

No. WD 70832

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

SAMUEL LIPARI,

Appellant,

v.

NOVATION, LLC *ET AL.*,

Respondents.

**Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Michael W. Manners**

Circuit Court No. 0816-04217

**BRIEF OF RESPONDENTS JERRY GRUNDHOFER,
ANDREW CECERE, RICHARD DAVIS, ANDREW DUFF,
PIPER JAFFRAY COMPANIES, AND POLSINELLI SHUGHART PC
(f/k/a SHUGHART THOMSON & KILROY, P.C.)**

MARK A. OLTHOFF MO #38572
ANTHONY BONUCHI MO #57838
POLSINELLI SHUGHART PC
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509
molthoff@polsnelli.com
abonuchi@polsinelli.com

JAY E. HEIDRICK
POLSINELLI SHUGHART, PC
6201 College Blvd., Suite 500
Overland Park, Kansas 66211
(913) 451-8788
(913) 451-6205 (FAX)
jheidrick@polsinelli.com

ATTORNEYS FOR RESPONDENTS
JERRY GRUNDHOFER, ANDREW
CECERE, RICHARD DAVIS, ANDREW
DUFF, AND PIPER JAFFRAY
COMPANIES

WILLIAM E. QUIRK
POLSINELLI SHUGHART PC
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509
wquirk@polsinelli.com

ATTORNEYS FOR RESPONDENT
POLSINELLI SHUGHART PC (f/k/a
SHUGHART THOMSON & KILROY,
P.C.)

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JURISDICTIONAL STATEMENT

This appeal is from a series of judgments dismissing the entirety of the plaintiff-appellant's claims. The circuit court dismissed most of the parties and claims—including those against these Respondents—on August 8, 2008. (L.F.I. 671–72.)¹ The circuit court dismissed Lathrop & Gage L.L.P. on December 29, 2008. (L.F.II. 391.) The trial court dismissed the sole remaining party (Robert Zollars) on March 27, 2009. (L.F.II. 732.)

Mr. Lipari filed his first notice of appeal on August 13, 2008 but it was dismissed as untimely. (L.F.II. 1.) He filed a second notice of appeal on January 9, 2009, which was dismissed on February 24, 2009. (L.F.II. 426.) Mr. Lipari filed the current appeal on March 30, 2009. The March 27, 2009 order and judgment fully disposed of all claims and issues as to all parties, left nothing for future determination and is appealable as a final judgment.

The jurisdiction of this Court arises under Article V, Section 3 of the Missouri Constitution, R.S.Mo. § 512 and Missouri Supreme Court Rule 81. This

¹ Lipari has filed eight volumes of legal file, four of which were filed originally in Case No. WD 70001 and four of which are filed in Case No. WD 70832. For ease of reference, Respondents will refer to these as “L.F.I.” and “L.F.II.,” respectively.

appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court.

STATEMENT OF FACTS

Contrary to the implication in Mr. Lipari's Statement of Facts, there are no "facts" that have been proven or stipulated to here because this appeal is based on the dismissal of his Petition as a matter of law. Because Lipari's assertions are somewhat disjointed and his Statement of Facts goes beyond a recitation of the allegations contained in the Petition, Respondents set forth the following summary of the allegations in order for this Court to better understand Lipari's claims.

A. Lipari's Allegations of Anticompetitive Conduct

For his claims under the Missouri antitrust statutes, Lipari alleges that three officers of U.S. Bancorp or U.S. Bank (Messrs. Grundhofer, Davis and Cecere), Piper Jaffray Companies and one of its officers (Mr. Duff) along with their outside counsel (Polsinelli Shughart) have engaged in anticompetitive conduct or conspired with others to keep him out of the marketplace or from obtaining certain inputs or facilities to reach the market. (L.F.I. 12, 23, Petition ¶¶ 1, 102.)² Lipari also alleges that the defendants have engaged in exclusionary practices in the

² Lipari acknowledges that he first instituted his claims against the so-called "hospital supply cartel" in October 2002. (L.F.I. 14, Petition ¶ 21.) He outlines his litigation history in Appendix One to his Petition. (L.F.I. 120–25, Appendix One pp. 1–6.)

capitalization of healthcare suppliers. (L.F.I. 23, Petition ¶¶ 103, 106.) Lipari defines the markets for his antitrust claims as follows:

- The hospital supply market for hospitals and nursing homes in Missouri
- The e-commerce hospital supply market in Missouri
- The upstream healthcare technology company capitalization market in Missouri.

(L.F.I. 18, Petition ¶¶ 59–65.)

Lipari alleges that the defendants have caused “antitrust injury” to “Missouri hospital supply customers” which he does not define but apparently includes hospitals and nursing homes, healthcare services consumers, consumers of healthcare insurance, healthcare insurers or insurance plans, and hospital and nursing home patients. (L.F.I. 19–22, Petition ¶¶ 68–98.) Lipari also asserts that he has suffered “antitrust injury,” dating back to at least October 2002 (L.F.I. 23, Petition ¶ 100; L.F.I. 120) and has been denied the opportunity to enter the above markets since that time (L.F.I. 23, Petition ¶¶ 101–106.) Lipari seeks damages of nearly \$3 billion. (L.F.I. 118–19.)

In addition to these assertions, Lipari alleges a curious array of seemingly unconnected events and circumstances that he believes arise out of or are related to

the so-called conspiracies that are preventing him from entering the marketplace.

Among these occurrences are the following:

- The U.S. Department of Justice, Attorney General's Office and Federal Trade Commission have acted to protect the hospital supply cartel. (L.F.I. 24, Petition ¶¶ 109–112.)
- The FBI has refused to investigate the cartel participants. (L.F.I. 24, Petition ¶ 113.)
- Several U.S. attorneys have perished or lost their jobs. (L.F.I. 25–29, Petition ¶¶ 120–149.)
- The White House, including former Deputy Chief of Staff Karl Rove and former President George W. Bush, influenced the Department of Justice for the protection of the cartel. (L.F.I. 31–32, 36, 40, 43, 49, 55, Petition ¶¶ 152–156, 160, 192, 222, 243, 281, 323–325.)
- The Missouri Governor's office undermined Lipari's efforts to reduce healthcare costs and engaged in a cover-up. (L.F.I. 41–46, Petition ¶¶ 228–265.)
- Officials from the State of Kansas influenced the press, targeted the trucking business of Lipari's father and acted for the protection of the cartel. (L.F.I. 50–54, Petition ¶¶ 289–315.)

- A former Hallmark Company senior executive assisted in securing a national cancer research center at St. Luke's Hospital in Missouri. (L.F.I. 46–47, 54–56, Petition ¶¶ 266–278, 316–329.)
- Lipari's phones have been unlawfully tapped. (L.F.I. 97, Petition ¶ 546.)
- Lipari has been deprived of his prior counsel, unable to engage a lawyer to handle his cases and his friends have been disbarred or denied admission to the bar. (L.F.I. 87, 89, 91–96, 98–103, Petition ¶¶ 479, 494, 507–19, 522–37, 548–82.)

Finally, Lipari included many of the allegations of anti-competitive conduct that were previously alleged in one or both of the (now-dismissed) federal actions, *Medical Supply Chain, Inc. v. U.S. Bancorp, et al. (Medical Supply I)* and *Medical Supply Chain, Inc. v. Neoforma, et al. (Neoforma)* in Appendix Four of his Petition. (L.F.I. 134–60.)

B. Lipari's Common Law Claims

In addition to the three causes of action asserted under R.S.Mo. § 416.031, Lipari alleges common law claims of tortious interference with business relations (Count IV), fraud (Count V), and *prima facie* tort (Count VI). (L.F.I. 114–18.)

