of diversity jurisdiction is made plain by Lipari's concession in his motion to remand: "The plaintiff concedes that the U.S. Supreme Court has just determined that national associations are to be treated as residents of the state in which they have a principal place of business . . . ." (W.D. Case No. 4:06-cv-01012-FJG, Doc. No. 6, p. 6).[5] Moreover, the allegations of Lipari's Complaint make clear that complete diversity exists [Doc. No. 1 Complaint ¶¶ 35, 36, 38, and the signature block showing Lipari's citizenship and residency] and the Western District of Missouri found that subject matter jurisdiction was proper because complete diversity existed between the parties. [W.D. Case No. 4:06-cv-01012-FJG, Doc. No. 21 pp. 4-5].

Likewise, because this case is separate and distinct from *Medical Supply I* and *III*, any appeal Lipari filed in those actions could not have divested the district court of jurisdiction.

Removal of this case was proper. Subject matter jurisdiction exists because there is complete diversity between the plaintiff and defendants below. The Court should thus deny Point I of Lipari's appeal.

[5] The United States Supreme Court decision to which Lipari referred is *Wachovia Bank v. Schmidt*, 546 U.S. 303, 126 S.Ct. 941 (2006).

II. The Trial Court Could Entertain Successive Rule 12(b)(6) Motions to Dismiss.

Lipari asserts that U.S. Bank's December 19, 2007 Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) [Doc. No. 43] was an improper second motion to dismiss. Again, Lipari's arguments fail.

After transferring the matter to the District of Kansas, on April 25, 2007, U.S. Bank filed a Motion to Dismiss pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure [Doc. No. 22]. The motion and supporting memorandum argued for dismissal on the grounds that Lipari lacked standing; that his claims were barred by the doctrine of *res judicata*; that his Complaint failed to comply with Fed. R. Civ. P. 8; and that his Complaint failed to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). [Doc. Nos. 22 & 23.]

On November 16, 2007, the district court issued a Memorandum and Order where it denied in part and granted in part U.S. Bank's motion. The court held that Lipari's allegations, when taken as true, stated sufficient facts to establish standing; that any claims that were not asserted in *Medical Supply I* or *III* were barred by *res judicata*; but those claims that were asserted in *Medical Supply I* or *III* were not barred by *res judicata*. The court did not address or issue any ruling on U.S. Bank's request for dismissal under Rule 12(b)(6) or Rule 8. [Aplee App. pp. 1-6.]

The district court went on to note that it was not clear from the record which claims had been previously asserted in *Medical Supply I* or *III* and ordered the parties to file briefing clarifying this issue. *Id.* at pp. 5-6. The court then stated that "Defendants may refile their motion to dismiss once the record clearly identifies which claims are barred by res judicata and which remain pending." *Id.* at p. 6.

Pursuant to the district court's order, the parties submitted briefing concerning the claims that had been previously asserted and those that were not barred by *res judicata*. [Doc. Nos. 40 & 42.] On December 16, 2007, U.S. Bank re-filed its motion to dismiss pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure as specifically authorized by the district court's November 16, 2007 Order. [Doc. No. 43.] Lipari argues that this motion was an improper second motion to dismiss under Rule 12(b)(6).[6] This argument fails.

First, the district court's November 2007 Memorandum and Order [Doc No. 39] addressed only U.S. Bank's *res judicata* arguments and specifically allowed U.S. Bank to re-file its motion after the parties and the district court identified which claims were not barred by *res judicata*. [Aplee App. pg. 6].

[6] It should be noted that Lipari is *not* arguing that U.S. Bank failed to preserve any defenses, only that the district court improperly allowed multiple motions to dismiss under Rule 12(b)(6). But as set forth in the district court's September 4, 2008 Memorandum and Order (Doc. No. 137), the Motion to Dismiss was proper.

Because the district court did not rule on U.S. Bank's arguments for dismissal under Rule 12(b)(b)(6) and Rule 8 and specifically granted leave to re-file its motion and brief, the December 2007 motion was proper.

