UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Ferris & Salter, P.C.,

Plaintiff,

v.

Thomson Reuters Corporation,
d/b/a West Publishing Corporation,
d/b/a FindLaw,

Defendant.

FILE NO. 0:12-cv-00109-JRT-SER

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND TO ENLARGE ANSWER PERIOD[1]

INTRODUCTION

Plaintiff is trying to turn what should be a breach of contract action into a tort action by asserting a purported "professional negligence" claim against Defendant. In dismissing the lawsuit that Plaintiff initially filed against Defendant in Michigan, Judge Julian Abele Cook, Jr., of the United States District Court for the Eastern District of Michigan expressly held as follows:

> [T]he Court concludes that – under Minnesota or Michigan law – no professional negligence action will lie against computer engineers and technicians. Accordingly, the Plaintiff's complaint will be construed as if it had been plead in contract.

See Ferris & Salter, P.C., v. Thomson Reuters Corp., No. 2:11-cv-12448, slip op. at 5-6

[1] Because Plaintiff has indicated that it does not oppose Defendant's motion to enlarge the time period for serving an answer until ten days after the Court rules on Defendant's motion to dismiss Count I of the Complaint (*see* Doc. #10), this reply memorandum will only address the motion to dismiss Count I.

(E.D. Mich. Oct. 19, 2011) (copy filed in the present action as Dkt. #7.1) (footnote omitted). For the reasons set forth in Defendant's initial memorandum (Dkt. #6) and in this reply memorandum, this Court should likewise reject Plaintiff's purported "professional negligence" claim, leaving Plaintiff to pursue only a breach of contract claim.

ARGUMENT

A. Issue Preclusion Bars Plaintiff's Professional Negligence Count.

Plaintiff agrees that the question of issue preclusion is governed by the five issue preclusion factors from *Robinette v. Jones*, 476 F.3d 585, 589 (8th Cir. 2007) that are listed on page 7 of Defendant's initial memorandum. *See* Pltf's Opp. Mem. (Dkt. #11) p. 7. Contrary to Plaintiff's assertions, however, proper application of those factors leads to the conclusion that Plaintiff cannot properly relitigate Judge Cook's ruling that Plaintiff may not pursue a professional negligence action against Defendant.

Plaintiff concedes, as it must, that the first issue preclusion factor is satisfied because Plaintiff was a party to the action before Judge Cook.

The second and third issue preclusion factors are satisfied because the issue that Defendant seeks to preclude is the legal viability of Plaintiff's purported professional negligence claim, which was plainly litigated before Judge Cook. Indeed, Plaintiff itself raised that issue before Judge Cook by arguing that the lawsuit Plaintiff commenced in Michigan was not subject to the forum selection clauses of the parties' contracts because Plaintiff was making a professional negligence claim rather than a breach of contract claim. Dkt. #9-2, pp. 3 and 6. Moreover, Judge Cook expressly ruled on the issue,

stating unequivocally that "under Minnesota or Michigan law – no professional negligence action will lie against computer engineers and technicians," before going on to construe Plaintiff's complaint "as if it had been plead in contract." Dkt. #7.1 at 5-6.[2]

As for the fourth issue preclusion factor, under the "relaxed" finality requirement applied by the Eighth Circuit, the fact that Judge Cook dismissed the Michigan action "without prejudice" does not prevent this Court from giving preclusive effect to Judge Cook's legal conclusion that Plaintiff cannot properly pursue a professional negligence action against Defendant. *See Robinette*, 476 F.3d at 589-90 (discussing "relaxed" standard of finality and enforcing issue preclusion following a dismissal *without prejudice*). After expressly concluding that Plaintiff's lawsuit should be treated "as if it had been plead in contract" (Dkt. #7.1, p. 6), Judge Cook had no choice but to dismiss the Michigan action *without* prejudice, since a dismissal *with* prejudice would have had the *res judicata* effect of precluding a breach of contract claim by Plaintiff. Far from authorizing Plaintiff to bring a *professional negligence* lawsuit in Minnesota, Judge Cook was merely preserving Plaintiff's ability to bring a *breach of contract* lawsuit in Minnesota. Accordingly, there is no reason to treat Judge Cook's decision as anything

[2] The fact that Judge Cook went on to say (in a footnote) that "even if a tort action would lie, that action – based upon the allegedly severed link to the Plaintiff's e-mail accounts – would still 'aris[e] out of' the contracts, thus falling within the broad language of the forum selection clauses," does not mean that he did not actually decide that Plaintiff could not bring a professional negligence claim under Minnesota or Michigan law. Dkt. #7.1, p. 6 n.3. Judge Cook was simply identifying an additional basis for his ruling.

less than a final decision on the viability of a professional negligence claim against Defendant under either Minnesota or Michigan law.