1. Allegations of Tortious Interference

Lipari asserts that two contracts or business expectancies existed, namely (1) a “contract to sale the office building lease to GE and General Electric Transportation Co.” and (2) the alleged escrow agreement(s) to provide “individual representative candidate trust accounts.” (L.F.I. 114 (p. 103)).³ Lipari then alleges legal conclusions concerning the defendants’ supposed knowledge of the agreement(s) or expectancies, intentional interference, lack of justification and damage. (L.F.I. 115 (p. 104)).

2. Allegations of Fraud

For his fraud claim, Lipari alleges that: (1) all defendants “were engaged in concealed fraudulent conduct,” (2) the representations “regarding their savings to hospitals” and “the validity of [his] claims, merits of his past litigation and quality of his legal representation” are false, (3) all defendants intended to cause Lipari injury through misrepresentations to him and others, (4) all defendants acted with malice to defraud Lipari, (5) that all defendants acted “in concert and in secret” while knowing that “lack of candor and disclosure of the true acts” would give the defendants an advantage over Lipari, (6) that Lipari “and third parties” were

³ Lipari also asserts variously in his Petition that there has been “interference” in his ability to secure legal counsel or the admission of his friends to the bar (L.F.I. _____, Petition ¶¶ _____) but these supposed relationships are not identified in his Count IV.

unaware of the falsity, (7) that Lipari, his “associates and customers” relied on the defendants’ representations and (8) damages. (L.F.I. 116–17 (pp. 105–06)).

3. Allegations of *Prima Facie* Tort

The allegations of *prima facie* tort are likewise pleaded as legal conclusions. Lipari asserts that the defendants’ conduct—even if not violative of Missouri’s antitrust laws or did not amount to tortious interference, was nevertheless “unlawful and fraudulent,” intentional, caused harm, and was done without justification. (L.F.I. 117–18 (p. 106–07)).

C. Allegations Made as to Polsinelli Shughart

The separate allegations made against the law firm Polsinelli Shughart can be summed up as follows:

- Polsinelli Shughart attorneys deprived Lipari of his original counsel, Bret Landrith, who has been disbarred by the State of Kansas. (L.F.I. 89, Petition ¶ 494.)
- Polsinelli Shughart attorneys have inhibited lawyers from representing Lipari in his lawsuits. (L.F.I. 87, 94–96, Petition ¶¶ 479, 520–539.)
- Lipari accuses Polsinelli Shughart of “networking” with Kansas officials to deny Donna Huffman’s admission to the Kansas bar. (L.F.I. 100–03, Petition ¶¶ 562–582.)

- Lipari accuses Polsinelli Shughart of “networking” with Kansas officials to deny Judy Jewsome’s admission to the Kansas bar (L.F.I. 98–100, Petition ¶¶ 548–561) which has also apparently chilled Lipari’s access to Senator Claire McCaskill. (L.F.I. 99, Petition ¶ 559.)

D. Allegations Made Against Mr. Cecere, Piper Jaffray and Andrew Duff

Out of some 93 pages of “common” allegations, Lipari identifies Mr. Cecere, Piper Jaffray and Mr. Duff by name in about ten paragraphs:

- Lipari accuses Cecere, Piper Jaffray and Duff of facilitating financing and investments in healthcare technology companies, supposedly deceiving investors of those companies and profiting from their participation. (L.F.I. 63–66, Petition ¶¶ 373–382.)
- Piper Jaffray conducted a study in 2001 showing savings in the healthcare distribution system. (L.F.I. 69, Petition ¶ 394.)
- Cecere, Piper Jaffray and Mr. Duff have supposedly received cash or stock from certain hospital supply manufacturers and hosted meetings where the manufacturers and distributors were present. (L.F.I. 76–77, Petition ¶¶ 431–34.)

E. Allegations Against Mr. Grundhofer and Mr. Davis

Plaintiff's 108-page Petition reflects the following "specific" allegations made toward Mr. Grundhofer and Mr. Davis:

- Lipari accuses Mr. Grundhofer and Mr. Davis of facilitating financing and investments in healthcare technology companies, supposedly deceiving investors of those companies and profiting from their participation. (L.F.I. 63–66, Petition ¶¶ 373–382.)
- Mr. Grundhofer and Mr. Davis have supposedly received cash or stock from certain hospital supply manufacturers and hosted meetings where the manufacturers and distributors were present. (L.F.I. 76–77, Petition ¶¶ 431–34.)
- Lipari accuses Mr. Davis of continuing the "extortion" of other healthcare supply companies during the course of Lipari's suits. (L.F.I. 86, 87, Petition ¶¶ 471, 478.)
- Lipari accuses Mr. Grundhofer of seeking to spin off Piper Jaffray from U.S. Bancorp because of Lipari's lawsuit claims. (L.F.I. 87, Petition ¶ 477.)
- Lipari accuses Mr. Grundhofer and Mr. Davis (through counsel) of interfering with the plaintiff's efforts to obtain

representation. (L.F.I. 87, 89, 94–95, 96, Petition ¶¶ 479, 494, 527–28, 533–34, 537.)

- Lipari accuses Mr. Grundhofer and Mr. Davis of not complying with federal Sarbanes Oxley obligations in the reporting of his lawsuits. (L.F.I. 87–88, 94, 96, Petition ¶¶ 480, 526, 538.)

STANDARD OF REVIEW

This Court reviews the Circuit Court's order dismissing these Respondents under a *de novo* standard. *Heidbreder v. Tambke*, 284 S.W.3d 740, 742 (Mo. App. W.D. 2009). Because the trial court did not state the grounds for dismissal, the appellate court presumes that the decision was based one of the grounds alleged in the motion to dismiss. *Id.* If dismissal was proper as a matter of law based on any ground alleged in the motion to dismiss, the dismissal will be affirmed. *Id.*

The denial of Lipari's motions to amend his petition is reviewed under an abuse of discretion standard. *Gohlston v. Lightfoot*, 825 S.W.2d 864, 869 (Mo. App. W.D. 1992).

STATEMENT OF THE ISSUES

- 1. Whether the circuit court properly dismissed the claims against these Respondents.**
- 2. Whether the circuit court properly denied Lipari's motions to amend his petition.**

RESPONDENTS' BRIEF

INTRODUCTION

This is the most recent of several lawsuits instituted by Mr. Lipari or his defunct company (Medical Supply Chain, Inc.) regarding his alleged inability to enter the hospital supplies market.⁴ Although the plaintiff sets forth his version of the tortuous history of this litigation in Appendix One to his Petition (LF.I. 120–25), additional history was set forth by Judge Murguia in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316 (D. Kan. 2006) and Judge Gaitan in *Lipari v. General Elec. Co.*, 2008 WL 2977032 (W.D. Mo., July 30, 2008).

⁴ See *Medical Supply Chain, Inc. v. U.S. Bancorp, U.S. Bank, Jerry Grundhofer, Andrew Cecere, U.S. Bancorp Piper Jaffray and Andrew Duff*, 2003 WL 21479192 (D. Kan., June 16, 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004); *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100 (D. Kan. 2004), *aff'd in part, rev'd in part*, 144 Fed. Appx. 708 (10th Cir. 2005); *Medical Supply Chain, Inc. v. Neoforma*, 419 F. Supp.2d 1316 (D. Kan. 2006), *appeal dismissed*, 508 F.3d 572 (10th Cir. 2007); *Lipari v. U.S. Bancorp and U.S. Bank*, 2008 WL 4190784 (D. Kan., Sept. 4, 2008), *aff'd* 2009 WL 2055125 (10th Cir., July 16, 2009); *Lipari v. General Elec. Co.*, 2008 WL 2977032 (W.D. Mo., July 30, 2008), *appeal pending*.

