

**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.)		
)		
)		

2008 NOV 2 PM 7:00
TDT

**DEFENDANT LATHROP & GAGE L.C.'S REPLY SUGGESTIONS
IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS**

COMES NOW Defendant, Lathrop & Gage L.C. ("Lathrop & Gage"), and offers these Reply Suggestions in Support of its Motion for Judgment on the Pleadings. The briefing on the Motion is complete and the matter is ripe for ruling.

I. INTRODUCTION

The Plaintiffs Petition fails to identify any basis upon which Plaintiff can ever be entitled to judgment against Lathrop & Gage. He has not sought to amend the Petition and Lathrop has not agreed (expressly or impliedly) to any amendment. Mr. Lipari's efforts to "clarify" the intent of the Petition demonstrate again that there is no legal basis upon which claims can be presented against the law firm Lathrop & Gage. Lathrop & Gage has not asked the Court to rely on any matters outside the pleadings (other than case law-some directly addressing Mr. Lipari and his claims), but even if the Court chooses to treat this as a Summary Judgment Motion, Mr. Lipari has had a full and fair opportunity to come forward with any material evidence and has failed to do so.

II. ARGUMENT

A. The Motion is Timely and A Motion to Dismiss is Appropriate.

The Motion for Judgment is timely under Mo.S.Ct.R. 55.27. The pleadings are closed. Defendant Lathrop & Gage filed an Answer on May 9,2008. Within the Answer, Lathrop & Gage pled that the Petition Failed to State Facts Upon Which Relief Can be Granted. Answer, Affirmative Defenses, Paragraph 1, Page 15. Plaintiffs Motion to Strike Lathrop's Answer and Plaintiffs Motion to Make Lathrop's Answer More Definite and Certain were denied, and Plaintiff did not subsequently file any reply to the Answer of Lathrop & Gage.

As required by Mo.S.Ct.R. 55.27, the Motion for Judgment on the Pleadings is presented at a time when it will not delay the trial. Trial is not set until November 2, 2009. Plaintiff has not sought additional time to reply, not requested a hearing, and not indicated that additional proceedings are needed for this Motion to be ripe.

Except for citation to published cases in other courts, Lathrop's Motion for Judgment on the Pleadings does not rely upon any materials outside the pleadings. In *RGB2 Inc. v. Chestnut Plaza, Inc.*, 103 S.W.3d 420 (Mo. Ct. App. 2003), cited by Plaintiff, the trial court erroneously relied upon a fact pled in the defendant's answer in ruling on a Rule 55.27(b) Motion. Lathrop & Gage has not requested that the Court rely upon a fact contained in the Defendant's Answer. In *Keirn v. Big Bass, Inc.*, 949 S.W.2d 122 (Mo. Ct. App. 1997), also cited by the Plaintiff, the Court of Appeals affirmed the trial court's judgment holding the trial court did not err in granting the Defendant's Motion for Judgment on the Pleadings when the Plaintiffs counsel did not request an opportunity to present evidence and did not offer any evidence that would have created an issue of fact. *Id.* at 125.

In addition, Plaintiff has chosen to attach 246 pages of Exhibits to his Response to Defendant's Motion for Dismissal. Any perceived prejudice in bringing the Motion under Rule 55.27(b) rather than Rule 74.04 is completely alleviated because Plaintiff has provided the Court with such additional materials as he sees fit. Lathrop & Gage has no objection to the Court reviewing the additional materials provided in Plaintiff's Response to rule on its Motion for Judgment.

Contrary to Mr. Lipari's assertion, (Response at 9), it is not required that all of the facts in the Petition *actually* be true. Rather, for purposes of considering a Motion for Judgment on the Pleadings, the *well pled* facts are treated as being true and then examined to determine whether a cause of action is stated on those facts. *American States Insurance Co. v. Herman C. Kempker Construction Company, Inc.*, 71 S.W.3d 232,235 (Mo. Ct. App. 2002) (facts assumed to be true); *Lick Creek Sewer Systems, Inc. v. Bank of Bourbon*, 747 S.W.2d 317,322 (Mo. Ct. App. 1998)(only well pled facts must be considered).

B. Plaintiff's Petition Does Not State a Claim Against Lathrop & Gage Upon Which Relief May Be Granted.

Considered alone or in combination with the attachments, Mr. Lipari does not state a cause of action against Lathrop & Gage. The Petition demonstrates on its face that it is untimely, does not state a cause of action against Lathrop & Gage for antitrust and the facts do not support actions for tortious interference or *prima facie* tort. In paragraphs 8-13 of his Response, Plaintiff restates and to an extent recasts his allegations against Lathrop & Gage. Restating defective pleadings does not make them sufficient. Even as slightly recast, the Petition does not state a cause of action against Lathrop & Gage for

violation of antitrust or conspiracy to violate antitrust, fraud, misrepresentation, tortious interference or *prima facie* tort.