Next, as set forth by the district court in its September 4, 2008 Order, Fed. R. Civ. P. 12(h) specifically allows a court to consider a defense of failure to state a claim upon which relief can be granted in the context of a motion for judgment on the pleadings under Rule 12(c). [Lipari Appx. p. 77]; *Res. Ctr. For Indep. Living, Inc. v. Ability Res., Inc.*, 534 F. Supp.2d 1204, 1207 (D. Kan. 2008) (citing *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003); *see also Vega v. State University of New York Board of Trustees,* 2000 WL 381430 *2 (S.D.N.Y., Apr. 13, 2000) (stating successive 12(b)(6) motions not precluded by Rule 12(g)). Therefore, the district court properly treated U.S. Bank's December 2007 motion to dismiss as a motion for judgment on the pleadings under Rule 12(c).

The district court specifically allowed U.S. Bank to re-file its December 2007 Motion to Dismiss. The motion was proper under Rule 12(c) and Rule 12(h) of the Federal Rules of Civil Procedure. Therefore, the district court did not err in considering the motion, and Point II of Lipari's appeal should be denied.

III. Whether a Written Contract Recognized Under State Law is Implausible in Federal Court.

In this allegation of error, Lipari makes multiple, hard-to-follow arguments. It appears that Lipari makes the following arguments that he relates to the dismissal of his breach of contract claim:

A. The Complaint's allegations satisfied the statute of frauds and escrow agreements do not fall within the statute of frauds.

B. The Complaint alleged sufficient facts to show a tort cause of action separate from the breach of escrow agreement, and nominal damages are available when breach of contact is established.

C. The Complaint alleged sufficient facts to allege a breach of contract claim.

D. An electronic signature is sufficient to satisfy the statute of frauds under Missouri law and the district court misapplied the *Twombly* standard.

None of these arguments have merit and each should be dismissed by the Court.

A. Whether the Statute of Frauds Applies

1. Based on the District Court's Judgment, the statute of frauds is irrelevant to this appeal.

The issue of whether Lipari's allegations satisfied the pleading requirements of the statute of frauds, or whether the statute of frauds applies to escrow agreements is irrelevant in this appeal. In its September 2008 Memorandum and Order, the district court dismissed Lipari's breach of contract claim on the grounds that the Complaint failed to state a claim upon which relief could be granted. The

court stated that, because dismissal was appropriate for failing to plead a breach of contract claim, that it was "not necessary to address the applicability of the statute of frauds, Mo. Rev. Stat. § 432.045." [Lipari Appx. p. 82.] Therefore, Lipari's arguments on the statute of frauds are irrelevant.

2. Even if relevant, the statute of frauds bars Lipari's breach of contract claim.[7]

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). 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.

Lipari's breach of contract action asserts U.S. Bank failed to provide escrow services at its banking institution. Although no Missouri court has addressed the

[7] While the district court did not rely on the statute of frauds for dismissal, this Court may affirm dismissal "on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Lippoldt v. Cole*, 468 F.3d 1204, 1219 (10th Cir. 2006).

precise issue, an escrow agreement meets the definition of a "credit agreement" under R.S.Mo. § 432.045.1 because 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 is a "financial accommodation." *R and B Kapital Dev., LLC v. North Shore Comm. Bank and Tr. Co.*, 832 N.E.2d 246, 253 (Ill. App. 2005). And, as in *R and B Kapital*, the proposed escrow agreement in this matter was part and parcel of a commercial loan. [*See*, *e.g.*, Doc. No. 1, Complaint ¶¶ 91, 108.]

In his Complaint, Lipari admits there is no written contract and that the agreement is "oral." [Doc. No. 1, Complaint, bottom of p. 52 to top of p. 53.] Because the allegations show there is no written contract, the statute of frauds precludes Lipari from maintaining an action for breach of an oral credit agreement. R.S.Mo. § 432.045.2; *see also Block v. NASB*, 59 S.W.3d 567, 572 (Mo. App. W.D. 2001).