The prior cases involving Lipari and his company all have been dismissed, sometimes with added sanctions. *See* 112 Fed. Appx. 730 (10th Cir. 2004) (sanctions for frivolous appeal); 144 Fed. Appx. 708 (10th Cir.) (Rule 11 sanctions as to individual claim against President of GE); 419 F. Supp.2d 1316 (D. Kan. 2006) (Rule 11 sanctions); 2009 WL 1090070 (10th Cir., Apr. 23, 2009) (upholding sanction prohibiting the filing of additional *pro se* pleadings in the *Neoforma* case).

Having lost each of his prior federal cases, Lipari now resorts to filing Missouri state claims against Jerry Grundhofer (U.S. Bancorp's CEO); Richard Davis (U.S. Bank's CEO); Andrew Cecere (U.S. Bancorp's CFO), Andrew Duff (Piper Jaffray's CEO), Piper Jaffray Companies and their litigation counsel (Polsinelli Shughart), among others, as defendants. And, while his allegations against the defendants here are much the same as the prior unsuccessful lawsuits, the tale that is told has become ever more fanciful. Despite pleading approximately 93 pages of so-called "facts" in nearly 600 separate paragraphs (plus several appendices which include allegations made in prior lawsuits) before setting out the five causes of action, Lipari's Petition suffers from many of the same fatal pleading defects that resulted in the dismissal of his federal antitrust claims. In addition, several of his causes of action are barred by the statute of

limitations and/or are not legally actionable. The circuit court's August 8, 2008 judgment dismissing these Respondents should be affirmed.⁵

ARGUMENT

I. The Circuit Court Properly Dismissed Lipari's Claims Under the Missouri Antitrust Statutes.

While the allegations in plaintiff's Petition are oftentimes incomprehensible, at bottom, Lipari claims that the defendants individually or in combination have kept him out of the hospital supply business since 2002. For several reasons, each of which alone is sufficient, the circuit court correctly dismissed the action. *See Rocha v. Metro. Prop. & Cas. Ins. Co.*, 14 S.W.3d 242, 245 (Mo. App. W.D. 2000) (appellate court may affirm the judgment based upon any grounds in the record).

A. Lipari had actual knowledge of his alleged damages and causes of action when he originally filed suit in October 2002; thus the claims filed in February 2008 are barred by the statute of limitations in R.S.Mo. § 416.131(2).

All actions under the Missouri antitrust statute must be commenced "within four years after the cause of action accrued." R.S.Mo. § 416.131(2). A cause of action accrues when the wrong is sustained and the plaintiff is able to ascertain its

⁵ Respondents note that Points 4, 7, 8 and 9 in Lipari's brief do not involve them and, thus, are not addressed herein.

damages. *See, e.g., Gaydos v. Imhoff*, 245 S.W.3d 303, 306 (Mo. App. W.D. 2008).

Plaintiff's state antitrust claims are predicated on the defendants' alleged actions to keep him out of the hospital supplies market. But he has already sought relief—as early as October 2002—for the same alleged “antitrust injury” he asserts here. (*See* L.F.I. 120, Petition Appendix One, p. 1, ¶¶ 1–5; *see also* L.F.I. 134–173, Appendices Four and Five setting forth the allegations of the prior lawsuits.) From the face of the Petition, it is clear that Lipari's alleged cause of action accrued no later than October 2002 when the first suit for antitrust damages was filed. *See Medical Supply Chain, Inc. v. U.S. Bancorp, et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004). Because Lipari did not file this action until February 2008—well after the four-year statute had run—his causes of action for violation of R.S.Mo. § 416.031 are time-barred.

Lipari nevertheless hopes to save his claims under a distorted and inaccurate view of the continuing wrong theory. Lipari makes his argument based upon more recent events in history and suggests that these unconnected circumstances have continued to deprive him access to the hospital supply and capital markets. That is not enough to overcome the overwhelming state of events he has alleged throughout the litigation that he has brought against these Respondents since 2002. *See United Farmers Agents, Inc. v. Farmers Ins. Exchange*, 892 F. Supp. 890, 912

(W.D. Tex. 1995), *aff'd* 89 F.3d 233 (5th Cir. 1996) (rejecting continuing conduct theory where subsequent actions merely further the initial alleged antitrust violation). *Accord: Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990); *Kaw Valley Elec. Co-op v. Kan. Elec. Power*, 872 F.2d 931, 933–34 (10th Cir. 1989). There is simply no merit to his assertions.⁶

The face of Lipari’s Petition shows that he had actual knowledge that the alleged antitrust claims accrued at least by October 2002. Notwithstanding his utter failure in each of the previous cases, this action was not filed until February 2008. Plainly, the causes of action for violation of R.S.Mo. § 416.031 are time-

⁶ Lipari also argues that the Circuit Court’s judgment contradicts *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), and its progeny. That argument is meritless. In *Lawlor*, the Supreme Court held that a prior judgment “cannot be given the [*res judicata*] effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.” *Id.* at 328. Unlike *Lawlor*, however, *no* subsequent conduct resulting in actionable claims has occurred since the entry of the previous judgments. The earlier lawsuits were based upon the same course of events and claimed injury at issue here. That Lipari now seeks to “update” or “repackage” some of the alleged conduct into state antitrust claims does not shield him from dismissal.

barred and the Circuit Court's judgment dismissing Counts I, II and III should be affirmed.

B. Lipari's Missouri antitrust claims are barred under the doctrine of collateral estoppel in light of the previous dismissal of his federal antitrust claims.

In March 2005, Medical Supply filed its third lawsuit asserting the inability to enter the hospital supplies market. Much like the *Medical Supply I* case before it, in *Neoforma Medical Supply* brought numerous causes of action, including antitrust claims for restraint of trade and monopoly under both federal and Missouri law. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1320 (D. Kan. 2006). Lipari sued Respondents Jerry Grundhofer, Andrew Cecere, Andrew Duff, Piper Jaffray and Polsinelli Shughart among others.⁷

On March 7, 2006, the federal court dismissed the federal antitrust claims for failure to state a claim upon which relief can be granted. *Id.* at 1327. The court also offered another basis for dismissal: Claim preclusion as to the alleged antitrust violations. *Id.* at 1331. Although Judge Murguia declined to exercise jurisdiction over the pendant state claims and dismissed them without prejudice, *id.*

⁷ Grundhofer, Cecere and Piper Jaffray had also been defendants in the original lawsuit filed in October 2002. *See* 2003 WL 21479192 (D. Kan., June 16, 2003).

at 1330, his determination of plaintiff's federal antitrust claims on the merits bars Lipari's current state antitrust claims under the doctrine of collateral estoppel.⁸

Missouri courts apply a four-part test to determine whether an issue is barred by issue preclusion: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *James v. Paul*, 49 S.W.3d 678, 682–683 (Mo. 2001). There is no requirement that the prior suit include specific findings. *Carr v. Holt*, 134 S.W.3d 647, 650 (Mo. App. E.D. 2004).

Although Mr. Lipari was not a party to the *Medical Supply I* or *Neoforma* suits, he is clearly in privity with Medical Supply as the alleged assignee of this

⁸ Respondents did not specifically seek dismissal on the ground of *res judicata* as Lipari's Point 1 argues. However, because the issues determined by the federal courts are dispositive of Lipari's "claims" here, collateral estoppel justifies the dismissal of Lipari's state antitrust suit.

cause of action.⁹ Lipari had a full and fair opportunity to litigate the *Medical Supply I* and *Neoforma* matters, both of which were fully concluded on the merits and ran their course of appeals. Therefore, the only factor to determine is whether the issues in the *Medical Supply I* and *Neoforma* matters are identical to the claims brought by Lipari in this suit.