Finally, Judge Cook's ruling regarding the viability of Plaintiff's purported professional negligence claim was essential to Judge Cook's decision to dismiss the Michigan lawsuit. Having concluded that Plaintiff could not present a viable professional negligence claim under either Minnesota or Michigan law, Judge Cook rejected Plaintiff's primary argument against Defendant's motion to dismiss or transfer, *i.e.*, that Plaintiff was making a tort claim that was not subject to the forum selection provisions in the parties' contracts. In that regard, Judge Cook expressly stated that he would construe Plaintiff's complaint "as if it had been plead in contract." Dkt. #7.1, p. 6. He then went on to dismiss the complaint on the basis of the forum selection clauses contained in the parties' contracts. *Id.* at 9.

B. The "Law of the Case" Doctrine Bars Plaintiff's Professional Negligence Count.

As explained in Defendant's Initial Memorandum, the "law of the case" is a "discretionary" doctrine that rests upon the principle that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). In the context of a decision that is based upon a matter of law, like Judge Cook's determination that "no professional negligence action will lie against computer engineers and technicians," the decision should only be reconsidered if "it is clearly erroneous and works manifest injustice." *Little Earth of the United Tribes, Inc. v. U.S. Dept. of Hous. & Urban Dev.*,

807 F.2d 1433, 1440 (8th Cir. 1986) (citing *United States v. Unger*, 700 F.2d 445, 450 n.10 (8th Cir.), *cert. denied*, 464 U.S. 934 (1983)). Because Plaintiff cannot establish that Judge Cook's legal conclusion regarding Plaintiff's purported professional negligence claim was "clearly erroneous and works manifest in justice," this Court should apply the "law of the case" doctrine to bar Plaintiff from seeking reconsideration of Judge Cook's ruling.

It does not matter that Judge Cook did not cite any Minnesota tort law in support of his decision. Judge Cook wisely rejected the inapposite Minnesota decisions that Plaintiff continues to cite to this Court. Then, in the absence of any controlling Minnesota decision, Judge Cook relied on cases from several other jurisdictions to assess whether a Minnesota court would permit a professional negligence claim arising out of computer-related services.

It is not as if Judge Cook failed to consider Minnesota law. Rather, Judge Cook looked to Minnesota law for support for Plaintiff's professional negligence theory and, finding none, properly concluded that no such support exists. Furthermore, Plaintiff had the obligation and the opportunity to submit legal authority for Judge Cook to consider, but failed to come up with any persuasive authority for the proposition that the courts of

Minnesota would recognize a professional negligence claim based upon computer-related services.[3]

C. Judge Cook Correctly Held that Plaintiff May Not Pursue a Professional Negligence Action Against Defendant.

Notwithstanding Plaintiff's vigorous protests to the contrary, there is substantial support for Judge Cook's conclusion that Minnesota would not authorize a professional negligence claim against a provider of computer-related services like the website design and hosting services that Defendant provided to Plaintiff. While no Minnesota court has ruled on the issue, there is no reason to believe that Minnesota courts would not adopt the virtually undisputed majority rule that computer consultants and service providers may not properly be sued for professional negligence.

[3] Plaintiff wrongly contends that Judge Cook's clear statement that Minnesota law does not permit a professional negligence action against a computer engineer or technician is not the "law of the case" because, according to Plaintiff, Judge Cook "specifically ruled that Minnesota tort law did not apply to his decision." Dkt. #11, p. 10. Plaintiff has mischaracterized Judge Cook's decision. Judge Cook actually held that a purported statement of Minnesota law from the *Piper Jaffray* case on which Plaintiff relied before Judge Cook and on which Plaintiff still relies in opposition to the present motion was "inapplicable to this controversy." Dkt. #7.1, pp. 3-4. Only after first reaching that conclusion did Judge Cook go on to further question Plaintiff's reliance on *Piper Jaffray*, noting that Minnesota law would have no application if, as Plaintiff argued, "this controversy were a tort action that is wholly independent of the parties' contracts." *Id.* at 4-5. The fact that Judge Cook pointed out that, from a choice of law perspective, Plaintiff's reliance on *Piper Jaffray* was inconsistent with Plaintiff's argument that its claims against Defendant were independent of the parties' contracts does not mean that Judge Cook failed to consider Minnesota law at all. On the contrary, Judge Cook's statements show that he duly considered Plaintiff's inconsistent and unsupported arguments regarding Minnesota law and rejected all of them.