Lipari next argues that part performance satisfies the statute of frauds and states: "[T]he complaint alleges and no one has disputed that the plaintiff performed under the contract as required until US Bancorp's repudiation."

[Lipari's Brief, p. 18.] Therefore, Lipari believes that an oral exception to the statute of frauds applies.[8]

Certainly U.S. Bank disputes this, but that is not the point. There was no performance because there was no contract or agreement. The alleged contract was for U.S. Bank to provide escrow services in exchange for a fee. Lipari does not allege that he deposited any funds into escrow with U.S. Bank, nor does he allege that he paid 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. Lipari's sole allegation of partial performance is his alleged agreement to use "US Bancorp's captive US treasury fund imposed by US Bancorp." [Lipari's Brief, p. 19.] But the supposed "performance" of a ministerial act to change a draft agreement during negotiations falls far short of meeting the exception upon which Lipari 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.

[8] 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).

Lipari also suggests U.S. Bank cannot rely on R.S.Mo. § 432.045 because the proposed agreement did not contain the necessary language as required by the statute. 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. This argument overlooks the requirement that § 432.045.3(1) applies to *written* credit agreements. As repeatedly stated, there is no written credit agreement in the record. Accordingly these arguments are insufficient to escape the statute of frauds.

Lipari also argues that his breach of contract claim survives because U.S. Bank has never rejected his loan application and therefore allegedly 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, the Complaint does not claim breach of any contract to provide his former company a loan. All of the allegations under Count I relate to the alleged escrow agreements. [Doc. No. 1, Complaint, ¶¶ 195-207.]

In his Complaint, Lipari admits there is no written contract and that the agreement is "oral." [Doc. No. 1, Complaint, bottom of p. 52 to top of p. 53.] Because the allegations show there is no written contract, and the statute of frauds precludes Lipari from maintaining an action for breach of an oral credit agreement, his breach of contract claim was properly dismissed. R.S.Mo. § 432.045.2; *see*

also Block v. NASB, 59 S.W.3d 567, 572 (Mo. App. W.D. 2001). The statute of frauds is an alternately compelling reason to deny this alleged point of error.

B. Whether the Complaint alleges sufficient facts to assert a tort cause of action separate from a breach of contract claim and whether nominal damages are available when a breach of contract theory is proven.

Lipari argues that his breach of fiduciary duty claim should not have been dismissed because the allegations in the Complaint are sufficient to establish a breach of fiduciary duty claim separate from his breach of contract theory. Namely, Lipari argues that the breach of fiduciary duty is continuing because U.S. Bank has not come forward to disclose the alleged frauds. [Lipari's Brief, pp. 22-23.] But these arguments have no relation to his breach of contract claim.

As noted herein, 10th Cir. R. 28.2(C)(2) requires all briefs to provide a *specific* reference to the record where the issue in dispute was raised and ruled upon. *See also State Ins. Fund v. Ace Transp. Inc.*, 195 F.3d 561, 565 n.3 (10th Cir. 1999). Lipari fails to provide any citation where the district court dismissed his breach of fiduciary duty claim on the grounds it was subsumed by his breach of contract claim. Therefore, Lipari has waived this argument.

In fact, the record shows that dismissal of Lipari's breach of fiduciary duty claim did not relate to his breach of contract claim. On page 10 of the September 2007 Memorandum and Order [Doc. No. 137], the district court dismissed Lipari's breach of fiduciary duty claim citing that he had failed to sufficiently plead facts to

support the elements for breach of fiduciary. [Lipari Appx. pp. 85-86.] Nowhere in the order does the district court address whether Lipari's breach of fiduciary claim was separate and distinct from his breach of contract claim. And Lipari does not specifically argue the fiduciary duty claim was wrongly dismissed other than to suggest there were sufficient facts alleged to show a "confidential relationship." [Lipari's Brief, at p. 22.] He does not address the ruling of the district court. Therefore, Lipari's arguments on this issue fail.