While Lipari now purports to bring this suit under Missouri's antitrust statutes, the Missouri antitrust law specifically provides that its provisions "shall be construed in harmony with ruling judicial interpretations of comparable federal statutes." R.S.Mo. § 416.141. And Missouri courts have consistently looked to federal courts' interpretation of the Sherman Act when construing the provisions of R.S.Mo. § 416.031. *See, e.g., Clinch v. Heartland Health*, 187 S.W.3d 10, 19–20

⁹ Mr. Lipari filed this suit as the alleged "Assignee of Dissolved Medical Supply Chain, Inc." Whether Mr. Lipari is a proper assignee to maintain this action, under Missouri law "an assignee acquires no greater rights than the assignor had at the time of the assignment." *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556–57 (Mo. App. S.D. 2004) (quoting *Carlund Corp. v. Crown Center Redevelopment*, 849 S.W.2d 647, 650 (Mo. App. 1993)). Mr. Lipari stands in Medical Supply's shoes and can occupy no better position than Medical Supply would have if it sued these defendants directly. *Id.* Thus, "any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari]." *Id.*

(Mo. App. W.D. 2006); *Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582, 586 (Mo. App. E.D. 1987); *Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. 1979) (recognizing that § 416.141 “intended to provide a ready body of precedent for interpreting the law and a single standard of business conduct already known and acquiesced in by businesses in Missouri”). Thus, Lipari’s state law claims are viewed under the same analysis as the previously defective federal claims.

If not dispositive, the federal decisions are most persuasive authority when determining the adequacy of Lipari’s Missouri antitrust claims. On three separate occasions, a federal court has found Lipari’s federal antitrust claims based on the *same* course of events to be groundless.¹⁰ *Medical Supply Chain, Inc. v. US Bancorp, NA*, 2003 WL 21479192, *3 (D. Kan. 2003) (“[P]laintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1 [of the Sherman Act].”); *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100, *3 (D. Kan. 2004)

¹⁰ Lipari asserts that he has not had an opportunity to “fully” litigate his claims but that is wrong. Simply filing a lawsuit does not ensure one’s right to a trial. Lipari has attempted numerous times to assert claims but each has been dismissed because he cannot do so. Lipari has also appealed those dismissals. A full opportunity to litigate has been provided.

(“[A]t the most fundamental level, plaintiff’s antitrust claims fail.”); *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006) (“Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations.”). And Lipari concedes that “the present case is the same Article III controversy as the *Medical Supply Chain, Inc.* actions” (Br. at p. 17.)

Although Respondents have not found a Missouri case applying preclusion principles in these circumstances, in *Gregory Marketing Corp. v. Wakefern Food Corp.*, 207 N.J. Super. 607, 504 A.2d 828 (N.J. Super. Ct., 1985), the New Jersey Superior Court decided a similar issue. There, the plaintiff brought suit in federal court alleging antitrust violations. The federal court dismissed the federal claims on the basis that the plaintiff lacked standing and failed to suffer an antitrust injury. The plaintiff later re-filed his action in state court, asserting state antitrust violations based on the same facts as his earlier federal action.

Like Missouri, New Jersey had enacted a statute stating that its state antitrust laws must be interpreted in accordance with their federal counterparts. Therefore, the defendants moved for dismissal of the state antitrust claims asserting they were barred by the doctrines of *res judicata* and collateral estoppel. The court agreed:

If that legislative mandate of “harmony,” “uniformity” and consistency between the state and federal antitrust statutes is to have

any meaning at all, plaintiffs are barred from relitigating here the issues of antitrust standing and injury.

Id. at 623–24¹¹. The same result is compelled here.

Moreover, Lipari’s substantial reliance on this Court’s decisions in *Sangamon Associates, LTD v. The Carpenter 1985 Family Partnership, LTD*, 280 S.W.3d 737 (Mo. App. W.D. 2009) and *Spath v. Norris*, 281 S.W.3d 346 (Mo. App. W.D. 2009) is misplaced. In *Sangamon*, the Court found collateral estoppel applied to the plaintiff’s later suit and, specifically, that the allegations of subsequent actions did not preclude its use. In *Spath*, while collateral estoppel was rejected, it was because the Court did not have before it sufficient information concerning the claims in the second suit. Here, however, there is no mistaking that the Missouri antitrust claims are identical to the federal claims other than Lipari’s nascent attempt to say the geographic market can be limited to Missouri. Because

¹¹ In *Watkins v. Resorts International Hotel and Casino, Inc.*, 124 N.J. 398, 591 A.2d 592 (N.J. 1991) the New Jersey Supreme Court rejected the *Wakefern* decision to the extent its holding was based upon an incorrect conclusion that dismissal for lack of standing in an earlier suit is a dismissal on the merits for purposes of *res judicata* and collateral estoppel. *Id.* at 604. That same concern is not present here because the prior dismissals of the federal antitrust claims were plainly on the merits.

issues concerning one or more of the essential elements of the antitrust claims have been decided fully and finally on the merits, collateral estoppel applies to bar Lipari's state antitrust claims.

The circuit court's judgment dismissing Counts I, II and III should be affirmed.

C. Lipari lacks standing to assert the antitrust claims.

Lipari lacks standing to recover damages arising from the hospital supply cartel he alleges exists to overcharge hospitals for medical supplies. Lipari is not a hospital, nor does he allege he purchased hospital supplies from the defendants. Thus, Lipari is not directly injured by the alleged conspiracy to charge high prices. Indeed, as a supposed competitor of the alleged cartel, Lipari would *benefit* by any agreement to charge artificially high prices, because he could undercut the price to win business. Plaintiff's allegations affirmatively establish this lack of standing, as he claims that he "found it easy to beat the 'volume discounts' on even very small quantity purchases for widely dispersed customers" (L.F.I. 66, Petition ¶ 385.) As a competitor, Lipari lacks standing to complain of defendants' alleged price fixing conduct. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339–40 (1990) (holding that a firm has not suffered antitrust injury where competitors have agreed to fix prices); *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582–83 (1986) (same); *Anesthesia Advantage, Inc. v. Metz Group*,

759 F. Supp. 638, 645–46 (D. Colo. 1991) (holding that plaintiffs had “no standing to assert [against its competitors] the price fixing claim independently or as a larger conspiracy, even assuming that the defendants were price fixing.”).

Moreover, Lipari’s Petition alleges several supposed “schemes” that, on their face, have nothing to do with him or his defunct organization. For example, Lipari complains at length about the establishment of a National Cancer Institute Certified Research Center at St. Luke’s hospital in Kansas City. (L.F.I. 46–49.) Lipari cannot claim he was harmed by this, nor does he. Lipari also complains about a potential change in health insurance in Missouri. (L.F.I. 41–44.) Again, there is no alleged connection between these contentions to his alleged inability to compete in the marketplace. Similarly, plaintiff cannot recover on the myriad allegations of inflated prices, harm to patients, harm to Medicare and Medicaid, and the alleged efforts to foil any investigation of these alleged facts. (L.F.I. 19–22, 40–44.) Plaintiff simply has not alleged an antitrust injury resulting from that alleged conduct. Finally, Lipari’s allegations that defendants somehow caused friends of his to be denied admission to the bar (L.F.I. 98–103) beyond any doubt are not related to his ability to sell hospital supplies.

