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 CORNÈR BANK (OVERSEAS) LTD; CORNÈR BANK S.A., *aka* CORNÈR BANCA S.A., *aka* GRUPPO CORNÈR, *aka* CORNÈR BANQUE S.A.; COLYN ROBERTS; GRAHAM THOMPSON & CO., and DOES from 1 to 100, Defendants.	)	Case No. 1:10-cv-01339 (RCL)

DEFENDANTS CORNÈR BANK (OVERSEAS) LTD., CORNÈR BANCA, S.A., AND COLYN ROBERTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Cornèr Bank (Overseas) Ltd. ("Cornèr Bank"), Cornèr Banca, S.A. ("Cornèr Banca"), and Colyn Roberts ("Roberts") (collectively, the "Cornèr Bank Defendants") hereby move to dismiss all claims asserted against them in the Amended Complaint filed by Plaintiff Tonya Kay Day ("Plaintiff"). The Amended Complaint should be dismissed pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure and the doctrine of *forum non conveniens*. In addition, Plaintiff's newly added twelfth cause of action and certain allegations in the Amended Complaint should be stricken pursuant to Rule 12(f).

As set forth in more detail in the attached Statement of Points and Authorities, this Court lacks personal jurisdiction over the Cornèr Bank Defendants – defendants with no connections to the United States or the District of Columbia. The District of Columbia is an inconvenient forum for a lawsuit concerning events alleged to have occurred entirely in the Bahamas. Plaintiff's

Amended Complaint also fails to state any claim on which relief can be granted. Finally, the irrelevant statements involving alleged conduct by Roberts and the supposed reputation of Cornèr Bank are presented to harass and cast these defendants in a derogatory and false light, and they should be stricken from the Amended Complaint, as should the improperly added Count XII.

Accordingly, the Cornèr Bank Defendants respectfully request that the Court dismiss Plaintiff's Amended Complaint.

June 27, 2011

Respectfully submitted,

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS CORNÈR BANK (OVERSEAS) LTD., CORNÈR BANCA, S.A., AND COLYN ROBERTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Plaintiff Tonya Kay Day ("Plaintiff"), a Nevada resident, has filed this action in the United States District Court for the District of Columbia against Defendants Cornèr Bank (Overseas) Limited ("Cornèr Bank"), Cornèr Banca, S.A. ("Cornèr Banca"), and Colyn Roberts ("Roberts") (collectively, the "Cornèr Bank Defendants"), banking associations located in the Bahamas and Switzerland and an individual resident in the Bahamas, respectively. The Complaint alleges events that occurred entirely in the Bahamas relating to a purported bank account that Plaintiff claims to own or control in the Bahamas. There are multiple bases for dismissing Plaintiff's Amended Complaint.

First, this Court lacks personal jurisdiction over the Cornèr Bank Defendants, which are all foreign defendants. Plaintiff's alleged claims against the Cornèr Bank Defendants do not

arise out of or relate to activities in the District of Columbia. Rather, the alleged events at issue took place entirely in the Bahamas, and the Complaint fails to identify any viable basis for jurisdiction over the Cornèr Bank Defendants in the District of Columbia or the United States. There is no way that Plaintiff can overcome this defect. Indeed, the Cornèr Bank Defendants have no ties with the District of Columbia or the United States that would justify the Court's exercise of personal jurisdiction. Therefore, the Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).

Second, the doctrine of *forum non conveniens* warrants dismissal. The alleged events occurred in the Bahamas, the Bahamas is an adequate forum, Bahamian law should apply, and all relevant public and private factors favor dismissal. Therefore, this Court may dismiss this case on *forum non conveniens* grounds without considering the Plaintiff's substantive claims.

Third, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) because Plaintiff has failed to state any claim on which relief can be granted. All of Plaintiff's causes of action are fatally flawed in that Plaintiff fails to allege essential elements of those claims, including that actions of the Cornèr Bank Defendants proximately caused injury. Moreover, the Amended Complaint does not provide plausible allegations that Plaintiff is the beneficiary of any putative account at Cornèr Bank and therefore has standing to raise any of the claims presented.

Fourth, the portions of the Amended Complaint that allege certain conduct by Roberts and rumors regarding Cornèr Bank should be stricken pursuant to Rule 12(f). These allegations, relating to Plaintiff's claims for battery and intentional infliction of emotional distress, are irrelevant to Plaintiff's action for recovery of funds. Instead, these outrageous allegations are presented merely to cast the Cornèr Bank Defendants in a negative and false light. Plaintiff's twelfth cause of action for invasion of privacy, which was added by the Amended Complaint,

should also be stricken. An amended complaint is not the appropriate mechanism for adding a new claim based on conduct that allegedly occurred after the action began.

