

**IN THE UNITED STATES COURT  
DISTRICT OF KANSAS**

SAMUEL K. LIPARI,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	Case No. 2:07-cv-02146-CM
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
<i>Defendants.</i>	)	

**REPLY TO MOTION TO DISMISS**

Comes now the plaintiff Samuel K. Lipari through his attorney Dennis Hawver and makes the following timely reply to the defendants' motion to dismiss (Doc.# 22).

**1. Defendants' contention that Plaintiff Lipari does not have standing or legal capacity to assert a claim on behalf of a dissolved corporation (Medical Supply Chain, Inc.).**

The defendants' contention is frivolous in that it contradicts clearly established law, both state and federal rules, statutes, the US Supreme Court and controlling case law for this jurisdiction and the State of Missouri court where the complaint was filed.

Federal courts recognize that corporation dissolution does not end the assignable rights to pursue claims. The dissolution of a firm need not abate suits by or against it, *Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co.*, 629 F.2d 1183, 1185-86 (7th Cir. 1980), since "the dissolved corporation might have a successor that could be substituted for it and the suit continue." *BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702, 705 (7th Cir. 2006).

In *Levy v. Liebling*, 238 F.2d 505 (7th Cir. 1956), cert. denied, 353 U.S. 936, 77 S.Ct. 812, 1 L.Ed.2d 759 (1957) the question was raised as to the ability of former shareholders to bring an action on a judgment, after the corporation was dissolved. The decision allowed the shareholders to maintain a cause of action on the judgment, recognized the rights of former shareholders to succeed, **in their individual capacities**, to rights owned by their corporation prior to its dissolution. The prevailing rule is the general principle that property of a dissolved corporation passes to its stockholders, who can then maintain an action on the property. (*Fletcher, supra*, § 8224, 19 Am.Jur.2d Corporations § 1659).

Samuel Lipari is the assignee of all rights and interests of the dissolved Missouri corporation Medical Supply Chain, Inc. and is identified as such in the complaint.

“The assignment by Deer Wood to Smith of its rights, title and interest under the purchase contract is within the bounds of "winding up" its business and affairs after the corporation was dissolved. § 351.476.1(5). We find assignment of contract rights of a dissolved corporation to be allowable under Missouri law.”

*Smith v. Taylor-Morley, Inc.*, 929 S.W.2d 918 at 924 (Mo. App. E.D., 1996).

Federal statutes governing civil actions permit Samuel Lipari to pursue his claims as an assignee. 28 U.S.C. § 1654 ensures that individuals may appear *pro se*. Section 1654 states: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

This court has to look to Missouri state law to determine Samuel Lipari’s capacity as a plaintiff. F.R.Civ P. Rule 17 relies on the corporation law of Missouri to determine the capacity of a party after dissolution. Rule 17(b) provides that issues of capacity are determined by the law of the individual’s domicile. *Esposito v. United States*, No. 03-3183 at pg.1 (Fed. 10th Cir. 5/26/2004) (Fed. 10th Cir., 2004).

Missouri courts have determined this issue under Missouri corporation statutes:

“Section 351.525 mandated every statutory trustee to be named in a suit after dissolution of a corporation. However, § 351.525 was repealed on May 29, 1991. Because of this statute’s repeal, with no provision under current Missouri law replacing it, we find that Deer Wood’s assignment of its rights, title and interest under the contract is valid.”

*Smith v. Taylor-Morley, Inc.*, 929 S.W.2d 918 (Mo. App. E.D., 1996)

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), the Supreme Court stated in no uncertain terms that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor."

This court is collaterally estopped from judgment that Samuel Lipari cannot represent himself *pro se*. Plaintiff has been determined to have standing to bring claims based on the assigned interest in his dissolved corporation. The Missouri state trial, appellate and supreme courts have already determined this issue as it applies to Samuel Lipari on claims formerly held by Medical Supply Chain, Inc. against the US Bank defendants alleged co-conspirators identified in conduct controlling the US Bank defendants’ litigation in a relationship of privity. See ¶¶ 220-224 of plaintiff’s complaint. “The doctrine of collateral estoppel prevents a second litigation of the same issues **between the same parties or those in privity with the parties.**” *Reed v. McKune*, 298 F.3d 945, 950 (10th Cir. 2002) (emphasis added).

