

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE, MISSOURI**

SAMUEL K. LIPARI)		
(Assignee of Dissolved Medical Supply Chain,)		
Inc.))		
)		
Plaintiff,)	Case No.	0816-CV04217
)	Division	02
vs.)		
)		
NOVATION, LLC, et al.,)		
)		
Defendants.)		
)		
)		

**DEFENDANT LATHROP & GAGE L.c.'S SUGGESTIONS
IN OPPOSITION TO PLAINTIFF'S MOTION FOR
LEAVE TO AMEND THE ORIGINAL PETITION FOR RELIEF**

COMES NOW Defendant, Lathrop & Gage L.C. ("Lathrop & Gage"), and offers these Suggestions in Opposition to Plaintiffs Motion for Leave to Amend the Original Petition for Relief.

1. BACKGROUND AND SUMMARY OF ARGUMENT.

Judgment has been entered in favor of each of the defendants that were served with process in this case.' In the nearly eleven months of litigation thus far, plaintiff had never sought leave to Amend his Petition. The proposed Amended Petition does not present claims that were unknown or unknowable at the time of Original Petition and are without merit. The Court should exercise its discretion and deny the requested Amendment.

¹ Plaintiff misstates the record (Motion at ~ 6) in suggesting the Court did not grant a Motion to Dismiss by Mr. Zollars. See Order of Judgment dated August 8, 2008. The Order does not address a Motion by Mr. Zollars. The on-line docket information, which is concededly not an official record, appears to indicate that service was returned non-est on Robert Zollars (5-5-2008) and that no new summons has been requested or issued.

11. ARGUMENT.

Plaintiffs Petition named 27 defendants. Lathrop & Gage filed an Answer to Plaintiffs Petition on May 9, 2005. The Court entered an Order of Judgment on August 5, 2005 in favor of twenty-five defendants (all but Lathrop & Gage that had been served with process). The August 5, 2005 Order plainly states that it is with prejudice as to those twenty-five defendants. Plaintiff then filed (an improper) interlocutory appeal asserting that the judgments entered on August 5, 2005 were ripe for appeal. The Appeal was dismissed because the case against Lathrop & Gage remained pending in the Circuit Court. The Order dismissing the Appeal was entered on October 6, 2005 and the mandate filed on October 9, 2005. Plaintiff did not seek leave to file an Amended Petition at that time. He did file a Motion seeking an Order declaring the case final for purposes of appeal (styled a Motion for Relief from Judgment or Order). That Motion was denied on November 20, 2005. Even though the appeal was untimely it is notable that plaintiff twice sought to have the Petition reviewed on appeal rather than seek to amend his Petition.

On November 12, 2005 Lathrop & Gage filed its Motion for Judgment on the Pleadings. In its opposition to the Motion for Judgment on the Pleadings, plaintiff argued zealously that his Petition was adequate. He never argued that he should be granted leave to amend, and never filed a separate motion seeking leave to amend. He never identified new evidence warranting an amendment when opposing the Motion for Judgment. The order granting judgment on the pleadings in favor of Lathrop & Gage was entered on December 29, 2005.

Lathrop & Gage filed an Answer to Plaintiffs Petition and therefore plaintiff is not entitled to amend as a matter of right. Mo. R. Civ. P. 55.33(a). Amendment after an answer may

only occur with leave of court or by consent of the adverse parties. *Id.* Lathrop & Gage does not consent.

Even if plaintiff sought leave under Rule 55.33(a) (he has not), the Court has discretion to deny leave to amend and that discretion is typically not disturbed on appeal. *Consumers Oil Co. v. American National Bank*, 713 S.W.2d 598,600 (Mo. Ct. App. 1986). Plaintiff has had adequate time and multiple opportunities to seek leave to amend his Petition. The defendants have expended time, effort and expense to litigate the allegations of the Petition. What is more, as is plain from the face of his Petition (Appendix 1, "history of litigation"), this action is the fifth or sixth by Mr. Lipari or his company (Medical Supply Chain) based on the same underlying facts and transactions. Mr. Lipari has been litigating this claim in State and Federal Courts in Missouri and in Federal Court in Kansas since 2002. It is manifest that he has had a full, fair, complete opportunity to plead a valid claim and does not suffer prejudice if his Motion is denied.

In addition, a court need not grant leave to amend a Petition where it is plain that amendment would be meritless. *Stewart Title v. WKC Restaurant Ventures, Inc.*, 961 S.W.2d 874 (Mo. Ct. App. 1998) (discretion is not abused when proposed amendment presents a meritless claim).

Plaintiff's Proposed Amended Petition does not cure any "defects" in his pleadings against Lathrop & Gage and proposes a plainly meritless claim. Plaintiff proposes to add as individual defendants Joel Voran and Andy Ramirez. Both are partners in Lathrop & Gage.² The Proposed Amended Petition does not allege any new conduct by them and does not allege that they caused any harm in any capacity other than in association with their membership in

² Effective, January 1, 2009, Lathrop & Gage L.C. became Lathrop & Gage LLP.

Lathrop & Gage.' The only time Mr. Voran and Mr. Ramirez are identified in the substance of the Proposed Amended Petition is in paragraph 58 in which their names are added to a list of other persons or entities alleged to be defendants. Adding two individuals of the entity Lathrop & Gage does not cure any deficiency in the Original Petition and does not add any new claims based on newly discovered evidence.⁴

IIL AMENDMENT UNDER RULE 67.06 IS NOT DISCRETIONARY.

Mr. Lipari's reliance on Mo. R. Civ. P. 67.06 is misplaced. The procedure described in Rule 67.06 is not triggered by the Order of Dismissal with Prejudice and the Judgment on the Pleadings entered in this case. Additionally, even if plaintiffs Motion is proper under rule 67.06, the Court has discretion to deny the motion. See *Saigh v. Anheuser Bush*, 396 S.W.2d 9 (Mo. Ct. App. 1965). The Court is not required to allow amendment. Construction of the rule to always require a right to amend would result in litigation which would never end.

³ The only new "conduct" by Lathrop & Gage as an entity in the Proposed Amended Petition appears at pp. 109-111, 117 where Mr. Lipari makes the specious claim that Lathrop's pleadings in this case constitute actionable conspiracy or antitrust activity.

⁴ Counts VI and VII of the Proposed Amended Petition do not address Lathrop & Gage, at least not clearly. In either event, they are frivolous and specious claims and invalid on their face.

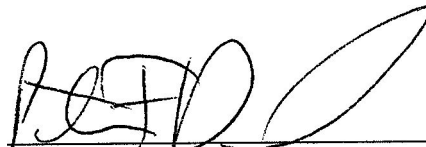
IV. CONCLUSION

All of the plaintiffs' claims against defendants (that are before this Court) have been adjudicated. Plaintiffs' Motion for Amendment should be denied.

Respectfully submitted,

LATHROP & GAGE LLP

By:

A handwritten signature in black ink, appearing to read 'W. Beck', written over a horizontal line.

William G. Beck (26549)

Peter F. Daniel (33798)

J. Alison Auxter (59079)

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Kansas City, Missouri 64108-2684

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ATTORNEYS FOR DEFENDANT

LATHROP & GAGE LLP

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, by First Class United States mail, postage prepaid, on the following party of record this 9th day of January, 2009:

Mr. Samuel K. Lipari
Medical Supply Chain
3520 Akin Boulevard, #918
Lee's Summit, MO 64064-7910

A handwritten signature in black ink, appearing to be 'L. Gage', written over a horizontal line.

An Attorney for Defendant
Lathrop & Gage LLP

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