For all these reasons, the Cornèr Bank Defendants respectfully request the Court to dismiss the Amended Complaint in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Cornèr Banca is a banking association organized and existing under the laws of Switzerland. Defendant Cornèr Bank, a subsidiary of Cornèr Banca, is a banking association organized and existing under the laws of the Bahamas. Cornèr Bank was incorporated in December 1995 and was issued a license to operate by the Central Bank of the Bahamas in January 1996. Neither Cornèr Banca nor Cornèr Bank is registered to do business in any state of the United States, has any assets or business of any kind in the District of Columbia or any state of the United States, or has any employees in the United States. Roberts is the manager of Cornèr Bank in Nassau and is a citizen and resident of the Bahamas.

Plaintiff claims that she is "a designated beneficiary, and/or trustee, and/or administrator" for an account that she claims was set up by or for her mother, Lavera Jean Foelgner. Am. Compl. ¶ 2. Foelgner allegedly told Plaintiff that she had set aside approximately $14 million for the Plaintiff in an account at Cornèr Bank. Am. Compl. ¶¶ 2, 21-22, 24-36. Plaintiff's only allegations in support of the existence of the account are a claimed conversation with Foelgner, a claimed conversation with Dominico Iannitti (the man Plaintiff claims funded the alleged account), vague rumors in Plaintiff's community, and a sticker on the back of a painting bearing a number and a password (though not, apparently, the name or location of a bank). Notably, the painting and the "printed papers . . . which resembled certain banking records" appeared in 1975 or 1976 – some twenty years before Cornèr Bank existed. Am. Compl. ¶¶ 20-21. Plaintiff does not allege any knowledge of a will, account documents, bank statements, tax returns,

correspondence, or any other written confirmation of the existence of the account or Plaintiff's claimed interest in the account.

After Foelgner's death in 2006, Plaintiff began inquiring about the alleged account. Am. Compl. ¶¶ 39-42. Plaintiff did not know the name of the bank at which the purported account was held but eventually concluded that it was Cornèr Bank. Am. Compl. ¶¶ 32, 41-42. After repeated and comprehensive record searches, Cornèr Bank confirmed that there was no such account at the Bank. Nevertheless, Plaintiff filed a Verified Complaint to initiate this lawsuit on August 2, 2010, claiming that the Cornèr Bank Defendants had withheld her access to the alleged account. The Bahamian press covered the proceedings as documents were filed with the Court, having published four articles to date. *See* Exhibits 1-4.

On September 24, 2010, Plaintiff filed a "Notice of Correction" that attempted to amend the Verified Complaint to address inconsistencies between the Complaint and a declaration filed in a prior matter. Following briefing on that issue and multiple other motions, the Court issued an order on June 10, 2011 allowing Plaintiff to file an amended complaint. Plaintiff's Amended Complaint, however, adds largely convenient and self-serving details, none of which is sufficient to save her claim from dismissal.

II. ARGUMENT

A. <u>This Court Lacks Personal Jurisdiction Over the Cornèr Bank Defendants</u>

This Court lacks personal jurisdiction over the Cornèr Bank Defendants. The burden is on the plaintiff to prove that the court has personal jurisdiction over the defendant. *See FC Inv. Grp. LC v. IFX Mkts., LTD*, 529 F.3d 1087, 1091 (D.C. Cir. 2008). The plaintiff must "allege specific facts connecting each defendant with the forum state." *Schwartz v. CDI Japan, LTD*, 938 F. Supp. 1, 4 (D.D.C. 1996). "Bare allegations and conclusory statements are insufficient." *Capital Bank Int'l, Ltd. v. Citigroup, Inc.*, 276 F. Supp. 2d 72, 74 (D.D.C. 2003) (citation

omitted). Plaintiff here has failed to meet that burden. As such, the Amended Complaint should be dismissed. Fed. R. Civ. P. 12(b)(2).

In the District of Columbia, there are two bases for the exercise of personal jurisdiction over an individual or corporation. The plaintiff may establish (1) general personal jurisdiction under D.C. Code Ann. § 13-334(a) or D.C. Code Ann. § 13-422 or (2) specific personal jurisdiction under D.C. Code Ann. § 13-423, the District of Columbia's long-arm statute. *Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n.9 (1984) (contrasting general and specific federal personal jurisdiction). Plaintiff cannot take refuge in either of these provisions to establish jurisdiction over the Cornèr Bank Defendants.

As a preliminary matter, Plaintiff does not make a single jurisdictional allegation regarding Roberts, and Plaintiff cannot do so. Based on the allegations in the Amended Complaint, this Court cannot exercise personal jurisdiction over Roberts. Moreover, Plaintiff's jurisdictional pleading against Cornèr Bank and Cornèr Banca is confused and insufficient. Plaintiff states that "the CORNER BANK group has engaged in substantial business in the U.S." but does not define what she means by that "group." Am. Compl. ¶ 9. Plaintiff also refers to alleged U.S. contacts of "the parent entity of CORNÈR BANK." Am. Compl. ¶ 10. She does not specify to whom these alleged contacts should be imputed.[1] In any event, her allegations do not support jurisdiction.

