

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

IA-19A  
10-12-11

-----X  
NAFISSATOU DIALLO,

Plaintiff,

v.

DOMINIQUE STRAUSS-KAHN,

Defendant.  
-----X

: Index No. 307065/2011

:  
: **NOTICE OF MOTION**  
: **TO DISMISS FIFTH**  
: **CAUSE OF ACTION**

: Part IA-19A

: Hon. Douglas E. McKeon, J.S.C.

: Return Date: October 12, 2011

**PLEASE TAKE NOTICE** that, upon the accompanying memorandum of law, and upon all prior pleadings had herein, Defendant Dominique Strauss-Kahn will move this Court at the Motion Support Office, Room 217, of the Supreme Court of the State of New York, County of Bronx, 851 Grand Concourse, Bronx, New York, on the 12th day of October 2011, at 9:30 in the forenoon, or as soon thereafter as counsel may be heard, for an Order dismissing the fifth cause of action for failure to state a claim.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to CPLR § 2214(b), answering papers, if any, shall be served on the undersigned counsel at least seven (7) days prior to the return date of this motion.

Dated: New York, New York  
September 26, 2011

ZUCKERMAN SPAEDER LLP

*William W. Taylor/SON*

William W. Taylor, III (admitted *pro hac vice*)

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TO: Kenneth P. Thompson  
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*Attorneys for Plaintiff*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

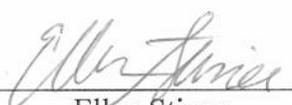
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NAFISSATOU DIALLO,	: Index No. 307065/2011
	: :
Plaintiff,	: Part IA-19A
	: Hon. Douglas E. McKeon, J.S.C.
v.	: :
	: <b>AFFIDAVIT OF SERVICE</b>
DOMINIQUE STRAUSS-KAHN,	: :
	: :
Defendant.	: :
	: :
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STATE OF NEW YORK     )  
                                  ss.:  
COUNTY OF NEW YORK   )

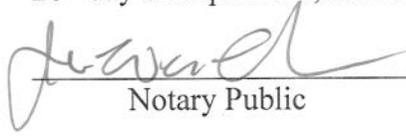
ELLEN STINES, being duly sworn, deposes and says:

1. I am not a party to this action and am 18 years of age or older.
2. I am an administrative assistance employed by the law firm of Zuckerman Spaeder LLP, attorneys for Defendant Dominique Strauss-Kahn in the above-referenced matter.
3. That on this 26<sup>th</sup> day of September, 2011, I caused to be served a true and accurate copy of Defendant Dominique Strauss-Kahn's Notice of Motion to Dismiss Fifth Cause of Action and Memorandum of Law in Support of Motion to Dismiss Fifth Cause of Action for Failure to State a Claim via personal delivery by Roland David of EPS Judicial Process Service, Inc., to the following:

Kenneth P. Thompson  
Douglas H. Wigdor  
THOMPSON WIGDOR LLP  
85 Fifth Avenue  
New York, New York 10003  
Tel: (212) 257-6800  
*Attorneys for Plaintiff*

  
\_\_\_\_\_  
Ellen Stines

Sworn to before me this  
26<sup>th</sup> day of September, 2011.

  
\_\_\_\_\_  
Notary Public

**JER WEI CHEN**  
Notary Public, State of New York  
No. 01CH6174210  
Qualified in Nassau County  
Certificate Filed in New York County  
Commission Expires 09/17/2015

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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NAFISSATOU DIALLO, : Index No. 307065/2011  
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 Plaintiff, : Part IA-19A  
 : Hon. Douglas E. McKeon  
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 v. :  
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 DOMINIQUE STRAUSS-KAHN, :  
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 Defendant. :  
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-----X

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**NOTICE OF MOTION TO DISMISS FIFTH CAUSE OF ACTION AND  
MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DOMINIQUE STRAUSS-  
KAHN'S MOTION TO DISMISS PLAINTIFF'S FIFTH CAUSE OF ACTION FOR  
FAILURE TO STATE CLAIM**

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Tel: (212) 704-9600  
Fax: (212) 704-4256

Dated: September 26, 2011

SUPREME COURT OF THE STATE OF NEW YORK  
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 DOMINIQUE STRAUSS-KAHN, :  
 :  
 :  
 Defendant. :  
 :  
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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT  
DOMINIQUE STRAUSS-KAHN’S MOTION TO DISMISS PLAINTIFF’S  
FIFTH CAUSE OF ACTION FOR FAILURE TO STATE A CLAIM**

On behalf of Defendant Dominique Strauss-Kahn, we have filed herewith a motion to dismiss the complaint in its entirety on the ground the Mr. Strauss-Kahn is absolutely immune from suit under controlling international law. The Court should grant that motion and dispose of this case. In this memorandum, we separately address why Plaintiff’s Fifth Cause of Action – for prima facie tort – should be dismissed on the alternative ground that the complaint fails to state a claim as a matter of law. Plaintiff has failed to state a claim for prima facie tort, because the complaint (1) improperly alleges *unlawful* conduct as the basis for prima facie tort, when an essential element of the tort is *lawful* conduct; (2) fails to allege that the classic torts alleged in Causes of Action One through Four cannot provide her with complete relief; and (3) fails to allege the essential element of special damages.