*Samuel K. Lipari v. Judge Michael W. Manners of the Circuit Court Of Jackson County, Missouri,*

(Petition for Writ of Mandamus) Case 68703, (W. Dist of Missouri State Court of Appeals. 2007) heard and rendered a decision on law declining the issuance of a writ related to the Medical Supply Chain, Inc. assigned claims Lipari was pursuing in state trial court and appellate court *pro se* without dismissing for lack of jurisdiction. Similarly, the Missouri State Supreme Court is hearing *Samuel K. Lipari v. Judge Michael W. Manners of the Circuit Court Of Jackson County, Missouri*, (Petition for Writ of Mandamus) and has not declined jurisdiction on the basis of Lipari's standing:

"Regardless of the merits of appellants' claims, without standing, the court cannot entertain the action." *Pace Constr. Co. v. Missouri Highway & Transp. Comm'n*, 759 S.W.2d 272, 274 (Mo. App. W.D. 1988) (quoting *Champ v. Poelker*, 755 S.W.2d 383, 386-87 (Mo. App. E.D. 1988))."

*Blue Cross and Blue Shield of Missouri v. Nixon*, 81 S.W.3d 546 (Mo. Ct. App., 2002).

The Western District of Missouri and the Eight Circuit Court of Appeals have also heard the standing issue that was raised against Samuel Lipari acting *pro se*. Each state and federal court was required to determine their jurisdiction in light of notice of Samuel Lipari's *pro se* status as an assignee or trustee and a record before the courts identifying the challenges:

"Standing cannot be waived, may be raised at any time by the parties, and may even be addressed *sua sponte* by the trial court or an appellate court. *Id.*" "[I]f a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented." *Id.* (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002))."

*Cook v. Cook*, No. WD 63209 at pg. 1 (MO 9/14/2004) (Mo, 2004)

In *Samuel K. Lipari v. General Electric Company, et al.* 16<sup>th</sup> Cir. Missouri State Case. No. 0616-CV-07421, the issue of whether Samuel Lipari as an assignee of interest from the dissolved Missouri corporation Medical Supply Chain, Inc. had standing to represent himself *pro se* was raised by John K. Power, the counsel for Neoforma and Novation, alleged to be co-conspirators of the US Bank defendants in the conduct complained of in this action and who also represented the General Electric defendants. The doctrine of collateral estoppel or issue preclusion precludes a court from reconsidering an issue previously decided in a prior action. *Estate of True v. C.I.R.*, 390 F.3d 1210, 1232 (10th Cir.2004). Missouri state law finds preclusive effect in identical circumstances and applies it preclusion to jurisdictional issues. See *Woods v. Mehlville Chrysler-Plymouth*, 198 S.W.3d 165 at 168 (Mo. App., 2006).

The court is required to look to Missouri state law to determine the preclusive effect of the proceedings in *Lipari v. General Electric et al*, W. Dist. of Missouri No. 06-0573-CV-W-FJG on this

federal district court action. See *McFarland v. Childers*, 212 F.3d 1178, 1185 (10th Cir.2000) also *Pittsburg County Rural Water Dist. v. McAlester*, 358 F.3d 694 at 708 (10th Cir., 2004).

The US District Court of the Western District of Missouri and the Eighth Circuit Court of Appeals in *Samuel Lipari v. General Electric Company, et al.* W.D. MO. Case no. 06-0573-CV-W-FJG and *In Re Samuel K. Lipari*, (Petition for Writ of Mandamus) Case No. 06-3546, (8<sup>th</sup> Cir. 2006) necessarily determined standing of Samuel Lipari to represent the assigned interests of his dissolved corporation *pro se* in now final judgments that did not expressly litigate the issue but are never the less issue preclusive on standing. See *Gospel Missions of America v. City of Los Angeles*, 2002 C09 585 at ¶33 (USCA9, 2002).

The defendants' argument that judicial estoppel prevents Lipari from now asserting his state law claims in his personal capacity is frivolous. Lipari's status is consistent with the status described in preceding litigation in the court and the Tenth Circuit where Lipari gave notice of the dissolution of Medical Supply Chain, Inc., the assignment of its rights to himself and his need to be substituted as the plaintiff. Lipari's status was changed and Medical Supply dissolved solely as a result of the defendants' continuing unlawful actions to keep Lipari out of the hospital supply market, consistent with the conduct averred by Lipari in his previous litigation and that of Medical Supply Chain, Inc. Lipari's complaint does not violate conventions against inconsistent pleading, therefore it does not meet the judicial estoppel requirement of *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005).

