

IN THE CIRCUIT COURT OF JACKSON COUNTY  
AT KANSAS CITY

SAMUEL K. LIPARI, )  
(Statutory Trustee of Dissolved )  
Medical Supply Chain, Inc.) )  
 )  
Plaintiff, )  
 )  
v. ) Case No. 0616-CV07421  
 )  
GENERAL ELECTRIC COMPANY, et al., )  
 )  
Defendants. )

GENERAL ELECTRIC COMPANY,  
GENERAL ELECTRIC CAPITAL BUSINESS  
ASSET FUNDING CORPORATION AND  
GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, LLC'S  
SUGGESTIONS IN SUPPORT OF THEIR MOTION TO DISMISS

Pursuant to Missouri Rules of Civil Procedure Rule 55.27 and 67.01, General Electric Company ("GE"), General Electric Capital Business Asset Funding Corporation ("GE Capital") and GE Transportation Systems Global Signaling, LLC ("GE Transportation") (collectively the "GE defendants") has moved this Court for an Order dismissing this action against them. The GE defendants' suggestions state more fully the basis for the motion.

BACKGROUND

This case represents another in a long series of lawsuits brought by Medical Supply Chain and/or Lipari regarding Medical Supply Chain's purported attempt to enter into the health care supplier/distribution market.

MSC's First Suit Against US Bancorp. In November of 2002, Medical Supply Chain ("MSC") brought suit against US Bancorp (and a host of others) in federal court in Kansas. In that suit, MSC claimed that in March of 2002 it sought to establish a banking relationship with US Bancorp. US Bancorp, however, refused to establish the escrow accounts requested by MSC

because of the "know your customer" requirements of the USA Patriot Act. MSC alleged antitrust claims and a variety of state law claims.

On November 12, 2002, MSC filed suit against US Bancorp and others (US Bancorp I). On June 16, 2003, the United States District Court for the District of Kansas dismissed MSC's Complaint in US Bancorp I. In its dismissal, the Court stated that some of MSC's allegations were "completely divorced from rational thought." Medical Supply Chain v. US Bancorp NA, et al., 2003 WL 21479192, at \*8. The Court further admonished MSC's counsel "to take greater care in ensuring that the claims he brings on his client's behalf are supported by the law and the facts." 2003 WL 21479192 at \*6.

MSC's First Suit Against the GE Defendants. On June 18, 2003 (just two days after the district court dismissed MSC's claims against US Bancorp), MSC filed suit against the GE defendants in federal court in Kansas (GE I). In that suit, MSC claimed that the GE defendants prevented MSC's entry into the health care supplier/distribution market by refusing to sublease a building or provide financing to MSC. Specifically, MSC alleged that the GE defendants (and GE CEO Jeffrey Immelt) violated the antitrust laws and Missouri common laws, including breach of contract. On January 29, 2004 the federal district court dismissed MSC's claims. MSC appealed the ruling to the Tenth Circuit. On July 26, 2005 the Tenth Circuit affirmed the district court ruling and remanded the matter to the district court for a determination of the proper sanctions against MSC.

MSC's Second Suit Against US Bancorp. In March of 2005 MSC filed a second suit against US Bancorp and a host of other defendants (US Bancorp II). This time MSC brought the suit in federal court in Missouri. The factual allegations and legal claims in US Bancorp II were substantially similar to the allegations and claims MSC asserted in US Bancorp I. US Bancorp II

was transferred from Missouri to Kansas. On March 7, 2006 the district dismissed MSC's Complaint against all defendants and it granted defendants' motion for sanctions.

MSC's Second Suit Against GE. On March 28, 2006, MSC, once again, filed suit against the GE defendants CGE II. In addition to naming the GE defendants as parties, MSC also named Carpet N' More and Heartland Financial as defendants. MSC's allegations against the GE defendants in GE II are substantially the same as MSC's allegations against GE in GE I. See GE I Amended Complaint, attached hereto and made a part hereof.

As in GE I Plaintiffs' allegations center around communications between MSC and GE's property manager, George Fricke. On or about May 15, 2003, Brett Landrith, MSC's counsel, wrote to George Fricke and offered to release GE Corporation from its remaining lease obligations on the building. Compare GE II Complaint, ~ 55 with GE I Amended Complaint, ~ 25. The offer contained a number of express conditions, however. Specifically, the offer was "contingent upon ... the City of Blue Springs' approval of Medical Supply Chain's purchase and occupation of the building," and "contingent upon GE Capital securing a 20 year mortgage on a property with a first year moratorium." Compare GE II Complaint, ~ 55 with GE I Amended Complaint, ~ 25. Landrith also asked Fricke to provide him with the name of a contact person for GE Capital or its mortgage agent. 14.

