UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY, KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

MOTION TO SUBSTITUTE PLAINTIFF UNDER F.R.C.P. RULES 17(A), 15(A) AND 25(A)

Comes now the plaintiff Medical Supply Chain, Inc. and makes the present motion to substitute the plaintiff party Medical Supply Chain, Inc. with the corporation's founder, chief executive and sole owner of registered stock[1] Samuel K. Lipari. Samuel K. Lipari is the real party in interest under the facts of the complaint. The plaintiff is entitled to the substitution under Federal Rules of Civil Procedure Rules 17(A), 15(A) AND 25(A). The plaintiff respectfully requests the substitution for the following reasons.

STATEMENT OF FACTS

1. Maintaining the Missouri corporate registration, franchise fee and tax records for a hospital supply corporation barred from participation in the market for hospital supplies by the conduct of the defendants has been burdensome for the corporation's founder and owner Samuel K. Lipari.

2. The plaintiff's complaint against Novation, LLP et al describes tortious conduct against Medical Supply Chain, Inc. and predecessor corporations to Medical Supply Chain, Inc. founded and operated by Samuel K. Lipari.

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[1] A distribution of 5000 shares has been promised to another stakeholder upon increase of shares available for subscription to ten million. That transaction, awaiting payment to the Missouri registrar of corporations has not been completed.

3. The intellectual property subject to the averments of racketeering and antitrust prohibited conduct is solely the property of Samuel K. Lipari.

4. The state law claims are based on contracts Samuel K. Lipari personally made and was personally subject to.

5. Under the facts of the complaint and a subsequent affidavit by Samuel K. Lipari (See exhibit 1), the defendants through their agents Andrew DeMarea, Magistrate James O'Hara have been successful at depriving Medical Supply Chain, Inc. of counsel in the US Supreme Court and have a great probability of depriving the plaintiff of counsel in the Kansas District Court as soon as October 20th, 2005.

6. The repeated sanctioning of Medical Supply's present counsel for correctly pleading the law and making a non-frivolous appeal is fully the foreseeable deterrent to obtaining substitute counsel and the furtherance of injustice an impartial observer would recognize had been intended.

7. As a corporation, the entity Medical Supply cannot be represented in this forum through its officer Samuel K. Lipari and would forfeit all rights without licensed counsel.

8. Samuel K. Lipari has at all times been in privity with Medical Supply and would forfeit his rights against the defendants unjustly should a dismissal with prejudice result from Medical Supply's deprivation of counsel in the present action.

9. Samuel K. Lipari losses would be irreparable because the State of Kansas lacks the resources to compensate him for the deprivation of property resulting from state officials Abuse of Process[2] and violating his right to access federal courts protected under 42 U.S.C. 1985(2) and(3) all of which are actionable under 42 U.S.C. 1983.

10. The failure of the sanctions against counsel to deter Medical Supply from pursuing the prosecution of the defendants for antitrust prohibited conduct they have officially admitted to creates a certainty that sanctions will now be brought against the plaintiff itself.

11. The substitution of parties from a lawful Missouri corporation in good standing to Samuel K. Lipari would spare the State of Missouri the serious affront of a Kansas or Tenth Circuit court unlawfully sanctioning a jurisdictional entity created under the laws of the State of Missouri and exercising rights

[2] Unlike malicious prosecution Abuse of Process does not require a outcome in favor of the plaintiff, merely proof of unlawful purpose.

provided for by the State of Missouri and United States Code to vindicate important state interests (See exhibit 2) as a private attorney general.

12. The US Senate Antitrust Subcommittee of the US Senate Judiciary Committee, having lost faith in this forum's willingness to uphold the rule of law in the market for hospital supplies is now seeking to substitute the reliance on private antitrust enforcement with two new bills for the institution of a regulatory and bureaucratic enforcement schemes on October 19th, 2005.

MEMORANDUM IN SUPPORT OF SUBSTITUTION

The plaintiff is entitled to the substitution under Federal Rules of Civil Procedure Rules 17(A), 15(A) AND 25(A). Samuel K. Lipari is the real party in interest. The plaintiff could not have known of the existence of a doctrine opposing the enforcement of federal antitrust laws in the market for hospital supplies in the Kansas District Court and the Tenth Circuit Court of Appeals or a secession from the rule of law over this market. No order has directly described the doctrine against the enforcement of antitrust law in the market for hospital supplies and the reviewing court's memorandum and orders were unpublished. Absent any basis for discretion to deny claims describing a defendant with market power acting in combination and conspiracy with another identified legally separate entity to restrain trade in the market for hospital supplies, bringing the present action in the name of Medical Supply Chain, Inc. was an understandable mistake.

