IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TONYA KAY DAY, individually and as trustee and administrator for Lavera Jean Foelgner, Plaintiff, v. THE CORNER BANK (OVERSEAS) LTD; CORNER BANK S.A., *aka* CORNER BANCA S.A., *aka* GRUPPO CORNER, *aka* CORNER BANQUE S.A.; COLYN ROBERTS; GRAHAM THOMPSON & CO., and DOES from 1 to 100, Defendants.	)	Case No. 1:10-cv-01339 (RCL)

DEFENDANT GRAHAM, THOMPSON & CO.'S
MOTION TO DISMISS AMENDED COMPLAINT

Pursuant to the Federal Rules of Civil Procedure 9(b), 12(b)(1), 12(b)(2), 12(b)(6), 12(f), and 15(d) and the doctrine of *forum non conveniens*, the Bahamian law firm of Graham, Thompson & Co. ("Graham Thompson") respectfully moves to dismiss all claims asserted against it in the Amended Complaint filed by Nevada resident Tonya Kay Day ("Day" or "Plaintiff").

This court lacks personal jurisdiction over Graham Thompson, and the District of Columbia is the wrong forum for alleged breaches of The Bahamas Code of Professional Conduct by a Bahamian law firm in its sixteen day representation in 2008 of former client Day in Nassau, Bahamas. The invasion of privacy claim alleged in the Amended Complaint was improper because the Court did not give Plaintiff leave to supplement the pleadings. Plaintiff

also has failed to state a claim upon which relief can be granted against Graham Thompson for any acts arising out of that sixteen day representation or thereafter, no matter how the multiplicative claims are pleaded. Plaintiff's request for punitive damages against Graham Thompson should be stricken because such damages are not recoverable as a matter of law. Accordingly, the Court should dismiss Defendant Graham Thompson as a matter of law.

Respectfully submitted,

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Dated: June 27, 2011

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TONYA KAY DAY, individually and as trustee and administrator for Lavera Jean Foelgner, Plaintiff, v. THE CORNER BANK (OVERSEAS) LTD; CORNER BANK S.A., *aka* CORNER BANCA S.A., *aka* GRUPPO CORNER, *aka* CORNER BANQUE S.A.; COLYN ROBERTS; GRAHAM THOMPSON & CO., and DOES from 1 to 100, Defendants.	)	Case No. 1:10-cv-01339 (RWR)

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT GRAHAM, THOMPSON & CO.'S MOTION TO DISMISS

Defendant Graham, Thompson & Co. ("Graham Thompson") is one of the oldest, largest, and most prestigious law firms in The Bahamas. This action arises from Graham Thompson's short sixteen day (June 16 – July 2, 2008) legal representation in The Bahamas of Plaintiff Tonya Day ("Day" or "Plaintiff"), a Nevada citizen, in which it wrote a letter to a Bahamian bank inquiring about an account number that allegedly belonged to Day's late mother. After the letter was prepared, the law firm withdrew and recommended another Bahamian law firm to represent Day. Graham Thompson transferred the complete client file and the full retainer to this other law firm. Day alleges that she was damaged under The Bahamas Code of Professional Conduct because Graham Thompson also represented the Bahamian bank in

unrelated matters. Plaintiff's Amended Complaint asserts that Graham Thompson engaged in legal malpractice, breached a contract, breached its fiduciary duty, committed fraud and misrepresentation (concealment), and conspired against Day. The Amended Complaint also claims that Day is entitled to a declaratory judgment against Graham Thompson and seeks to supplement the pleadings to assert that Graham Thompson invaded Day's privacy. This action and all claims against Graham Thompson should be dismissed for lack of personal jurisdiction, *forum non conveniens*, improper attempt to supplement the pleadings, lack of subject-matter jurisdiction, and failure to state a claim upon which relief can be granted. The punitive damage request against Graham Thompson should be stricken as well.

First, the Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(2) because this Court lacks personal jurisdiction over Graham Thompson. Graham Thompson has no – much less the requisite "continuous and systematic" – business contacts with Washington, D.C.

- Graham Thompson is a law firm and partnership in The Bahamas.
- Graham Thompson maintains its place of business in Nassau and Freeport, Bahamas.
- Graham Thompson has never been authorized to do business in Washington, D.C.
- The lawyers at Graham Thompson have never been admitted to the D.C. Bar.
- Graham Thompson has never had any employees based in Washington, D.C.
- Graham Thompson has no partners or associates domiciled in Washington, D.C.
- Graham Thompson has no resident agent in Washington, D.C. who is authorized to accept service of process on the law firm's behalf.
- Graham Thompson has never actively solicited business in Washington, D.C.
- Graham Thompson has never recruited an employee from Washington, D.C.

- Graham Thompson does not own any real or personal property in Washington, D.C.
- Graham Thompson does not maintain records in Washington, D.C.
- To the extent that Graham Thompson has ever represented clients who reside in Washington D.C., it represented those clients concerning legal issues in The Bahamas and not in Washington, D.C.

Thus, there is no basis for general personal jurisdiction over Graham Thompson.

In addition, the alleged injuries in this case all arise out of or relate to activities in The Bahamas. Day, a Nevada citizen, through her Utah law firm, contacted Graham Thompson, a law firm in The Bahamas, to provide legal services in The Bahamas to contact a Bahamian bank about an account number that allegedly belonged to Day's mother, a decedent of Kansas. All the acts in this case occurred exclusively in The Bahamas, including the legal representation claims against Graham Thompson. Plaintiff is a Nevada citizen and the mother's estate is in Kansas. Neither any acts nor any injuries occurred, or are even alleged to have occurred, in the District of Columbia. Thus, there is no connection to the District of Columbia to permit specific personal jurisdiction over the Bahamian law firm of Graham Thompson for its acts in The Bahamas.

Second, the Amended Complaint should be dismissed under the doctrine of *forum non conveniens*. The claims in the Amended Complaint all arise from actions occurring entirely within The Bahamas. Bahamian courts handle these types of tort and contracts causes of action. Most of the evidence and the witnesses reside in The Bahamas and would be amenable to process in The Bahamas. The District of Columbia, on the other hand, is particularly burdensome to all of the parties because none of the events occurred in Washington, D.C. and because none of the evidence or witnesses is in Washington, D.C. In addition, Bahamian law

will govern this dispute. Thus, The Bahamas, and not the District of Columbia, is the most convenient forum for this case.

Third, Plaintiff's invasion of privacy claim should be dismissed pursuant to Rule 15(d). This claim is based on alleged conduct that occurred after the filing of the original Verified Complaint. Plaintiff thus improperly sought to supplement the pleadings, without leave from the Court, by including the invasion of privacy claim in the Amended Complaint. The invasion of privacy action also should be dismissed for failure to state a claim because (1) Plaintiff does not allege the publicity of any private facts or false statements and does not allege that the Bahamian editorials would be highly offensive to a reasonable person, and (2) the allegations are based on the content of pleadings and motion papers in this very case, which Plaintiff placed in the public domain and as to which Graham Thompson has absolute immunity.

Fourth, the individual tort and contract claims against Graham Thompson should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(6) for lack of standing or failure to state a claim. In all the tort claims, the Complaint fails to allege that Graham Thompson's short sixteen day representation in 2008 proximately caused any injury. Civil conspiracy, in Count VII, is not a cognizable cause of action in the District of Columbia and Day fails to allege with plausibility any facts that her former lawyers agreed somehow, while recommending her substitute Bahamian counsel and refunding her retainer, to deny her access to alleged bank account proceeds that are not even arguably in control of the private law firm. For Count I's alleged breach of contract, the Amended Complaint fails to allege the existence of any specific contract between Day and Graham Thompson, fails to identify any contractual provision that was or could have been breached, and fails to identify any remedy. Finally, Day lacks standing for the declaratory judgment action because such a declaration would not redress any injury.

Fifth, the Amended Complaint's request for punitive damages should be stricken pursuant to Rule 12(f). The Amended Complaint makes no allegation of malice to justify damages for tortious conduct. Punitive damages also are not awarded for breach of contract claims as a matter of law.

For these reasons, which are discussed more fully below, Defendant Graham Thompson's Motion to Dismiss should be granted.

STATEMENT OF FACTS

Graham Thompson is a law firm and an unregistered partnership in The Bahamas since 1950. The law firm maintains its place of business in Nassau, Bahamas and in Freeport, Bahamas.