C. Whether the Complaint alleges sufficient facts for a breach of contract theory

In his brief, Lipari argues that his breach of contract claim should not have been dismissed because he properly pled a breach of contract claim in paragraphs 99, 100, 101, 102 & 201 of his Complaint. [Lipari's Brief, p. 24.] These paragraphs fall woefully short of sufficiently alleging a breach of contract.

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) 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).

While the court must accept the plaintiff's allegations as true, the plaintiff's allegations must plead sufficient facts which, when taken as true, show a "plausible" entitlement to relief above mere speculation. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007), abrogating *Conley v. Gibson* 355 U.S. 41 (1957). In *Twombly*, the Supreme Court, quoting *Wright and Miller*, 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).

The Court need look no farther than Lipari's citation to paragraph 201 to see that his Complaint did not state a plausible claim for relief. Paragraph 201, which Lipari contends "formally" states his breach of contract action [Lipari's Brief, p. 24], reads:

> 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 U.S. BANK and the escrow agent, the language designating U.S. BANK's compensation for its duties in any legal disputes arising between the parties, the directions for U.S. BANK's investment of long term held funds, the directions for U.S. 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 U.S. BANK as escrow depository on the escrow form, the price term U.S. BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.

[Doc. No. 1 ¶ 201, p. 47[9] (emphasis added)].

Based upon this allegation, Lipari admits the parties had only agreed to "some or all" of the terms and the contract was a written agreement. Upon a plain reading of this allegation, there is no plausible claim for breach of contract. And other allegations in Lipari's Complaint further demonstrate the legal insufficiency of this claim.

In paragraph 215 (pg. 51), Mr. Lipari begins his eight-page quote of a supposed telephone conversation between himself, then Medical Supply attorney Bret Landrith, and U.S. Bank's employees Lars Anderson, Brian Kabbes and Susan Anderson.[10] At the bottom of page 52 and continuing on to page 53, Lipari pleads that the following exchange ensued:

> **Lars Anderson U.S. 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

[9] Lipari's Complaint contains multiple paragraphs that contain the same numbers (*i.e.*, paragraph 201 appears on both pages 39 and 47).

[10] U.S. Bank does not admit that Lipari's "quotes" in ¶ 215 are accurate, but the analysis under Rule 12(b)(6) requires that Lipari's allegations be taken as true.

> business and we relied and depended on your excerption that it was ok and we sent it our to our best people."

[Doc. 1, ¶ 215, pp. 52-53] (emphasis added). Taking these allegations as true, Lipari admits there was no executed written contract between he parties. These allegations directly conflict with his allegations in paragraph 201 where Lipari alleged the parties had agreed to "some or all" of the terms of a written contract.[11]

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. Suntide 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. Missouri law shows that Lipari's allegations are insufficient.

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[11] Lipari did not plead 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.

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' petition failed to plead a breach of contract theory because: (1) the Complaint 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. Lipari has not even properly pled whether the contract was written or oral; he does not attach a copy of the alleged contract to his Complaint; and, as noted by the district court, the Complaint does not show a plausible "meeting of the minds" sufficient to show an agreement. [Lipari Appx. pp. 81-82.] Therefore, the district court did not err in dismissing Lipari's breach of contract claim.

D. The sufficiency of an electronic signature under Missouri law and the district court's application of *Twombly*.

Lipari argues the district court failed to recognize that an electronic signature is sufficient under Missouri law to satisfy the statute of frauds and misapplied the *Twombly* standard. But these are simply more misconstrued and irrelevant

arguments. The district court's dismissal of Lipari's breach of contract claim was *not* based on whether there was a signed contract between the parties. Rather, it was based in Lipari's failure to sufficiently allege facts to support a breach of contract claim under Missouri law. [Lipari Appx. pp. 80-82.] Therefore, Lipari's arguments regarding the sufficiency of an electronic signature under Missouri law are irrelevant.

And as discussed in Point III, *infra*, Lipari's arguments about the sufficiency of an electronic signature are irrelevant because there was no agreement.