D. Lipari failed to alleged antitrust injury.

In order to sustain a claim under the antitrust laws, a plaintiff must show both “but-for” causation and “antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-*

Mat, Inc., 429 U.S. 477, 489 (1977); *Tal v. Hogan*, 453 F.3d 1244, 1253 (10th Cir. 2006). Lipari did not and could not allege either element here.

In order to show “but-for” causation, there must be “a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage” *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 407 (10th Cir. 1992) (quoting *Reibert v. Atl. Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973)). In other words, the plaintiff must show that “‘but for’ the violation, the injury would not have occurred.” *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993). “[L]ack of causation in fact is fatal to the merits of any antitrust claim. Consequently, an essential element in plaintiffs’ claim is that the injuries alleged would not have occurred but for [the defendant’s] antitrust violation.” *Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir. 1986) (internal citation omitted). Lipari’s Petition was properly dismissed because it does not allege that defendants’ actions were the cause in fact of Lipari’s inability to compete in the relevant market(s). Rather than pleading facts, Lipari merely alleges the legal conclusion he “was and is a competitor” and that he has “suffered direct antitrust injuries.” (L.F.I. 109.) That is not enough to assert an antitrust claim seeking nearly \$3 billion.

In addition to the “but for” test, the plaintiff must allege “antitrust injury,” which is to say, “injury of the type that flows from that which makes defendants’

acts unlawful.” *Brunswick*, 429 U.S. at 489; *see also Tal*, 453 F.3d at 1253. An antitrust complaint must be dismissed “absent allegations that [the defendant’s] conduct hampered [the plaintiff’s] ability to compete.” *Classic Communications, Inc. v. Rural Tel. Serv. Co., Inc.*, 995 F. Supp. 1185, 1187 (D. Kan. 1998); *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 759 (2d Cir. 1972) (affirming dismissal of complaint where “the anticompetitive acts alleged in the complaint have not lessened [the plaintiff’s] ability to compete.”).

The case of *Association of Washington Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696 (9th Cir. 2001) fully supports the dismissal here. There, the plaintiffs, public hospital districts, sued various tobacco companies and organizations on a variety of claims including violations of antitrust laws. In affirming dismissal of the claims, the court of appeals held that the plaintiffs—like Lipari here—had failed to allege antitrust injury. *Id.* at 704. In particular, the court recognized that the plaintiffs did not participate in the same market as the alleged wrongdoers: “Parties whose injuries, though flowing from that which makes the defendant’s conduct unlawful, are experienced in another market do not suffer antitrust injury.” *Id.* at 705 (quoting *Am. Ad Mgmt., Inc.*, 190 F.3d at 1057).

Lipari’s alleged injuries simply do not flow “from that which makes defendants’ acts unlawful.” *Greater Rockford Energy and Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 401 (7th Cir. 1993) (quoting *Brunswick*, 429 U.S. at 489); *see*

also *Federal Prescription Serv., Inc. v. Am. Pharmaceutical Ass'n*, 663 F.2d 253, 268–72 (D.C. Cir. 1981) (holding that mail-order prescription service would have incurred the same costs regardless of defendant’s alleged anticompetitive conduct); *Hodges v. WSM, Inc.*, 26 F.3d 36, 39 (6th Cir. 1994) (finding no antitrust injury where plaintiff suffered due to defendant’s rightful exercise of property rights, not defendant’s alleged anticompetitive behavior). Alleged grand conspiracy theories aside, there is no basis to assert “antitrust injury” here. Lipari’s vague claims of “antitrust injury” are speculative and plainly meritless. See *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1100 (10th Cir. 1991); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 99–100 (5th Cir. 1988).

E. Lipari’s antitrust claims are barred by the *Noerr-Pennington* doctrine to the extent they are based on allegations relating to defendants’ defense of prior lawsuits.

Many of Lipari’s allegations concern his belief that he has been wrongfully deprived of a “property interest” in his antitrust claims by defendants’ conduct in defending the prior lawsuits. For example, Lipari alleges that defendants “obstruct[ed] the petitioner in his federal litigation to recover the market entry capitalization” (L.F.I. 23, Petition at ¶ 103.) In this same vein, Lipari asserts that defendants have made attempts to deprive the petitioner of his corporate counsel. (L.F.I. 23, 87, 93–96, Petition at ¶¶ 103, 479, 520–37.) This claim is

apparently based on Lipari’s contention that defendants conspired to have his former counsel, Bret Landrith, disbarred and that the prior sanctions against him and his company prevented other attorneys from agreeing to represent him. (*Id.*) Lipari alleges that this difficulty in getting replacement counsel led him to dissolve his corporation in the hope that he could then continue the litigation *pro se*. (L.F.I. 23, Petition ¶¶ 104–06.)¹²

Lipari’s argument that he has a “property interest” in his federal antitrust claim that was wrongfully taken from him by defendants is ludicrous. The federal antitrust claims have been found meritless—and sanctionable—in the prior lawsuits (which negates Lipari’s argument of a “sham exception”). It would be strange, indeed, for a plaintiff to be sanctioned for filing frivolous claims, and then allowed to proceed in a subsequent case on the theory that the defendant’s conduct in establishing the fundamental legal defects of the initial claims was itself an antitrust violation. Defending oneself against a patently frivolous lawsuit is not wrongful.

¹² It is unclear how these occurrences have in any way prevented Lipari from entering the relevant markets in the context of competition laws. Even putting these allegations in their best light, at most it can be inferred that Lipari has been unable to find representation in his *cause célèbre*. But Respondents are unaware of any case law where such circumstances give rise to an actionable antitrust claim.

In any event, the *Noerr-Pennington* doctrine mandates dismissal of Lipari's claims to the extent that they involve allegations relating to defendants' defense of the prior lawsuits. The *Noerr-Pennington* doctrine immunizes defendants from liability for their "genuine efforts to seek redress through the judicial process, even if the outcome of such litigation is certain to affect or eliminate competition." *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986). The inapplicability of the *Noerr-Pennington* doctrine is an essential element of plaintiff's case. *Defino v. Civic Center Corp.*, 780 S.W.2d 665, 668 (Mo. App. E.D. 1989). Lipari has failed to overcome that hurdle in this case.

F. Lipari's claims under R.S.Mo. § 416.031.1 were properly dismissed for the reason he failed to plead facts constituting the essential elements of his antitrust claims.

Rule 55.05 of the Missouri Rules of Civil Procedure requires that plaintiff's Petition "contain a short and plain statement of the facts showing the pleader is entitled to relief." *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). A party that fails to plead sufficient facts showing entitlement to relief deprives the trial court of jurisdiction in the matter. *Id.* The plaintiff cannot rely on mere conclusions, and courts will disregard conclusions not supported by facts in

determining whether or not a petition states a cause of action. *See id.* (citing *Lick Creek Sewer Sys. v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo. App. 1988)).

Lipari must plead three elements in order to state a claim under § 416.031.1: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, Missouri commerce. *See* R.S.Mo. § 416.031.1; *see also* *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan 2006) (citing similar 15 U.S.C. § 1). However, conclusory allegations are insufficient; the use of “antitrust ‘buzzwords’” is not enough. *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024, 1026 (10th Cir. 1992).

Like the previous unsuccessful federal antitrust claims, Lipari has failed to sufficiently plead a contract, combination, or conspiracy among two actors. In Count I of his Petition, Lipari merely alleges: “The petitioner avers the following defendants have agreed with Novation, LLC to injure the plaintiff” and then lists as defendants Messrs. Davis, Grundhofer, Cecere and Duff as well as Piper Jaffray and Polsinelli Shughart with all the other defendant parties. (L.F.I. 105, p. 94.)