## **2. Defendants' contention that the complaint fails to comply with Fed. R. Civ. P. Rule 8.**

Although a plaintiff need not precisely state each element of his claims, he must plead minimal factual allegations on those material elements that must be proved. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). "Rule 8 does not set out a page limit, but rather requires that '[e]ach averment of a pleading shall be simple, concise, and direct.'" *Oil Express Nat'l, Inc. v. D'Alessandro*, No. 96 C 1528, 1997 WL 613276, at \*2 (N.D.Ill. Sept.26, 1997).The plaintiff's claims meet the concise requirements of Rule 8 averments:

"Rule 8 does not require a "short and plain complaint," but rather a "short and plain statement of the claim." FED. R.CIV.P. 8(a)(2) (emphasis added)... Moreover, it is "each averment of a pleading" that Rule 8(e)(1) states "shall be simple, concise, and direct" — not each pleading itself."

*Ciralsky v. C.I.A.*, 355 F.3d 661 at 670 (D.C. Cir., 2004). The plaintiff's claims are stated with short concise averments of only the elements required to sustain each claim. However, the plaintiff's case is

complex and includes multiple claims based on the conduct of both defendants many agents and employees. Rule 8(a)(2) "must be applied with some logic and common sense. The length of a pleading will depend upon a number of factors, not the least of which is the complexity of the case." *In re Catanella, E.F. Hutton & Co., Inc.*, 583 F.Supp. at 1401. See also *Untracht v. Fikri*, 368 F.Supp.2d 409 (W.D. Pa., 2005). While the trial court's dismissal of *Medical Supply Chain v. Novation, et al* 05-cv-02299-CM, now under review in the Tenth Circuit was based in part on a prolix complaint, that complaint's detail like this complaint's is a direct response to Mr. Olthoff's assertions that Rule 8 pleading is insufficient to state a claim.

Under Fed.R.Civ.P. 8(e) this simplified "notice pleading" "is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Brejcek v. County of Bucks*, 2004 WL 377675, \*2 (E.D.Pa.2004); *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). However the plaintiff and his predecessor in interest have never had the opportunity for this liberal discovery.

### **3. Defendants' contention that the claims in Lipari's complaint are barred by *res judicata*.**

The prior dismissals do not preclude the present claims. *Medical Supply Chain v. Novation, et al*, KS Case No. 02-cv-02539-CM has been appealed and is not a final judgment for claim or issue preclusion purposes.

The court's order denying the plaintiff's motion to strike suggested addressing the defendants' *res judicata* arguments in a reply:

"Plaintiff appears to argue that this case is the "same case or controversy" as previous actions "variously styled *Medical Supply Chain v. US Bancorp N A, et al, Medical Supply Chain v. Novation, et al* KS Case No. 02-cv-02539-CM, W. Dist. Mo. Case No 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-KHV-GLR . . ." (Pl.'s Mot. to Strike at p.1). If plaintiff's claims are identical to claims that have been adjudicated in a prior action, he should consider whether his claims in this case are appropriate under *res judicata* and collateral estoppel and address the issue in his response to defendants' motion to dismiss."

Order 8/20 at page 2.

The record of this court reveals there has never been a final judgment in *Medical Supply I* as required under Fed.R.Civ.P. 58 and the doctrine of Claim Preclusion is inapplicable. The only judgment in the case is a June 9th, 2005 entry limited to the attorney fees of \$23,956.00 awarded as a sanction against

Medical Supply's former counsel Bret Landrith. Document 64 on the appearance docket in *Medical Supply Chain, Inc. v. US Bancorp, NA, et al*, case no. 02-2539-CM ("*Medical Supply I*") Case 2:05-cv-02299-CM-GLR This judgment does not resolve any of the claims in the plaintiff's complaint.

The first requirement for claim preclusion-- see Restatement (Second) of Judgments § 13 & cmt. g—is that there be a final judgment in the prior case. *Id.* §§ 13, 18-19. For purposes of determining the finality of an order, it must dispose of all claims. (Ordinarily, a judgment is not final unless it disposes of all claims against all parties) *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 (Fed. 1st Cir., 2005).