1. *Judge Cook's Rejection of Plaintiff's Purported Professional Negligence Claim Has Ample Legal Support.*

There is substantial legal support for refusing to permit professional negligence claims arising out of computer-related services. *See, e.g., Racine County v. Oracular Milwaukee, Inc.*, 767 N.W.2d 280, 286 (Wis. Ct. App. 2009), *aff'd on other grounds*, 781 N.W.2d 88 (Wis. 2010); *Donald Dean & Sons, Inc. v. Xonitek Sys. Corp.*, 656 F.Supp.2d 314, 324 n.21 (N.D.N.Y. 2009); *Rapidigm, Inc. v. ATM Mgmt. Servs., Inc.*, No. GD02-17261, 2003 WL 23146480 (Pa. Com. Pl. July 10, 2003); *Atkins Nutritionals, Inc. v. Ernst & Young LLP*, 754 N.Y.S.2d 320, 322 (N.Y. App. Div. 2003); *Richard A. Rosenblatt & Co. v. Davidge Data Sys. Corp.*, 743 N.Y.S.2d 471, 472 (N.Y. App. Div. 2002); *Heidtman Steel Prods., Inc. v. Compuware Corp.*, No. 3:97CV7389, 2000 WL 621144, at *14 (N.D. Ohio Feb. 15, 2000) (applying Michigan law); *UOP v. Andersen Consulting*, 1997 WL 219820, *5-6 (Conn. Super. Ct. 1997) (applying Illinois law); *Arthur D. Little Int'l Inc. v. Dooyang Corp.*, 928 F. Supp. 1189, 1202-03 (D. Mass. 1996); *Columbus McKinnon Corp. v. China Semiconductor Co.*, 867 F. Supp. 1173, 1182-83 (W.D.N.Y. 1994); *RKB Enterprises Inc. v. Ernst & Young*, 582 N.Y.S.2d 814, 816 (N.Y. App. Div. 1992); *Hosp. Computer Sys., Inc. v. Staten Island Hosp.*, 788 F.

Supp. 1351, 1361 (D. N.J. 1992) (applying New York law); *see also* Raymond T. Nimmer, *The Law of Computer Technology* § 9:30 (3d ed. 2008).[4]

The foregoing legal authorities recite a number of reasons for prohibiting professional negligence claims against parties who provide computer-related services. For example, the Wisconsin court in *Racine County* described some of those reasons as follows:

> From our own experience, we know that many computer skills are learned "hands on" and not during long and intensive training. We also know that the state of Wisconsin does not license computer consultants. We are not aware of any enforceable code of ethics governing computer consultants. Moreover, allowing Racine County to pursue contract remedies promotes the very different purposes of tort law and contract law described by our supreme court in *Mackenzie v. Miller Brewing Co.*, 2001 WI 23, ¶¶ 27-28, 241 Wis.2d 700, 623 N.W.2d 739.

767 N.W.2d at 289. The federal district court judge in *Columbus McKinnon* similarly explained that "[t]o lift the theory of malpractice from its narrow origin of personal, professional services to a lay patient or client and apply it to the law of commercial contracts would obfuscate the necessary boundaries of these two areas of law." 867 F. Supp. at 1182-83.

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[4] Plaintiff tries to falsely diminish the number of decisions in which courts from other states have rejected professional negligence claims against providers of computer-related services. Indeed, Plaintiff goes so far as to say that four decisions cited by Defendant and Judge Cook "appear to be the sum total supporting Defendant's conclusion." Dkt. #11, p. 13. In making that statement, Plaintiff completely disregards two other decisions that Defendant cited in its initial memorandum, as well as the many above-cited decisions and authorities that Plaintiff would have necessarily uncovered had it bothered to research the point. Moreover, Plaintiff fails to meaningfully discuss any of the six decisions cited in Defendant's initial memorandum in which courts rejected professional negligence claims against providers of computer-related services.