Judge Murguia reviewed similar allegations and found in *Neoforma* that, “[a]lthough plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations.” 419 F. Supp.2d at 1327. Simply citing the elements of an antitrust claim and alleging a violation of them is not sufficient. *Id.*;

TV Comm. Network, Inc., 964 F.2d at 1027 (“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 conspiracy has taken place.’”); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913–914 (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).

In the above cases, allegations like Lipari’s were found inadequate under the federal court’s pleading standards. If Lipari’s allegations fail under notice pleading, they certainly fail under the more stringent “fact pleading” requirements of the Missouri Rules of Civil Procedure. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004) (“Although the petition does not have to plead evidentiary or operative facts showing an entitlement to the relief sought, it must

plead ultimate facts demonstrating such an entitlement and cannot rely on mere conclusions.”).

Mountain View Pharmacy v. Abbot Labs., 630 F.2d 1383 (10th Cir. 1980) is also apt authority. There, the plaintiff alleged twenty-eight defendants had engaged in tying arrangements and price fixing in violation of § 1 of the Sherman Act, but did not specify which defendants were the conspiring parties. Despite the fact that the conspiracy allegation was limited to the named parties in the suit, the court affirmed dismissal, holding that “[a] blanket statement that twenty-eight defendants have conspired to fix prices . . . to thirteen plaintiffs does not provide adequate notice for responsive pleading.” *Id.* at 1388.

Lipari’s Petition never elaborates on the alleged conspiracy other than to simply assert that such an agreement must exist because hospitals, nursing homes and insurers are overpaying for hospital supplies and these parties must be the ones responsible for it. Due to Lipari’s failure to allege any of the required particulars, “[d]ismissal is appropriate.” *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994).

Lipari’s Petition fails to state adequate facts on an essential element of his claim. Count I of his Petition was properly dismissed.

G. Lipari’s claims under R.S.Mo. § 416.031.2 were properly dismissed for the reason he failed to plead facts constituting the essential elements of his antitrust claims.

Count II of Lipari’s Petition fails to allege sufficient facts to support a cause of action under R.S.Mo. § 416.031.2. Like his claim in Count I, Lipari simply alleges conclusions for each necessary element and fails to plead any facts to support them. Moreover, Lipari fails to plead sufficient facts to identify a relevant market to support his antitrust claim. The Circuit Court properly dismissed Count II of Plaintiff’s Petition.

In order to maintain a claim under § 416.031.2, Lipari must allege sufficient facts to show the willful acquisition or maintenance of a monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. *See* R.S.Mo. § 416.031.2; *see also Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d at 1328 (referring to Sherman Act § 2). However, Lipari simply sets forth the legal elements for a cause of action under Section 416.031.2 and makes a conclusory allegation that mirrors each element. (L.F.I. 109–14, Petition pp. 98–103.)

These allegations are wholly insufficient to allege a cause of action under § 416.031.2. A plaintiff must do more than cite relevant antitrust language to state a claim for relief. *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d at

1327; *TV Comm., Inc.*, 964 F.2d at 1027; *Estate Constr. Co.*, 14 F.3d at 221 (4th Cir. 1994); *Nelson Radio and Supply Co.*, 200 F.2d at 913–914; *see also Bell Atlantic Corp.*, 127 S. Ct. at 1965. Moreover, in Missouri, allegations that contain mere conclusions are insufficient and will be disregarded when considering whether a plaintiff has properly pled a cause of action. *See Brock v. Blackwood*, 143 S.W.3d at 56. Because his Count II is nothing but conclusion, the claim was properly dismissed.

In order to maintain a cause of action under § 416.031.2, Lipari must also properly plead the boundaries of an alleged relevant market or markets. *Adidas America, Inc. v. National Collegiate Athletic Assn.*, 64 F. Supp.2d 1097, 1103 (D. Kan. 1999). The relevant market must be defined by “the interchangeability of or the cross-elasticity of demand between the product in question and substitutes for it.” *Id.*, quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, (1962); *see also HDC Medical, Inc. v. Minntech Corp.*, 474 F.3d 543, 547 (8th Cir. 2007). Products belong in the same market when they are reasonably interchangeable for the same uses and must exhibit a high cross-elasticity of demand. *See Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1153 (W.D. Ark. 1995). As stated by the Eighth Circuit, “defining a relevant market is primarily a process of describing those groups of producers which, because of similarity of their products, have the ability—actual or potential—to take significant amounts of business away

from each other.” *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987). Products have a high cross-elasticity if consumers will shift from one to the other in response to changes in the relative costs. *Community Publishers, Inc.*, 892 F. Supp. at 1153 n.7. Failure to define a relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand renders the Petition insufficient and a motion to dismiss may be granted. *See Adidas America, Inc.*, 64 F. Supp. 2d at 1102.

Plaintiff has failed to properly define a relevant product market to support his antitrust claim. The entirety of plaintiff’s claim refers generally to “hospital supplies.” But plaintiff fails to identify any specific product which would constitute “hospital supplies” or how the “hospital supplies” he might sell would be interchangeable and subject to a high cross-elasticity with the “hospital supplies” alleged to be sold by the defendants. Because the plaintiff has failed to identify a single product, his claim under § 416.031.2 fails.

A market definition must be plausible to survive a motion to dismiss. *See TV Communications Network*, 964 F.2d at 1028 (affirming dismissal because the plaintiff “did not allege a relevant product market which [the defendant] was capable of monopolizing, attempting to, or conspiring to monopolize in violation of section 2 of the Sherman Act.”); *Adidas Am., Inc.*, 64 F. Supp.2d at 1102 (to survive a motion to dismiss, the plaintiff “must allege a relevant market that

includes all [products or services] that are reasonably interchangeable”). In *Adidas America*, the district court dismissed a complaint alleging monopolization of a market for “NCAA promotional rights” where the plaintiff “failed to explain or even address why other similar forms of advertising . . . are not reasonably interchangeable.” 64 F. Supp.2d at 1102. Lipari’s Petition suffers from the same defect.

Even giving Lipari the benefit of all inferences, the relevant market cannot be defined as generically as “hospital supplies.”¹³ “[A]n antitrust plaintiff may not define a market so as to cover only the practice complained of, this would be circular or at least result-oriented reasoning.” *Adidas Am.*, 64 F. Supp.2d at 1102. Rather, the market alleged must be justified through application of the relevant legal principles for market definition. As the *Adidas* court noted:

Where [an antitrust] plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and

¹³ It should be noted that the Tenth Circuit Court of Appeals rejected the previous allegation of a healthcare capitalization market. (App. ____, Dec. 10, 2004 Order at p. 5.) The supposed “e-commerce hospital supply” market also is ill-defined and should be rejected. *See United Farmers Agents, Inc. v. Farmers Ins. Exchange*, 89 F.3d 233, 236 (5th Cir. 1996) (rejecting an “electronic access” market definition).

cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Adidas Am., 64 F. Supp.2d at 1102 (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436–37 (3d Cir. 1997) and collecting cases).

Lipari's relevant market argument also fails because it is at once both too broad and too narrow. Lipari's "hospital supplies" market is too broad because Lipari fails to address how the market could be broad enough to include all hospital supplies, from janitorial supplies to bandages to CT scanners. A broom or bandage is obviously not "reasonably interchangeable" with a CT scanner. And Lipari's market is too narrow because the Petition fails to explain why the market may be limited to "hospital supplies." Moreover, just as the complaint in *Adidas America* was dismissed because the plaintiff there failed to explain why other forms of advertising were not substitutes, 64 F. Supp.2d at 1102, Lipari's Petition was properly dismissed because it fails to explain why other ways of marketing hospital supplies (such as selling through telemarketing, catalogs or a direct sales force) are not reasonable substitutes for "e-commerce" hospital supply sales.