**BACKGROUND**

Plaintiff’s complaint asserts Five Causes of Action: (1) battery, (2) assault, (3) intentional infliction of emotional distress, (4) false imprisonment, and (5) prima facie tort. All causes of action are premised on the same core averment: that Mr. Strauss-Kahn allegedly

sexually assaulted Plaintiff at the Sofitel hotel on May 14, 2011. Compl. ¶ 1. The Fifth Cause of Action for prima facie tort incorporates by reference the complaint's prior allegations concerning the alleged sexual assault, Compl. ¶ 59, and specifically alleges: "Defendant's conduct was unlawful and not justifiable under all the circumstances." Compl. ¶ 63.

The complaint does not detail Plaintiff's claimed damages. Rather, it demands generally "[a]n award of damages in an amount to be determined at trial." Compl., Prayer for Relief ¶ C.

### ARGUMENT

#### **I. Plaintiff Has Failed to Allege The Essential Element of Lawful Conduct.**

The essential element of a prima facie tort that is absent from Plaintiff's claim is that the alleged tortious conduct is otherwise *lawful*. According to the Court of Appeals of New York, "[p]rima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143, 490 N.Y.S.2d 735, 741 (1985). The tort "arises only because the specific act relied upon – and which it is asserted caused the injury – are not, in the absence of the intention to harm, tortious, unlawful, and therefore, actionable." *Ruza v. Ruza*, 286 A.D. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955).

Plaintiff here has alleged only unlawful conduct as the basis for a prima facie tort – an alleged sexual assault. The Fifth Cause of Action incorporates all of the complaint's prior allegations concerning the alleged sexual assault, Compl. ¶ 59, and expressly alleges that "Defendant's conduct was unlawful and not justifiable under all the circumstances." Compl. ¶ 63. Thus, she has not alleged a prima facie tort based on lawful conduct. That Cause of Action, therefore, must be dismissed for failure to state a claim.

## II. Plaintiff May Not Plead Prima Facie Tort In the Alternative.

Although New York law permits pleading of prima facie tort in the alternative, *see Bd. of Educ. v. Farmingdale Classroom Teachers*, 38 N.Y.2d 397, 405-06, 380 N.Y.S.2d 635, 643-44 (1975), such alternative pleading is unavailable here, as a matter of law, where Plaintiff's core allegations can only reasonably be read to allege unlawful conduct. Prima facie tort is not meant to be a "catch-all" alternative "for every cause of action that cannot stand on its own legs." *Freihofer*, 65 N.Y.2d at 143, 490 N.Y.S.2d at 741. Pleading in the alternative is only inappropriate when classic torts, such as those pleaded here, can provide complete relief. *See Springer v. Viking Press*, 90 A.D.2d 315, 318, 457 N.Y.S.2d 246, 248 (1st Dep't 1982) ("Where . . . complete relief can be accorded under classical tort concepts, *prima facie* tort may not be pleaded side by side with the pleading of conventional tort."); *Stanley v. Bray Terminals, Inc.*, 197 F.R.D. 224, 230 (N.D.N.Y. 2000) ("If a traditional tort remedy can provide such relief and the prima facie tort cannot be established without at the same time establishing a classical tort, the Court must dismiss" the prima facie tort.)

Even if Plaintiff's complaint could be construed liberally as to plead prima facie tort in the alternative – which, on its face, it does not do – alternative pleading is improper here because the classic torts alleged are more than adequate to grant Plaintiff relief. *See Ruza*, 286 A.D at 770, 146 N.Y.S.2d at 811 (observing that prima facie tort "remedy need rarely be invoked, for the 'categories of tort' are many, and development within the categories is progressive indeed"). If Defendant were to be found liable on any of the first four Causes, no additional relief would be available under prima facie tort. *See Farmingdale*, 38 N.Y.2d at 406, 380 N.Y.S.2d at 645 (observing "once a traditional tort has been established the allegation with respect to prima facie tort will be rendered academic"). Moreover, it is difficult to fathom how if Plaintiff is unable to prove the classic torts alleged, she could prove a prima facie tort based on lawful conduct. *See*