The Supreme Court case most often cited for preclusion effect of a prior 12(b)(6) dismissal was a dismissal in entirety:

"2. The Rule 12(b)(6) dismissal that was the source of the Supreme Court's oft-cited footnote in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), stating that "[t]he dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits," *id.* at 399 n. 3, 101 S.Ct. 2424, was likewise a dismissal of "all of the actions in their entirety," *id.* at 396, 101 S.Ct. 2424."

*Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at fn 2 (Fed. 1st Cir., 2005). By dismissing Medical Supply's state claims without prejudice in *Medical Supply I*, a determination not opposed or appealed by the defendants, this court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the *Medical Supply I* dismissal was a mere interim order. *Id.*

The plaintiffs' state claims filed in Missouri state court after dismissal without prejudice were the permissible and intended result of the without prejudice distinction. The fact that *Medical Supply Chain v. Novation, et al* includes the US Bank defendants and continues to this day in the Tenth Circuit does not preclude the state court action filed by the plaintiff and now questionably removed and transferred to this court:

"Identical cases between the same parties can be pending in a federal district court and a state court at the same time. *Carter v. Owens Ill., Inc.*, 261 Ark. 728, 551 S.W.2d 209, 209 (1977). In such instances, the first forum to dispose of the case enters a final judgment binding on the parties. *Id.* at 210."

*Mountain Pure, LLC v. Turner Holdings, LLC*, 439 F.3d 920 at 924 (8th Cir., 2006). Even if *res judicata* was applicable, it would not apply to the plaintiffs' state law based claims:

"Even assuming *res judicata* applies, the doctrine does not bar a subsequent action where, in an

earlier action, a court has made an express reservation of right as to future litigation. *Cater*, 846 S.W.2d at 176. An express reservation of rights as to litigation on a certain item preserves the subject for future adjudication. *Miles v. Teague*, 251 Ark. 1059, 476 S.W.2d 245, 247 (1972). Accordingly,[a] determination by the court that its judgment is "without prejudice" (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action.

*Coleman's Serv. Ctr., Inc.*, 935 S.W.2d at 296 (quoting Restatement (Second) of Judgments, § 26(1)(b) (1982)).”

*Mountain Pure, LLC v. Turner Holdings, LLC*, 439 F.3d 920 at 925 (8th Cir., 2006).

This diversity action is governed by Missouri state law, *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) A federal court sitting in diversity jurisdiction applies the substantive law and the choice of law provisions of the forum state, which in this case is Kansas. *Missouri P.R. Co. v. Kansas Gas & Electric Co.*, 862 F.2d 796, 798 n. 1 (10th Cir.1988).

**a. Fed. R. Civ. P. Rule 54 Final Judgment Requirements Negate *Res Judicata* Effect of Prior Litigation**

Since there has never been a final judgment in earlier litigation between the plaintiff or Medical Supply Chain, Inc. his predecessor in interest and the US Bank defendants, *res judicata* does not apply. "*Res judicata*, or claim preclusion, precludes a party or its privies from relitigating issues that were or could have been raised in an earlier action, provided that the earlier action proceeded to a final judgment on the merits." *King v. Union Oil Co. of Cal.*, 117 F.3d 443, 445 (10th Cir. 1997).

It is clearly established under the controlling law of this jurisdiction that the prior dismissal of the plaintiff's claims without prejudice was not a final judgment.

“The district court's original order dismissing the defendants' counterclaims without prejudice did not satisfy the final judgment rule. Fed. R. Civ. P. 54(b).”

*Witherspoon v. Collins*, 2002 C10 1113 at ¶ 14 (USCA10, 2002). Under the controlling case law for this jurisdiction, the court is required to perform an analysis that excludes the applicability of *res judicata* against the plaintiff:

“*Reed v. McKune*, 298 F.3d 946 (10th Cir., 2002), sets out the analysis we must follow here:  
[18] The doctrine of *res judicata* prohibits litigation of certain claims based on the resolution of an earlier action between the same parties. "Under *res judicata*, a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U. S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).”

*Witherspoon v. Collins*, 2002 C10 1113 at ¶ 17-18 (USCA10, 2002).