[1] Plaintiff attempts to refer to both Cornèr Banca S.A. and Cornèr Bank (Overseas) Ltd. as "Cornèr Bank." *See* Am. Compl. ¶ 4. This is both confusing and impermissible. Under basic principles of corporate law, Plaintiff cannot impute the purported contacts of parent corporation Cornèr Banca S.A. to its subsidiary Cornèr Bank in order to establish personal jurisdiction over Cornèr Bank. *See Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 336-37 (1925); *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 70 (D.D.C. 1998) ("Ordinarily, a defendant corporation's contacts with a forum may not be attributed to shareholders, affiliated corporations, or other parties."). Moreover, Plaintiff cannot impute alleged conduct of Cornèr Bank to Cornèr Banca merely because of their parent-subsidiary relationship. *See, e.g., Gonzalez v. Internacional de Elevadores, S.A.*, 891 A.D.2d 227, 237 (D.C. 2006) (addressing piercing the corporate veil standard).

1. General Jurisdiction Does Not Exist.

First, a court in the District of Columbia may exercise "general" personal jurisdiction over a person or legal entity "domiciled in, organized under the laws of, or maintaining his or its principal place of business" in the District of Columbia, *see* D.C. Code Ann. § 13-422, or that is "doing business" in the District of Columbia. *See* D.C. Code Ann. § 13-334(a). Cornèr Bank and Cornèr Banca, banking associations organized and existing under the laws of the Bahamas and Switzerland, respectively, do not maintain their principal – or any other – places of business in the District of Columbia, and do not do any business in the District of Columbia. Indeed, Cornèr Bank and Cornèr Banca have virtually no contacts with the United States, let alone the type of "continuous and systematic" contacts with the District of Columbia that would justify haling Cornèr Bank or Cornèr Banca into court here. *See Diamond Chem. Co. v. Atofina Chems., Inc.*, 268 F. Supp. 2d 1, 6 (D.D.C. 2003). Among other things:

1. Cornèr Bank and Cornèr Banca are not registered to do business in any state of the United States.
2. Cornèr Bank and Cornèr Banca have no assets or business of any kind in the District of Columbia or any state of the United States.
3. Cornèr Bank and Cornèr Banca do not have any employees resident in the United States.
4. Cornèr Bank has no depositors who are (a) United States citizens or (b) corporations, trusts, or other entities with United States citizens as beneficiaries, and as a matter of policy, Cornèr Bank does not accept deposits from United States citizens.

Plaintiff does not allege otherwise. Her allegations that could arguably relate to Cornèr Bank and/or Cornèr Banca do not amount to "continuous and systematic" contacts. Am. Compl. ¶¶ 9-10. Merely maintaining a correspondent account in the United States does not confer

jurisdiction (particularly when, as here, the cause of action does not arise from the improper use of, or have any relation whatsoever to, a U.S. correspondent account). *See, e.g., Oriental Imports and Exports, Inc. v. Maduro & Curiel's Bank, N.A.*, 701 F.2d 889, 892 (11th Cir. 1983); *Licci v. American Express Bank Ltd.*, 704 F. Supp. 2d 403, 407-08 (S.D.N.Y. 2010); *Leema Enterprises, Inc. v. Willi*, 575 F. Supp. 1533, 1537 (S.D.N.Y. 1983). It is unclear what relevance the offering of Visa and Mastercard services has to the United States or the District of Columbia.

Likewise, Plaintiff's Amended Complaint lacks any allegation whatsoever against Roberts to justify the assertion of personal jurisdiction over him individually. Roberts is not a United States citizen and is domiciled in the Bahamas as opposed to the District of Columbia or anywhere else in the United States.

2. Specific Jurisdiction Does Not Exist.

Second, the District's long-arm statute, D.C. Code Ann. § 13-423, which provides for the exercise of "specific" personal jurisdiction, serves as the only other possible basis for personal jurisdiction. *See Deutsch v. U.S. Dep't of Justice*, 881 F. Supp. 49, 52 (D.D.C. 1995) (noting that the long-arm statute is the only basis upon which personal jurisdiction may be obtained over a defendant who does not meet the requirements of D.C. Code Ann. § 13-422). The long-arm statute provides, in relevant part, for personal jurisdiction over a defendant where the claim for relief arises from the defendant'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; or

5. Having an interest in, using, or possessing real property in the District of Columbia.

D.C. Code Ann. § 13-423(a). In sum, personal jurisdiction over a foreign defendant is permissible 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 quotations and citations omitted).

Here, Plaintiff is a resident of Nevada, and her claims are based upon an alleged bank account located in the Bahamas that Plaintiff claims that her late mother either owned or controlled. Plaintiff has not alleged – and cannot allege – that her claims against the Cornèr Bank Defendants arise out of their conducting any business, causing any injury, or possessing any property in the District of Columbia. Likewise, Plaintiff has not alleged that she suffered any injury in the District of Columbia. In other words, Plaintiff has not alleged any connection between her allegations against the Cornèr Bank Defendants, on the one hand, and the District of Columbia, on the other. The District of Columbia's long-arm statute does not provide for personal jurisdiction under such circumstances, when defendants lack any contacts – much less the requisite minimum contacts – with the forum, and when the claim has no connection with the forum. *See, e.g.*, *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 413-14; *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 127-28 (D.C. Cir. 1999).

