UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROLAND KISER, Plaintiff, -against- HSH NORDBANK AG, Defendant.	09 Civ. 8849 (JSR) (AJP)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT HSH NORDBANK AG'S MOTION TO DISMISS COUNT 4 AND COUNT 7 OF PLAINTIFF'S COMPLAINT

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Defendant HSH Nordbank AG ("Nordbank" or the "Bank") respectfully submits this Memorandum of Law in Support of its Motion to Dismiss two causes of action in the Complaint filed by Plaintiff Roland Kiser ("Kiser") pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the Complaint fails to allege a viable cause of action for fraud or for intentional infliction of emotional distress, and those claims should be dismissed.

PRELIMINARY STATEMENT

This is an employment termination case. Kiser's core complaint is that, when Nordbank terminated his employment "for cause" in September 2009, no cause existed. Nevertheless, he seeks to recast his plainly contract-based grievances as tort claims in an ill-disguised effort to transform a breach-of-employment-contract case into something more. His claims for intentional infliction of emotional distress and for fraud are legally impermissible.

As to Kiser's claim for intentional infliction of emotional distress, New York courts have held repeatedly that such a claim is not viable if it is based upon an employer's termination of an employee. Even aside from that precedent, Kiser's allegations about the events surrounding his termination fall far short of the type of extreme and outrageous conduct required to state a cause of action. Furthermore, apart from the cancellation of his corporate cellular phone service--which can hardly be considered outrageous--all of Kiser's allegations relating to this claim were pled "on information belief," establishing that he does not even have personal knowledge of the alleged events which allegedly caused him severe emotional distress. In short, whether considered individually or in the aggregate, the conduct alleged cannot in any way be considered so far beyond the bounds of human decency as to be atrocious. Thus, Kiser fails to state a claim for intentional infliction of emotional distress.

Kiser's fraud claim likewise warrants dismissal. First, it is black-letter law that no fraud claim will lie where the only fraud alleged relates to a breach of contract, and that is exactly what Kiser alleges here. He alleges that Nordbank's investigation of his conduct--prompted by claims of discrimination made against him by other Nordbank employees--was not "independent and objective" as the Bank allegedly represented to him, and therefore did not provide "just cause" to terminate his employment. Plainly, this claim inextricably relates to Kiser's breach of contract claim. Even if that were not the case, Kiser's fraud claim is not cognizable because he seeks only "reputation damages" in connection with his fraud claim and does not plead any pecuniary loss.

In sum, Kiser's intentional infliction of emotional distress and fraud causes of action fail as a matter of law and must be dismissed.

BACKGROUND

Nordbank, a German "Landesbank," hired Kiser in 2002 to serve as General Manager and Chief Operating Officer of its New York branch.[1] Plaintiff's Complaint ("Compl.") ¶¶ 1, 2, 32.[2] On June 1, 2007, Nordbank and Kiser executed an employment agreement (the "Employment Agreement"). *Id.* ¶ 4. The Employment Agreement provided for Kiser to receive annual salary, bonuses, and other benefits through June 30, 2013, unless Kiser resigned or was terminated for "cause." *Id.* ¶¶ 4, 34. Kiser's employment was terminated in September 2009, for "cause," purportedly as a result of "alleged events from 2007." *Id.* ¶¶ 7, 8.

[1] This background summary focuses primarily on the allegations relating to the causes of action that are the subject of this motion. Nordbank does not concede the validity of any of the allegations referenced in this motion.

[2] A copy of the Complaint is appended as Exhibit A to the Declaration of John D. Shyer in Support of Nordbank's Motion To Dismiss.