As the present action now moved against the plaintiff's objections to the District of Kansas is in danger of proceeding with the venue's doctrine opposing antitrust enforcement in the market for hospital supplies beyond the express statutes of Congress and the repeated precedents of the United States Supreme Court into discrediting the fact finding of the US Senate Judicial Committee's Sub Committee on Antirust's now four year investigation into the claims made by the plaintiff, the substitution of Samuel K. Lipari for the plaintiff corporation is appropriate in that the complained of misconduct of the defendants will not prevent the vindication of rights sought by this suit. The appropriateness is identical and parallel to the unfortunate necessity of Republican Senators opposed to increasing federal government regulation and bureaucracy yet never the less having to introduce legislation on October 19th, 2005 to control the market for hospital supplies and protect the nation against illegal anticompetitive conduct supported by the Kansas District Court and the Tenth Circuit.

A. Substitution under Rule 17(a)

The court is required to permit the substitution of parties under Rule 17(a) of the Federal Rules of Civil Procedure:

> “Rule 17(a) requires the district court to grant leave to substitute or join the real party in interest prior to dismissing an action for failure to name the real party in interest:
>
> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.
>
> Fed. R. Civ. P. 17(a).”

Esposito v. United States, No. 03-3183 at pg.1 (Fed. 10th Cir. 5/26/2004) (Fed. 10th Cir., 2004). The mistake of the plaintiff in bringing the action in the name of Medical Supply is understandable and correctable without prejudice to the defendants. In fact it is a necessary response to the legal and extra legal maneuvering of the defendants.

In this circuit, courts have never required a plaintiff seeking substitution to show that his mistake was "understandable" in addition to being" honest." Instead, Tenth Circuit cases focus primarily on whether the plaintiff engaged in deliberate tactical maneuvering (i.e. whether his mistake was "honest"), and on whether the defendant was prejudiced thereby. See, *e.g.*, *Scheufler*, 126 F.3d at 1270 (upholding district court's joinder of real party in interest because plaintiff's failure to include certain parties" was not the result of some tactic designed to prejudice defendant" and "there has been no tangible showing that defendant was prejudiced by the joinder"); *Metro*. Paving, 439 F.2d at 306 (permitting substitution of corporations for joint venture where" it was clear from the outset that the three corporations were the real parties in interest" and "there was no prejudice to the defendant," even though applicable statute of limitations had run at time of substitution). Interestingly, Metropolitan Paving suggests that even a mistake that should have been patently obvious does not automatically foreclose a later substitution, so long as the plaintiff did not act in bad faith and the defendant has not been prejudiced thereby. 439 F.2d at 306.”

1. Real party in interest

As the real party in interest, Samuel K. Lipari is required to be substituted for Medical Supply Chain, Inc.

> "Rule 17(a) provides that "[e]very action shall be prosecuted in the name of the real party in interest." Since Mr. Esposito could not bring this action, his right had to be asserted, if at all, by a party on whom the right devolved at his death. The identity of this real party in interest is determined by referring to the governing substantive law. See 6A Federal Practice & Procedure § 1543, at 334; *Audio-Visual Mktg. Corp. v. Omni Corp.*, 545 F.2d 715, 719 (10th Cir. 1976)."

Esposito v. United States, No. 03-3183 at pg.1 (Fed. 10th Cir. 5/26/2004) (Fed. 10th Cir., 2004).

The Kansas District court in *Schrag v. Dinges* described the Tenth Circuit authority on substitution of a real party in interest:

> "However, there is some indication that the issue is actually one of real party in interest and should be handled according to Federal Rule of Civil Procedure 17(a). Rule 17(a) provides in pertinent part:
>
> Every action shall be prosecuted in the name of the real party in interest.... No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.
>
> The Tenth Circuit has stated in a case in which the defendants challenged the joinder of a shareholder-plaintiff both under Rule 17(a) and the standing doctrine:
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> [T]he standing challenge is not properly raised in connection with real party interest analysis under Rule 17(a). Professor Wright has explained that "`[t]he concept of real party in interest should not be confused with the concept of standing. The standing question arises in the realm of public law, when governmental action is attacked on the ground that it violates private rights or some constitutional principle....' `Real party in interest' is very different from standing."
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> *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1154 n. 7 (10th Cir.1985)"

Schrag v. Dinges, 825 F.Supp. 954 at 958 (Kan., 1993).

2. Capacity to sue

Samuel K. Lipari possesses the substantive rights being asserted in the present under the applicable laws. Medical Supply will in effect lose its capacity to litigate. Neither the law of the State of Missouri or the State of Kansas permit a non attorney to represent a corporation in litigation.

> "Federal Rule of Civil Procedure 17 governs both the determination of a party's capacity to sue and be sued and his or her status as the real party in interest. The "real party in interest" principle requires that an action "be brought in the name of the party who possesses the substantive right being asserted under the applicable law." 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1541 at 321 (2d ed. 1990) (hereinafter Federal Practice & Procedure). Capacity, by contrast, refers to "a party's personal right to litigate in a federal court." Id. § 1542, at 327.
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> 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).

