

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>TD INTERNATIONAL, LLC,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Case No. 09cv867 (RJL)</b>
	)	
<b>STEVEN K. FLEISCHMANN, ET AL.</b>	)	
	)	
<b>Defendants.</b>	)	

**DEFENDANTS' MOTION TO DISMISS  
COUNTS II, III, & IV OF THE COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 12(b), Defendants Steven K. Fleischmann and Tertium Datur International, LLC, by and through undersigned counsel, hereby respectfully move this Court for an order dismissing Counts II, III, and IV of the Complaint for the reasons set forth in the accompanying Memorandum of Points of Law and Authority.

Pursuant to Local Civil Rule 7(f), Defendants request an oral hearing on this motion.

June 11, 2009

Respectfully submitted,

/s/ Jeremy Levin  
Jeremy Levin (DC-495736)  
Michael J. Barta (DC-431663)  
Bryan H. Parr (DC-977503)  
BAKER BOTTS L.L.P.  
1299 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2400  
Tel: (202) 639-7734  
Fax: (202) 639-1029

*Attorneys for Defendants  
Steven K. Fleischmann and Tertium Datur  
International, LLC*

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<b>STEVEN K. FLEISCHMANN, ET AL.</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM OF POINTS OF LAW AND AUTHORITY  
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS  
COUNTS II, III, & IV OF THE COMPLAINT**

Jeremy Levin (DC-495736)  
Michael J. Barta (DC-431663)  
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BAKER BOTTS L.L.P.  
1299 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2400  
Tel: (202) 639-7734  
Fax: (202) 639-1029

*Attorneys for Defendants  
Steven K. Fleischmann and Tertium Datur  
International, LLC*

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## INTRODUCTION

Plaintiff alleges that Defendant Steven Fleischmann had a contractual obligation to share with Plaintiff any revenues he generated from work performed for his clients. Plaintiff's claims arise from Mr. Fleischmann's purported failure to share the revenues from such work with Plaintiff. This is a partnership dispute pure and simple, and the allegations sound in contract, not tort.

Plaintiff attempts to concoct a tort claim, however, with two red herrings which – even if accepted as entirely true for purposes of this motion – do not in any way support such a claim. First, Plaintiff intimates that Mr. Fleischmann – through the use of “altered” invoices – deceived his client TAQA into paying him directly as opposed to Plaintiff. Putting aside the absence of any specific alleged facts supporting the suggestion that TAQA was deceived or suffered damages in any way, TAQA is not a party to this lawsuit, nor does Plaintiff suggest any standing to recover on behalf of TAQA. Any supposed fraud on TAQA – even if fully credited – is immaterial to Plaintiff's claims. Second, Plaintiff alleges that Mr. Fleischmann suggested to Plaintiff that TAQA was having administrative problems in making payments, thus briefly delaying Plaintiff's “follow-up” on the status of particular payments it claims to have been expecting. Plaintiffs do not allege, however, (a) any facts showing that Mr. Fleischmann's statements were untrue, (b) any detrimental reliance on these statements; or (c) any causal connection between this reliance and any particular damages.

These failures defeat Plaintiff's fraud claim entirely. But at absolute minimum, Plaintiff has failed to plead fraud with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b).

In addition, nothing in Plaintiff's complaint supports a conversion claim. Plaintiff's only claim to the money supposedly misappropriated by Mr. Fleischmann is

contractual, and it is fundamental to the law of conversion that no claim lies where there is a mere obligation to pay. Fundamentally, conversion would require the theft of a particular sum of funds that is in the possession or would imminently be in the possession of Plaintiff. Here, the only reason Plaintiff would be in possession of these funds relates to Mr. Fleischmann's alleged contractual obligation to share them. Under blackletter law, this is not a conversion claim but is instead a breach of contract claim.

Accordingly, Counts II and III for fraud and conversion respectively must be dismissed. Further, for the reasons set forth in Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction, Count IV of the Complaint must also be dismissed.

### **BACKGROUND**

Plaintiff filed this action on Monday, May 11, 2009 along with a request for an ex parte TRO and a preliminary injunction. On Tuesday, May 19, the Court heard argument on the TRO and preliminary injunction. On Friday, May 22, Plaintiff's counsel contacted Defendants' counsel asking them if they would accept service of the summons and complaint. Defendants' counsel agreed and received the same by mail on Tuesday, May 26.