On May 15, Fricke left a voice mail message stating that "we will accept that transaction" and on the same day he followed up with an e-mail stating that "GE will accept your proposal to terminate the existing lease." Compare GE II Complaint, ~ 56-57 with GE I Amended Complaint, m126-27. MSC does not allege that Fricke purported to accept MSC's mortgage proposal on behalf of GE Capital, or that Fricke was even authorized to act on behalf of GE Capital. More importantly, MSC does not allege that anyone from GE Capital accepted MSC's

mortgage proposal orally or in writing, either before or after GE Capital's review of MSC's loan application.

MSC claims that GE did not finance MSC's purchase of the building and therefore allegedly repudiated its contract with MSC. As a consequence, MSC filed this suit for damages. Unlike the federal lawsuits (US Bancorp I, US Bancorp II and GE I) that sought damages under federal antitrust laws and state common law, MSC is now only alleging a breach of contract claim.

#### STANDARD OF REVIEW

A motion to dismiss for failure to state a cause of action is solely a test to the adequacy of the plaintiff's Petition. In considering a motion to dismiss, the Petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action. Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 464 (Mo. banc 2001). However, the court can disregard conclusory statements in a petition that are not supported by properly alleged facts. See, M., Mackey v. Mackey, 914 S.W.2d 48, 50 (Mo. App. 1996).

#### ARGUMENT

##### I. Lipari Does Not Have The Legal Capacity To Sue.

Lipari claims that he dissolved MSC on January 27, 2006. Petition, ~ 13. Because MSC is now dissolved, Lipari claims that he is the statutory trustee under R.S.Mo. § 351.526. As statutory trustee, Lipari claims that he has standing to bring this suit against the defendants. R.S.Mo. 351.526, however, applies only if the corporate rights and privileges of the corporation were forfeited prior to August 28, 1990. Thus, by Lipari's own admission, § 351.526 does not apply to this case. Instead, it is R.S.Mo. 351.476 that applies to this situation. Pursuant to

351.476.1, a "dissolved corporation continues its corporate existence but may not carry on in any business except that appropriate to wind up and liquidate its business and affairs, ...

(2) dissolution of a corporation does not: ...

(5) prevent commencement of a proceeding by or against the corporation in its corporate nature ... "

Thus, only MSC can bring this lawsuit against the defendants because Lipari does not have the requisite legal capacity to bring the suit and the Petition should be dismissed.

II. Plaintiffs Breach of Contract Claim Should be Dismissed Because Plaintiff Does Not Allege Satisfaction of Two Conditions Precedent

A. Contract Claim Against GE

The basis for MSC's breach of contract claim is that the May 15, 2003 letter from Brett Landrith, its corporate counsel to GE Commercial Properties employee (George Fricke) and Fricke's voice mail and e-mail, taken together, constitute a written agreement. Petition at ~ 55, 56 and 57. However, as MSC's offer plainly states, it was "contingent on ... the City of Blue Springs' approval of Medical Supply Chain's purchase and occupation of the building and is contingent upon GE securing a 20 year mortgage on a building and a property with a first year moratorium. Petition at ~ 55.

The satisfaction of a condition precedent must either be alleged in the Complaint or MSC must state a reason for its non-performance. Lowery v. Air Support Int'l. Inc., 982 S.W.2d, 326, 330 (Mo. App. 1998) (citing Globe Am. Corp. v. Miller Hatcheries, Inc., 110 S.W.2d 393, 396 (Mo. App. 1937)). MSC's breach of contract claim should be dismissed because it does not and cannot allege satisfaction of either condition. MSC does allege that it introduced itself to the City of Blue Springs' Economic Development. Petition at ~ 89. MSC also alleges that the City of Blue Springs' Economic Development Director "approved of the use of the building for a

national corporate headquarters of a hospitality supply chain technology company capable of producing above living wage jobs for the community." Neither of these allegations, however, satisfy the necessary condition precedent. In fact, MSC is conspicuously silent regarding whether the City of Blue Springs approved MSC's purchase and occupation of the building at 1600 N.E. Coronado Drive. MSC is also conspicuously silent as to any reason or excuse as to why the City did not provide the necessary approval. MSC's silence regarding this condition precedent is fatal and its breach of contract claim against GE should therefore fail. Lowery, 982 S.W.2d at 330.

The Petition also fails to allege satisfaction of the other condition precedent, acceptance by GE Capital of a mortgage on the terms required by MSC. Although MSC alleges that it had discussions with an individual from GE Capital (Petition ~ 94.96), it does not allege that it received financing from GE Capital, or anyone else for that matter. More importantly, even if MSC could allege that GE Capital agreed to lend it money, MSC's claim must still fail under Missouri Statute of Frauds. Because any agreement between MSC and a lender would not be capable of performance within a year (in fact, MSC wanted a year long moratorium of mortgage payments), the statute of frauds applies to the "agreement." Thus the purported loan agreement between GE Capital and MSC would have to be "in writing and signed by the party to be charged therewith." Mo. Rev. Stat. § 432.010. Accordingly, MSC's allegations, to the extent there are any, that GE Capital had agreed to lend MSC money must fail because there is no allegation of any written agreement between MSC and GE Capital, as required under the statute of frauds. Because MSC cannot allege the satisfaction of the condition precedent pertaining to securing a loan, its purported contract claim against GE fails.