This view is consistent with other circuits and the State of Missouri. In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987) the Ninth Circuit reasoned that Rule 17(b)

requires the court to apply the law of the state of incorporation when the state law is a "capacity statute." *Louisiana-Pacific Corp. v. Asarco, Inc.*, 5 F.3d 431, 432 (9th Cir. 1993) (Washington[] [state's] two-year corporate capacity statute is not preempted by CERCLA's three-year statute of limitations). See *United States v. Northeast Pharmaceutical & Chem. Co., Inc.*, 579 F. Supp. 823, 827 n.1 (W.D. Mo. 1984) (stating that it is well settled in the federal courts and in Missouri common law that state capacity statutes control under Rule 17(b)).

Medical Supply Chain, Inc. has the capacity to sue and be sued even after it is dissolved. A corporation administratively dissolved is not prevented from commencing a proceeding in its corporate name. Section 351.476.2(5); *Reben v. Wilson* , 861 S.W.2d 171, 176 (Mo.App. 1993). *Unison Realty Corp. v. RKO Theatres, Inc.*, ; National Council of *Young Israel, Inc., v. Feit Co.*, 347 F.Supp. 1293, 1295 n. 4 (S.D.N.Y.1972); 7A C. Wright & A. Miller, Federal Practice and Procedure § 1958 at 663-64 (1972).

Samuel K. Lipari is the real party in interest for claims against Medical Supply. The Missouri Court of Appeals has held the corporate veil will be pierced where: (1) the corporation is completely dominated by a person or other corporation to the extent that the corporation has no separate mind, will or existence of its own. *K.C. Roofing Center v. On Top Roofing, Inc.*, 807 S.W.2d 545, 548-49 (Mo. App. W.D. 1991). *See also Mitchell v. K. C. Stadium Concessions, Inc.*, 865 S.W.2d 779 (Mo. App. W.D. 1993). These results accord with the Tenth Circuit where assets of a dissolved corporation subject their holder to liability. See *City and County of Denver v. Adolph Coors Co*. 813 F. Supp. 1471, 1474-75 (D. Colo. 1992).

B. Substitution Under Rule 15(a)

The plaintiff's motion to substitute Samuel K. Lipari for Medical Supply Chain, Inc. under Rule 17(a) is also consistent with Rule 15(a):

> " Appellants' application to amend the complaint to name new plaintiffs, Lady and Kongsung, pursuant to Rule 15 of the Federal Rules of Civil Procedure, should also have been granted. Rule 15(a) may be used to substitute new plaintiffs. *Hackner v. Guaranty Trust Co.*, 117 F.2d 95 (2d Cir.), cert. denied, 313 U.S. 559, 61 S.Ct. 835, 85 L.Ed. 1520 (1941) (new plaintiff allowed to come into a case by amendment, although action dismissed as to all original plaintiffs because of lack of jurisdictional amount).
>
> The Supreme Court has recently admonished: 'Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore Federal Practice (2d ed. 1948), PP15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-- the leave sought should, as the rules require, be

'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.' *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)."

Staggers v. Otto Gerdau Co., 359 F.2d 292 at 296-297 (C.A.2 (N.Y.), 1966).

C. Substitution Under Rule 25(c)

The plaintiff's motion to substitute Samuel K. Lipari for Medical Supply Chain, Inc. under Rule 17(a) is also consistent with Rule 25(c). If Samuel K. Lipari dissolves or fails to renew the corporate registration of Medical Supply Chain, Inc. its assets would revert back to the personal property of Samuel K. Lipari effectively transferring the interest in this litigation from the company to the founder and owner. Rule 25(c) provides:

"(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

Samuel K. Lipari is the proper party as plaintiff in this action and was at the time the action was initiated against Novation LLC and the other defendants.

"Because Froning's, Inc., was clearly the proper real party in interest at the time the action was commenced, the procedure to be followed in this situation is governed by Fed.R.Civ.P.25(c) dealing with the substitution of parties due to a transfer of interest. *Unison Realty Corp. v. RKO Theatres, Inc*.,35 F.R.D. 232 (S.D.N.Y.1964); 3B Moore's Federal Practice P 25.08 at 25-321 (2d Ed. 1977); 7A C. Wright & A. Miller, Federal Practice and Procedure § 1958 at 663 (1972)."

Froning's, Inc. v. Johnston Feed Service, Inc., 568 F.2d 108 at 110 (C.A.8 (Iowa), 1978)

CONCLUSION

Whereas for above stated reasons, the plaintiff Medical Supply respectfully requests that the court substitute Samuel K. Lipari as plaintiff in this action.

Respectfully Submitted

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Certificate of Service

I certify that on October 9th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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