### **ANALYSIS**

Federal Rule of Civil Procedure 12(b)(6) requires that a count be dismissed if the plaintiff fails to state a claim upon which relief can be granted. The Court must determine whether a complaint's factual allegations satisfy the irreducible minimum of providing "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). "Though conclusory assertions may afford a defendant 'fair notice' of the nature of a plaintiff's claim, only factual allegations can clarify the 'grounds' on which that claim rests." *Republic Prop. Trust v. Republic Props. Corp.*, 540 F. Supp. 2d 144, 152-53 (D.D.C. 2008).

I. Count II Must Be Dismissed Because Plaintiff Fails to State a Claim for Fraud

The essence of Plaintiff's allegations are that Mr. Fleischmann was party to an operating agreement in which he agreed to devote "his best efforts and substantially all of his productive working time to TDI's business." Complaint ¶¶ 10, 20. That contractual provision is the entire basis for the proposition that TDI had any entitlement whatsoever to payments from TAQA – Mr. Fleischmann's client – for work requested of and performed principally by Mr. Fleischmann. Plaintiff alleges that Mr. Fleischmann – contrary to his alleged contractual duty – did not share the revenues generated from work for TAQA with TDI. However, Plaintiff freely acknowledges it knew that work had been performed for TAQA, and that it had not received payment from TAQA in connection with this work. Complaint ¶ 17. In other words, it had the information necessary to determine the scope and nature of the alleged contractual breach.

Read in the most liberal fashion possible, Plaintiff alleges only that certain representations made by Mr. Fleischmann at an unspecified time caused it to briefly delay steps it might have taken to collect against TAQA and/or Mr. Fleischmann for the funds it believed it was owed contractually. *Id.* But Plaintiff does not allege that it suffered any damages as a result of any momentary delay in follow-up because of these representations. There is no separate fraud claim here independent from Plaintiff's contractual claims, and dismissal of Count II is required.

A. Plaintiff Cannot Simply Recast Its Breach of Contract Claim As a Claim for Fraud

It is hornbook law that a breach of contract does not constitute fraud. *See Regency Communications Inc. v. Cleartel Communications Inc.*, 160 F. Supp. 2d 36, 44 (D.D.C. 2001); *United States v. D'Amato*, 39 F.3d 1249, 1261 n.8 (2d Cir. 1994) ("Failure to comply with a contractual obligation is only fraudulent when the promissor never intended to honor the

contract. To infer fraudulent intent from mere nonperformance, therefore, would eviscerate the distinction between a breach of contract and fraud.” (citations omitted)). For a claim of fraud to lie, “the tort must exist in its own right independent of the contract, and any duty upon which the tort is based must flow from considerations other than the contractual relationship.” *Choharis v. State Farm Fire and Cas. Co.*, 961 A.2d 1080, 1089 (D.C. 2008) (noting that “even a ‘willful, wanton or malicious’ breach of a contract to pay money cannot support a claim of fraud”). Specifically, a plaintiff must “(i) demonstrate a legal duty separate from the duty to perform under the contract; (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.” *Regency Commc’ns*, 160 F. Supp. 2d at 42.

No amount of bad faith in connection with a breach of contract can convert it into a tort, particularly where there are no damages or duty that exist separately from the breach of contract, which is precisely the case here. *Regency Communications* is highly instructive on this point. There, the plaintiff alleged claims of breach of contract, fraud, and RICO violations, concerning defendant’s undercharging of certain long distance calls and withholding of information related to the calculation of the relevant charges. 160 F. Supp. 2d at 38-39. In dismissing the plaintiff’s fraud claims, this District Court found that defendant’s duty to pay and allocate fees arose solely from the contract allegedly breached, and any “duty to act in good faith . . . , being an implied term of the contract, is not ‘separate from the duty to perform under the contract.’” *Id.* at 42. Accordingly, “withholding of information and funds is behavior directly related to the contract; in fact, it is the specific behavior the contract required of [defendant],” and was thus not “collateral or extraneous to the contract.” *Id.* Finally, the Court found that merely appending a claim for treble damages or for RICO violations did not somehow

give plaintiff's fraud claim the requisite special damages "unrecoverable as contract damages," which arise only where a "plaintiff can point to damages *caused by the contract's breach* that, under applicable contract law, would be nonrecoverable in a single-count contract action." *Id.* at 43 (emphasis added). Consequently, the Court found that plaintiff's fraud claim was duplicative of its breach of contract claim and failed as a matter of law.