Next, the district court properly applied the plausibility standard set forth in *Twombly*. Lipari cites to *Anderson v. Suiters*, 499 F.3d 1228, 1232 (10th Cir. 2007) as support for his argument that the district court misapplied the *Twombly* standard. [Lipari's Brief, p. 25.] In *Anderson*, this Court clarified the *Twombly* standard as applied in this Circuit:

> As we have explained this new standard for reviewing a motion to dismiss, "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims."

(emphasis in original) (quoting *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

As demonstrated above, Lipari's Complaint fails to show whether the contract was oral or written; the specific terms or obligations for each party; and

whether there was a meeting of the minds sufficient for form an agreement. The district court's basis for dismissal is directly on point with *Twombly* and *Anderson*:

> Plaintiff's allegations to [*sic*] not support a plausible "meeting of the minds." By plaintiff's own admission, the parties agreed to "some or all" of the terms. He alleges certain terms were supposedly agreed to, but fails to set forth the terms of the alleged contract or the substance of the email communications. Plaintiff has not pleaded a contract with any measure of definiteness and certainty.

[Lipari Appx. p. 82.]

The application of an electronic signature is irrelevant and the district court properly applied the *Twombly* standard in dismissing Lipari's breach of contract claim. Therefore, Point III should be denied and the judgment affirmed.

IV. Whether the District Court Could Nullify the Electronic Records in Global and National Commerce Act, 15 U.S.C. §§ 7001 *ET SEQ* ("E-SIGN").

Lipari argues the district court erred by dismissing his breach of contract claim because "the trial court's finding of a lack of plausibility has the effect of overruling [the E-SIGN Act]." [Lipari's Brief, at p. 28.] Lipari argues that the email correspondence between the parties is sufficient to satisfy the statute of frauds and "The court's findings that the Missouri Statute of Frauds prevents enforcement of the contract for escrow accounts between the parties is demonstrated clear error. . . ." *Id.* at 31.

But, as noted above, the district court did not dismiss Lipari's breach of contract claim under the statute of frauds. The district court held that Lipari failed

to properly allege a breach of contact claim and stated "It is, therefore, not necessary to address the applicability of the statute of frauds (citation omitted)." [Doc. No. 137, p. 7.]

And Lipari's arguments again fail on their merits as well. Although found nowhere in his Complaint, Lipari 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. Although Lipari fails to cite which particular provisions of the E-SIGN act he relies upon, this argument fails because the statute applies only to interstate transactions. 15 U.S.C. § 7001(a). And according to Lipari's Complaint, the e-mails and drafts were exchanged solely within the State of Missouri and the putative escrow accounts would be located in Missouri. [*See*, *e.g.*, Doc. No. 1, Complaint ¶¶ 6, 35, 39, 83, 86, 104, 105.]

Moreover, the E-SIGN Act does *not* state a contract is formed by electronically affixing one's name to a document. Rather, the statute simply provides that "a contract . . . may not be denied legal effect, validity, or enforceability *solely* because an electronic signature or electronic record was used in its formation." 15 U.S.C. § 7001(a)(2) (emphasis added). The dispute is not whether an electronic contract is enforceable as the E-SIGN Act addresses. There was simply no agreement between the parties (written, oral, electronic or otherwise) and the provisions of the E-SIGN act are therefore irrelevant.

Because the district court did not consider the statute of frauds in dismissing Lipari's breach of contract claim, his arguments in Point IV that the e-mail exchanges between the parties satisfied the statute of frauds under E-SIGN are irrelevant. But regardless, the statute of frauds still bars Lipari's breach of contract claim and the district court's judgment should be affirmed.

V. Whether the District Court's Dismissal of Bad Faith or Tortious Interference Violated Missouri law.

Lipari argues the district court erred by dismissing his claims for bad faith and tortious interference. Again, Lipari violates 10th Cir. R. 28.2(C)(2) by failing to provide precise reference to the district court's ruling. Moreover, Lipari never asserted a claim for bad faith or tortious interference. Thus, there was no ruling on these phantom claims.