The firm has never practiced or been authorized to practice law in the District of Columbia, and none of its attorneys is admitted to the D.C. Bar. The firm does not have and never has had any employees or partners domiciled in Washington, D.C. Nor does the firm actively solicit business or recruit employees from Washington, D.C. The firm owns no real or personal property in the District of Columbia.

On or about June 16, 2008, Stanford A. Graham P.C. ("Stanford A. Graham"), a Utah law firm, contacted Graham Thompson in The Bahamas to represent Day in inquiring about funds in an alleged Bahamas-based account in a Bahamian bank under the name of Lavera Jean Foelgner ("Foelgner"). The Bahamian law firm learned that Day is a citizen of Nevada, and Foelgner, Day's late mother, was a citizen of Kansas. Graham Thompson requested a retainer of $5,000, and, on June 17, 2008, $5,000 was wired from Stanford A. Graham's client account to Graham Thompson's client account.

Graham Thompson prepared a letter to Corner Bank Ltd. ("Corner Bank") requesting that the bank provide all information it had with respect to an account number that was provided by Stanford A. Graham and that was believed to be associated with Foelgner and Day. On Thursday, June 26, 2008, Day, who was in Nassau, Bahamas, requested that Ms. Cheryl Whyms ("Whyms"), an attorney at Graham Thompson, accompany her to Corner Bank the next day to hand deliver the letter. Although Whyms did not accompany Day to the bank, she provided Day with a copy of the letter dated June 27, 2008.

On July 2, 2008, Graham Thompson informed Stanford A. Graham that it had discontinued its representation of Day because it represented Corner Bank in unrelated matters. Graham Thompson recommended Genell Sands of McKinney, Bancroft & Hughes to represent Day. Upon Stanford A. Graham's request, Graham Thompson forwarded Day's complete file and the full retainer of $5,000 to McKinney, Bancroft & Hughes on July 21, 2008. At no point did Graham Thompson represent Corner Bank in any matters involving Day.

Day initiated this litigation by publicly filing a Verified Complaint on August 6, 2010. Numerous motions were filed by the parties thereafter. The Tribune, a Bahamian newspaper, published three articles concerning this litigation. *See* Neil Hartnell, *Top law firm wants $14 million action claim thrown out*, The Tribune (The Bahamas), Sept. 27, 2010, *available at* http://www.tribune242.com/09272010_Law_business_Page1-2; Neil Hartnell,, *Bahamas bank: No record of disputed $14m trust account*, The Tribune (The Bahamas), Oct. 4, 2010, *available at* http://www.tribune242.com/business/10042010_Bank_business_Page1-5; Neil Hartnell, *'Scurrilous attacks': Law firm hits back*, The Tribune (The Bahamas), Jan. 4, 2011, *available at* http://www.tribune242.com/01042011_Law-firm_business_Page1-2. These articles,

which are attached as Exhibits 3, 4, and 5,[1] appear to rely entirely on the filings in this case for its substance. This court issued an Order providing Plaintiff leave to file an amended Complaint. On June 16, 2011, Day timely filed her Amended Complaint, which included a new invasion of privacy claim based on conduct that occurred after August 6, 2010. Subsequently, a fourth editorial by the same author was published by the same newspaper concerning this matter. *See* Neil Hartnell, *Top law firm, bank fail to dismiss $14m account case,* The Tribune (The Bahamas), June 20, 2011, *available at* http://www.tribune242.com/business/06202011_Law-firm_business_Page1-2.

ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER THE BAHAMIAN LAW FIRM GRAHAM THOMPSON FOR ITS ACTS IN THE BAHAMAS.

The Due Process Clause of the Fourteenth Amendment limits the District of Columbia's power to assert personal jurisdiction over a nonresident defendant. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). "Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id*. at 414 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (additional internal quotation omitted)). "[T]he defendant's conduct and connection with the forum State [must be] such that he should

[1] These exhibits are incorporated by reference in the Amended Complaint. *See Evans v. First Mount Vernon, ILA*, ___ F. Supp. 2d ___, 2011 WL 1990538, at *3 (D.D.C. May 24, 2011) (stating that courts may consider exhibits that are incorporated by reference in the complaint in a motion to dismiss).

reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

In a diversity case, as here, the court's personal jurisdiction depends on the State's long-arm statute. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 509 (D.C. Cir. 2002). Both Due Process and the District of Columbia's long-arm statutes allow courts to find personal jurisdiction over a defendant through either general or specific jurisdiction. *See Savage v. Bioport, Inc.*, 460 F. Supp. 2d 55, 58-60 (D.D.C. 2006).

Under Rule 12(b)(2), the plaintiff has the burden of proving that the court has personal jurisdiction over the defendant. *FC Inv. Group LC v. IFX Markets, LTD.*, 529 F.3d 1087, 1091 (D.C. Cir. 2008); *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 229 (D.D.C. 2007). "Bare allegations and conclusory statements are insufficient." *Richards*, 480 F. Supp. 2d at 229 (quoting *Capital Bank Int'l Ltd. v. Citigroup, Inc.*, 276 F. Supp. 2d 72, 74 (D.D.C. 2003). "The plaintiff must instead allege specific facts connecting each defendant with the forum state." *Id.* (internal quotations omitted). Here, District of Columbia courts lack both general and specific personal jurisdiction over Graham Thompson.

A. This Court lacks general jurisdiction over Graham Thompson.

D.C. Code § 13-334(a) permits the exercise of general jurisdiction over a foreign corporate defendant if the corporation is "doing business" in the District of Columbia.[2] *See Gorman*, 293 F.3d at 509. "[T]he reach of the 'doing business' jurisdiction under § 13-334(a) is co-extensive with the reach of constitutional due process." *Id.* at 510 (citing *Hughes v. A.H.*

[2] Although § 13-334 is a service of process statute, the District of Columbia Court of Appeals has held that the statute grants general personal jurisdiction over "a foreign corporation which carries on a consistent pattern of regular business activity" within the District. *AMAF Int'l Corp. v. Ralston Purina Co.*, 428 A.2d 849, 850 (D.C. 1981); *see also FC Inv. Group*, 529 F.3d at 1092 n.5.

Robins Co., Inc., 490 A.2d 1140, 1148 (D.C. 1985)). "Under the Due Process Clause, such general jurisdiction over a foreign corporation is only permissible if the defendant's business contacts with the forum district are 'continuous and systematic.'" *Id.* at 509-10 (quoting *Helicopteros*, 466 U.S. at 415).

Graham Thompson is a law firm and partnership in The Bahamas with its place of business in Nassau, Bahamas and in Freeport, Bahamas. Graham Thompson has never been authorized to do business in Washington, D.C., and none of the firm's lawyers has ever been admitted to the D.C. Bar. The law firm has never had an agent in the District of Columbia who could receive service of process on its behalf and has never had any employees based in Washington, D.C. The firm has never actively solicited business in Washington, D.C. and has never recruited an employee from Washington, D.C. The firm owns no real or personal property, maintains no records, and has no partners domiciled in the District of Columbia. To the extent that the firm has ever represented clients who reside in Washington, D.C., the firm represented those clients concerning legal issues related to The Bahamas and not Washington, D.C. *See* Ex. 1, Declaration of Judith Whitehead, ¶¶ 5-9. Thus, the firm is devoid of District of Columbia contacts, let alone 'continuous and systematic' business contacts.

Although Graham Thompson has an internationally accessible website, the mere accessibility of this website by D.C. residents does not establish the necessary minimum contact to establish personal jurisdiction. *See GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *Gorman*, 293 F.3d at 512. A website can be used to establish general personal jurisdiction when it is "interactive" and when D.C. residents use the website in a "continuous and systematic" way. *FC Inv. Group*, 529 F.3d at 1092. Graham Thompson's website is a passive website through which individuals can access information about the law firm.

As such, it cannot be the basis of personal jurisdiction. *See id.* ("An essentially passive website through which customers merely access information is insufficient [to establish general personal jurisdiction]." (internal quotation omitted)). D.C. residents also do not use this website in a "continuous and systematic" way. The website is not used for transactional business and has not led to frequent representation of D.C. residents in The Bahamas. Thus, the law firm's website is insufficient for a court in the District of Columbia to find general personal jurisdiction over Graham Thompson.

B. This Court lacks specific jurisdiction over Graham Thompson.

When a foreign corporate defendant lacks "continuous and systematic" business contacts with the District of Columbia, this Court can only exercise personal jurisdiction over the defendant pursuant to the District of Columbia's long-arm statute, D.C. Code § 13-423, which permits specific jurisdiction. The statute provides, in relevant part:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's --
>
> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;
>
> * * *

> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

D.C. Code § 13-423.