**b. Missouri State statute permitted Lipari's refilling of state law claims dismissed without prejudice**

In Missouri State Court where Lipari filed his state law based claims that have now been removed and transferred here over Lipari's repeated objections, Lipari clearly was not precluded by this court's earlier decisions: "The dismissal of a petition for failure to state a claim, without prejudice, does not preclude a plaintiff from reasserting the claim on new factual allegations." *Bachman v. Bachman*, 997 S.W.2d 23, 25 (Mo. App. E.D. 1999). In fact, Lipari's clearly established right to proceed in the present action is guaranteed by Missouri statute, Rule 67.01: "This is consistent with Rule 67.01, which permits a party to bring another civil action for the same cause that has been dismissed without prejudice unless the civil action is otherwise barred." *Bentch v. Clifford*, 28 S.W.3d 453 (Mo. App. E.D., 2000).

Missouri state preclusion elements are consistent with this jurisdiction:

"Generally, the doctrine of collateral estoppel (issue preclusion) precludes a party or those in privity with that party from relitigating issues that were necessarily and unambiguously decided in a previous case and final judgment. *In re Marriage of Evans*, 155 S.W.3d 90, 96[8] (Mo.App.2004). The doctrine applies "when a second suit is between the same parties, or those in privity with them, but the cause of action is different." *Dodson*, 133 S.W.3d at 538[22]. The elements of collateral estoppel are: (1) the issue decided in the prior case mirrors that in the present action; (2) the prior suit resulted in a final judgment on the merits; (3) the party against whom the doctrine is asserted participated as a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine may apply had a full and fair opportunity to litigate the issue. *Evans*, 155 S.W.3d at 96[9].

Commonly, the term "*res judicata*" is called claim preclusion and is described as a judicially created doctrine designed to inhibit a multiplicity of lawsuits. *66, Inc. v. Crestwood Commons Redevelopment Page 555 Corp.*, 998 S.W.2d 32, 42[29] (Mo.banc 1999). The *res judicata* defense precludes not only those issues on which the court in the former suit was required to pronounce judgment, but on all points properly belonging to the subject matter of the litigation and which the parties, exercising reasonable diligence, might have brought into the case at the time. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318[5] (Mo.banc 2002).

The elements of *res judicata* are: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or status of the person for or against whom the claim is made. *Evans*, 155 S.W.3d at 96[5]. Summarily stated, "the distinction between collateral estoppel and *res judicata* is that collateral estoppel operates only as to issues previously litigated, but not as to matters not litigated in the prior action even if they might have properly been determined." *Vogt v. Emmons*, 158 S.W.3d 243, 248 n. 3 (Mo.App.2005)."

*Hollida v. Hollida*, 190 S.W.3d 550 (Mo. App., 2006).

### **c. The Controlling Authority for The Kansas District Court Produces the Same Result.**

The controlling case law for the Kansas District Court is equivalent. *Res judicata* includes both claim preclusion and issue preclusion. Issue preclusion, or collateral estoppel, prevents re-litigation of an issue by a party against whom the issue has been conclusively determined in a prior action. *Hall v.*

*Doering*, 997 F.Supp. 1445, 1459 (D.Kan.1998); *Am. Home Assurance Co. v. Pac. Indem. Co.*, 672 F.Supp.

495, 498 (D.Kan.1987); *Crutsinger v. Hess*, 408 F.Supp. 548, 551 (D.Kan.1976); *Jackson Trak Group, Inc. v. Mid States Port Auth.*, 242 Kan. 683, 690, 751 P.2d 122, 128 (1988); *Phelps v. Hamilton*, 122 F.3d 1309, 1318 (10th Cir. 1997).

*Res judicata* is an affirmative defense on which defendant has the burden of proof. See Fed.R.Civ.P. 8(c); *Nwosun v. Gen. Mills Rests., Inc.*, 124 F.3d 1255, 1256 (10th Cir.1997). For the doctrine to apply, four elements must exist: (1) a judgment on the merits in the earlier action; (2) identity of the parties or privies in the two suits; (3) identity of the cause of action in both suits; and (4) a full and fair opportunity for plaintiff to litigate the claim in the first suit. *Id.* at 1257.

**d. Lack of a Full and Fair Opportunity for Plaintiff to Litigate**

Neither Medical Supply Chain, Inc. nor its successor in interest Samuel K. Lipari had an opportunity to litigate the state law based claims, which were consistently raised in preceding litigation and repeatedly dismissed by this court without prejudice. No discovery has ever been permitted. This court did not make findings of fact or law in earlier litigation related to the plaintiffs' state law based claims. *Morgan v. City of Rawlins*, 792 F.2d 975, 978-980 (10th Cir. 1986) (applying Wyoming claim preclusion law, finding that where factual issues under Section 1983 were not focus of prior state proceeding, plaintiff did not have full and fair opportunity to litigate federal claim and claim preclusion did not bar action under Section 1983).