For the same reasons as in *Regency Communications*, Plaintiff's allegations of fraud in this case are duplicative of, and not extraneous to, its claim for breach of contract. Putting aside the similarity of the two sets of allegations themselves (*compare* Complaint ¶¶ 21-24 *with* Complaint ¶¶ 27-32), Plaintiff fails to satisfy any prong discussed in *Regency Communications*. The only duty Plaintiff could conceivably invoke in conjunction with its fraud claim would arise under a partnership contract, *see* Complaint ¶ 10, and any alleged fraudulent misrepresentations would directly relate to the contract. *See, e.g., id.* ¶ 15 ("Fleischmann, while still an acting member of TDI . . ."). Nor does Plaintiff point to "damages caused by the contract's breach" that would be nonrecoverable in a single-count contract action. *Regency Commc'ns*, 160 F. Supp. 2d at 43. Indeed, the damages Plaintiff seeks for its breach of contract claim (\$1.5 million) are over twice as much as – and presumably inclusive of – the amount it seeks for its fraud claim (\$626,401.42). *See* Complaint ¶¶ 25, 33; *cf. id.* ¶ 18.

#### B. Plaintiff Fails to Allege All Elements Required for a Claim of Fraud

No matter how construed, Plaintiff's vague allegations fail to state a claim for fraud. Under District of Columbia law, "[a] plaintiff must prove '(1) a false representation (2) made in reference to a material fact, (3) with knowledge of its falsity, (4) with the intent to deceive, and (5) an action that is taken in reliance upon the representation.'" *3D Global Solutions, Inc. v. MVM, Inc.*, 552 F. Supp. 2d 1, 8 (D.D.C. 2008). "In addition, the plaintiff must

show that ‘provable damages’ resulted from the fraud,” *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 861 (D.C. 1999), and “more than mere ‘but-for’ causation,” which is not sufficient to establish common law fraud. *United States v. Spicer*, 57 F.3d 1152, 1157 (D.C. Cir. 1995). Moreover, “[a]llegations in the form of conclusions on the part of the pleader as to the existence of fraud are insufficient.” *Kitt*, 742 A.2d at 860.

With regard to Plaintiff’s allegations regarding Mr. Fleischmann’s issuance of supposedly-altered invoices to TAQA, Plaintiff states only that Mr. Fleischmann acted “intentionally,” *e.g.*, Complaint ¶¶ 27-28, but Plaintiff offers no fact suggesting that Mr. Fleischmann acted with the requisite “intent to deceive.” Perhaps if fully credited, Plaintiffs’ allegation might support an inference of an intent to deceive TAQA. And indeed, Plaintiff alleges what action TAQA purportedly took in reliance upon Mr. Fleischmann’s representations. *See* Complaint ¶¶ 27-29. But TAQA is not before this court claiming fraud, and Plaintiff must allege how fraud was perpetrated upon Plaintiff, not TAQA, to state a claim for relief.

Plaintiff’s other allegations of fraud concern representations allegedly made to Plaintiff regarding “problems at TAQA” causing a delay in their paying bills. Complaint ¶¶ 30-31. But Plaintiff fails to allege any facts supporting the proposition that such representations were false or material. Instead, Plaintiff makes the conclusory assertion that Mr. Fleischmann acted “falsely,” without offering any facts to clarify the grounds on which such a conclusion might be based. Further, because Plaintiff fails to provide any grounds for why Mr. Fleischmann’s representations regarding “problems at TAQA” were false, Plaintiff cannot and does not allege Mr. Fleischmann’s knowledge of the falsity. Simply suggesting that Mr. Fleischmann acted “knowingly” is insufficient. *See Kitt*, 742 A.2d at 860.