In September 2007, two then-employees of Nordbank's New York branch allegedly lodged internal complaints stating that Kiser improperly showed favoritism toward another Nordbank employee whom they alleged to be Kiser's paramour. Compl. ¶ 41. Nordbank allegedly launched two separate inquiries into Kiser's alleged discriminatory conduct--one in the Fall of 2007 and another in early 2008--and both "exonerated Kiser." *Id.* ¶¶ 48-50. In late 2008, one of the complaining employees filed a lawsuit against Nordbank and Kiser seeking damages based on Kiser's alleged sexual discrimination and other improper conduct in the workplace. *Id.* ¶ 44. The other employee filed a similar lawsuit against Nordbank nine months later. *See Id.*

By the Spring of 2009, the "salacious nature of the allegations made against Kiser by the former Nordbank employees, set forth in court papers publicly available in New York, were the subject of media attention in Germany." *Id.* ¶¶ 16, 54. The "sensational articles" by the German media were "seriously embarrassing [to] Kiser." *Id.* ¶ 55.

Shortly after the ramp-up in negative press surrounding Kiser's alleged conduct, Nordbank allegedly launched a "new" investigation of the allegations of discrimination made by the former employees in New York and revealed the existence of the investigation in a press release in August 2009. *Id.* ¶¶ 57-60. On September 17, 2009, Nordbank terminated Kiser's employment and issued a press release stating, in part:

> Following an investigation of operations in its New York branch, HSH Nordbank has implemented management changes with immediate effect. The bank has dismissed one of the branch's three General Managers and the head of the local legal department. Former employees claimed of being discriminated against by members of the managerial staff at the branch. On becoming aware of the accusations, the bank set up a body of inquiry to review the allegations. The investigators were supported in their work by a New York law firm and an audit firm who have now delivered independent reports on their findings.

Id. ¶¶ 70-71.

On October 19, 2009, Kiser filed a Complaint against Nordbank with seven causes of action, alleging, *inter alia*, (a) breach of the Employment Agreement (First Cause of Action); (b)

fraud (Fourth Cause of Action); and (c) intentional infliction of emotional distress (Seventh Cause of Action). At bottom, Kiser alleges that "he was wrongfully terminated" because the 2009 investigation--which led to his termination for "cause"--was "bogus." *Id.* ¶¶ 1, 57. The Complaint alleges that "the bogus 'new investigation' revealed nothing constituting cause to terminate the Employment Agreement 'for cause.'"[3] *Id.* ¶ 64.

In the fourth cause of action for "fraud," Kiser alleges that Nordbank personnel who conducted the investigation in 2009 told him that it "was to be an independent and objective investigation" and that those statements were allegedly false because Nordbank's CEO had "predetermined as of May and June 2009 that--whatever the actual facts--the 'investigation' would paint Kiser in a negative light and come up with grounds . . . to terminate Kiser for cause." *Id.* ¶¶ 100, 101. Kiser further alleges that he relied on those statements about the investigation, and, therefore, did not take steps with Nordbank's Board of Directors (the "Board") allegedly which "could have prevented [Nordbank's CEO] from carrying out his scheme." *Id.* ¶ 102. Finally, the Complaint alleges that his "reliance on Nordbank's misrepresentations caused Kiser damage in that it subjected him to the severe reputational harm described above, making it extremely difficult for Kiser to find further employment in the banking industry." *Id.* ¶ 103.

[3] Kiser's theory--which is not particularly relevant to this motion--is that "the new investigation was just a charade intended to make a scapegoat of Kiser and others, not an actual search for the truth." Compl. ¶ 61. According to Kiser, his termination was a "political publicity stunt aimed at getting the political parties in power re-elected" in the German elections. *Id.* ¶ 7. Kiser alleges that because Nordbank's financial performance was the subject of negative publicity in Germany, Nordbank's Chief Executive Officer ("CEO"), Prof. Dr. Dirk Jens Nonnenmacher ("Nonnenmacher") could have lost his position if the political party in power was defeated in the German elections. *Id.* ¶¶ 2, 18. Nordbank's CEO allegedly used the investigation to distract the public from the press coverage about Nordbank's other alleged problems and to portray himself in a "heroic" light by announcing Kiser's termination. *Id.* ¶¶ 56-58.