Lipari's Complaint asserted the following claims:

1) Breach of Contract (Count I) [Doc. No. 1, p. 45];

2) Fraud (Count II) [*id.* at 49];

3) Misappropriation of Trade Secrets (Count III) [*id.* at 61];

4) Breach of Fiduciary Duty (Count IV) [*id.* at 63];

5) *Prima Facie* Tort (Count V) [*id.* at 66].

He did not assert any claim for bad faith or tortious interference. Therefore, the district court made no ruling on these issues. Point V of Lipari's brief does not address any district court ruling and should be denied as irrelevant.

VI. Whether the Complaint Stated a Claim for *Prima Facie* Tort

Lipari failed to properly 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).

Lipari's Complaint asserted numerous claims or alleged unlawful acts to support his *prima facie* tort claim. [Doc. No 1, pp. 66-70.] But in his appellate brief, Lipari argues only that allegations related to the disciplinary proceedings of his former counsel are sufficient to state a claim under *prima facie* tort. [Lipari's Brief, at 33-38.] He has therefore waived his arguments as to the other alleged "unlawful acts" in his Complaint. *Becker v. Kroll,* 494 F.3d 904, 913 n.6 (10th Cir. 2007) ("An issue or argument insufficiently raised in the opening brief is deemed waived").

And Lipari's allegations related to his former counsel's disciplinary proceedings are also insufficient. Lipari's brief states that the Complaint sufficiently states claims for *prima facie* tort under Missouri law but he provides no citation to the particular provision of the Complaint. By failing to cite to the particular provisions of his Complaint, Lipari waives this argument. *AdvantEdge Business Group v. Thomas E. Mestmaker & Associates, Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009) (An appellant who fails to cite any legal authority or evidentiary support in his opening brief waives the argument); *Pignanelli v. Pueblo Sch. Dist. No. 60,* 540 F.3d 1213, 1217 (10th Cir. 2008); *Becker v. Kroll,* 494 F.3d 904, 913 n.6 (10th Cir. 2007).

But regardless, Lipari's allegations in his Complaint are woefully insufficient to demonstrate a plausible cause of action under *Twombly*. Lipari's p*rima facie* tort claim is set forth in Count V of his Complaint and the totality of his allegations concerning his former counsel are that U.S. Bank caused a Kansas disciplinary complaint to be filed on Medical Supply Chain Inc.'s counsel and that U.S. Bank lacked a good faith cause to do so. [Doc. No. 1, p. 67, ¶¶ 249(1)(e) & 249(4)(e).]

Under *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." Lipari's brief sets forth an alleged

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 U.S. Bank's counsel engaged in a conspiracy to have Mr. Landrith disbarred.[12] [Lipari's Brief at pp. 33-38.] But these allegations do not appear in Count V of his Complaint.

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 U.S. Bank. 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.

[12] 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).

Finally, Lipari lacks standing for this claim as none of the actions described in his brief were directed towards him or Medical Supply. The claimed actions concerned Mr. Landrith and occurred in a completely unrelated suit, years after the supposed transaction pleaded in this Complaint.

Count V was properly dismissed. This claim of error should be denied.

VII. Whether U.S. Bancorp's Invocation of an Automatic Protective Order as a Blanket Against All Production and Depositions Could Properly Deprive the Plaintiff/Appellant of All Scheduled Rule 26 Discovery Without District Court Review.

For this point of error, Lipari argues that U.S. Bank's Motion for Protective Order stopped all discovery and the district court erred by not ruling on the motion or extending discovery. But Lipari again fails to provide any citation as to which motion for protective order he describes or where this issue was presented and ruled on by the Court. He has therefore waived any claimed error. *See* 10th Cir. R. 28.2(C)(2); *State Ins. Fund v. Ace Transp. Inc.*, 195 F.3d 561, 565 n.3 (10th Cir. 1999) (declining to consider argument when the defendant failed to make specific citation to the record).