B. Contract Claims Against GE Capital and GE Transportation

MSC has not, and cannot, allege that it had a written agreement with GE Capital and GE Transportation. Because MSC's offer as reflected in paragraph 55 of the Petition was not capable of performance within a year, any agreement between GE Capital and MSC or GE Transportation and MSC would have to be in writing and signed before it could be enforceable under Missouri statute of fraud. Mo. Rev. Stat. § 432.010. See above. Because MSC has not alleged any agreement, let alone a written agreement, between it and GE Capital or GE Transportation, its claims of a breach of contract should fail.

Nor can MSC claim that GE, through George Fricke, accepted MSC's offer on behalf of GE Capital and GE Transportation. Even if Fricke accepted the contract on behalf of GE, GE's acceptance of the contingent contract for the buyout of the lease cannot bind GE Capital to extend a mortgage to MSC. In a breach of contract action, "two separate corporations are to be regarded as distinct legal entities, even if the stock of one is owned partly or wholly by the other." Mid-Missouri Tel. Co. v. Alma Tel. Co., 18 S.W.3d, 578-582 (Mo. App. 2000) (finding no breach of contract signed by an affiliate).

The Petition alleges only that Fricke told MSC that he was "the authority for the building at 1600 N.E. Coronado Drive" (Petition at ~ 82). The Petition does not allege that GE Capital or GE Transportation told MSC that Fricke could accept a contract on either of their behalf. Nor does plaintiffs' Petition even suggest that Fricke had the authority to bind either GE Capital or GE Transportation. MSC recognized that Fricke only spoke for GE, not any of the other defendants. See Petition ~ 55 (alleging that MSC requested that Fricke provide it with a "contact person for GE Capital or its mortgage agent"). The Petition does not and cannot allege that GE Capital and GE Transportation actually authorized Fricke to accept a contract on their behalf. To

the extent MSC argues that Fricke had actual authority to bind GE Capital or GE Transportation, that argument fails.

To the extent MSC argues that Fricke had apparent authority to accept a contract on behalf of GE Capital and GE Transportation, that argument must also fail. Apparent authority can only be based only upon statements by the principals (i.e., GE Capital and GE Transportation), not any statement by the agent. State v. Cook, 104 S.W.3d 808, 813 (Mo. App. 2003) ("[A]pparent authority cannot be created by acts of the supposed agent alone; the principal itself must have created the appearance of authority in order to be held liable"), Essco Geometric v. Harbored Indus., 446 F.3d 718,726 (8<sup>th</sup> Cir. 1995) ("Under Missouri law, apparent authority is created by the conduct of the principal which causes a third person reasonably to believe that the purported agent has the authority to act for the principal, and to reasonably and in good faith rely on the authority held out by the principal.").

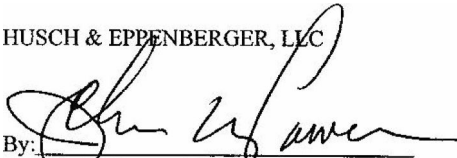
Because GE Capital and GE Transportation neither signed the alleged agreement, nor did they expressly or implicitly authorized Fricke or GE to enter into the alleged contract with MSC, they cannot be bound by the terms and obligations of the contract. Continental Cas. Co. v. Campbell Design Group, Inc., 914 S.W.2d 43, 44 (Mo. App. 1996) (A "basic legal premise [is] that a contractor generally binds no one but the parties thereto, and it cannot impose any contractual obligations or liability on one not a party to it"). Accordingly, MSC has no claim for breach of contract against GE Capital or GE Transportation.

#### **CONCLUSION**

Pursuant to R.S.Mo. 351.526 and 351.476, Lipari does not have standing to bring this action. Lipari's lack of standing should cause this Court to dismiss the claim. Even if Lipari has standing, the claim should still be dismissed because, based on plaintiffs own allegations in the

Complaint, it fails to state a claim upon which relief can be granted. If a contract between GE and MSC were formed, GE did not breach the contract because two of the three condition precedents were never performed. GE Capital and GE Transportation were never parties to the contract and, as such, they cannot be obligated to perform any of the terms or conditions of the contract.

HUSCH & EPPENBERGER, LLC



By:

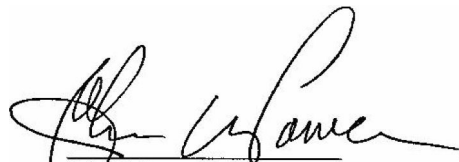
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BUSINESS ASSET FUNDING CORPORATION  
AND GE TRANSPORTATION SYSTEMS  
GLOBAL SIGNALING, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 4th day of May, 2006, by first class mail, postage prepaid to:

Samuel K. Lipari  
297 NE Bayview  
Lee's Summit, MO 64064

  
John K. Power