**e. The Effect of the *Medical Supply I* Dismissal Interim Order.**

By dismissing Medical Supply's state claims without prejudice in *Medical Supply I*, a determination not opposed or appealed by the defendants, the trial court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the *Medical Supply I* dismissal was a mere interim order. *Id.*

In the Western District of Missouri where the present action was first filed and where the US Bancorp defendants have now removed the original supplemental state law contract and trade secret claims, it was clearly established law that the plaintiff was not subject to claim preclusion. An interim order that is not accompanied by an express entry of final judgment "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed.R.Civ.P. 54(b); see also, e.g., *United States v. Arkansas*, 791 F.2d 1573, 1576 (8th Cir.1986).

**4. Defendants' contention that the Plaintiff's complaint fails to state a claim upon which relief may be granted under Rule 12(b)(6).**

A Rule 12(b)(6) motion should not be granted unless "it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997) (further quotations omitted). The Court accepts all wellpleaded factual allegations in the complaint as true and draws all reasonable inferences from those facts in favor of plaintiff. See *Shaw v. Valdez*, 819 F.2d 965, 968 (10th Cir.1987). In reviewing the sufficiency of plaintiff's complaint, the issue is not whether plaintiff will prevail, but whether plaintiff is entitled to offer evidence to support his claims. Although plaintiff need not precisely state each element of his claims, he must plead minimal factual allegations on those material elements that must be proved. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

The plaintiff has met the pleading requirements for his contract based claims:

"Counter defendants also argue that counter plaintiffs' pleading is insufficient to state a claim because "in stating a claim on contract, the pleader should allege the making of a contract, its terms and the breach thereof, which must not be left to inference." *Thompson v. Phillips Pipe Line Co.*, 438 P.2d 146, 200 Kan. 669 (1968). Counter defendants reliance on Kansas case law is misguided. "Under standard Erie doctrine, state pleading requirements, so far as they are concerned with the degree of detail to be alleged, are irrelevant in federal court even as to claims arising under state law." *Andresen v. Diorio*, 349 F.3d 8, 17 (1st Cir.2003); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (rule 8's simplified pleading standard applies to all civil actions)."

*The Bradbury Co., Inc. v. Teissier-Ducros*, 387 F.Supp.2d 1167 at 1172-73 (D. Kan., 2005).

See also *Litton v. Maverick Paper Co.*, 354 F.Supp.2d 1209 at 1217 (D. Kan., 2005) (Rule 8(a), Fed.R.Civ.P. statement sufficient to give notice of claim.)

Lipari has also pled the elements of a contract claim and they are clearly identified in the headers of the text of his complaint which was written for a Missouri state court where F. R. Civ. P. Rule 8 does not apply. So the defendants' argument a contract could not have been formed between Lipari's predecessor in interest and the US Bank defendants is frivolous:

"The elements for a breach of contract claim are: (1) the existence of a contract between the parties; (2) consideration; (3) the plaintiffs performance or willingness to perform in compliance with the contract; (4) defendant's breach of the contract; and (5) that plaintiff was damaged by the breach."

*Britvic Soft Drinks, Ltd. v. ACSIS Techs., Inc.*, 265 F.Supp.2d 1179, 1187 (D.Kan.2003). See also *Ice Corp. v. Hamilton Sundstrand Inc.*, 444 F.Supp.2d 1165 (D. Kan., 2006).

The plaintiff has met the requirements under Missouri law for pleading his trade secrets in the form of a confidential business plan and representative certification education book were misappropriated:

“In addition to establishing that the price book is a trade secret, plaintiff must produce sufficient evidence to support a finding that defendants misappropriated it. Plaintiff has proven this by showing that defendants used a trade secret of plaintiff's (the price book), without the consent of plaintiff and that defendants used improper means to acquire the trade secret. Plaintiff has already established that the price book was a trade secret and it did not consent to its use by defendants in competition with plaintiff. There is evidence that the price book was acquired by improper means, as plaintiff presented testimony that the book was never taken from plaintiff's premises except to make sales calls and was immediately returned. Even if Dick had authority to keep the book at home, he was under an obligation to return it after leaving the business, pursuant to his fiduciary duties as an officer of plaintiff to maintain plaintiff's trade secrets and not to use plaintiff's property for his own benefit to the detriment of plaintiff. By not returning the book and further taking it to Walk Easy's office, Dick misappropriated the book. Although the evidence does not show whether the other defendants participated in the removing of the book from plaintiff's premises, they used the price book or allowed it to be used for the benefit of Walk Easy, while knowing or having reason to know that it was a confidential, nonpublic price book belonging to plaintiff. Further, it was acquired when Dick, Wayne and Convy had a fiduciary duty to maintain its secrecy. Defendants' actions amounted to a breach of that duty.