In the seventh cause of action for "intentional infliction of emotional distress," Kiser makes four allegations to support his claim: (i) "on information and belief," Nordbank had Kiser "followed" and his communications "monitored," *id.* ¶ 117; (ii) "on information and belief," Nordbank "created a media climate" in which references to any "scandal" at Nordbank were "referred and associated back to Kiser's termination," *id.* ¶ 118; (iii) "on information and belief," Nordbank planned to have security escort Kiser from the premises after terminating his employment on September 17, 2009--although that never happened because Kiser was not at the office, *id.* ¶ 119; and (iv) Nordbank "turned off Kiser's cell phone number" upon terminating his employment, *id.* ¶ 120.

ARGUMENT

I. NORDBANK'S MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFF'S ALLEGATIONS, EVEN IF TAKEN AS TRUE, COULD NOT ENTITLE HIM TO RELIEF FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS OR FRAUD

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court "must accept as true the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff." *Harris v. City of New York*, 186 F.3d 243, 247 (2d Cir. 1999); *see also Nathel v. Siegal*, 592 F. Supp. 2d 452, 460 (S.D.N.Y. 2008). If "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," then the court must dismiss the claim. *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998). "[B]ald assertions and conclusions of law" are insufficient to overcome a motion to dismiss. *Id.*; *see also Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996).

Applying that standard, this Court should dismiss Kiser's claims for intentional infliction of emotional distress and fraud based on well-settled law.

II. PLAINTIFF'S ALLEGATIONS DO NOT APPROACH THE OUTRAGEOUS AND EXTREME CONDUCT NEEDED TO SUSTAIN AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION

A plaintiff cannot adequately plead a cause of action for intentional infliction of emotional distress without setting forth facts clearly alleging outrageous and extreme conduct underlying the claim. *See McRedmond v. Sutton Place Res. & Bar, Inc.*, 48 A.D.3d 258, 258-60, 851 N.Y.S.2d 478, 479 (1st Dep't 2008). Whether the challenged conduct is sufficiently outrageous "is a matter for the court to determine in the first instance." *Kinsella v. Rumsfeld*, 180 F. Supp. 2d 363, 370 (N.D.N.Y. 2001), *aff'd in part, vacated in part on other grounds*, 320 F.3d 309 (2d Cir. 2003). Even at the pleading stage, that element is difficult to satisfy. *See Fahmy v. Duane Reade, Inc.*, No. 04-1798, 2005 WL 2338711, at *7 (S.D.N.Y. Sept. 26, 2005) (dismissing claim based on alleged discriminatory employment policies in promotions and compensation); *Grasso v. Chase Manhattan Bank*, No. 01-4371, 2002 WL 575667, at *4 (S.D.N.Y. Apr. 17, 2002) (dismissing claim based on allegations that fellow employees ostracized the plaintiff). "Acts which merely constitute harassment, disrespectful or disparate treatment, a hostile environment, humiliating criticism, intimidation, insults or other indignities" are no grounds for relief. *Lydeatte v. Bronx Overall Econ. Dev. Corp.*, No. 00-5433, 2001 WL 180055, at *2 (S.D.N.Y. Feb. 22, 2001). Conduct instead 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." *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303 (2d Cir. 1983) (internal quotations omitted).

Termination of employment alone is not sufficiently "outrageous and extreme" to serve as a basis for an intentional infliction of emotional distress claim. *See Gaugaix v. Labs. Esthederm USA, Inc.*, No. 98-4465, 2000 WL 1528212, at *7 (S.D.N.Y. Oct. 16, 2000). Courts have refused to allow termination to support such a claim, regardless of whether the employment

is pursuant to an employment agreement or is at-will. S*ee Vardi v. Mut. Life Ins. Co. of N.Y.*, 136 A.D.2d 453, 455-56, 523 N.Y.S.2d 95, 98 (1st Dep't 1988) (an employee could not state a claim for intentional infliction of emotional distress based solely on alleged false accusations that supported the employer's decision to terminate employment agreement); *Bailey v. N.Y. Westchester Square Med. Ctr.*, 38 A.D.3d 119, 125, 829 N.Y.S.2d 30, 35-36 (1st Dep't 2007) (termination of the employment of an at-will employee "alone may not form the basis of an intentional infliction of emotional distress cause of action") (internal quotations omitted); *Fama v. Am. Int'l Group, Inc.*, 306 A.D.2d 310, 311, 760 N.Y.S.2d 534, 536 (2nd Dep't 2003) (same).