Moreover, any claimed discovery dispute had no effect on the dismissal of Lipari's suit. The district court dismissed all but one of Lipari's claims based on his failure to state a claim upon which relief can be granted. [Lipari Appx. pp. 76-89.] Lipari then voluntarily dismissed his remaining claim. [Doc. No. 147; Aplee App. pp. 24-27.] Because the district court's dismissal was based purely on the

legal sufficiency of Lipari's claims, any claimed error pertaining to discovery disputes is irrelevant to this appeal.

Nevertheless, the merits of Lipari's argument are based on his failure to understand the Federal Rules of Civil Procedure. Lipari contends that U.S. Bank's March 17, 2008 Motion for Protective Order relating to Plaintiff's First Requests for Production [Doc. No. 59] served as a "blanket protective order" that prevented him from conducting any further discovery in the case. He is flatly incorrect.

Lipari presumably refers to D. Kan. R. 26.2 for his misconception that filing a motion for protective order serves as an "automatic blanket protective order." But the plain language of this local rule states that if a party files a motion for protective order it "shall stay the discovery *at which the motion is directed* pending order of the court." D. Kan. R. 26.2 (emphasis added). By the plain reading of the rule, the only discovery that was automatically stayed was U.S. Bank's obligation to produce documents and responses to Plaintiff's First Requests for Production.

There was never a "blanket protective order" in place. Lipari's claimed prohibition to discovery was the result of his failure to read or understand the Federal Rules of Civil Procedure. But a *pro se* party is still required to follow the Federal Rules of Civil Procedure. *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992) (holding that *pro se* litigants "must follow the same rules of procedure that

govern other litigants"). The district court did not abuse its discretion and Point VII should be denied.

VIII. Whether the Trial Court Could Restrict Discovery for State Law Based Claims Beyond the Relevancy Established in Missouri State Court Discovery Precedents.

Lipari argues that the district court "was in error to grant the defendants' protective order's [*sic*] overly broad restraint of discovery of material related to proving Missouri state law claims." [Lipari's Brief at p. 45.] But Lipari fails to provide any specific citation to show where this issue was presented to and ruled upon by the district court. Therefore, he has waived this argument. *See* 10th Cir. R. 28.2(C)(2); *State Ins. Fund v. Ace Transp. Inc.*, 195 F.3d 561, 565 n.3 (10th Cir. 1999) (declining to consider argument when the defendant failed to make specific citation to the record).

And because the district court dismissed his suit based on pure legal issues, Lipari's complaint about discovery disputes is irrelevant to this appeal.

U.S. Bank filed two motions for protective orders in this case. The first was related to Plaintiff's First Requests for Production [Doc. No. 59] and the second related to Plaintiff's Notice of Deposition for a Corporate Designee [Doc. No. 82]. Although the district court granted both of these motions [Aplee App. pp. 7-23], Lipari does not reference this Order and makes no analysis or explanation as to how the district court erred in granting the motions, which constitutes waiver of

this argument. *Pignanelli v. Pueblo Sch. Dist. No. 60,* 540 F.3d 1213, 1217 (10th Cir. 2008); *Becker v. Kroll,* 494 F.3d 904, 913 n.6 (10th Cir. 2007); *AdvantEdge Business Group v. Thomas E. Mestmaker & Associates, Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009).

Lipari's arguments also fail on their merits. Regarding Plaintiff's First Requests for Production, U.S. Bank served objections to the requests in addition to seeking a Motion for Protective Order. [Aplee App. pp. 28-40.] Pursuant to D. Kan R. 37.1(b), Lipari had 30 days to file a motion to compel if he disagreed with the objections. But he failed to do so and therefore waived his right to challenge the objections. *See id.*

Because Lipari waived the right to challenge the objections, U.S. Bank had no further obligation to respond to Plaintiff's Requests for Production. Thus, the district court's ruling in Doc. No. 145 concerning the Motion for Protective Order on Plaintiff's Requests for Production—although correct—is moot. The ruling had no bearing on Lipari's ultimate right to the discovery because even if the district court had denied U.S. Bank's Motion, Lipari still would not be entitled to the discovery.

