

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

MEDICAL SUPPLY CHAIN, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-2299-CM
)	
NOVATION, LLC, et al.,)	
)	
Defendants.)	

**DEFENDANTS' JOINT RESPONSE TO SAMUEL LIPARI'S MOTION TO ALTER
OR AMEND JUDGMENT (DOC. NO. 128) AND RESPONSE
TO SHOW CAUSE ORDER (DOC. NO. 130)**

Defendants, through their respective attorneys of record, file this response to Samuel Lipari's Motion to Alter or Amend Judgment, and answer the Court's May 16, 2008 Show Cause Order.

As discussed herein, the Court's March 31, 2008 ruling striking Mr. Lipari's Rule 60(b) motion is well-founded and supported in both law and fact. As a consequence, the present Rule 59(e) motion likewise should be stricken. Medical Supply Chain, Inc. sought to appeal this Court's earlier rulings, including the denial of its Motion to Substitute Mr. Lipari as party plaintiff. That appeal was dismissed. 508 F.3d 572 (10th Cir. 2007). The Court of Appeals thereafter rejected Medical Supply's further request for relief from the judgment. No facts or laws have changed since either this Court's dismissal or the Tenth Circuit's ruling that in any fashion suggest Medical Supply Chain, Inc. (or its sole shareholder) can reassert the now-twice dismissed federal claims. Because Mr. Lipari is not the plaintiff, he lacks standing to pursue relief on behalf of Medical Supply Chain, Inc. and there is no authority for the Court to consider his Rule 59(e) or 60(b) motions. But even on its merits, Mr. Lipari's present motion should be denied for the following reasons:

1. The Court's Order striking Lipari's Rule 60(b) motion is not a "Judgment" subject to a Rule 59(e) motion; and

2. There has been no intervening change of law to support the motion.

3. The Court has inherent authority to strike Mr. Lipari's motions.

For these reasons, the Court should strike plaintiff's Rule 59(e) Motion to Alter Or Amend Judgment or, in the alternative, deny it on its merits.

I. Response to Show Cause Order (Doc. No. 130)

On March 31, 2008, this Court, sua sponte, struck Lipari's "Rule 60(b) Motion" (Doc. 122) and directed Lipari to show cause why he has not violated Rule 11(b). The Court further ruled that if Lipari failed to demonstrate that he has not violated Rule 11(b), the Court would sanction Lipari with both a fine and filing restrictions (Doc. 127 at p. 3). Lipari's Rule 59(e) Motion was filed in response to the Court's March 31 Order. Thus, the defendants believed the Court would determine whether Lipari had complied with its sua sponte Order and that they no right to weigh in on the matter. In other words, because Lipari's Rule 59(e) motion did not involve any issue presented by any party to the case, and because the Court had previously held that Lipari was not authorized to file pleadings in this case, defendants did not believe that the Court desired a response to that motion. In light of such circumstances, defendants suggest any neglect was inadvertent and excusable.

Pursuant to the Court's May 16, 2008 Order (Doc. 130), the defendants hereby object to Lipari's Rule 59(e) Motion.

II. Argument Opposing Mr. Lipari's Rule 59(e) Motion (Doc. No. 128)

A. Lipari lacks standing to litigate on behalf of Medical Supply Company, Inc. Therefore, like the previous Rule 60(b) motion, his Rule 59(e) motion should be stricken from the record.

Mr. Lipari continues his attempt to re-litigate this matter as a *pro se* “interested person” on behalf of his corporation even though he has never been substituted as the plaintiff and Medical Supply’s appeal was dismissed. As noted in the Court’s March 31, 2008 Order, as well as in numerous other pleadings and Orders in this litigation, the plaintiff in this action is Medical Supply Chain, Inc. The fact that Mr. Lipari voluntarily dissolved his corporation (after his prior lawyer was disbarred) does not automatically entitle him the right to prosecute these claims or file pleadings in his personal capacity. *See Reben v. Wilson*, 861 S.W.2d 171, 176 (Mo. App. E.D. 1993) (holding that dissolution of a corporation does not abate or suspend pending proceedings by the corporation); *Nato Indian Nation v. State of Utah*, 76 Fed. Appx. 854, 856 (10th Cir. 2003) (prohibiting corporations from appearing *pro se* and holding that a corporation must appear through a licensed attorney).

While Mr. Lipari attempted to substitute himself as the plaintiff in this action, the Court declined in its discretion to do so. *See* Doc. No. 104. In that Order, the Court noted that the substitution of Mr. Lipari would serve no purpose because the claims had been dismissed and a substitution of party would not change the outcome. *Id.* p.4. That reasoning still applies. Moreover, that ruling is the law of the case in light of plaintiff’s dismissed appeal. The plaintiff in this action remains Medical Supply Chain, Inc. and there is no authority for any motion filed by Mr. Lipari, including the pending motion to alter or amend judgment. *See Phelps v. Hamilton*, 122 F.3d 1309, 1315 (10th Cir. 1997) (recognizing that “a plaintiff must maintain standing at all times throughout the litigation for a court to retain jurisdiction.”). As it did with the Rule 60(b) motion, Mr. Lipari’s Rule 59(e) motion should also be stricken by the Court.