Indeed, "[i]t is particularly difficult to withstand a motion to dismiss claims for intentional infliction of emotional distress in the employment law context." *Lydeatte*, 2001 WL 180055, at *2. The instances in which New York federal and state courts, in employment cases, have dismissed intentional infliction of emotional distress claims on the pleadings as insufficiently "outrageous and extreme" are numerous, and many of those cases alleged facts far more "outrageous" than the allegations in the instant case:

- The plaintiffs alleged that defendant-employer (i) used abusive language; (ii) subjected employees to oppressive work rules; (ii) forced employees to perform humiliating tasks; (iii) required employees to step over training pads wet with dog urine to use the bathroom; and (iv) told an employee who refused to leave her young daughter at night to take care of the employer's dogs that she should lock her daughter in the dog's cage so she could work. *Epifani v. Johnson*, 882 N.Y.S.2d 234, 240-41 (App. Div. 2nd Dep't 2009).

- The plaintiff alleged that, while in the workplace, she was subjected to two instances of inappropriate sexual touching and exposed to derogatory comments and other inappropriate behavior. *Zephir v. Inemer*, 305 A.D.2d 170, 170, 757 N.Y.S.2d 851, 852 (1st Dep't 2003).

- The plaintiff alleged that defendant-employer summoned security guards in the workplace to "accost" the plaintiff. *Allen v. St. Carbini Nursing Home*, No. 00-8558, 2001 WL 286788, at *7 (S.D.N.Y. Mar. 9, 2001).

- The plaintiff alleged that the defendant-employer denied employment benefits knowing that the plaintiff's mental state was "weakened by depression." *Costello v. Gannett Satellite Info. Network, Inc.*, Nos. 96-9216, 96-9264, 1997 WL 196362, at *1 (2d Cir. Apr. 23, 1997).

- The plaintiff alleged that he was subjected to office gossip concerning his sexual orientation, discriminatory treatment by a supervisor, and derogatory comments by coworkers. *Ward v. Goldman Sachs & Co.*, No. 96-6904, 1996 U.S. Dist LEXIS 22, at *3 (S.D.N.Y. Jan. 3, 1996).

In fact, it was observed as recently as last year that "all the claims for intentional infliction of emotional distress considered by the New York Court of Appeals . . . [have] failed because the alleged conduct was not sufficiently outrageous." *See Sheikh v. City of N.Y. Police Dep't*, Nos. 03-6326, 05-4718, 2008 WL 5146645, at *14 (E.D.N.Y. Dec. 5, 2008) (internal quotations omitted).

In this case, Kiser's claim for intentional infliction of emotional distress should suffer the same fate. As an initial matter, all of Kiser's allegations are inseparably linked to his termination. *See* Compl. ¶¶ 116-20. Kiser specifically acknowledges in his Complaint that his claim arose as a result of Nordbank's decision to terminate his employment. *Id.* ¶ 116. Because termination alone will not give rise to a cause of action for intentional infliction of emotional distress, *see Gaugaix*, 2000 WL 1528212, at *7, it necessarily follows that alleged actions linked to the termination decision provide no basis for a claim.

In any event, regardless of whether the allegations are related to termination, the allegations do not even approach the extreme and outrageous conduct necessary to state such a claim. In fact, none of them even comes close to the allegations in the cases above which were dismissed on the pleadings. If exposure to sexual harassment provides no basis for an intentional infliction of emotional distress claim, *see Zephir*, 305 A.D.2d at 170, 757 N.Y.S.2d at 852, then having to switch cellular telephone service must fall short of the pleading standard. Kiser's other

allegations--based on speculation[4] only--that (a) he was "followed" and his communications "monitored" and (b) that there was an alleged plan to subject him to a "perp walk" that never happened likewise do not amount to atrocious conduct necessary to support a claim. *Cf. Allen*, 2001 WL 286788, at *7 (actually being accosted by security guards was no basis for a claim). The same holds true for Kiser's vague allegations about Nordbank's creation of a "media climate" involving references to his termination.[5]

In sum, considered individually or in the aggregate, the allegations at issue do not support a claim by this former employee for intentional infliction of emotional distress.