Subsection (a)(1) is co-extensive with the limits of the Due Process Clause, but the other subsections do not appear to be as far-reaching. *Savage*, 460 F. Supp. 2d at 60; *Crane v. Carr*, 814 F.2d 758, 762 (D.C. Cir. 1987) ("The drafters of this provision apparently intended that the (a)(4) subsection would not occupy all of the constitutionally available space. . . . This court has explicitly noted, moreover, that (a)(4) of the D.C. long-arm statute may indeed stop short of the outer limit of the constitutional space."); *Mocrief v. Lexington Herald-Leader Co.*, 807 F.2d 217, 221 (D.C. Cir. 1986) ("Paragraph (a)(3) . . . is a precise and intentionally restricted tort section. . . which stops short of the outer limits of due process").

Courts may assert personal jurisdiction over a foreign entity in its group name only "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985) (internal citations omitted). To establish personal jurisdiction under § 13-423(a)(1), "the plaintiff must demonstrate that (1) the defendant transacted business in the District; (2) the claim arose from the business transacted in the District; (3) the defendant had minimum contacts with the District; and (4) the Court's exercise of personal jurisdiction would not offend 'traditional notions of fair play and substantial justice.'" *COMSAT Corp. v. Finshipyards S.A.M.*, 900 F. Supp. 515, 521 (D.D.C. 1995). Subsection (a)(2) "only applies to a non-resident who injects itself into the District by agreeing to provide some service to [a] resident in the District[.]" *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, ___ F.3d ___, 2011 WL 1957688, at *21 n.18 (D.D.C. 2011) (quoting *COMSAT*, 900 F. Supp. at

524). Subsection (a)(3) "requires that both the alleged tortuous injury and the act forming the basis of the claim must have occurred in the District of Columbia." *Id.*; *see Mocrief*, 807 F.2d at 221 ("Paragraph (a)(3) . . . confers jurisdiction only over a defendant who commits an act in the District which causes an injury in the District, without regard to any other contacts."). Finally, § 13-423(a)(4) "permits jurisdiction over a defendant who commits an act outside the District which causes injury in the District only when the defendant engages in some persistent course of conduct or derives substantial revenue from the District." *Mocrief*, 807 F.2d at 221.

In this case, there is precisely zero – and plaintiff does not even attempt to allege any – business transactions, service contracts, or tortious injuries in the District of Columbia. Graham Thompson does not have any business transactions in or minimum contacts with the District of Columbia. Even if the law firm had business in Washington, D.C., this litigation does not arise out of any such transactions. The Amended Complaint involves legal services rendered in The Bahamas by a Bahamian law firm based on the request and instructions of a Utah law firm for a Nevada citizen and beneficiary of the estate of a Kansas decedent. If any contract existed between Day and Graham Thompson, it would have involved the provision of legal services to a Nevada resident, and not a District of Columbia resident, for service in The Bahamas, and not in the District of Columbia. Further, none of the alleged torts in this case involved alleged acts that occurred in the District of Columbia or resulted in alleged injuries in the District of Columbia, and Graham Thompson does not "regularly do[ ] or solicit[ ] business, engage[ ] in any other persistent course of conduct, or derive[ ] substantial revenue from . . . services rendered, in the District of Columbia." D.C. Code § 13-423(a)(4). Because the Amended Complaint alleges no actions or contacts in the District of Columbia and no injury to

anyone or any entity in the District of Columbia, § 13-423 cannot establish personal jurisdiction over Graham Thompson.

The Amended Complaint's only substantive reference to Washington, D.C. is its unsupported assertion that Day has trust arrangements in and under the law of the District of Columbia. But these vague arrangements are neither with defendant Bahamian law firm nor prepared by defendant Bahamian law firm. Plaintiff provides no basis for this vague assertion or how it justifies a District of Columbia forum, especially when the law firm's sixteen days of legal services were solely in The Bahamas and the alleged bank account was allegedly arranged in The Bahamas by a Bahamian bank for Kansas and Nevada beneficiaries. Nor does the pleaded presence of the Embassy of The Bahamas in the District of Columbia provide carte blanche jurisdiction over every Bahamian individual and non-governmental entity. The operations of The Commonwealth of The Bahamas in this city are not the acts of the Bahamian law firm such that the private defendant can be sued here. Plaintiff's unsupported assertion is the type of bare allegations and conclusory statements that are insufficient to establish jurisdiction. Graham Thompson could not reasonably anticipate being haled into court in Washington, D.C.

While the District of Columbia recognizes no separate cause of action for civil conspiracy, District of Columbia recognizes specific jurisdiction over a defendant based on the District of Columbia acts of a co-conspirator. *See* D.C. Code § 13-423(a) (asserting personal jurisdiction based on the acts of an agent); *FC Inv. Group*, 529 F.3d at 1096-98. "For 'conspiracy' jurisdiction . . . plaintiff must allege (1) the existence of a civil conspiracy . . ., (2) the defendant's participation in the conspiracy, and (3) an overt act by a co-conspirator within the forum, subject to the long-arm statute, and in furtherance of the conspiracy." *FC Inv. Group*, 529 F.3d at 1096 (internal quotation omitted). "[T]o establish jurisdiction under a theory of civil

conspiracy, the plaintiff must plead with particularity overt acts *within the forum* taken in furtherance of the conspiracy." *Id.* at 1097 (emphasis added) (quoting *World Wide Minerals v. Republic of Kazakhstan*, 296 F.3d 1154, 1168 (D.C. Cir. 2002)). "'[B]ald speculation' or a 'conclusory statement' that individuals are co-conspirators is insufficient to establish personal jurisdiction under a conspiracy theory." *Id*. (quoting *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997).

This Court does not have personal jurisdiction over Graham Thompson based on conspiracy jurisdiction. For one, the Amended Complaint fails to plead with any plausibility or particularity that a conspiracy exists between Graham Thompson and Corner Bank and/or Colyn Roberts ("Roberts"). The allegation that the law firm conspired with the bank so "that [Day] would never get access to that account and to the proceeds," Amended Complaint ¶ 90, is not plausible as to Graham Thompson, which wrote a letter to the bank for Day seeking that account information and recommended other Bahamian counsel for Day in 2008 to deal with the bank on this matter as admitted in her complaint, Amended Complaint, ¶¶ 52 & Request for relief ¶ f. Under *Ashcroft v. Iqbal*, ___ U.S.___, 129 S. Ct. 1937, 1949 (2009), the conspiracy allegations are not sufficient to withstand a motion to dismiss, so these implausible allegations cannot establish jurisdiction either. The Amended Complaint does not establish any facts from which this court could find that an agreement existed, or when such an agreement occurred, or how it occurred. The Amended Complaint does not allege that any overt action to further this conspiracy occurred. Most fundamentally, the Amended Complaint fails to allege that an overt action by a co-conspirator occurred in the District of Columbia and that the District of Columbia act would be subject to the long-arm statute. Rather, the Amended Complaint simply speculates that a conspiracy exists.

Because the litigation does not arise from or relate to any actions or injuries in the District of Columbia, this court lacks specific jurisdiction over Graham Thompson. To maintain personal jurisdiction over Graham Thompson in this case would offend traditional notions of fair play and substantial justice.

II. THE DOCTRINE OF *FORUM NON CONVENIENS* WARRANTS DISMISSAL OF THE AMENDED COMPLAINT BECAUSE THE DISTRICT OF COLUMBIA HAS NO CONNECTION TO THE PARTIES OR THIS DISPUTE, THUS BURDENING ALL PARTIES AND WITNESSES, AND BECAUSE THE BAHAMAS WOULD BE A MORE CONVENIENT AND APPROPRIATE FORUM.

"The doctrine of *forum non conveniens* permits a court to dismiss an action over which it has jurisdiction when there is an adequate alternative forum in which the case can be more conveniently heard."[3] *BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d. 73, 84-85 (D.D.C. 2003) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)). "[D]ismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and *where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.*" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (emphasis added).

"In deciding *forum non conveniens* claims, a court must decide (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal." *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008). When the chosen forum is not the plaintiff's

[3] Graham Thompson disagrees with the erroneous bases of venue asserted in the Amended Complaint but recognizes that venue over alien corporations, partnerships, and unincorporated associations may often be established in any district pursuant to 28 U.S.C. § 1391(d).

home forum, plaintiff's choice of forum is given less than its usual deference. *Piper Aircraft*, 454 U.S. at 255-56; *BPA Int'l*, 281 F. Supp. 2d at 85.