In his above-cited treatise, Professor Nimmer asserts that malpractice claims against providers of even the most sophisticated computer-related services should not be allowed because of the absence of any recognized standards that govern practitioners:

> Most practitioners in computer consulting, design, and programming do not fit a model that creates malpractice liability. These businesses and "professional" parties clearly engage in complex and technically sophisticated activities. Computer programmers commonly define themselves as "professionals." Yet, despite the complexity of the work, computer programming and consultation lack the indicia associated with professional status for purposes of imposing higher standards of reasonable care. While programming requires significant skill and effective consultation requires substantial business and technical knowledge, the ability to practice either calling is not restricted or regulated at present by state licensing laws.... Unlike traditional professions, while practitioner associations exist, there is no substantial self-regulation or standardization of training within the programming or consulting professions.

Nimmer, *supra* at 9-11.

Along those same lines, the federal district court judge in the *Hospital Computer Systems* case noted:

> Professionals may be sued for malpractice because the higher standards for care imposed on them by their profession and by state licensing requirements engenders trust in them by clients that is not the norm of the marketplace. When no such higher code of ethics binds a person, such trust is unwarranted. Hence, no duties independent of those created by contract or under ordinary tort principles are imposed on them.

788 F. Supp. at 1361.

2. *There Is No Legal Support in Minnesota for Allowing Computer Service Providers to be Sued for Professional Negligence*.

a. Piper Jaffray is an insurance case that has no application here.

The linchpin of Plaintiff's dubious argument that Minnesota law permits a professional negligence claim against Defendant continues to be a quotation from *Piper Jaffray Cos. v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, 967 F. Supp. 1148, 1156 (D. Minn. 1997). As Judge Cook correctly noted, however, the fact that the issue in *Piper Jaffray* was the proper interpretation of a professional services exclusion in an insurance policy means that the definition of "professional services" that Plaintiff quotes from that decision has no application to the present case. Dkt. #7.1, pp. 3-4. Indeed, in setting forth that definition, the *Piper Jaffray* court expressly included the phrase "*within the meaning of an insurance exclusion*," to highlight the limited scope of the definition. 967 F. Supp. at 1156 (emphasis added).

As noted in Defendant's initial memorandum, Plaintiff omitted the phrase "within the meaning of an insurance exclusion" both times that Plaintiff quoted *Piper Jaffray* in opposition to Defendant's motion to dismiss or transfer the Michigan case. Having been exposed in that regard, Plaintiff now includes the limiting language in his opposition memorandum. Plaintiff continues to ignore the import of that limiting language, however, and continues to rely upon *Piper Jaffray* as if that decision established a rule of law in Minnesota that would prevent Minnesota courts from embracing the various decisions from other jurisdiction that have refused to permit professional negligence claims against parties who provide computer-related services.

Despite Plaintiff's efforts to expand the holding of *Piper Jaffray*, that case is plainly about insurance coverage, not about the boundaries of tort liability. For this reason, the language that Plaintiff quotes from *Piper Jaffray* does not in any way suggest that a Minnesota court would permit providers of computer-related services to be sued as professionals. Simply stated, the definition of "professional services" for purposes of interpreting the language of an insurance policy has no effect on whether or not a party who provides computer-related services can be sued for professional negligence.

In fact, many of the states whose laws have been held in the above-cited cases to prohibit tort actions for computer malpractice have separately endorsed the same basic definition of "professional services" *for purposes of interpreting the provisions of an insurance policy* as the court in *Piper Jaffray* applied. *See Chapman ex rel. Chapman v. Mutual Serv. Cas. Ins.* Co., 35 F. Supp. 2d 693, 698 (E.D. Wis. 1999); *Harad v. Aetna Cas. & Sur. Co.*, 839 F.2d 979, 984 (3d Cir. 1988) (applying Pennsylvania law); *St. Paul Fire & Marine v. Quintana*, 419 N.W.2d 60, 62 (Mich. Ct. App. 1988); *Hartford Cas. Ins. Co. v. Shehata*, 427 F. Supp. 336, 337 (N.D. Ill. 1977) (applying Illinois law); *Roe v. Federal Ins. Co.*, 587 N.E.2d 214, 217-18 (Mass. 1992).[5] Thus, far from distinguishing Minnesota law from that of the states that do not permit professional negligence claims