Finally, the only action allegedly taken by Plaintiff in reliance on any of Mr. Fleischmann's representations regarding "problems at TAQA" consists of "not follow[ing] up on the status of the invoices in question until April 2009." Complaint ¶ 32. Yet this inaction cannot be said to have caused the damages Plaintiff claims, which are equivalent to the alleged full value of the invoices (\$626,401.42). *See* Complaint ¶¶ 15, 33. Indeed, the only loss arguably related to Plaintiff's delay in follow-up would be the interest on any money it was owed during the time period of the delay. However, assuming *arguendo* that Plaintiff were entitled to recover such a loss, the availability of prejudgment interest on its contract claim would compensate Plaintiff for this expense, and thus there are simply no provable damages attributable to the alleged misrepresentations. In short, Plaintiff fails to allege provable damages resulting from its delay in follow up with TAQA, and Plaintiff fails to allege any facts that might support a causal link between Mr. Fleischmann's purported misrepresentations and any damages.

C. Plaintiff Has Not Pleaded Fraud with Particularity

To the extent Plaintiff's claim for fraud is cognizable – and it is not – Plaintiff fails to plead it with particularity as required by Federal Rule of Civil Procedure 9(b). Rule 9(b) requires that where a party is "alleging fraud or mistake, [that] party must state with particularity the circumstances constituting fraud or mistake." The D.C. Circuit has interpreted this rule to mean that the party alleging fraud must state in his pleading "the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud" and "identify individuals allegedly involved in the fraud." *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004) (quoting *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 1994)); *see also U.S. ex rel. Brown v. Aramark Corp.*, 591 F. Supp. 2d 68 (D.D.C. 2008). The pleading

requirement serves several purposes. “It discourages the initiation of suits brought solely for their nuisance value, and safeguards potential defendants from frivolous accusations of moral turpitude. And because ‘fraud’ encompasses a wide variety of activities, the requirements of Rule 9(b) guarantee all defendants sufficient information to allow for preparation of a response.” *Martin-Baker Aircraft Co.*, 389 F.3d at 1256 (internal quotations omitted).

As in *Martin-Baker Aircraft*, Plaintiff’s allegations in Count II of the Complaint do not allow Defendant to defend against specific charges of fraud. Plaintiff fails to allege when or where Mr. Fleischmann “stated to TDI there were problems at TAQA causing delays in payment and falsely assured TDI it would be paid,” *id.* ¶ 30, *see* Green Decl. ¶ 7, and “induced TDI not to follow up with the outstanding invoices by stating that they would be paid by TAQA,” Complaint ¶ 31. Nor does Plaintiff indicate who precisely was involved in these activities, *see id.*; Green Decl. ¶ 7, or set forth anything showing the “fact misrepresented” or “false representation” conveyed by these activities. Plaintiff makes only insufficient, conclusory assertions that Mr. Fleischmann acted “falsely.” Plaintiff does not allege, for example, that there were in fact no problems at TAQA or that TAQA was not undergoing a reorganization. As such, Plaintiff has failed to plead fraud with the requisite particularity, and none of Plaintiff’s allegations relating to fraud are sufficient to allow Defendants to respond.<sup>1</sup>

## II. Plaintiff Fails to State a Claim for Conversion

Count III of the Complaint makes plain that Plaintiff’s claim for conversion is little more than an effort to enforce an obligation to pay money, Complaint ¶ 37 (“payments due and owed to TDI”), which could not be the basis for a claim for conversion *even if* Defendants

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<sup>1</sup> As discussed above, with respect to the allegations concerning the “alteration” of invoices, Plaintiff offers nothing to suggest that it was in fact misled by these allegations. Although Defendants believe the opposite will be proved, the fact that TAQA personnel may have been misled by these invoices is immaterial to Plaintiff’s fraud claim.

*did* owe Plaintiff money. Under District of Columbia law, “[c]onversion is any unlawful exercise of ownership, dominion or control over the personal property of another in denial or repudiation of his rights thereto. One may be liable for conversion to a person who is in possession of property or who has the right to immediate possession of the property. Money can be the subject of a conversion claim only if the plaintiff has the right to a specific identifiable fund of money. A cause of action for conversion, however, may not be maintained to enforce a mere obligation to pay money.” *Curaflex Health Servs., Inc. v. Bruni*, 877 F. Supp. 30, 32 (D.D.C. 1995) (internal quotations and citations omitted). Plaintiff’s allegations that Defendants misappropriated money owed to them does not render its claim viable. *See Calvetti v. Antcliff*, 346 F. Supp. 2d 92, 106-07 (D.D.C. 2004) (“[C]onversion claims cannot be predicated on the misappropriation of money . . .”).<sup>2</sup>