*Stanley*, 197 F.R.D. at 230 (affirming dismissal where “the *prima facie* tort cannot be established without at the same time establishing a classical tort”); *see also Jones v. City of New York*, 161 A.D.2d 518, 519 555 N.Y.S.2d 788, 789 (1st Dep’t 1990) (affirming dismissal where classic torts pled were wrongful eviction and intentional infliction of emotional distress); *Hill v. City of New York*, 2005 WL 3591719, No. 03 CV 1283 (ARR), at \*8 (E.D.N.Y. Dec. 30, 2005) (allegations of excessive use of force and conspiracy, as alleged, could not constitute a *prima facie* tort). Indeed, if Plaintiff cannot prove she was sexually assaulted, and the facts show that the parties’ conduct was consensual – as they will if this case were to proceed to discovery and trial – her claim would lack the essential element of proof that the defendant’s sole motivation was to inflict harm, or he acted with “disinterested malevolence.” *Posner v. Lewis*, 80 A.D.3d 308, 312, 912 N.Y.S.2d 53, 56 (1st Dep’t 2010); *Epifani v. Johnson*, 65 A.D.3d 224, 232-33, 882 N.Y.S.2d 234, 242 (2nd Dep’t 2009). Thus, Plaintiff cannot sustain a claim for *prima facie* tort as an alternative to the torts pleaded in Causes of Action One through Four.

### **III. Plaintiff Has Failed to Allege Special Damages.**

The final reason for dismissing Plaintiff’s *prima facie* tort claim is her failure to allege special damages. An “essential element of [*prima facie* tort] is the allegation of special damages, fully and accurately stated with sufficient particularity as to identify and causally relate the actual losses to the allegedly tortious acts.” *Broadway & 67th Str. Corp. v. City of New York*, 100 A.D.2d 478, 486, 475 N.Y.S.2d 1, 6 (1st Dep’t 1984). *See also Freihofer*, 65 N.Y.2d at 143, 490 N.Y.S.2d at 741 (“A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages.”). To satisfy the pleading requirement of special damages, a plaintiff’s damage claim must be itemized, and cannot be pleaded simply as round sums. *See Mancuso v. Allergy Assocs.*, 70 A.D.3d 1499, 1501, 895 N.Y.S.2d 756, 758 (4th Dep’t 2010) (“Damages pleaded in such round sums, without any

attempt at itemization, must be deemed allegations of general damages.”) (citation omitted).

“Conclusory allegations of damages are insufficient.” 14 N.Y. Prac., New York Law of Torts § 1:97 (2011) (citing cases).

Plaintiff here has made no effort to itemize her damages. She simply has sought “[a]n award of damages in an amount to be determined at trial” to compensate her for unspecified “monetary and/or economic harm,” “harm to her professional and personal reputations and loss of career fulfillment,” “all non-monetary and/or compensatory harm,” and “all other monetary and/or non-monetary losses suffered by Plaintiff.” Compl. Prayer for Relief, ¶ C. Plaintiff’s damages demand is insufficient, as a matter of law, to sustain a claim for prima facie tort; therefore, it must be dismissed. *See Epifani*, 65 A.D.3d at 233, 882 N.Y.S.2d at 242 (affirming dismissal where plaintiff pled “injury to her foot and ankle, pain, swelling and inability to walk or stand, all in an amount to be proven at the time of trial, but in excess of the jurisdictional minimum of this Court”); *Vigoda v. DCA Productions Plus Inc.*, 293 A.D.2d 265, 266, 741 N.Y.S.2d 20, 23 (1st Dep’t 2002) (“All that plaintiffs have alleged is lost future income, conjectural in identity and speculative in amount. As such, this is an insufficient allegation of damages to support a cause of action for prima facie tort.”); *Broadway & 67th St. Corp.*, 100 A.D.2d at 486, 475 N.Y.S.2d at 6 (affirming dismissal where “[n]either the complaint nor plaintiff’s bill of particulars sufficiently itemizes such special damages”); *Mancuso*, 70 A.D.3d at 1501, 895 N.Y.S.2d at 758 (affirming dismissal where plaintiff pled damages in “round sums”).

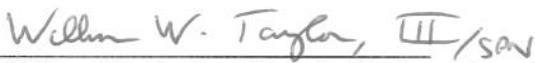
**CONCLUSION**

For the foregoing reasons, Defendant Dominique Strauss-Kahn respectfully requests that the Court dismiss the Fifth Cause of Action for failure to state a claim.

Dated: New York, New York  
September 26, 2011

Respectfully submitted,

ZUCKERMAN SPAEDER LLP

  
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\*Application for admission *pro hac vice* pending