Finally, it is patently clear that Lipari now merely seeks to substitute his failed “nationwide” geographic market, *see* 419 F. Supp.2d at 1328, for one purportedly limited to “Missouri.” However, Lipari makes no allegations concerning whether he was prevented from the supposed markets in every city or county in the state. The absurdity of Lipari’s argument demonstrates the invalidity of its claims. *See Apani Southwest, Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 633 (5th Cir. 2002) (stating “the alleged geographic market [for bottled water] did not correspond to the commercial realities of the industry and was not economically significant.”). The circuit court here, recognizing similar pleading deficiencies, properly dismissed Lipari’s allegations.

Even if a proper “relevant market” is alleged, Lipari’s Petition is fundamentally flawed. A plaintiff claiming monopolization must allege that the defendant possesses “monopoly power in the relevant market,” and a plaintiff claiming attempted monopolization must allege that the defendant has a “dangerous probability of success in monopolizing the relevant market.” *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999). The defendant’s market share is a key factor in determining whether it has either monopoly power or a dangerous probability of obtaining such power. *Id.* Monopolization generally requires a share of 70% or more. *See Colorado Interstate Gas v. Natural Gas Pipeline*, 885 F.2d 683, 694 n.18 (10th Cir. 1989);

see also Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995) (“a market share of 30 percent is presumptively insufficient to establish the power to control price”); *U.S. Anchor Mfg. Co. v. Rule Indus.*, 7 F.3d 986, 1001 (11th Cir. 1993) (“[B]ecause [defendant] possessed less than 50% of the market . . . there was no dangerous probability of success as a matter of law.”).

“[I]n order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a particular defendant.” *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (rejecting attempt to show dangerous probability of success by aggregating shares of two defendants). Lipari made no allegations of the market shares held by any separate participants in the hospital supply market, e-commerce market or capitalization of technology market. Instead, he concludes that the “defendants” have 100% of the market for hospital supplies delivered through electronic marketplaces in Missouri (L.F.I. 110, Petition, p. 99), the “defendants” have 80% of the market for hospital supplies in Missouri (L.F.I. 110, Petition, p. 99) and several additional legal conclusions of “monopoly market share” or “monopoly power” (L.F.I. 110–11, Petition, pp. 99–100), none of which is sufficient to survive a motion to dismiss. *See Endsley v. City of Chicago*, 230 F.3d 276, 282 (7th Cir. 2000). While it may be convenient for Lipari to refer to the “defendants” in an amorphous way, there is no attempt at

explanation in the 600 allegations preceding the counts to allege this “monopoly” share or any explanation how individuals such as Messrs. Grundhofer, Davis, Cecere, or Duff have “monopoly” power in the market for selling hospital supplies. Nor is there any allegation how the Polsinelli Shughart law firm or Piper Jaffray Companies exert monopoly power in sales or distribution of hospital supplies.

Moreover, merely because a company provides services to or may have investments in other companies does not make them joint competitors in the market. In *Spanish Broadcast System, Inc. v. Clear Channel Communications, Inc.*, 242 F. Supp.2d 1350 (S.D. Fla. 2003), *aff’d* 376 F.3d 1065 (11th Cir. 2004), the defendant did not compete in the alleged relevant market, but did own 26% of a firm that did compete. The court dismissed the plaintiff’s § 2 claims, holding that this ownership interest did not convert the defendant into a competitor in the relevant market. *Id.* at 1363. *Accord Invamed, Inc. v. Barr Labs., Inc.*, 22 F. Supp.2d 210, 219 (S.D.N.Y. 1998) (“[T]hat the [Defendants] possess market power through their alleged ownership interests in [a market participant], standing alone, does not satisfy the pleading requirements of a monopolization or attempted monopolization claim.”).

The circuit court properly dismissed the claims in Count II for monopolization under R.S.Mo. § 416.031.2.

H. The circuit court properly dismissed Lipari’s claim in Count III purporting to assert conspiracy to violate § 416.031(2).

In Count III, plaintiff attempts to allege a conspiracy to violate R.S.Mo. § 416.031.2. But plaintiff’s allegations in Count III fail to allege any facts, much less sufficient facts to support a cause of action. Plaintiff simply sets forth the legal elements for conspiracy and states under each element, “The Petitioner hereby re-alleges the averments of facts in this complaint and its attachments.” (L.F.I. 114.) While Rule 55.12 allows Lipari to adopt by reference other parts of his Petition, a reference must be sufficiently clear and explicit to advise defendants of the issue tendered for trial. *See Hester v. Barnett*, 723 S.W.2d 544, 561 (Mo. App. W.D. 1987). Lipari’s adoption by reference encompasses 150 pages of issues ranging from the disbarment of plaintiff’s former counsel (*e.g.* L.F.I. 87)¹⁴ to individuals denied the opportunity of bar admission (*e.g.* L.F.I. 93–96, 98–99) to Karl Rove’s involvement in the alleged hospital supply conspiracy (*e.g.* L.F.I. 31–32, 36, 40, 43, 49, 55) to adoption of all his allegations in the suit against U.S. Bancorp (L.F.I. 134–60) and GE (L.F.I. 160–73).¹⁵ By incorporating all of

¹⁴ *See In re Landrith*, 124 P.3d 467 (Kan. 2005).

¹⁵ In his brief, Lipari identifies the conspiracy as one to “overcharge Missouri’s hospitals and the public and private insurers paying the costs.” (Br. at

his prior allegations, the plaintiff has not concisely set forth the issue to be tendered for trial, and his incorporation by reference is wholly improper.

Additionally, a cause of action for conspiracy to commit antitrust violations under § 416.031.2 is subject to a four-year statute of limitations. *See Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 627 F. Supp. 105, 109 (S.D. Iowa 1985) (four-year period under federal antitrust statute).¹⁶ As set forth above, plaintiff's state antitrust claims are barred by the statute of limitations. Rather than restating those arguments again here, defendants incorporate by reference those arguments.

p. 45.) The plaintiff has no standing to assert such a claim as he is neither a hospital nor an insurer. *See supra* p. 25.

¹⁶ Respondents have not located a Missouri case setting forth a limitations period for a conspiracy under R.S.Mo. § 416.031.2. However, because a “civil conspiracy” in itself is not actionable but, rather, is based upon an unlawful act or a lawful act done unlawfully, the assertion here of anticompetitive conduct must be tied to the limitation in R.S.Mo. § 416.131(2).

I. An officer or director of a corporation cannot be liable for the acts of the corporation unless the officer or director participated in the acts or had personal knowledge of them.

In Missouri, a corporate officer or director cannot be liable personally for the alleged misdeeds of a corporation simply by holding a corporate office. *Boyd v. Wimes*, 664 S.W.2d 596, 598 (Mo. App. 1984). In order for a corporate officer or director to be liable, the plaintiff must aver that the officer or director had actual or constructive knowledge of the misconduct and participated therein. *Osterberger v. Heitz Const. Co.*, 599 S.W.2d 221, 229 (Mo. App. E.D. 1980). Other than legal conclusions (L.F.I. 106–07), Lipari’s Petition fails to allege any facts that Messrs. Grundhofer, Cecere, Davis, or Duff had actual knowledge of the alleged acts or actually participated in them. *See* 144 Fed. Appx. 708, 716 (10th Cir. 2005) (finding claims against corporate officer frivolous). Lipari’s Petition fails to state a claim upon which relief can be granted as to the claims against Messrs. Grundhofer, Davis, Cecere and Duff, and was properly dismissed.