A. The Bahamas is an adequate alternative forum.

An adequate alternative forum exists when the defendant is "amenable to process" in the foreign jurisdiction. *Reyno*, 454 U.S. at 255 n. 22 (quoting *Gulf Oil*, 330 U.S. at 506-07); *see also Huertas v. The Kingdom of Spain*, 2006 WL 785302, at *2 (D.D.C. 2006) (unpublished). "A foreign forum is not inadequate merely because it has less favorable substantive law, because it employs different adjudicative procedures, or because of general allegations of corruption in the judicial system." *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 678 (D.C. Cir. 1996) (internal citations omitted).

The legal system of The Bahamas is based on the English common law and foreign plaintiffs can bring civil lawsuits for breach of contract and tort claims. Ex. 1, Declaration of Judith Whitehead, ¶ 14-15. Day's allegations will generally fall within the six years statute of limitations in The Bahamas for contract and tort claims. *See* § 5 Limitation Act 1995, *available at* http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/1995/1995-0009/LimitationAct_1.pdf. This is not one of those rare cases where the alternative forum offers a remedy that is clearly unsatisfactory. *See Reyno*, 454 U.S. at 254-55 (finding that plaintiff's inability to raise strict liability claims under Scottish law was not unsatisfactory because the subject matter of the dispute could still be raised in Scottish courts).

Graham Thompson is amenable to process in The Bahamas. Order 10 and Order 61 of the Rules of the Supreme Court provides service of process for residents and corporations of The Bahamas. Rules of the Supreme Court, Orders 10 & 61. As a law firm in The Bahamas,

Graham Thompson is "undoubtedly amenable to service of process in [T]he Bahamas." *Miyoung Son v. Kerzner Int'l Resorts, Inc.*, 07-61171-CIV, 2008 WL 4186979, at *7 (S.D. Fla. 2008) (unpublished). Furthermore, Order 11 of the Rules of the Supreme Court contains a list of cases in which service out of the jurisdiction is permissible. Rules of the Supreme Court, Order 11. Foreign corporations, like the other named defendants, are amenable to process in The Bahamas for "tort[s] committed within the jurisdiction." *See id*; *FFSB Ltd. v. Seward & Kissel LLP*, [2007] 70 W. Indian Rep. 20 (P.C.) (appeal taken from Bah.), slip op. 10-13, *available at* http://webarchive.nationalarchives.gov.uk/20101103140224/http://www.privy-council.org.uk/files/other/FFSB.rtf. Thus, all the named defendants in this litigation are amenable to process in The Bahamas.

Plaintiff's argument that publications in a Bahamian newspaper show that Day could not receive a fair trial in The Bahamas is unavailing.[4] None of the articles that Day mentioned in the Amended Complaint illustrates or suggests that the courts in The Bahamas are corrupt or that Day could not receive a fair trial in The Bahamas. *See* Exs. 3, 4, & 5. Nor does Day identify any specific passage in these articles to support her position. These articles simply appear to be summaries of this litigation based entirely on the filings with this Court, which are public documents since Day did not seek to file under seal. All the quotes and facts appear to be from the original Verified Complaint or from the filed motions and responses. Rather, Day's generalized allegations of corruption are insufficient to render The Bahamas an inadequate alternative forum.

[4] Day makes false and unsupported accusations that "Defendants enjoy a substantial leverage over the local media . . . ." Amended Complaint, ¶ 13. The Bahamas has a free press. *See* Freedom House, Global Press Freedom Rankings, *in* Freedom of the Press 2011 (2011), *available at* http://freedomhouse.org/images/File/fop/2011/FOTP2011GlobalRegionalTables.pdf. Graham Thompson does not have any control over what the media publishes.

Courts additionally refrain from declaring a foreign forum corrupt based on newspaper articles and similar allegations. In *Gonzales v. P.T. Pelangi Niagra Mitra Int'l, P.T.*, 196 F. Supp. 2d 482, 487-88 (S.D. Tex. 2002), the District Court concluded that "Plaintiffs offer [of] voluminous proof of corruption in the Indonesian judiciary – including newspaper articles, statements by prominent Indonesian politicians, the results of a survey conducted by the Partnership of Governance Reform in Indonesia, a World Bank report and statements by the United States government," – failed to render Indonesia an inadequate forum for *forum non conveniens* purposes. There, the District Court stated that there was "virtually no support to . . . 'the alternative forum is too corrupt to be adequate' argument," and that United States Courts should refrain from judging upon the integrity of a forum judiciary. *Id*. at 488. In comparison, the three modest publications cited by Day, even if slightly unfavorable to any one party, could not remotely justify a declaration that The Bahamas is an inadequate forum for *forum non conveniens* purposes.

Day also contends that The Bahamas only allows "very limited discovery." Amended Complaint, ¶ 13. "A foreign forum is not inadequate merely . . . because it employs different adjudicative procedures . . . ." *El-Fadl*, 75 F.3d at 678. Neither the lack of jury trials nor less generous discovery procedures renders foreign forums inadequate. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991) (jury trials); *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996) (jury trial); *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1352-53 (1st Cir. 1992) (discovery procedures). For example, this Court has stated previously that a foreign forum is not inadequate because it offers little to no opportunity for depositions. *Marra v. Papandreou*, 59 F. Supp. 2d 65, 74 (D.D.C. 1999); *see Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1484 (9th Cir. 1987) (finding that the

Singapore forum was an adequate available forum even though depositions were allowed only in certain circumstances), *amended on other grounds* 861 F.3d 565 (9th Cir. 1988). Thus, the discovery procedures in The Bahamas do not render the country an inadequate alternative forum.

Finally, other courts have found The Bahamas as an adequate alternative forum for tort litigation. *See, e.g., Pinder v. Moscetti*, 666 F. Supp. 2d 1313, 1318-19 (S.D. Fla. 2008); *Miyoung Son*, 2008 WL 4186979 at *7; *Snee v. Sunrise Props., Ltd.*, 06-80614-CIV, 2009 WL 2163179, at *6 (S.D. Fla. July 17, 2009) (unpublished).

B. The private interests of the litigants favor The Bahamas forum.

The private interest factors that a court must consider in a *forum non conveniens* inquiry include the relative ease of access to proof, the availability of compulsory process for attendance of unwilling witnesses, the costs of transporting witnesses, and other expenses and inefficiencies. *Reyno*, 454 U.S. 241 n.6; *Huertas*, 2006 WL 785302 at *2.

Because Day's claims arose out of actions occurring entirely within The Bahamas, access to proof would be much easier there. The relevant documents and the majority of the critical witnesses are in The Bahamas; only Nevada resident Day and her Utah law firm, Stanford A. Graham, reside outside of The Bahamas. As such, discovery would be easier if the case was heard in The Bahamas, and the majority of the witnesses would be subject to compulsory process if the case was heard in The Bahamas.

Indeed, the costs and inefficiencies would be significantly less if the case was heard in The Bahamas. Because plaintiff and referring counsel Stanford A. Graham reside respectively in Nevada and Utah, the costs and burdens on the Plaintiff and the referring counsel between a District of Columbia forum and a Bahamian forum are essentially the same. *See Miyoung Son*, 2008 WL 4186979 at *9. Additionally, Day already has at least one Bahamian

counsel, McKinney, Bancroft & Hughes, representing her in this matter. The District of Columbia, however, is significantly more costly and inefficient for Graham Thompson, Corner Bank, and the majority of the witnesses.

None of the private factors favors the District of Columbia. There is no evidence in Washington, D.C., there are no witnesses in Washington, D.C., and there are no parties to this dispute in Washington, D.C. The District of Columbia is inconvenient to all the parties. Thus, all the private factors strongly support dismissal on the grounds of *forum non conveniens.*

C. The public interests also favor The Bahamas as a more convenient forum.

The public factors to consider include the ease with which the present forum will be able to apply foreign law, avoiding unnecessary problems with conflict of laws, the extent of any local interest in the dispute, the desirability of clearing foreign controversies from congested dockets, and the burden on the local jury pool in hearing a foreign controversy. The public factors strongly favor dismissal of the claims against Graham Thompson.

Bahamian law will govern the contract and tort claims (*see* Section IV, A for a more detailed conflict of law analysis). Although this Court certainly is capable of applying foreign law, it will be forced to rely on expert testimony and evidence provided by the parties as to the substance of Bahamian law. This would create an unnecessary administrative burden on an already congested court. In addition, some of Day's counts may raise novel issues of Bahamian law, which preferably would be handled by Bahamian courts.