III. THIS COURT SHOULD DISMISS PLAINTIFF'S FRAUD CLAIM BECAUSE IT IS INEXTRICABLY RELATED TO HIS BREACH OF CONTRACT CLAIM AND BECAUSE PLAINTIFF FAILS TO PLEAD ANY ACTUAL PECUNIARY LOSS.

Kiser's fraud claim fares no better. First, his claim is plainly related to his breach of contract claim and, therefore, fails as a matter of law. In addition, his fraud claim is not viable because he seeks only "reputational damages" rather than actual pecuniary loss.

A. Plaintiff's Fraud Claim Fails As A Matter Of Law Because It Is An Impermissible Attempt To Recast A Breach-Of-Contract Claim.

"New York law does not recognize claims that are essentially contract claims masquerading as claims of fraud." *Metzler v. Harris Corp.*, No. 00-5847, 2001 U.S. Dist. LEXIS 1903, at *6-7 (S.D.N.Y. Feb. 26, 2001) (dismissing employee's fraud claim); *see also Schenkman v. N.Y. Coll. of Health Prof'ls*, 29 A.D.3d 671, 672-73, 815 N.Y.S.2d 159, 161 (2nd

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[4] Kiser makes these allegations "on information and belief." Compl. ¶¶ 117-19. It is indeed puzzling as to how Kiser can claim distress given his lack of knowledge about the very allegations that form the basis for his claim.

[5] In addition, any basis for recovery regarding these allegations pertaining to statements made to the media rests exclusively in Plaintiff's defamation claim. *See Hirschfeld v. Daily News, L.P.*, 269 A.D.2d 248, 249, 703 N.Y.S.2d 123, 124 (1st Dep't 2000) (finding dismissal warranted where emotional distress claims "fall within the ambit of other traditional tort liability [such as a] . . . cause[] of action sounding in defamation"); *see also Clark v. Schuylerville Cent. Sch. Dist.*, 24 A.D.3d 1162, 1164, 807 N.Y.S.2d 175, 177-78 (3rd Dep't 2005).

Dep't 2006) (former employee "did not plead any viable fraud-based claim, since the only fraud charged related to a breach of contract"); *Dailey v. Tofel, Berelson, Saxl & Partners Co.*, 273 A.D.2d 341, 341-42, 710 N.Y.S.2d 95, 96 (2nd Dep't 2000) (a "cause of action to recover damages for fraud will not arise where, as here, the only fraud charged relates to a breach of contract"); *Grant v. DCA Food Indus., Inc.*, 124 A.D.2d 909, 909-10, 508 N.Y.S.2d 327, 328 (3rd Dep't 1986) (same). Where separate claims for breach of contract and fraud are "in substance, . . . based upon the same allegations," the fraud claim must be dismissed. *Mastropieri v. Solmar Constr. Co.*, 159 A.D.2d 698, 700, 553 N.Y.S.2d 187, 189 (2nd Dep't 1990).

The New York Court of Appeals analyzed such allegations in *New York University v. Continental Insurance Company*, 87 N.Y.2d 308 (1995). There, among other things, the plaintiff alleged that "the defendants engaged in a 'sham' investigation to perpetuate their allegedly fraudulent scheme" to deny plaintiff's claim for indemnification under its insurance policy and then terminated the policy. *Id.* at 319. The Court concluded that plaintiff's fraud allegation "merely evidence[d the] plaintiff's dissatisfaction with [the] defendants' performance of the contract obligations" and that the "allegation does not state a tort claim." *Id.*

Here, too, Kiser's fraud claim unquestionably relates to his breach of contract claim and must be dismissed. Indeed, Kiser's fraud allegations are at the heart of his breach of contract claim. His breach of contract claim alleges that Nordbank breached his employment agreement by terminating him "without cause" because the investigation which led to the termination decision was allegedly "bogus." Compl. ¶¶ 57, 79. That same purportedly "bogus" investigation about his conduct as an employee is the sole basis for his fraud claim. Like the plaintiff's claim in *Continental Insurance*, Kiser's fraud claim concerns his dissatisfaction with the investigation

process that led to the termination decision under the parties' contract. Accordingly, dismissal is equally compelled in this case.