Since plaintiff has established facts sufficient to support a finding that the book was a compilation of data, deriving independent economic value and the subject of reasonable efforts to maintain secrecy, and that the individual defendants, who were officers of plaintiff misappropriated plaintiff's trade secrets by taking the price book and using it for the benefit of defendant Walk Easy, the trial court erroneously applied the law and erred in directing a verdict against plaintiff on the misappropriation count.”

*Lyn-Flex West Inc. v. Dieckhause et al.*, 24 S.W.3d 693 (Mo. App. E.D., 1999).

The plaintiff's complaint adequately pleads fraud under F.R. Civ. P. Rule 9. The complaint identifies communications stating the identity of the speaker, time, place, what was misrepresented and how the plaintiff was injured from reliance on the misrepresentations. Additionally, to have met the state pleading requirements where the plaintiff filed the complaint, the plaintiff had to identify the basis of the duty the defendants violated in misrepresentations to the plaintiff. In order to make a submissible case of fraudulent misrepresentation in Missouri state court, a plaintiff must prove nine essential elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury. *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988); *Trimble v. Pracna*, 167 S.W.3d 706, 712-13 (Mo. banc 2005) (reversing denial of JNOV on

fraud). This is the reason for the detail in the plaintiff's complaint that the defendants after switching forums now say is too prolix.

Lipari's pleading of Prima Facie Tort and Breach of Fiduciary Duty are also exactly what is required under the controlling case law of the state court where this complaint was filed. Rule 12(b) 6 is inapplicable as a basis for dismissing the plaintiff's claims.

**5. Defendants' contention that the parts of the Plaintiff's complaint should be stricken.**

The defendants make a conclusory argument that the plaintiffs' complaint describes conduct that should be stricken. The best way to keep conduct from being complained of is not to commit it. The events identified by the plaintiff and complained of by the defendants seem to have occurred after the defendants learned of the gravamen of the antitrust and state law based claims brought by the plaintiff and his predecessor in interest. As such, the information is especially important to Missouri state courts in deciding important public policy issues including whether the present state law based prohibitions against the defendants' conduct should be enforced, why they have not been enforced *vis a vis* the procedural history of the plaintiff's experience in other jurisdictions and whether related state antitrust law enforcement or further diligence related to the merger of the defendants' alleged co-conspirators' hospital St. Luke's with the University of Kansas School of Medicine should be performed. As such the text complained of by the defendants has already aided the courts and law enforcement officials of the State of Missouri immensely in obtaining a full understanding of the plaintiff's state law based claims and his standing to pursue them.

"The standard for a motion to strike is demanding. As the undersigned previously has observed:

Rule 12(f) motions are a generally disfavored, drastic remedy. A motion to strike will usually be denied unless the allegations have no possible relation to the controversy and may prejudice one of the parties. If the record reveals any doubt as to whether under any contingency a certain matter may raise an issue, the Court should deny the motion. If plaintiffs plead evidentiary facts that aid in giving a full understanding of the complaint as a whole, they need not be stricken.

*PAS Communications, Inc. v. U.S. Sprint, Inc.*, 112 F.Supp.2d 1106, 1107 (D.Kan.2000).

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As a result, American Family's motion to strike is inappropriate. It fails to cite any law or logic in support of its motion to strike, which makes it conclusory. Given the demanding standard for a motion to strike, American Family has not met its burden. As this court has held, because Count III "could succeed under certain facts, [Count III] is not insufficient as a matter of law and [is] not subject to a Rule 12(f) motion to strike." *Youell v. Grimes*, 2001 WL 121955, \*1-2 (D.Kan.2001)."

*Home Quest Mortg. v. American Family Mut. Ins.*, 393 F.Supp.2d 1096 at 1099-1100 (D. Kan., 2005)

**6. Defendants' attempt to sanction the plaintiff without a separate motion and without following the rules.**

The defendants' combined motion to dismiss and to sanction the plaintiff is improper. *Zhu v. St.*

*Francis Health Center*, 413 F.Supp.2d 1232 (D. Kan., 2006).