There also is a local interest in having localized controversies decided at home. *Reyno,* 454 U.S. at 260. The Bahamas has a local interest in regulating the conduct of its law firms and its banks. This interest is particularly strong in this case because Day's alleges legal malpractice in The Bahamas by Bahamian lawyers; Bahamian, not American, interests are

paramount in regulating the legal practice within The Bahamas and in disciplining purported misconduct committed by Bahamian attorneys. The alleged malpractice claim will be governed by The Bahamas Bar (Code of Professional Conduct) Regulations and the Legal Profession Act 1992. It would be an affront to the principles of international comity for a District of Columbia court to interpret and apply the Bahamian Bar Regulations and the Legal Profession Act 1992 to adjudicate a Bahamian law firm for its legal practice exclusively in The Bahamas. Furthermore, a jury composed of D.C. residents has minimal interest in adjudicating a dispute concerning the standard of legal practice in The Bahamas or concerning contract and torts claims based on activities in The Bahamas and involving a Nevada citizens and Bahamian corporations. Thus, the public factors favor this suit being heard in The Bahamas. This Court should, therefore, dismiss Day's claims against Graham Thompson for *forum non conveniens*.

III. THE INVASION OF PRIVACY CLAIM SHOULD BE DISMISSED AS AN IMPERMISSIBLE ATTEMPT TO SUPPLEMENT THE PEADINGS AND FOR FAILURE TO STATE A CLAIM.

A. Count XII in the Amended Complaint is an impermissible attempt to supplement the pleadings in contravention to Rule 15(d).

In the June 10, 2011 Order, this Court granted Plaintiff leave to file an amended complaint within seven days. Importantly, the Court did not grant Day leave to file a supplemental pleading pursuant to Federal Rule of Civil Procedure 15(d). Rule 15(d) provides: "On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to by supplemented."

Day timely filed her Amended Complaint, which included, as Count XII, an invasion of privacy cause of action against Graham Thompson and Corner Bank. Because this

invasion of privacy claim was based on alleged conduct subsequent to the filing of Day's original Verified Complaint, the Amended Complaint was actually a "supplemental" complaint. *See Human Genome Sci., Inc. v. Kapposi,* 738 F. Supp. 2d 120, 122-23 (D.D.C. 2010); *Bittel Tech., Inc. v. Bittel USA, Inc.*, No. C10-00719, 2011 WL 940300, at *2-3 (N.D. Cal. Feb. 18, 2011).

The United States Court of Appeals for the District of Columbia has stated that "supplements *always* require leave of the court." *Hall v. Cent. Intelligence Agency*, 437 F.3d 94, 100 (D.C. Cir. 2006) (emphasis added). Day was not given leave to file such a supplemental pleading. No motion was filed by Day seeking to supplement the pleadings, and Defendants were not given notice that a supplemental complaint would be filed. In addition, Defendants are prejudiced because they must respond to a supplemental pleading under an expedited briefing schedule. Thus, this Court should dismiss Count XII as an improper attempt to file a supplemental pleading.

B. The invasion of privacy cause of action should be dismissed for failure to state a claim upon which relief can be granted.

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft*, 129 S. Ct. at 1949 (internal quotation omitted). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancements." *Id.* (internal quotation and citation omitted). A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A court need not 'accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must [a] court accept legal

conclusions cast in the form of factual allegations.'" *Anderson v. Holder*, 691 F. Supp. 2d 57, 61 (D.D.C. 2010) (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

Day does not state clearly which invasion of privacy tort she alleges in her supplemental Amended Complaint. Arguably, she raises either a public disclosure of private facts tort or a false light tort. Under the common law,[5] the tort of invasion of privacy resulting from the disclosure to the public of private facts requires publicity, by the defendant, of private facts that are not of legitimate concern to the public and would be highly offensive to a reasonable person. *See* Restatement (Second) of Torts § 652D (1977); *Wolf v. Regardie*, 553 A.2d 1213, 1220 (D.C. 1989) (citing a hornbook and cases from other jurisdiction). The claim of false light invasion or privacy requires publicity, by the defendant, about a false statement, representation, or imputation understood to be of and concerning the plaintiff, which the defendant knew was false or acted in reckless disregard as to it falsity, and which places the plaintiff in a false light that would be offensive to a reasonable person. *See* Restatement (Second) of Torts § 652E (1977); *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999) (stating the required elements under District of Columbia law); *Bean v. Gutierrez*, 980 A.2d 1090, 1094 (D.C. 2009) (recognizing the mens rea element).

The Amended Complaint fails to allege that any private facts concerning Day was published. The three editorials mentioned in the Amended Complaint appear to summarize this litigation based entirely upon the pleadings publicly filed in this Court, and the quotations attributed to Graham Thompson come directly from its filed motions and reply memorandums.[6]

[5] Bahamian law will govern the invasion of privacy claim (*see* Section IV, A for a more detailed conflict of law analysis). Since The Bahamas is a common law jurisdiction, the common law, as stated in the Restatement (Second) of Torts, is informative.

[6] Under the "English" rule, litigants enjoy absolute immunity from civil litigation for statements published in documents which have been filed in a judicial proceeding. *See Norman v. Borison*,

"[T]here is no protected interest in preventing the further publicity of what [plaintiff] himself left open to the public eye," and "an invasion of privacy action does not lie as to events which take place in public view." *Harrison v. Washington Post Co.*, 391 A.2d 781, 784 (D.C. 1978). Although Day asserts that "the present case . . . concerned private matters of a non-public figure," Amended Complaint ¶ 59, Day's own public filing of her Verified Complaint on August 6, 2010, brought this litigation into the public view. Day did not initiate this action under seal, and, thus, left herself and this litigation open to the public eye, including newspaper reporters. Thus, Day cannot assert that this litigation and the information in the docket were private facts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-97 & 494 n. 25 (1975) (asserting that no invasion of privacy or defamation causes of action can lie for the publication of information that was available in unsealed judicial documents and citing decisions emphasizing as a defense to invasion to privacy claims the fact that the information in question was derived from official records available to the public); *Norman v. Borison*, 17 A. 2d 697, 715-17 (Md. Apr. 22, 2011) (holding that the publication of a Complaint cannot satisfy an invasion of privacy claim).

The Amended Complaint also fails to allege that the information published was not of legitimate public concern. The litigation involves serious allegations against a Bahamian bank and a Bahamian law firm. Certainly, these allegations are of legitimate public concerns in The Bahamas, where the editorials were published. Day's failure to identify a single private fact that was published or to allege that the information was not of legitimate public concern warrants dismissal of her invasion of privacy for public disclosure of private facts claim.

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17 A. 2d 697, 708-09 (Md. Apr. 22, 2011) (stating the "English" rule); *In re Spikes*, 881 A.2d 1118, 1123 (D.C. 2005) ("Submitting a memorandum of law in support of a motion filed in the course of a legal proceeding is cloaked with the absolute privilege that attaches to statements made within the judicial process."). To the extent that Day's invasion of privacy claim is based on any statements made by Graham Thompson in the filings with this Court, absolute immunity enjoyed by the Bahamian law firm bars Day's claim.

Furthermore, the Amended Complaint fails to allege or identify any false statement, reputation, or imputation understood to be of and concerning the plaintiff or to allege that Graham Thompson knew that any statement was false or acted in reckless disregard as to the falsity of any statement. Day's failure to plead such elements or any factual enhancements in support thereof warrants dismissal of the false light invasion of privacy claim. Finally, Day fails to allege that the three editorials would be highly offensive to a reasonable person, a required element for both types of invasion of privacy torts. Accordingly, Count XII must be dismissed for failure to state a claim pursuant to 12(b)(6).

IV. THE REMAINING CLAIMS AGAINST GRAHAM THOMPSON SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

At common law, proximately caused damages are an element of the legal malpractice, fiduciary duty, contract, and related causes of action. Both The Bahamas and the District of Columbia are common law jurisdictions and share the same common law principles. Under District of Columbia law, a successful claim of legal malpractice requires that the plaintiff show an applicable standard of care, a breach of that standard, and a proximate causal relationship between the violation and the harm complained of. *See Taylor v. Akin, Gump, Strauss, Hauer & Feld*, 859 A.2d 142, 147 (D.C. 2004). A claim of breach of fiduciary duty similarly requires the plaintiff to show the existence of a fiduciary duty, breach of that duty, and proximate cause of harm. *See Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 75 (D.D.C. 1998). Breach of contract requires that the plaintiff show the existence of a contract, breach by the defendants, and a proximate causal relationship between the breach and the harm complained of. *See In re Belmar*, 319 B.R. 748, 759-60 (Bankr. D.C. 2004). Because proximately caused damage is an element of these claims, lack of proximately caused damages is

fatal on a motion to dismiss for failure to plead an element. *See Mount v. Baron*, 154 F. Supp. 2d 3, 9-10 (D.D.C. 2001). Courts routinely dismiss malpractice and related claims after finding, as a matter of law, that the alleged negligence did not proximately cause harm to the client. *See, e.g., id* at 9 (dismissing malpractice complaint because plaintiffs failed to allege facts showing proximate causation); *Shapiro*, 24 F. Supp. 2d at 77-78 (dismissing malpractice and fiduciary duty claims where amount of attorneys fees charged were not, as a matter of law, unreasonable).