Likewise, the district court's ruling as to U.S. Bank's Motion for Protective Order regarding Lipari's Notice of Deposition for a Corporate Designee did not deny Lipari's discovery. Although the court granted the motion, it specifically

granted the Lipari leave to re-notice the deposition. [Aplee App., p. 20.] But Lipari chose not to re-notice the deposition and his claimed inability to conduct this discovery is the result of his own inaction, not the district court's ruling.

The district court did not abuse its discretion by entering the protective orders and did not deny Lipari any discovery. Therefore, this point of error should be denied.

IX. Whether Electronic Records Were Discoverable In Their Original Form.

Lipari's only argument under this allegation of error is to make hollow assertions that U.S. Bank made repeated misrepresentations to the trial court and that he "was better served by saving the electronic documents for formal discovery. . . ." [Lipari's Brief, p. 46.] But he does not identify any district court ruling much less identify, explain and argue any reversible error under this point. *See* 10th Cir. R. 28.2(C)(2); *State Ins. Fund v. Ace Transp. Inc.*, 195 F.3d 561, 565 n.3 (10th Cir. 1999) (declining to consider argument when the defendant failed to make specific citation to the record).

The district court could not have abused its discretion regarding electronic records because it made no ruling on the issue. This alleged point of error is also irrelevant because it concerns a discovery dispute that had no bearing on the district court's dismissal of Lipari's claims. Therefore, the Court should deny this point.

X. Whether the Trial Court Was Required to Answer the Affidavit of Bias.

Lipari argues the district judge and magistrate judge erred by failing to recuse themselves after Lipari filed an Affidavit of Prejudice pursuant to 28 U.S.C. § 144. Lipari makes several frivolous (and sanctionable) allegations which he believes required the district judge and magistrate judge to recuse themselves. But Lipari again fails to provide any citation to the record or evidentiary argument for his frivolous claims. While Lipari makes numerous frivolous allegations of bias, he does not cite to his affidavit or attempt to explain how its contents meet the procedural requirements of 28 U.S.C. § 144. An appellant who fails to cite any legal authority or evidentiary support in his opening brief waives the argument. *Pignanelli v. Pueblo Sch. Dist. No. 60,* 540 F.3d 1213, 1217 (10th Cir. 2008); *Becker v. Kroll,* 494 F.3d 904, 913 n.6 (10th Cir. 2007); *AdvantEdge Business Group v. Thomas E. Mestmaker & Associates, Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009).

And Lipari's arguments also fail on their merits. An affidavit under § 144 requires a judge to cease proceedings only if the affidavit is specific and sets forth sufficient facts demonstrating a personal bias against the party. *See*, *e.g.*, *U.S. v. Bennet*, 539 F.2d 45, 51 (10th Cir. 1976). If an affidavit simply alleges mere conclusions or unsupported statements, it is insufficient and the court may proceed forward. *See id.*

Lipari's affidavit [Doc. No. 116] is woefully insufficient. It contains nothing but conclusory and unsupported allegations concerning decisions rendered by the district court and Lipari's frustration that the court had yet to rule on certain motions for protective order. But mere adverse decisions against a party are not sufficient to show bias or prejudice. *See Winslow v. Lehr*, 641 F. Supp. 1237, 1241 (D. Colo. 1986). The affidavit must show a *personal* bias against the party, rather than a judicial bias. *See id.* (emphasis added).

The "Affidavit of Prejudice" and Lipari's arguments in his brief fail to set forth any specific factual basis as to why either Judge Murguia or Magistrate Waxse would have any personal bias against Lipari and, in fact, fails even to allege that either Magistrate Waxse or Judge Murguia do have a personal bias against him. Therefore, the district judge (and the magistrate judge) did not err in declining to recuse themselves based on Lipari's frivolous "Affidavit of Prejudice." This point of error should be denied.

CONCLUSION

For the above stated reasons, Defendants/Appellees request the Court affirm the district court's judgment against the Plaintiff/Appellant and grant Defendants/Appellees whatever other relief they are justly entitled.

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/s/ Mark A. Olthoff
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the above and foregoing was delivered via United States mail, postage prepaid, this 23rd day of March, 2009, to:

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