[5] The definition that the *Piper Jaffray* court applied comes from a Minnesota Court of Appeals decision that adopted the definition set forth by the Nebraska Supreme Court in *Marx v. Hartford Accident & Indem. Co.*, 157 N.W.2d 870, 871-72 (Neb. 1968). *See Piper Jaffray*, 967 F. Supp. at 1156 (citing *Ministers Life v. St. Paul Fire & Marine Ins. Co.*, 483 N.W.2d 88, 91 (Minn. Ct. App. 1992)). All but one of the above-cited cases directly cite *Marx*. Furthermore, the only case that does not, cites a case that contains a definition that can be traced straight back to *Marx*. *See Chapman*, 35 F. Supp. 2d at 698, *citing Shelley v. Moir*, 405 N.W.2d 737, 739 n.2 (Wis. Ct. App. 1987), *citing Bank of Cal. N.A. v. Opie*, 663 F.2d 977, 981 (9th Cir. 1981), *citing Marx*, 157 N.W.2d at 871-72.

against providers of computer-related services, the language that Plaintiff quotes from *Piper Jaffray* is consistent with the law of those states and, if anything, provides a reason to believe that Minnesota would join those states in refusing to allow professional negligence lawsuits in the context of computer-related services.

b. Plaintiff has cited no other Minnesota case that supports its professional negligence theory.

None of the other Minnesota decisions cited by Plaintiff support Plaintiff's contention that providers of computer-related services are subject to being sued for professional negligence.

The *City of Eveleth* case involved an *engineer* who provided services in connection with the design and installation of a water treatment facility. *City of Eveleth v. Ruble*, 302 Minn. 249, 225 N.W.2d 521 (1974). That the engineer was a professional does not appear to have been disputed. Rather, the arguments seem to have centered on whether, in light of the professional nature of the engineer's services, expert testimony was required to prove various parts of the plaintiff's case. 302 Minn. at 254-64, 225 N.W.2d at 525-30.

There was likewise no issue in the *City of Mounds View* case as to the ability of the plaintiff to assert professional negligence claims against the defendant *architects*. *City of Mounds View v. Walijarvi*, 263 N.W.2d 420, 422-23 (Minn. 1978). Indeed, the case recites a long history of courts treating architects as professionals. *Id.* at 423-24. The issue in the case was whether or not providers of professional services could be sued for breach of warranty as well as for professional negligence. *Id.* at 424-25. The

Minnesota Supreme Court refused to permit the breach of warranty claims to proceed. *Id.* at 425.[6]

The issue in the *Waldor Pump* case was whether or not an *engineer* owed a professional duty of care to a subcontractor who relied upon the engineer's plans. *Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assocs., Inc.*, 386 N.W.2d 375, 376-77 (Minn. Ct. App. 1986). Again, as in *City of Eveleth* and *City of Mounds View*, no one bothered to try to argue that the engineer in *Waldor Pump* was not a professional. As such, the case fails to provide any precedential or persuasive authority for Plaintiff's contention that, having contracted to provide website design and hosting services, Defendant can be sued for professional negligence in addition to breach of contract. Simply referring to Defendant's personnel as "computer engineers" does not make those individuals the equivalent of a civil engineer like the defendant in *Waldor Pump*.[7]

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[6] Plaintiff quotes the *City of Mounds View* case at length on page 16 of its opposition memorandum, but fails to tell this Court that the "rule" that the Minnesota Supreme Court was explaining in the quoted passage *was not* the rule permitting negligence claims against professionals, *but rather* the rule prohibiting breach of warranty claims against professionals. Since Plaintiff has not asserted any breach of warranty claims in the present action, the language that Plaintiff has quoted has no relevance here.

[7] Calling someone an "engineer" does not make them a "professional." Moreover, as explained at pages 7-8 above, there are a number of reasons why providers of the types of computer-related services that Defendant provided to Plaintiff should not be treated like engineers and architects for purposes of tort liability. Among other things, unlike architects and civil engineers, providers of computer-related services lack extensive standardized education and training, lack state licensing requirements, lack a recognized code of ethics, and lack statutory continuing education requirements. In addition, providers of computer-related services do not exercise the recurring discretionary judgment that is associated with the various professional groups against whom professional negligence claims are allowed.

c. Minnesota statutes do not support Plaintiff's professional negligence theory.

Significantly, Minnesota statutes that govern the licensing and continuing education requirements of professionals and that establish rules applicable to negligence claims against professionals all fail to mention providers of computer-related services. *See, e.g.*, Minn. Stat. § 326.01, *et seq.* (setting forth various initial and continuing licensing requirements for engineers, architects, surveyors and landscape architects); Minn. Stat. § 326A.01, *et seq.* (same for accountants); Minn. Stat. § 544.42 (defining "professional" to mean "a licensed attorney or an architect, certified public accountant, engineer, surveyor or landscape architect licensed or certified under Chapter 326 or 326A" and establishing rules governing negligence claims against such professionals); Minn. Stat. § 145.682 (setting forth rules governing negligence claims against "a physician, surgeon, dentist or other healthcare professional"). The fact that the Minnesota Legislature has chosen not to treat providers of computer-related services as "professionals" is yet another reason not to permit such providers to be sued on a professional negligence theory.