The Tenth Circuit has stated that filing restrictions are a harsh sanction, and that litigiousness alone is not a sufficient reason to restrict access to the court. Where a party has "engaged in a pattern of litigation activity which is manifestly abusive," however, restrictions are appropriate. *Johnson v. Cowley*, 872 F.2d 342, 344 (10th Cir.1989). The plaintiff has engaged in past litigation against the defendants which due to the fact that discovery has never been permitted and the cases have not reached a final judgment, cannot be ruled abusive.

Placing a prior restraint on the plaintiff for past conduct seeking to vindicate important state and federal public policies by meeting the clearly established pleading standards and the clear language of statutes in a petition created for a state court outside of the jurisdiction of this court innovates a new form of penalty for litigants. The plaintiff could not have known that following the rules of the State of Missouri in filing state law based claims expressly dismissed without prejudice by this court in a ruling that the Federal Rules of Civil Procedure including F.R. Civ. P. 54(b) and F.R. Civ. P. 58 clearly makes a non final judgment would result in penalties. The court should to undertake to restrain the plaintiff's clearly established rights without notice and an opportunity to be heard. Such a ruling would violate the plaintiff's due process rights:

"A final point worth noting, although not raised in the briefs, is that the due process calculus may also be affected by the "knowledge which the circumstances show [the offending] party may be taken to have of the consequences of his own conduct." *Link*, 370 U.S. at 632, 82 S.Ct. at 1390. Thus, fundamental fairness may require some measure of prior notice to an attorney that the conduct that he or she contemplates undertaking is subject to discipline or sanction by a court. Consequently the absence, for example, of a statute, Federal Rule, ethical canon, local rule or custom, court order, or, perhaps most pertinent to the case at hand, court admonition, proscribing the act for which a sanction is imposed in a given case may raise questions as to the sanction's validity in a particular case."

*Eash v. Riggins Trucking Inc.*, 757 F.2d 557 at 571 (C.A.3 (Pa.), 1985).

The relief the defendants seem to be seeking falls under the Doctrine of Abatement. Surprisingly, this court and the US District Court for the Western District of Missouri rejected the plaintiff's argument that this matter could not proceed in federal court concurrently with *Medical Supply Chain v. Novation, et al* , W. Dist. Mo. Case No 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-CM which at the present time is on review in the Tenth Circuit. The Missouri State Courts are well settled on the Doctrine of Abatement:

“This doctrine "holds that where a claim involves the same subject matter and parties as a previously filed action so that the same facts and issues are presented, resolution should occur through the prior action and the second suit should be dismissed." *HTH Companies, Inc. v. Mo. Dept. of Labor and Industrial Relations*, 154 S.W.3d 358, 361-62 (Mo.App.2004). Because an interlocutory order of dismissal was entered in Case I, the trial court never lost jurisdiction over that pending case. *Peet v. Randolph*, 103 S.W.3d 872, 876 (Mo.App.2003); *Pritz v. Balverde*, 955 S.W.2d 795, 797 (Mo.App.1997). Rule 55.27(a)(9) authorizes dismissal of a lawsuit on the ground "[t]hat there is another action pending between the same parties for the same cause in this state[.]" The motions to dismiss filed by Jenkins and Central asserted this defense, and it is undisputed that Case I and Case II are identical in all material respects. Consequently, Case II is barred by the doctrine of abatement. *Peet*, 103 S.W.3d at 876.”

*Golden Valley Disposal v. Jenkins Diesel*, 183 S.W.3d 635 at 41-642 (Mo. App., 2006).

The plaintiff acting *pro se* made convincing arguments that the state claims were improperly removed to federal court on diversity grounds when diversity clearly exists in *Medical Supply Chain v. Novation, et al* , W. Dist. Mo. Case No 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-CM over these claims and the defendants did not seek a reconsideration of this court’s dismissal of the state claims without prejudice. This court has rejected abatement of a second concurrent federal incarnation of this case.

#### **CONCLUSION**

Whereas for the above stated reasons the plaintiff respectfully requests that the court deny the defendants’ motion for dismissal and sanctions.

Respectfully submitted,

/s/ Dennis Hawver

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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was served via electronic case filing, on this 11th day of September, 2007 to:

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