Plaintiff's claim that the Bahamian law firm had a conflict of interest in violation of the ethics rules of The Bahamas is a legal conclusion that can be decided on a motion to dismiss. Whether allegations concerning two unrelated legal representations adequately plead a conflict of interest is nothing more than "legal conclusion couched as factual allegation" and can be adjudicated on the pleadings. *See Ass'n of Am. Physicians & Surgeons, Inc. v. FDA*, 539 F. Supp. 2d 4, 12 (D.C. Cir. 2008) (citation omitted), *a'ffd*, 358 F. App'x 179 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3669 (U.S. May 4, 2010) (No. 09-1354).

Here, the conflict of interest allegations fail to plead causation or even allege damages, much less how they could have been proximately caused, which is the fourth and final element of all the counts. The Bahamian law firm withdrew after sixteen days of representing Day, recommended substitute counsel in The Bahamas, and returned the retainer in full. The Amended Complaint does not allege how plaintiff was possibly harmed. That omission is fatal to all the remaining claims against the law firm.

The inadequate pleading of proximate causation discussed above defeats not only the malpractice claim asserted in Count X, but also the breach of contract and breach of fiduciary duty claims in Counts I and II, as well as the related Counts V (for declaratory relief), VII (civil conspiracy), and XI (fraud). Although the Amended Complaint purports to state different types

of action, the claims labeled breach of contract and breach of fiduciary duty are nothing more than restatements of the negligence claim for legal malpractice. In the District of Columbia, contract and tort claims that are based on the same conduct as a legal malpractice claim also should be dismissed where the malpractice claim is dismissed for failure to state a claim. *See Macktal v. Garde*, 111 F. Supp. 2d 18, 22 (D.D.C. 2000), *aff'd*, 2001 WL 238170 (D.C. Cir. 2001) ("[I]f the underlying malpractice claims fails, tort and contract claims arising from the same transaction must also fail."); *O'Neil v. Bergan*, 452 A.2d 337, 343 (D.C. 1982) ("In short, the 'reasonable skill' promised in the implied agreement is the same as the 'reasonable skill' which an attorney must display to avoid tort liability."); *Shapiro*, 97 F. Supp. 2d at 11-12; *Shapiro*, 24 F. Supp. 2d at 81 (breach of contract claim only survives to extent underlying professional negligence claims survive). Counts V, VII, and XI assert claims based on the same set of operative facts as the malpractice claims discussed above, and they should be dismissed for the same reasons.

Sixteen days of delay in 2008 did not operate to deprive Day of anything of value. Speculative damage is insufficient to sustain Day's causes of action against her former lawyers. A plaintiff's allegation that he or she was deprived of the opportunity to pursue legal relief is speculative and insufficient to allege proximate causation. *See Thomas v. Powell*, 247 F.3d 260, 264-65 (D.C. Cir. 2001) (stating that plaintiff's claim that attorneys' breach of duty caused his lost ability to pursue a potentially lucrative individual claim for damages was insufficient to establish proximate cause); *Macktal*, 111 F. Supp. 2d at 22 (dismissing complaint because allegations of harm based on "speculation about what alternative results could have been achieved" were inadequate); *In re Belma*, 319 B.R. at 758-59 (clients' claim that lawyer's error deprived them of leverage against adversary was too speculative to support causation of

damages); *Mount*, 154 F. Supp. 2d at 9-10; *Bigelow v. Knight*, 737 F. Supp. 669, 671 (D.D.C. 1990) (dismissing malpractice claim because "plaintiff essentially alleges only vague and general failures of the defendant to locate and interview witnesses who would have 'render[ed] suitable support for a defense,'" but "fails to identify what these witnesses would have testified to and how they would have supported a defense which would have resulted in his acquittal").

A. The substantive laws of The Bahamas control the plaintiff's contract and tort claims.

As a preliminary matter, it is the law of The Bahamas, and not the District of Columbia, that applies in this case.

"In diversity cases, a federal court must apply the choice of law rule of the court's forum." *Tolbert v. Nat'l Harmony Mem'l Park*, 520 F. Supp. 2d. 209, 211 (D.D.C. 2007); *accord Ideal Elec. Sec. Co., v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 148 (D.C. Cir. 1997). The District of Columbia's choice of law rules are "a constructive blending" of the "governmental interest analysis" and the "most significant relationship test." *See Oveissi v. Islamic Rep. of Iran*, 573 F.3d 835, 842 (D.C. Cir. 2009) (recognizing the choice of law rules for tort claims); *Stephen A. Goldberg Co. v. Remsen Partners, Ltd.*, 170 F.3d 191, 194 (D.C. Cir. 1999) (recognizing the choice of law rules for contract disputes); *Hercules & Co. v. Shama Rest. Corp.*, 566 A.2d 31, 41 n.18 (D.C. 1989).

In determining which jurisdiction's law controls in tort litigation, courts in the District of Columbia are to consider: (1) the governmental policies underlying the applicable laws and which jurisdiction's policy would be most advanced by having its law applied to the facts of the case; (2) the place where the injury occurred; (3) the place where the conduct causing the injury occurred; (4) the domicile, residence, place of incorporation and place of business of

the parties; and (5) the place where the relationship, if any, between the parties is centered. *Oveissi*, 573 F.3d at 842.

For contract disputes, the District of Columbia requires courts to consider: (1) the governmental policies underlying the applicable laws and which jurisdiction's policy would be most advanced by having its law applied to the facts of the case; (2) the place of contracting; (3) the place of negotiation; (4) the place of performance; (5) the location of the contact's subject matter; and (6) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Stephen A. Goldberg Co*, 170 F.3d at 194; *Oveissi*, 573 F.3d at 842 (explaining the governmental interest analysis). In service contracts, presumptive weight is given to the place of performance. *Stephen A. Goldberg Co*, 170 F.3d at 194. "[T]he place of contracting standing alone is typically viewed as rather insignificant, especially when it was fortuitous." *Id.* (referencing Restatement (Second) of Conflicts of Laws § 188, cmt. e).

Here, Bahamian law controls Day's tort claims. The conduct causing any alleged injury occurred in The Bahamas, and the relationship between the parties centered in The Bahamas. The parties are from The Bahamas or Nevada, and the place of the alleged injury was either in The Bahamas or Nevada. Moreover, The Bahamas has a strong governmental interest in enforcing its conflict of interest rules through its disciplinary process, in ensuring that its lawyers do not commit legal malpractice in The Bahamas, and in ensuring uniformity in means and outcome of enforcement. The tort claims all stem from Day's allegation that Graham Thompson, under Rule V of The Bahamas Code of Professional Conduct, had a conflict of interest (Count II, Amended Complaint ¶ 70; Count V, Amended Complaint ¶ 83; Count VII, Amended Complaint ¶ 91; Count XI, Amended Complaint ¶ 107) and violated "Bar Act of 1971

(Chapter 64 of the Bahamas laws 'Legal Profession')" (Count X, Amended Complaint ¶ 103).[7] Comment 13 to Rule V speaks in terms of disciplinary proceedings, not private rights of action for damages. *See* The Bahamas Bar (Code of Prof'l Conduct), 64 Subsidiary Legislation § 40, Rule V cmt. 13 (1981) ("Generally speaking in disciplinary proceedings under this Rule, ..."), *available at* http://laws.bahamas.gov.bs/cms/images/LEGISLATION/SUBORDINATE/1981/1981-0022/BahamasBarCodeofProfessionalConductRegulations_1.pdf. What plaintiff crucially omits is whether The Bahamas rule cited in the Amended Complaint permits a private cause of action for damages for a violation. That is a fatal omission in the pleading because District of Columbia law states that the analogous but not identical District of Columbia Rules are to be enforced in disciplinary proceedings, and the District of Columbia Rules are not intended to permit a private right of action for damages for violation of conflict of interest rules. The District of Columbia Rules of Professional Conduct provides:

> [3] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.
>
> [4] Nothing in these Rules, the Comments associated with them, or this Scope section is intended to enlarge or restrict existing law regarding the liability of lawyers to others or the requirements that the testimony of expert witnesses or other modes of proof must be

[7] The Amended Complaint cites The Bar Act of 1971 in asserting the malpractice count. To the extent that the malpractice claim or the other claims rely on The Bar Act of 1971, Day fails to state a claim pursuant to 12(b)(6) because The Bar Act of 1971 was repealed and replaced by the Legal Profession Act 1992.