Furthermore, in order to establish personal jurisdiction over a particular defendant, that defendant's conduct and connection with the forum should be sufficiently substantial "that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The only references to the District of Columbia in the Amended Complaint are Plaintiff's claims that she has "made trust arrangements" (presumably

with her attorney) in the District and that the Embassy of the Bahamas is present in the District. Am. Compl. ¶ 12. These vague allegations – pertaining to venue rather than jurisdiction – are wholly irrelevant to the Amended Complaint, have nothing to do with the defendants, and establish no contacts by the Cornèr Bank Defendants with the District.[2] *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws") (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

Because the Cornèr Bank Defendants lack the required minimum contacts with the District of Columbia and the United States and the Amended Complaint does not arise from or in any way relate to actions or injuries in the District of Columbia or the United States, the claims against the Cornèr Bank Defendants should be dismissed for lack of personal jurisdiction.

B. The Doctrine of *Forum Non Conveniens* Merits Dismissal

The Court should also dismiss this case under the doctrine of *forum non conveniens* and may do so without considering the jurisdictional or merits issues raised by Plaintiff. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) ("[A] court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.").

Under the doctrine of *forum non conveniens*, "a federal district court may dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem Int'l Co.*, 549 U.S. at 425. A case should be dismissed

[2] Indeed, an adoption of the Plaintiffs argument for jurisdiction would mean that the courts of the District of Columbia would exercise jurisdiction over every citizen of (and every organization domiciled in) any country that maintains an embassy in Washington, D.C.

when "an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant' . . . or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems[.]'" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, (1981) (quoting *Koster v. (American) Lumbermens Mut. Casualty Co*., 330 U.S. 518, 524, (1947)). In other words, this Court must decide "(1) whether an adequate alternative forum [exists] 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).

1. The Bahamas has jurisdiction to hear this case and is an adequate alternative forum

An adequate alternative forum exists when defendant is amenable to process in that forum and the foreign court will adjudicate the plaintiff's claims. *Piper Aircraft Co.*, 454 U.S. at 254 n.22; *see Leon v. Millon Air, Inc*., 251 F.3d 1305, 1312 (11th Cir. 2001) (finding courts are generally reluctant to hold an alternative forum inadequate). First, a court in the Bahamas can adjudicate Plaintiff's claims. The Bahamas is an independent member of the Commonwealth of Nations, and a parliamentary democracy whose "legal traditions closely follow those of the United Kingdom." U.S. State Department, Background Note: The Bahamas, *available at* http://www.state.gov/r/pa/ei/bgn /1857.htm. This common law system will adjudicate contract and tort claims.[3] *Sun Trust Bank v. Sun Int'l Hotels, Ltd.*, 184 F. Supp. 2d 1246, 1263 (S.D. Fla. 2001) ("Bahamian law is derived from English common law and recognizes theories of negligence."); s*ee* 83 R.S.C. § 5 (1995), *available at* http://laws.bahamas.gov.bs/statutes/statute_CHAPTER_83.html; *Pinder v. Moscetti*, 666 F. Supp.

[3] There is no federal statute at issue in this case that "Congress implicitly spoke to, and rejected, the application of *forum non conveniens doctrine*." *See C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983).

2d 1313, 1318 (S.D. Fla. 2008) ("The Bahamas is both an available and adequate alternative forum."); *Miyoung Son v. Kerzner Int'l Resorts, Inc.*, 2008 WL 4186979, *7 (S.D. Fla. Sept. 5, 2008) (unpublished) (same); *Kristoff v. Otis Elevator Co.*, 1997 WL 67797, *2 (E.D. Pa. Feb. 14, 1997) (unpublished) (same). In addition, Plaintiff's claims will not be time barred by the Bahamas' six-year limitations period for tort and contract claims. *Id*.

Second, Cornèr Bank and Roberts are amenable to process in the Bahamas. Defendant Cornèr Bank is a banking association organized and existing under the laws of the Bahamas, and Roberts is a citizen and resident of the Bahamas. Therefore, the Bahamian courts may exercise jurisdiction over both defendants. Rules of the Supreme Court (Bahamas), Order 10 & 61; *see Kristoff*, 1997 WL 67797, *2.

2. Balancing the private and public interests favors dismissal

Factors considered to be in a litigant's private interest include the ease of access to sources of proof, availability of compulsory process for witnesses, cost of obtaining attendance of witnesses, ability to view the premises, and "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Here, every private factor favors dismissal. Most of the documents related to this case, including banking records, are in the Bahamas and the site of the alleged tort is in the Bahamas. All of the witnesses and parties, other than Day, are located in the Bahamas, would be subject to compulsory process there, and would have to travel 1,000 miles to appear in this Court. Indeed, there are no documents, evidence, or witnesses related to the case located in this Court's jurisdiction.