3. *The Three Non-Minnesota Decisions that Plaintiff has Cited Do Not Support Plaintiff's Contention that Computer Service Providers Can Be Sued for Professional Negligence*.

None of the three non-Minnesota cases that Plaintiff cites in its opposition memorandum provides a sound reason for concluding that Plaintiff should be allowed to pursue a professional negligence claim against Defendant. *See Diversified Graphics, LTD. v. Groves*, 868 F.2d 293 (8th Cir. 1988); *Martin v. Indiana Michigan Power Co.*,

383 F.3d 574 (6th Cir. 2004); *Data Processing Servs., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314 (Ind. Ct. App. 1986).

In *Diversified Graphics*, the plaintiff was permitted to assert tort claims under Missouri law against a *professional accounting firm* that allegedly acted in a negligent manner in providing "management advisory services" that involved computer consulting. As the court in a subsequent case pointed out, however, the *Diversified Graphics* case turned on the fact that it involved a claim against Ernst & Whinney, an accounting firm. *Hosp. Computer Sys.*, 788 F. Supp. at 1361 n.5. Indeed, the court in *Diversified Graphics* concluded that the evidence established that the accounting firm failed to fulfill its duty under the Management Advisory Services Practice Standards adopted by the American Institute of Certified Public Accountants. 868 F.2d at 296-97. Because, in the words of the court in *Hospital Computer*, "[a]ccountants are universally recognized as 'professionals' who are held to a higher standard of care," the *Diversified Graphics* case is "inapposite" in a case (like this one) that does not involve an accounting firm or the breach of any published professional standards. 788 F. Supp. at 1361 n.5.

In *Martin*, the issue was whether or not a particular employee was exempt from the overtime requirements of the Fair Labor Standards Act (the "FLSA"). 381 F.3d at 578. The case has absolutely nothing to do with tort liability. Even so, it is worth noting that Plaintiff omits the part of the FLSA's definition of "computer professional" that requires that the employee's primary duty "includes *work requiring the consistent exercise of discretion and judgment*." *See Martin*, 381 F.3d at 579 (quoting 29 C.F.R. §§ 541.3(a)(4), 541.3(e)) (emphasis added). Presumably, Plaintiff recognizes that the

work involved in designing and hosting a simple website and directing email traffic to particular mailboxes does not involve "the consistent exercise of discretion and judgment." As the Sixth Circuit recognized in *Martin*, not all computer jobs are "highly complex and require exceptional expertise." *Id.* at 580.

Finally, like each of the other cases on which Plaintiff relies, the *Data Processing Services* case can be readily distinguished from the present case and does not support adoption of a rule that would permit providers of computer-related services to be sued for professional negligence. The central issue in that case was whether the U.C.C. applied to the parties' transaction. 492 N.E.2d at 317-19. In that regard, the case discusses whether the transaction was a "sale of goods" or a "sale of services." *Id*. The court ultimately concluded that the transaction, which was for custom computer programming work at a time (1979-81) when then the world of computing was far more mysterious and imposing than it is today, was for the sale of services, so the U.C.C. did not apply. *Id*. at 318.[8] The court nevertheless affirmed an award of "damages for a *breach of contract*," concluding that there was an implied contractual promise by the computer programmer to possess "the reasonable skill and ability to do the job for which it contracted." *Id*. at 319-20 and 322 (emphasis added). The case does not discuss or recognize any right to assert a professional negligence claim.

[8] The fact that the *Data Processing* case arose at a time when the world of computing was completely different provides another reason for disregarding that case. Whereas programmers at the time of the underlying transaction in *Data Processing* would have had to write computer code to create the software necessary to provide the services that were the subject of that transaction, no one at Findlaw had to write any code or do any actual "programming" to design and host Plaintiff's website and to direct the flow of Plaintiff's emails.

CONCLUSION

For all of the reasons set forth above and in Defendant's initial memorandum, the Court should dismiss Plaintiff's purported "professional negligence" claims (*i.e.*, Count I of the Complaint), pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

MOSS & BARNETT
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Dated: April 18, 2012

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