> employed in determining the scope of a lawyer's duty to others. Moreover, nothing in the Rules or associated Comments or this Scope section is intended to confer rights on an adversary of a lawyer to enforce the Rules in a proceeding other than a disciplinary proceeding. Some judicial decisions have considered the standard of conduct established in these Rules in determining the standard of care applicable in a proceeding other than a disciplinary proceeding. A tribunal presented with claims that the conduct of a lawyer appearing before that tribunal requires, for example, disqualification of the lawyer and/or the lawyer's firm may take such action as seems appropriate in the circumstances, which may or may not involve disqualification.

D.C. Rules of Prof'l Conduct Scope cmt. 4. Because Day failed to allege Bahamian authority that permits this cause of action, the action should be dismissed.

Bahamian law also controls Day's spurious breach of contract claim. Although paragraph 66 of the Amended Complaint alleges that "GTC [Graham Thompson] was in breach of contract," the Amended Complaint does not allege that Day and Graham Thompson entered into a contract, *i.e.*, that a specific contract exists, and does not identify any specific contractual terms between the parties. Because there is no alleged contract or contractual terms between the parties, there could be no breach. In any event, the oral discussions were in Utah and the Bahamas: Stanford A. Graham, a Utah law firm, contacted Graham Thompson in The Bahamas to request legal assistance for Day; and the Utah law firm subsequently wired a $5,000 retainer to the Bahamian law firm. The Bahamas was the location of the performance and subject matter of the nonexistent contract: Graham Thompson was requested to render legal service in The Bahamas concerning an alleged bank account in The Bahamas. And The Bahamas has a powerful interest in regulating contracts for legal services, or the lack thereof, in its jurisdiction.

B. Count X fails to state a claim for legal malpractice.

There is no statutory authority for legal malpractice in The Bahamas; thus, this legal malpractice claim would have to rely on Bahamian common law. Although Bahamian

common law applies, American common law may be informative especially to basic common law propositions.

The Count fails to plead proximate causation of injury. First, the Amended Complaint does not allege any injuries from Graham Thompson's legal representation. Although the Amended Complaint asserts that Graham Thompson was privy to confidential information, *see* Amended Complaint ¶ 44, it does not allege that any injury occurred as a result. Second, the Amended Complaint does not allege any injury as a result of the change in legal representation. Graham Thompson transferred Day's complete file and her full retainer to McKinney, Bancroft & Hughes.

The only tangible injury alleged in the Amended Complaint is that Day is being denied access to alleged funds in her mother's alleged account. Graham Thompson's actions did not cause this injury. Nor does the Amended Complaint allege such. Instead, Day alleges that she was deprived of honest services and of undivided loyalty of counsel. *See* Amended Complaint ¶ 103. These injuries are insufficient for malpractice claims; only actual losses or damages are permissible injuries in malpractice claims. *See* 4 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 35:9 (Westlaw 2009 ed.); 7 Am. Jur. 2d *Attorney at Law* § 201 (2d ed. 2010). The Amended Complaint fails to allege any actual losses or damages caused by Graham Thompson. Therefore, the Amended Complaint fails to state a claim for malpractice against Graham Thompson, and the malpractice count should be dismissed pursuant to Rule 12(b)(6). Because the legal malpractice claim should be dismissed, the remaining contract and tort claims should be dismissed since they are based on the same conduct as the malpractice claim.

C. Count I fails to state a claim for breach of contract.

Although Bahamian contract law would control in this case, basic contract principles in the United States are informative. To breach a contract there must be an agreement as to all the material terms. Howard O. Hunter, *Modern Law of Contracts* § 4.2 (2010.). Courts have dismissed breach of contract claims pursuant to Rule 8 and Rule 12(b)(6) when plaintiffs fail to allege that a specific contract exists or fail to identify the specific contract terms that were breached. *See Ihebereme v. Capital One, N.A.*, 730 F. Supp. 2d 40, 47 (D.D.C. Aug. 9, 2010) ("The conclusory assertion that 'Chevy Chase violated the terms of the contract between Plaintiff and Defendant' . . . does not put defendant on notice of *which* terms it allegedly breached, so the allegation does not satisfy the notice-pleading purpose of Rule 8's requirement for a plain statement of the claim."); *Wolff v. Rare Medium, Inc.*, 210 F. Supp. 2d 490, 494 (S.D.N.Y. 2002) (holding that "a plaintiff must identify the specific provision of the contract that was breached as a result of the acts at issue"); *see also Ohio Cas. Ins. Co. v. Bank One*, 1997 WL 30951, at *2 (N.D. Ill. Jan. 22, 1997) (finding that plaintiff failed to identify a specific contract that was breached or to identify "specific contact terms that were breached"). The Amended Complaint fails to allege that a contract actually existed, or, at the very least, what terms were mutually agreed upon, between Graham Thompson and Day. The Amended Complaint also fails to allege that the expressed or implied terms of any contract prohibited Graham Thompson from representing Corner Bank in unrelated matters. Thus, the Amended Complaint fails to allege that Graham Thompson breached any mutually agreed terms.

In addition, Day cannot show that Graham Thompson's alleged breach of contract caused any compensable damages. Since Graham Thompson transferred the full retainer to Day's new counsel, there were no compensatory damages under any alleged contract. To the

extent that Day seeks punitive damages based on the breach of contract claim, punitive damages generally are not available in contract disputes. *See, e.g., Barnes v. Gorman*, 536 U.S. 181, 187 (2002) ("But punitive damages, unlike compensatory damages and injunctions, are generally not available for breach of contract."); Restatement (Second) of Contract § 355. Thus, there are no legitimate remedies sought for Graham Thompson's alleged breach of contract.

D. Count II fails to state a claim for breach of fiduciary duty.

The Bahamas recognizes limits on an attorney's common law fiduciary duties. *See FFSB Ltd. v. Seward & Kissel LLP*, 70 W. Indian Rep. 20, slip op. at 17. "The extent of a lawyer's duty is very sensitive to the particular facts and surrounding circumstances." *Id*. To state a claim for breach of a fiduciary duty, plaintiff must plead duty, breach, causation and injury. *See, e.g., Armenian Genocide Museum & Mem'l, Inc. v. The Cafesjuan Family Found., Inc.*, 607 F. Supp. 2d 185, 190 (D.D.C. 2009); *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr LLP*, No. 2009 CA 5574, slip op. at 9-10 (D.C. Super. Ct. Aug. 2, 2010).[8]

Neither the Amended Complaint nor the original Verified Complaint alleges any facts that Graham Thompson represented both Corner Bank and Day on the same Day matter. According to the Verified Complaint, Day, represented at the time by Graham Thompson, visited Corner Bank in June of 2008,[9] Verified Complaint at ¶¶ 24, 27, and bank officer Roberts stated "that Graham Thompson was a reputable law firm that actually represented his bank," Verified Complaint, ¶ 28. In the non-verified Amended Complaint, bank officer Roberts is now alleged to have asserted "that GTC [Graham Thompson] was a reputable law firm that represented his bank and that she, DAY, stood no chances against that law firm." Amended Complaint, ¶ 48.

[8] Again, American common law is informative.

[9] There appears to be a typographical error in the Verified Complaint when it asserted that Day visited Corner Bank in June 2010 rather than June 27, 2008.

Both Complaints assert, in a conclusory manner, that Graham Thompson must have represented "both sides, in the very same matter." Amended Complaint, ¶ 48. This speculation about "in the same matter" has no factual support. Graham Thompson could not have represented Corner Bank in the same Day matter before Day's visit to the bank. Based on the facts alleged, the bank was not aware of a conflict with Day such that it would have sought legal representation prior to Day's delivery of the Graham Thompson prepared letter. The Complaint fails to allege any facts that Graham Thompson represented Corner Bank in this Day matter at any time. Graham Thompson did represent Corner Bank in unrelated matters.