Plaintiff's allegations relating to *forum non conveniens* should be disregarded. *See* Am. Compl. ¶ 13. Plaintiff refers vaguely to the "banking secrecy laws of the Bahamas and very

limited discovery allowed under the rules in the courts of the Bahamas." *Id.* However, "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." *MBI Group, Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 30 (D.D.C. 2008) (internal quotations omitted). Moreover, Plaintiff's allegations regarding so-called media manipulation are meritless and contrary to the facts.

Every public factor also favors dismissal of this case. These factors include congested court dockets when claims are not handled at their origin, the burden of jury duty for citizens with no relation to the litigation, and the burden of courts "untangl[ing] problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp.*, 330 U.S. at 508-09. Here, this Court would be adding a claim to its docket that did not occur in its jurisdiction. Also, jurors would be required to decide a controversy that occurred in another country and would only be able to lean of the facts by report. *Id*.

Moreover, this Court would be required to conduct a conflict of laws analysis and would likely apply Bahamian law. In determining which law to apply, this Court should consider: "(1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicil[e], residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered." *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 842 (D.C. Cir. 2009) (quotation omitted). All four factors favor applying Bahamian law: (1) the alleged injury occurred in the Bahamas; (2) the alleged conduct occurred in the Bahamas; (3) all defendants are domiciled or incorporated in the Bahamas; and (4) the relationship between all the parties is centered in the Bahamas.

Finally, although the Plaintiff's interest in a U.S. forum may be given consideration, the fact that the alleged harm occurred in the Bahamas and all Defendants reside in the Bahamas outweighs this consideration. *See Miyoung Son*, 2008 WL 4186979, *10 (citing *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) (en banc) (holding that a U.S. plaintiff's choice of forum is not automatically granted greater deference unless the choice was motivated by "legitimate reasons").

C. Plaintiff Has Failed to State Any Claim On Which Relief Can Be Granted

Because Plaintiff has failed to state a cognizable claim on which relief can be granted against the Cornèr Bank Defendants, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Conclusory assertions are not sufficient, and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U. S. 265, 286 (1986). Rather, the facts alleged must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted). Plaintiff, however, offers only vague and implausible assertions that would not permit a reasonable inference that she is entitled to any relief.

Moreover, for each purported cause of action, Plaintiff fails to allege that the Cornèr Bank Defendants have caused her damages. Both proximate cause and injury are essential elements of the tort and contract claims, and failure to plead these elements is fatal to Plaintiff's Amended Complaint. Finally, none of the allegations comprising the causes of action mention Cornèr Banca at all, and there is only one substantive allegation against Cornèr Banca in the

entire Amended Complaint. Am. Comp. ¶ 54. Multiple counts also contain no reference to Roberts.

1. Count I Fails to State a Claim for Breach of Contract

To state a claim for breach of contract, a plaintiff must allege (1) the existence of a contract, (2) a breach of that contract by defendant, (3) causation, and (4) damages. *See, e.g., In re Belmar*, 319 B.R. 748, 759-60 (Bankr. D.C. 2004) (citing *Park v. Arnott*, 1992 U.S. Dist. LEXIS 9903, 1992 WL 184521, *4 (D.D.C. 1992)). Plaintiff does not allege that any contract existed between her and any of the Cornèr Bank Defendants. She merely states that "Cornèr Bank had the obligations under the Account contract concluded with Foelgner not to handicap her or Day's access to that joint or trust Account." Am. Compl. ¶ 62. The Complaint does not allege that Plaintiff has ever seen any "Account contract" or otherwise has a reasonable belief that such an agreement existed between Foelgner and the Cornèr Bank Defendants.

Even if, *arguendo*, such a contract did exist between Foelgner and Cornèr Bank, Plaintiff has not sufficiently pleaded why she would have standing to assert a claim for breach of that contract. Plaintiff claims only that her mother told her about the alleged account but does not offer any proof that she is the beneficiary of that claimed account. "The statute of frauds makes unenforceable oral contracts to leave property by will, and statutes regulating the making of wills universally require that those instruments be in writing." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 284 (1990) (internal citation omitted); *see, e.g.*, D.C. Code § 18-103 (requiring only that the will be signed by the testator and that at least two witnesses sign in the testator's presence). The vague allegations that Plaintiff has set forth with respect to any contract between her mother and Cornèr Bank cannot permit a reasonable inference that Plaintiff is entitled to damages for breach of any putative contract. *See, e.g., Iqbal*, 129 S.Ct. at 1949.

Finally, Count I is alleged against all defendants but contains no reference to Roberts or Cornèr Banca whatsoever, much less any claim that an alleged contract could bind Roberts or Cornèr Banca such that they could be liable for breach of contract. As such, dismissal of this cause of action is particularly appropriate with respect to Roberts and Cornèr Banca.