Mr. Lipari's reliance on paragraphs 102 and 104 of his Petition only reinforces Lathrop & Gage's statute of limitations arguments. Paragraphs 102 and 104 do not identify Lathrop & Gage by name. They do not charge Lathrop & Gage with any specific conduct. They do not allege market control by Lathrop & Gage and do not define the relevant market or how a law firm could dominate a medical supply market.

His pleading demonstrates that he already brought suit on his claims against the "co-conspirators" for antitrust violations in 2002. Petition, Appendix 1. Any claim that Lathrop & Gage is liable for those injuries is barred by the statute of limitations.'

C. The Petition, Even If "True" Fails To State a Cause of Action Against Lathrop & Gage for Violation of Missouri's Antitrust Laws.

The "facts" pled in Mr. Lipari's Petition do not state a cause of action against Lathrop & Gage. Mr. Lipari may not simply cite the elements of the antitrust claim and then allege a violation of them in order to succeed on his claim. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F.Supp.2d at 1327; *TV Comm. Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (9th Cir. 1992) ("Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief."); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must 'provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a

¹ There is no cause of action within Mo.Rev.Stat. § 416.031 for tortiously interfering with "property rights" arising from antitrust violations, which is what Mr. Lipari has literally pled. Even if such a right existed, the harm occurred when the property rights were violated, which, according to Mr. Lipari's pleadings, was more than five years ago.

conspiracy has taken place. "); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911,913-14 (5th Cir. 1952) ("[A] general allegation of conspiracy, without a statement of the facts constituting the conspiracy to restrain trade, its object and accomplishment, is but an allegation of a legal conclusion, which is insufficient to constitute a cause of action."); *see also Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (holding that an antitrust complaint must contain enough facts that, when taken as true, show a plausible right to recovery). Even if true, the "facts" pled by Mr. Lipari do not state a claim against Lathrop & Gage for violations of Missouri's antitrust laws.

D. Subsequent Acts, Fraud, Tortious Interference and *Prima Facie* Tort.

Mr. Lipari terminated Medical Supply Chain, Inc. on January 27,2006. Petition, paragraph 106. He alleges he is the assignee of Medical Supply Chain, Inc. Petition, page 1. Mr. Lipari's claims cannot be broader than those that existed when Medical Supply Chain, Inc. was terminated. Mr. Lipari cannot act on behalf of anyone but himself. Any allegations of conduct that occurred after the termination of the corporation cannot state a cause of action upon which relief may be granted in this case because a terminated entity cannot be damaged.

To permit this tort action by Mr. Lipari arising out of an alleged interference with the Kansas Supreme Court's bar disciplinary proceedings regarding Mr. Landrith would violate the full faith and credit provisions of the United States Constitution. Mr. Lipari has neither the standing nor the right to challenge those proceedings in a tort claim in this court. The tortious interference claims are barred by the statute of limitations and the *prima facie* tort claims fails as a matter of law because it pleads purportedly illegal

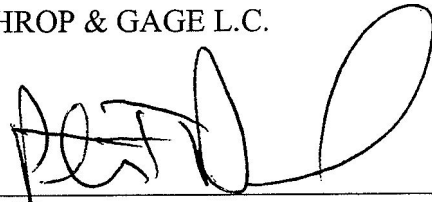
actions. Mr. Lipari did not have a valid contractual right to be represented by a disbarred lawyer.²

WHEREFORE, for the reasons discussed above, Lathrop & Gage requests that this Court grant Lathrop & Gage's Motion for Judgment on the Pleadings and dismiss all claims against Lathrop & Gage with prejudice, and grant all other relief which this Court deems just and proper.

Respectfully submitted,

LATHROP & GAGE L.C.

By:

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

William G. Beck (26849)

Peter F. Daniel (33798)

J. Alison Auxter (59079)

2345 Grand Boulevard, Suite 2800

Kansas City, Missouri 64108-2684

Telephone: (816) 292-2000

Telecopier: (816) 292-2001

ATTORNEY FOR DEFENDANT

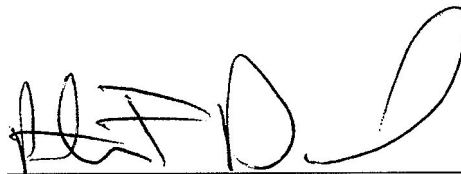
LATHROP & GAGE i.c.,

² Lathrop & Gage does not understand and therefore does not address section "f" of Plaintiffs response. It does not appear to state any argument in opposition to the current Motion.

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 24th day of November, 2008:

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 L.C.

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