B. There is no “judgment” for the Court to alter or amend and Lipari is attempting to re-litigate settled issues.

If the Court declines to strike Mr. Lipari's Rule 59(e) motion, then it should deny it on its merits. Motions to alter or amend judgments pursuant to Rule 59(e) are extreme remedies and should only be granted to correct manifest errors of law or present newly discovered evidence. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). Neither is applicable here.

The Court's decision to strike Lipari's Rule 60(b) motion based on lack of standing is not a judgment subject to a Rule 59(e) motion. Rule 54(a) of the Federal Rules of Civil Procedure defines judgment as "a decree and any order which from an appeal lies." The Court's March 31 Order did not deny Lipari's Rule 60(b) motion, but rather struck it from the record due to Lipari's lack of standing. Therefore, the Court's March 31 Order is not an order "from which an appeal lies" because it did not determine any new issue as to Lipari's standing.

While Mr. Lipari argues that he may proceed *pro se* as the alleged assignee of Medical Supply's claims, this assertion is neither an assignment of error in law nor newly discovered evidence. Medical Supply has already made this same argument based on the same evidence. The Court rejected its position and Medical Supply's appeal was dismissed. Mr. Lipari cannot re-litigate the issue through successive motions under Rules 59(e) or 60(b), particularly where he is not a party in the case. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (holding that motions under Rules 59(e) and 60(b) "are inappropriate vehicles to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion."); *see also Borrero v. City of Chicago*, 456 F.3d 698 (7th Cir. 2005).¹

¹ Following the Court's dismissal of this case, Mr. Lipari filed a "Motion for Reconsideration." That motion was denied and Medical Supply Chain appealed, though its appeal was dismissed as untimely. There is simply no reason – or legal or factual basis – to keep litigating issues the plaintiff has repeatedly lost.

Notwithstanding this bar to the motions, Mr. Lipari constructs his argument upon this Court's decision in *Lipari v. US Bancorp, et al*, Case No. 07-CV-02146 wherein the Court has allowed that Lipari to proceed *pro se* on Medical Supply Chain, Inc.'s state law claims as the alleged assignee of all assets from Medical Supply Chain. According to Mr. Lipari, this result is different than the one in this case that denied substitution of parties, and was brought about due to the June 4, 2007 Supreme Court decision in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (discussing Rule 8 pleading standards in a *pro se* prisoner case).

But there is no intervening change in law based upon *Erickson* or the decision in *Lipari* that compels re-litigation of the issues here. Mr. Lipari, himself, is the named plaintiff in the most recent case and the Court found there existed sufficient factual allegations for Mr. Lipari, as alleged assignee of corporate assets, to appear *pro se* as the named plaintiff in that action. Mr. Lipari originated that action and there was no motion, order, or appeal concerning substitution of parties. In contrast, this lawsuit was filed by a then-licensed lawyer in the name of the corporate entity Medical Supply Chain, Inc. and the dissolution of Medical Supply Chain (during the case) does not automatically substitute Lipari as the plaintiff. Medical Supply remains the plaintiff in this action and it must be represented by a licensed attorney—and only a licensed attorney may file pleadings on its behalf.

There is no change in law that would allow Mr. Lipari to now step into Medical Supply's place to pursue federal claims that were dismissed (twice) on the merits. Mr. Lipari is attempting to re-litigate issues that have been settled by this Court and the Court of Appeals. Therefore, his

Motion to Alter or Amend Judgment pursuant to Rule 59(e) should be denied if it is not stricken.²

C. The Court may strike Lipari’s Rule 60(b) motion through its inherent authority to control its docket.

Every court is granted the inherent authority to control its docket as it sees fit. *In re Calder*, 973 F.2d 862, 868 (10th Cir. 1992) (“The court has the inherent power ‘to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.’”) quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). This inherent power includes the authority to strike motions as well as pleadings. *See Lynn v. Roberts*, 2006 WL 2850273 (D. Kan., Oct. 4, 2006); *see also Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005).

While Mr. Lipari argues that the Court does not have authority under either Rule 12 or Rule 37 of the Federal Rules of Civil Procedure to strike his Rule 60(b) motion, these rules apply only to parties, and pleadings filed by parties in civil litigation. Mr. Lipari is not a party to the action, and motions as an interested person are not authorized pleadings in this action. As noted above, Mr. Lipari has no standing in this case to litigate on behalf of his company. Therefore, the Court may strike his filings through its inherent power to control its own docket. Moreover, the Court has authority under Rule 11(b) to *sua sponte* issue sanctions, including striking motions and any other discipline the Court in its discretion deems appropriate. *See Lynn*, 2006 WL 2850273, *5-6.

Because the Court properly struck Mr. Lipari’s Rule 60(b) motion, his Motion to Alter or Amend Judgment pursuant to Rule 59(e) should be denied.

² To the extent the Court may now consider the merits of Mr. Lipari’s Rule 60(b) motion, these same arguments defeat that motion. Defendants also hereby incorporate their prior arguments with respect to the Rule 60(b) motion. (Doc. No. 123).

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above item was filed in PDF format with the Court pursuant to its *Case Management / Electronic Case Files* program and thereby a notice of filing was e-mailed to counsel of record herein, all on the 23rd day of May, 2008.

A copy was also served via United States mail, postage prepaid, to:

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