B. Alternatively, Plaintiff's Fraud Claim Fails Because He Seeks Only Reputation Damages And Does Not Plead Any Actual Pecuniary Loss

To plead damages recoverable under a fraud claim, a party must allege "actual pecuniary loss." *Rather v. CBS Corp*., 886 N.Y.S.2d 121, 127 (App. Div. 1st Dep't 2009). Recovery in fraud is confined to damages actually sustained as a direct result of the fraud. *See Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421-22 (1996). The out-of-pocket loss requirement is "well-settled" under New York law. *Id.* "Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud." *Id.*

A fraud claim based upon reputation damages is not viable because those alleged damages are not out-of-pocket losses. *See, e.g.*, *Kulas v. Adachi*, No. 96-6674, 1997 WL 256957, at *10 (S.D.N.Y. May 16, 1997) (holding that damage to business reputation and loss of customers were not out-of-pocket losses recoverable in fraud); *Lama*, 88 N.Y.2d at 421 (precluding recovery for loss of business opportunity); *see also Spithogianis v. Haj-Darwish*, No. 07-4609, 2008 WL 82188, at *7 (S.D.N.Y. Jan. 7, 2008) ("Damages for injury to a plaintiff's business reputation or lost profits that would have been realized but for the fraud are generally not recoverable."); *Saleemi v. Pencom Sys. Inc.*, No. 99-667, 2000 WL 640647, at *6-7 (S.D.N.Y. May 17, 2000) (citing *Kulas* with approval).

Recently, the New York Appellate Division, First Department, upheld the dismissal of a fraud claim asserted against CBS Corp. by its former news anchor, Dan Rather, for failure to allege pecuniary loss. *Rather v. CBS Corp*., 886 N.Y.S.2d at 127-28. Rather alleged that CBS made various misrepresentations to him in the aftermath of a controversial broadcast, including promises to conduct an "independent" investigation about the broadcast and to publicly defend

his reputation. *Id.* at 126. Rather alleged that those misrepresentations "induced him to remain silent about his role in the broadcast and remain at CBS Corp., where he was allegedly 'warehoused' until the completion of his contract. *Id.* As a result, he "allege[d] that he suffered money and reputational damages." *Id.*

On appeal, the First Department held that Rather's fraud claim "was unavailing" to the extent that it alleged that he earned less with his subsequent employer than the market rate for comparable journalists. *Id.* at 127. The court noted that "'the loss of an alternative contractual bargain . . . cannot serve as the basis for fraud or misrepresentation damages because the loss of the bargain was 'undeterminable and speculative.'" *Id.* (quoting *Lama*, 88 N.Y.2d at 422) (alterations omitted). The court also held that "[a]s to lost opportunities in the trade . . . his future earnings are speculative." *Id.* at 127-28. Finally--and significantly--the court held that even if Rather had pled pecuniary loss, his fraud claim was properly dismissed because it was an impermissible attempt to recast his breach of contract claim to sound in fraud. *Id.* at 128.

In light of the foregoing authorities, Kiser's fraud claim fails as a matter of law. He has not pled any actual pecuniary loss. He is seeking to recover in fraud for only the alleged "severe reputational harm" allegedly sustained because of his employment termination, which does not constitute cognizable damages. Compl. ¶ 103. Indeed, the Complaint's allegation that "it [will be] extremely difficult for Kiser to find further employment in the banking industry"--asserted approximately one month after his termination--is far more speculative than Rather's damage allegations in *Rather v. CBS Corp*. 886 N.Y.S.2d at 127-28. In short, Kiser's failure to plead recoverable damages is an independent, and conclusive, reason to dismiss his fraud claim.

CONCLUSION

For the foregoing reasons and in accordance with Rule 12(b)(6), this Court should dismiss Plaintiff's claims for intentional infliction of emotional distress and fraud.

Dated: December 1, 2009

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