2. Count II Fails to State a Claim for Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, a plaintiff must allege facts sufficient to show that (1) defendant owed a fiduciary duty to the plaintiff, (2) defendant breached that duty, and (3) the breach was a proximate cause of injury to the plaintiff. *See Armenian Genocide Museum & Mem'l., Inc. v. Cafesjian Family Found., Inc.*, 595 F. Supp. 2d 110, 116 (D.D.C. 2009). Plaintiff states, in conclusory fashion, that Cornèr Bank and Roberts owed fiduciary duties to Plaintiff. Am. Compl. ¶¶ 68-69. Yet Plaintiff's pleadings do not permit a reasonable inference that a fiduciary relationship ever existed between Plaintiff and Cornèr Bank or Roberts. Plaintiff only alleges that she had control of an account at Cornèr Bank. Even assuming this account existed, Plaintiff fails to allege facts that would constitute a fiduciary relationship. *See Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1108 (D.C. Cir. 2008) (merely being a depositor does not create a fiduciary relationship); *Goldman v. Bequai*, 19 F.3d 666, 676 (D.C. Cir. 1994) ("there is no basis in law to hold that a depositor establishes a fiduciary relationship with every bank employee").

Moreover, as explained above, Plaintiff has failed to allege that she has standing to assert this claim on behalf of her deceased mother or plead what damages were caused by the alleged breaches of fiduciary duty. Also, this Count contains no allegations whatsoever relating to Cornèr Banca.

3. Count III Fails to State a Claim for Conversion

Plaintiff fails to state a claim for conversion against Cornèr Bank, whom she claims withheld proceeds that belong to Plaintiff. The tort of conversion addresses any "unlawful exercise of ownership, dominion, or control, of the personal property of another in denial or repudiation of that person's rights thereto." *O'Callaghan v. District of Columbia*, 741 F. Supp. 273, 279 (D.D.C. 1990) (internal citation omitted). Money can be the subject of a conversion claim only if the plaintiff has a property right to a specific and identifiable fund of money. *See Curaflex Health Services, Inc. v. Bruni*, 877 F. Supp. 30, 32 (D.D.C. 1995). Plaintiff only makes conclusory assertions that she has a property right to any specific and identifiable fund. First, she cannot identify, beyond speculation, any specific account at Cornèr Bank that her mother in fact owned or that Plaintiff controls. Second, Plaintiff has not provided a plausible account that she has a property right in such an account, relying only on alleged rumors and claimed conversations with two individuals who are now deceased. *See Cruzan*, 497 U.S. at 284.

Furthermore, "where the defendant's initial possession is lawful, the settled rule is that in the absence of other facts and circumstances independently establishing conversion, a demand for [the property's] return is necessary to render . . . possession unlawful and to show its adverse nature." *Shea v. Fridley*, 123 A.2d 358, 361 (D.C. 1956). Even if Cornèr Bank held funds in an account for Foelgner, the Bank's possession would have been lawful and pursuant to the voluntary deposits allegedly made by Foelgner. However, Plaintiff does not plead that she made any demand to Cornèr Bank for the return of the funds that she claims belong to her. Instead, Plaintiff states only that she inquired about the account at issue, that she contacted Cornèr Bank, and that Cornèr Bank "refused to cooperate with her." Am. Compl. ¶¶ 49, 54-55. These allegations are far from sufficiently specific to state a claim for conversion.

4. Count IV Fails to State a Claim for Unjust Enrichment

Plaintiff's claim against Cornèr Bank for unjust enrichment also fails. The equitable remedy of unjust enrichment or quasi-contract requires Plaintiff to show that "(1) [she] had a reasonable expectation of payment, (2) the defendant should reasonably have expected to pay, or (3) society's reasonable expectations of person and property would be defeated by nonpayment." *Heller v. Fortis Benefits Ins. Co.*, 142 F.3d 487, 495 (D.C. Cir. 1998). The element of reasonableness is key here. Plaintiff's allegations regarding the conversation with her mother and the account number on the back of a painting do not constitute grounds for a "reasonable" expectation of payment. Likewise, it is not "reasonable" to expect Cornèr Bank to pay $14 million to Plaintiff when she has provided no documentation of any kind that she owns or is the beneficiary of any account at Cornèr Bank or that such an account even exists, and when Cornèr Bank likewise possesses no such evidence. Finally, Plaintiff's causes of action for unjust enrichment and breach of contract are mutually exclusive. *See, e.g.*, *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1194 n.2 (D.C. 1997).

5. Count VII Fails to State a Claim for Civil Conspiracy

There is no cause of action for "civil conspiracy." *Hall v. Clinton*, 285 F.3d 74, 82 (D.C. Cir. 2002) ("Civil conspiracy, of course, is not actionable in and of itself"). Nonetheless, Plaintiff attempts to state a claim for civil conspiracy. This claim fails as a matter of law. *See also Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1493 (D.C. 1989).