There is no question that plaintiff was never “in possession” of the allegedly converted TAQA payments. At most Plaintiff suggests that it had a *contractual* right to *eventual* possession of the payments. *See* Complaint ¶¶ 16, 29, 37. Even if such a contractual right existed, it would not qualify as a property right. *See Curaflex Health Servs.*, 977 F. Supp. at 32-35 (finding that a contractual obligation to deposit funds in a lockbox did not give plaintiff a property right in those funds and that plaintiff had no immediate right to possess the funds under the contract). Thus Plaintiff does not allege a viable *property* right to *immediate* possession of the payments, as required in a common-law action for conversion.<sup>3</sup>

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<sup>2</sup> To be clear, to the extent Plaintiff might be claiming that somehow Mr. Fleischmann converted – in allegedly altering invoices – a debt or obligation to TDI, this is simply not the sort of property that may be converted. As this District Court recently explained in *Ficken v. AMR Corp.*: “Conversion and trover extend only to intangible rights identified by a tangible document that is converted; thus a plaintiff may bring a suit for conversion of a promissory note, a check, a bank book, or an insurance policy, but not for conversion of a debt, the good will of a business or an idea.” 578 F. Supp. 2d 134, 143 (D.D.C. 2008). An invoice is not negotiable and though it perhaps describes a debt, it does not represent a particular sum of money.

<sup>3</sup> A threshold matter in evaluating a claim for conversion is “the nature of the property right” in the chattel allegedly converted. *Pearson v. Dodd*, 410 F.2d 701, 706 n.23 (D.C. Cir. 1969).

Further, like Plaintiff's fraud claims discussed above, Plaintiff's allegations concerning its claim for the tort of conversion sound in contract and are duplicative of its claim for breach of contract, and as such must be dismissed. *See, e.g., Choharis*, 961 A.2d at 1089 (“[T]he tort must exist in its own right independent of the contract, and any duty upon which the tort is based must flow from considerations other than the contractual relationship.”). Plaintiff fails to suggest any duty owed by Defendants to Plaintiff aside from a duty of Mr. Fleischmann to “devote his best efforts and substantially all of his productive working time to TDI's business.” But even if that duty is presumed to have existed,<sup>4</sup> it existed only pursuant to and dependent on a contract. *See* Complaint ¶ 10. Nor are “special damages” present that might allow Plaintiff to maintain its duplicative tort claim, as Plaintiff fails to allege damages caused by the breach of contract that would be nonrecovered in a single-count contract claim. *Compare* Complaint ¶ 18 (total amount of \$1,200,631.17 includes “all invoices paid to TD, all monies expended by TDI to vendors on behalf of TAQA, and all money and benefits paid to Fleischmann after June 3, 2008”) *with* ¶ 25 (seeking \$1.5 million in damages for breach of contract) *and* ¶ 38 (seeking \$626,401.42 for conversion). Accordingly, Plaintiff's claim for conversion must be dismissed for failure to state a claim.

### III. Plaintiff Fails to State a Claim for Injunctive Relief

Count IV of the Complaint presents the same allegations presented in Plaintiff's Motion for a Temporary Restraining Order and for a Preliminary Injunction, currently *sub judice*. For the reasons set forth in Defendants' opposition to that motion, Count IV should be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

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<sup>4</sup> Plaintiff fails to allege whether the relevant contract was in force during the relevant period or what aspects of Plaintiff's claims it governed.

**CONCLUSION**

For the foregoing reasons, this Court should grant Defendants' motion, issue an order dismissing counts II, III, and IV of the Complaint, and provide any other relief it deems appropriate.

June 11, 2009

Respectfully submitted,

/s/ Jeremy Levin

Jeremy Levin (DC-495736)  
Michael J. Barta (DC-431663)  
Bryan H. Parr (DC-977503)

BAKER BOTTS L.L.P.  
1299 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2400  
Tel: (202) 639-7734  
Fax: (202) 639-1029

*Attorneys for Defendants  
Steven K. Fleischmann and Tertium Datur  
International, LLC*