The Count also fails to plead that Graham Thompson's alleged conflicted representation caused tangible harm to Day. The Amended Complaint does speculatively assert that Graham Thompson allegedly withheld information about the bank account that it allegedly learned after Graham Thompson had discontinued its representation. The law firm, however, could not advise Day with information about her matter after the attorney-client relationship ended. Nevertheless, any substantive information that Graham Thompson had possessed concerning its representation of Day would now be in the possession of Day's new counsel, McKinney, Bancroft & Hughes.

E. Because Count XI fails to plead with particularity and fails to state a claim for misrepresentation and fraud, the count should be dismissed.

Rule 9(b) requires the pleader to state with particularity the circumstances constituting fraud or mistake. Rule 9(b) also applies to claims of misrepresentations. *Simms v. District of Columbia*, 699 F. Supp. 2d 217, 226 (D.D.C. 2010). To plead fraud with particularity, the party must state the time, place, and content of the false misrepresentations, the fact misrepresented, and what was obtained or given up as a consequence of the fraud. *Id.* at 226-27. In other words, "Rule 9(b) requires the pleader provide the 'who, what, when, where, and how'

with respect to the circumstances of the fraud." *Anderson v. USAA Caus. Ins. Co.*, 221 F.R.D. 250, 253 (D.D.C. 2004). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

The Amended Complaint claims that Graham Thompson's failure to disclose its representation of Corner Bank in unrelated matters amounted to misrepresentation (concealment) and fraud. Other than stating that there was a non-disclosure, the Amended Complaint fails to plead any of the other elements of misrepresentation (concealment) and fraud under Bahamian law.

These omitted common law elements generally include, an intent to deceive, a justifiable reliance on the part of the plaintiff, and a resulting injury proximately caused by the fraud. *See* Restatements (Second) of Torts §§ 550-51; W. Page Keeton, *Prosser and Keeton on Torts* §§ 105-10 (5th eds. 1984). The Amended Complaint fails to allege any of these elements, and also fails to allege that this non-disclosure was material to Day.

F. Count VII fails to state a claim of civil conspiracy.

Civil conspiracy is not an independent tort, *i.e.*, there is no civil action based on conspiracy alone. *Hall v. Clinton*, 285 F.3d 74, 82 (D.C. Cir. 2002); *Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1493 (D.C. 1989) ("Under both federal and District of Columbia law, civil conspiracy is not actionable in and of itself."). A count of civil conspiracy creates no independent basis for liability and has no legal force except as a vehicle for imposing vicarious liability. *Hall*, 285 F.3d at 82; *Riddell*, 866 F.2d at 1493. Because the Amended Complaint asserts a civil conspiracy as an independent action, it should be dismissed as a matter of law.

Furthermore, an essential element of vicarious liability under the doctrine of civil conspiracy is an agreement.[10] *Hall*, 285 F.3d at 82. To survive a motion to dismiss, plaintiff must allege "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also* 15A C.J.S. *Conspiracy* § 28 (2010). "[A] conclusory allegation of an agreement at some unidentified point does not supply facts adequate to show [a conspiracy]." *Twombly*, 550 U.S. at 557; *see also Acosta Orellana v. Croplife Int'l*, ___ F. Supp. 2d. ___, 2010 WL 1931689, at *22 (D.D.C. May 13, 2010). Merely stating that the defendants conspired is not enough to establish a cause of action for civil conspiracy. *See Pietrangelo*, No. 2009 CA 5574, slip op. at 44-45. Here, the Amended Complaint merely speculates that an agreement to conspire exists and provides no factual support to suggest such a conclusion. Further, Day completely ignores the fact that Graham Thompson actually helped Day by drafting a letter on her behalf requesting information from Corner Bank about the alleged bank account.

G. Day is not entitled to a declaratory judgment sought in Count V.

Use of a United States statute, The Declaratory Judgment Act, to enforce Bahamian rules of practice for Bahamian attorneys giving Bahamian legal advice in The Bahamas is an inappropriate use of this Court's discretionary power to issue equitable relief and an affront to principles of international comity. These matters are left to the discipline process of

[10] The United States Court of Appeals for the District of Columbia stated that the elements of common law civil conspiracy include: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; [and] (4) which overt act was done pursuant to an in furtherance of the common scheme." *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *see also* Restatement (Second) of Tort § 876; 16 Am. Jur. 2d *Conspiracy* §§ 50-53.

The Bahamas Bar. In any event, such declaratory relief is in the nature of an advisory opinion for past foreign conduct unlikely of repetition.

Day also lacks standing for this count because the alleged injury is without any causal connection to the relief sought and because the relief sought against the law firm will not redress any injury. Graham Thompson's alleged "breach of their professional duties" did not cause Day any legally cognizable injury. The gravamen of the Amended Complaint maintains that Day is injured because she is being denied access to the alleged funds in her late mother's alleged bank account. The law firm does not control those alleged funds. There is no causal connection between this pleaded injury and the alleged breach of professional duties.

The declaratory relief also would not redress Day's injury. A declaratory judgment that Graham Thompson breached its professional duties would not provide Day with access to her mother's bank account. Had Day claimed she received insufficient or unsatisfactory legal representation, a declaratory judgment would still be insufficient. Unsatisfactory legal representation is not the type of ongoing injury that can be resolved or rectified by a declaratory judgment. *See Foretich v. United States*, 351 F.3d 1198, 1212-16 (D.C. Cir. 2003) (finding declaratory relief is capable of redressing injuries that are ongoing and not expired or retracted). Because there is no causal connection or redressability, this Court should dismiss this count.

V. THE COURT SHOULD STRIKE THE PUNITIVE DAMAGES PRAYER FOR RELIEF PURSUANT TO RULE 12(f) BECAUSE THE AMENDED COMPLAINT CONTAINS NO ALLEGATION THAT DEFENDANT GRAHAM THOMPSON ACTED WITH MALICE AND PUNITIVE DAMAGES ARE NOT AVAILABLE FOR BREACH OF CONTRACT

The request for punitive damages should be stricken because the Amended Complaint contains no allegations of any conduct warranting punitive damages. Amended Complaint, Request for Relief ¶ e.

Under District of Columbia law, a plaintiff cannot recover punitive damages for breach of contract. *See Choharis v. State Farm Fire & Cas. Co.*, 961 A.2d 1080, 1090 (D.C. 2008). Accordingly, Day is not entitled to punitive damages based upon the breach of contract alleged in Count I.

Nor do the remaining counts for legal malpractice and breach of fiduciary duty and ancillary causes of action allege any malicious conduct that could support a request for punitive damages. Punitive damages are "reserved only for tortious acts which are replete with malice." *Zanville v. Garza*, 561 A.2d 1000, 1002 (D.C. 1989); *see Dalo v. Kivitz*, 596 A.2d 35, 40-41 (D.C. 1991). In *Dalo*, the defendant attorneys had entered into an agreement to share a fee with their client but failed to advise the client of the potential conflicts of interest. 596 A.2d at 36. The District of Columbia Court of Appeals affirmed the trial court's refusal to award the plaintiff's punitive damages count even though the plaintiff had "proven by well beyond a preponderance of the evidence that [the defendants] committed legal malpractice in numerous respects," because the trial court had found no malicious intent by the lawyer. *Id*. at 41. Under *Dalo*, a plaintiff must plead and prove a defendant's malicious intent to justify punitive damages — a claim of legal malpractice alone is insufficient. Because Day has not alleged any malicious

intent by Graham Thompson, punitive damages are not recoverable against the law firm defendant.

Pursuant to Rule 12(f), a party may move to have stricken from any pleading any "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The Court may strike a request for relief where the damages sought are not recoverable as a matter of law. *See Questrom v. Federated Dep't Stores, Inc.*, 41 F. Supp. 2d 294, 307-08 (S.D.N.Y. 1999) (granting defendant's motion to strike portions of plaintiff's prayer for relief), *aff'd*, 2 F. App'x 81 (2d Cir. 2001); *Helwig v. Kelsey-Hayes Co.*, 907 F. Supp. 253, 256 (E.D. Mich. 1995) (granting motion to strike plaintiffs prayer for punitive damages because punitive damages were not authorized under applicable law); see also 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382 (Supp. 1998) (stating that a motion to strike may be used to address "requests for remedies that are unavailable with regard to the law at issue"). Because punitive damages are not recoverable based upon the pleadings in this case, the Court should strike the request for punitive damages pursuant to Rule 12(f).

CONCLUSION

For all the foregoing reasons, Defendant Graham, Thompson & Co. respectfully requests that this Court grant its Motion to Dismiss.

Respectfully submitted,

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Dated: June 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to:

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