Although allegations of civil conspiracy can be used to impose vicarious liability on co-conspirators, a plaintiff must allege that the parties to the conspiracy agreed to commit unlawful acts and caused injury to the plaintiff by an overt act taken in furtherance of a common scheme. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). A conspiracy claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.

Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556.

Plaintiff, however, merely sets forth conclusory allegations that defendants (making no mention of Cornèr Banca) conspired to deprive Plaintiff of access to the supposed account. Am. Compl. ¶¶ 90-91. She does not allege that the defendants reached any sort of agreement and does not plead specific overt acts that were taken in furtherance of a common purpose shared by defendants. "[T]he tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 129 S.Ct. at 1940. Plaintiff's claim for "civil conspiracy" must be dismissed on both of these grounds.

6. Count VIII Fails to State a Claim for Battery

To state a claim for the tort of battery, a plaintiff must allege that the defendant committed an act with the intent to cause harmful or offensive touching, and harmful or offensive contact in fact resulted. *See, e.g.*, *Etheredge v. District of Columbia*, 635 A.2d 908, 916 (D.C. 1993). Plaintiff does not claim that she suffered physical injury from Roberts' alleged acts. Any claim that Roberts' alleged acts were "offensive" must be evaluated according to a reasonable person standard, and Plaintiff has failed to plead conduct that a reasonable person would find offensive.

Moreover, as set forth in Section (D) below, the Cornèr Bank Defendants move to strike the allegations that, according to Plaintiff, would comprise this cause of action.

7. Count IX Fails to State a Claim for "Inflicting Severe Emotional Distress"

Likewise, Plaintiff fails to state a claim against Roberts for "inflicting severe emotional distress." "To recover on a claim for intentional infliction of emotional distress, a plaintiff must demonstrate 'extreme and outrageous conduct which intentionally or recklessly cause[d] severe emotional distress.'" *Rogala v. District of Columbia*, 161 F.3d 44, 57-58 (D.C. Cir. 1998) (quoting Restatement (Second) of Torts § 46 (1965)). The Court determines whether "the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so." *Drejza v. Vaccaro*, 650 A.2d 1308, 1316 (D.C. 1994). The requirement of outrageousness is a difficult one to meet. *Drejza*, 650 A.2d at 1316.

Plaintiff does not make any allegations of conduct that would be deemed "outrageous" by a reasonable person. She claims merely that she was "essentially" or "effectively" pushed out of the Cornèr Bank offices and "brought to tears." Am. Compl. ¶¶49, 51, 98. Plaintiff also admits that Roberts called a car to transport Plaintiff back to her hotel – far from "outrageous" conduct, Roberts tried to assist Plaintiff. Am. Compl. ¶ 51. To give rise to a cause of action for intentional infliction of emotional distress, the alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998) (internal citations omitted). Plaintiff has clearly failed to meet that bar.

Moreover, as set forth in Section (D) below, Cornèr Bank and Roberts move to strike the allegations that, according to Plaintiff, would comprise this cause of action.

8. Count XII Fails to State a Claim for Invasion of Privacy

Plaintiff also fails to state a claim for invasion of privacy, because she does not allege any disclosure of *private* facts. "To state an invasion of privacy claim, Plaintiff must allege publicity

given to a matter concerning [her] private life . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Mesumbe v. Howard University*, 706 F. Supp. 2d 86, 96 (2010) (quoting Restatement (Second) of Torts § 652D). Plaintiff's suggestion that she "is entitled to privacy in this matter" is confounding. Am. Compl. ¶ 114. Of course, Plaintiff made this matter public by filing a lawsuit in a public forum. "[T]here is no protected privacy interest in preventing the further publicity of what [Plaintiff herself] left open to the public eye." *Harrison v. Washington Post. Co.*, 391 A.2d 781, 784 (D.C. 1978). Litigants, like Plaintiff, should have a reasonable expectation that their publicly filed allegations will be republished and reported by interested news media. Here, the Bahamian press has a legitimate interest in reporting on court proceedings that, because they involve two entities located in the Bahamas, are of legitimate concern to their readership. Plaintiff does not allege that this lawsuit is not of legitimate concern, or that the publications would be offensive to a reasonable person.

Moreover, there is no basis whatsoever for Plaintiff's allegations that the Cornèr Bank Defendants have "used" or "manipulated" the media or that the articles are "editorials" reflecting the Cornèr Bank Defendants' positions. It is evident that the *Tribune* articles represent accurate and balanced summaries of the pleadings that were filed, and quote directly from those pleadings rather than from separate interviews with the Defendants. *See* Exhibits 1-4. The articles do not clearly favor either party, citing Plaintiff's allegations and this Court's ruling as well. Finally, as set forth in Section (D) below, the Cornèr Bank Defendants move to strike this new cause of action.

9. Plaintiff is Not Entitled to Declaratory Relief or an Accounting

Plaintiff is not entitled to the relief that she pleads as Counts V and VI of the Amended Complaint. First, declaratory relief is only appropriate for redressing ongoing injuries. *See*

Foretich v. United States, 351 F.3d 1198, 1212-16 (D.C. Cir. 2003). The declaratory judgment sought in Paragraph 83, relating to alleged conduct by Cornèr Bank and Roberts in or about June 2010, would not redress any current harm or address any ongoing wrongdoing. The declaratory remedy sought in Paragraph 82 and the accounting sought in Count VI are both subject to the Court's determination, upon presentation of convincing evidence by Plaintiff, that any account exists in Plaintiff's or Foelgner's name at Cornèr Bank, and that Plaintiff is the beneficial owner of such account or otherwise entitled to the proceeds therein.

D. Allegations Regarding Roberts' Supposed Conduct and Count XII Should Be Stricken

Finally, the Court should strike from the Amended Complaint the allegations in Paragraphs 47-51, 54-59, 69, 83, and 93-100, which have been included for improper purposes. Rule 12(f) of the Federal Rules of Civil Procedure provides: "The court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." The allegations in these identified paragraphs primarily relate to alleged conduct by Roberts and also contain unsubstantiated rumors relating to Cornèr Bank.

The claims relating to battery and intentional infliction of emotional distress, and the corresponding allegations, have been presented for "scandalous" reasons under Rule 12(f). "The word 'scandalous' in Rule 12(f) generally refers to any allegation that unnecessarily reflects on the moral character of an individual" or that casts a derogatory light on a party. *Pigford v. Veneman*, 215 F.R.D. 2, 4 (D.D.C. 2003) (internal citations omitted). Plaintiff describes Roberts' alleged conduct in sensational terms, characterizing it as "offensive," "outrageous," and "unbecoming of a banker." Am. Compl. ¶¶ 56, 94. Furthermore, Plaintiff includes conclusory allegations regarding Cornèr Bank's reputation and claims that the Bank is violating laws, as well as United States policies that are irrelevant to a bank organized under the laws of the

Bahamas. Am. Compl. ¶ 58. These self-serving statements, as well as those contained in Paragraphs 47-51, 57-59, 69, 93, and 95-100, are included in an attempt to mask the weakness of all of the frivolous allegations in the Complaint by inflaming sensibilities about Roberts and Cornèr Bank. Indeed, Plaintiff's failure to plead any actual damages based on her interaction with Roberts highlights the absence of any substance to this claim.

Furthermore, at the heart of Plaintiff's claim is her aim to access an alleged bank account that she claims is being held at Cornèr Bank. The first sentence in her Complaint states: "This is an action for recovery of the moneys owned by Plaintiffs on the account held, or controlled, by Defendants." The allegations involving Roberts, the additional claims for battery, and the false statements relating to Cornèr Bank's and Cornèr Banca's reputations are impertinent and immaterial to Plaintiff's contentions relating to the account. Again, these allegations have been included merely to paint the Cornèr Bank Defendants in an unfavorable light. Moreover, the identified paragraphs, if not stricken from the Complaint, will be unduly prejudicial to the Cornèr Bank Defendants both during the pendency of this lawsuit, as they create a derogatory and false impression of the Cornèr Bank Defendants, and in the future, as the Amended Complaint can be obtained or viewed by corporations in other jurisdictions who seek to conduct business with the Cornèr Bank Defendants.

The Court should also strike Count XII (including Paragraphs 13, 59, 110-114), for invasion of privacy, which was improperly added to the Amended Complaint. This cause of action is based on press articles that were published in the Bahamas regarding this action. However, an amended complaint is not the proper pleading for adding a new cause of action based on conduct that occurred after the initial complaint was filed. Fed. R. Civ. P. 15(d) ("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 be supplemented."). The allegations in Count XII clearly occurred after the filing of the initial Complaint, and Plaintiff has not sought the Court's leave to supplement that pleading. *See U.S. v. Hicks*, 283 F.3d 380, 385 (D.C. Cir. 2002) (distinguishing between amended and supplemental pleadings and noting that "supplements always require leave of the court"). Also, these allegations constitute irrelevant and impertinent matter added primarily to unduly prejudice the Cornèr Bank Defendants by suggesting that they are manipulating the media in the Bahamas to portray Plaintiff in a particular manner. As explained above and as evidenced by Exhibits 1-4 to this Motion, Plaintiff's assertions regarding the articles in the Bahamian press are completely contrary to reality.

III. CONCLUSION

For the foregoing reasons, Defendants Cornèr Bank (Overseas) Ltd., Cornèr Banca S.A., and Colyn Roberts respectfully request that the Court dismiss Plaintiff Tonya Kay Day's Amended Complaint.

June 27, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2011, I electronically filed Cornèr Bank (Overseas) Ltd., Cornèr Banca S.A., and Colyn Roberts' Motion to Dismiss Plaintiff's Amended Complaint with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to:

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