As noted above, Missouri is a fact-pleading state and Lipari must plead sufficient facts to show entitlement to relief. These allegations against the “defendant co-conspirator officers” are woefully insufficient to show they had actual knowledge of and/or participated in efforts to violate the antitrust statutes in order to be personally liable. They are simply unsupported conclusions and must

be disregarded in determining whether his Petition states a cause of action. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004).

Lipari has failed to allege any facts to show that defendants Grundhofer, Davis, Cecere and Duff may be subject to personal liability. Therefore, the claims were properly dismissed with prejudice.

II. The Circuit Court Properly Dismissed Lipari's Count IV Alleging Tortious Interference With Business Relations.

In Count IV of his Petition, plaintiff alleges that defendants personally interfered with Medical Supply Chain's putative escrow agreement with U.S. Bank and a real estate transaction between Medical Supply Chain and General Electric Transportation Company. (*See* L.F.I. 114, Petition, p. 103.) Plaintiff's claims fail.

As repeatedly set forth above, the Missouri Rules of Civil Procedure require that a petition set forth facts which demonstrate the pleader is entitled to relief. *See* Rule 55.05; *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). Conclusory allegations not supported by facts will be disregarded in determining whether a petition sets forth sufficient facts to maintain a cause of action. *See id.*, citing *Lick Creek Sewer System v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo. App. 1988).

In order to maintain a cause of action for tortious interference with contract or business expectancy, Lipari must allege facts to show (1) a contract or valid

business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. 1993). While Lipari identifies the contract or business expectancy as the supposed escrow agreement with U.S. Bank and the real estate contract with G.E., he fails to allege any facts as to the remainder of the elements for this cause of action. Rather, he simply sets forth the element and mirrors that element with a conclusory allegation that purportedly satisfies the claim. His allegations violate Rule 55.05 of the Missouri Rules of Civil Procedure and his conclusory allegations are disregarded when determining whether he has properly stated a cause of action. *See Brock v. Blackwood*, 143 S.W.3d at 56.

In addition, Lipari's claims regarding the supposed escrow agreement have been dismissed with prejudice. *See Lipari v. U.S. Bancorp*, 2008 WL 4190784 *3–4 (D. Kan., Sept. 4, 2008), *aff'd* 2009 WL 2055125 (10th Cir., July 16 2009). As a matter of law, plaintiff's claim must fail because there is no valid contract or expectancy with respect to the supposed escrow agreement.

Moreover, under Missouri law, corporate agents, employees, and representatives are privileged to induce a corporation to breach a contract, unless the person uses improper means, lacks good faith, was motivated by personal benefit, or the action was not taken with the best interest of the corporation in

mind. *Nola v. Merollis Chevrolet Kansas City, Inc.*, 537 S.W.2d 627, 634 (Mo. App. 1976); *Meyer v. Enoch*, 807 S.W.2d 156, 159 (Mo. App. E.D. 1991). This is true even if the corporate officer or director committed an error of judgment in taking an action. *Nola*, 537 S.W.2d at 634 (citing to *Wilson v. McClenny*, 136 S.E.2d 569, 570 (N.C. 1964)). To show that corporate officials are not justified in inducing a corporation's breach of contract, a plaintiff must show that the officials were motivated by malice, and not by a desire to act in their official capacity for the benefit of the corporation. *Forkin v. Container Recovery Corporation*, 835 S.W.2d 500, 503 (Mo. App. E.D. 1992). Absence of justification is defined as the "absence of any legal right to take the actions complained of." *Meyer*, 807 S.W.2d at 159.

Plaintiff's Petition fails to allege facts that show the defendants' alleged conduct was outside their normal duties, motivated by personal benefit, or were committed contrary to the best interests of the corporation. Plaintiff fails to plead any facts to disregard the corporate officer privilege and submit defendants Grundhofer, Davis, Cecere and Duff to personal liability for their alleged tortious interference with plaintiffs' business expectancy. Therefore, Count IV of plaintiff's Petition was properly dismissed.

Finally, a claim for tortious interference with contract or business expectancy must be brought within five years of the action's accrual. R.S.Mo.

§ 516.120(4); *D'Arcy and Associates, Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 29 (Mo. App. W.D. 2004). Lipari alleges the defendants tortiously interfered with a supposed escrow agreement between U.S. Bank and Medical Supply in 2002, which demonstrates that he had *actual* knowledge of this claim when the first of many lawsuits related to the transaction was filed. Because Lipari did not file this suit until February 2008, his claim for tortious interference, as it relates to the supposed escrow transaction, is beyond the five-year statute and is therefore time-barred.

III. The Circuit Court Properly Dismissed Lipari's Count V Alleging Fraud.

Plaintiff's claim for fraud must be dismissed as he fails to allege any facts which meet the particularity pleading requirement of Rule 55.15 of the Missouri Rules of Civil Procedure.

The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and (6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002). There must be more than mere suspicion, surmise and speculation. *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo. App.

1997). Moreover, Rule 55.15 requires that all allegations of fraud be pled with particularity. As stated in *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 126 (Mo. App. W.D. 1993):

Every essential element of fraud must be plead, and failure to plead any element renders the claim defective and subject to dismissal. (citations omitted). All averments of fraud, except malice, intent, knowledge and any other condition of the mind, are to be stated with particularity. (citations omitted). In other words, the fraud must clearly appear from the allegations of fact, and be independent of conclusions. (Citations omitted.)

In his Count V, Lipari alleges no particular facts to support his fraud claim. For his allegations regarding a false representation, Lipari re-alleges all of the more than 600 prior averments and states, “Defendants were engaged in concealed fraudulent conduct.” (L.F.I. 116, Petition, p. 105.) He also asserts that the “defendants” misrepresented the “savings to hospitals,” the “validity” or “merits” of his claims and the “quality” of his past legal representation. (*Id.*) These allegations are not actionable representations of “fact.” A fraud claim cannot be borne out of opinions or the possibility of future outcomes. *See Clinch*, 187

S.W.3d at 17; *Bohac v. Walsh*, 223, S.W.3d 858, 863 (Mo. App. E.D. 2007)¹⁷ Lipari's allegations as to the other elements of fraud are equally cryptic. His allegations fail to meet the basic pleading requirements of Rule 55.05, much less the heightened requirements of Rule 55.15. Neither the parties nor the Court should be forced to scour the Petition in an effort at guesswork as to what plaintiff believes constitutes the substance of his claims. Because Lipari has failed to allege sufficient facts to support his fraud claim, Count V was properly dismissed.

IV. The Circuit Court Correctly Dismissed Lipari's Count VI Alleging *Prima Facie* Tort.

In order to maintain a claim of *prima facie* tort, Lipari must allege facts to show: (1) an intentional lawful act by defendant; (2) defendant's intent to injure the plaintiff; (3) injury to the plaintiff; and (4) an absence of or insufficient justification for defendant's act. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993); *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc). *Prima facie* tort is not a catchall cause of action or a duplicative remedy. Like any

¹⁷ Given the results of the prior suits, it is difficult to perceive how one can misrepresent the validity or merits of those claims. In any event, it should also be noted that, in *Lipari v. U.S. Bancorp*, the court dismissed Lipari's fraud claims (found largely in Appendix Four to the Petition (L.F.I. 134–60)). See 2008 WL 4190784 *4–5 (D. Kan., Sept. 4, 2008).

tort, it has specialized elements which must be met to maintain the cause of action. *Nazeri*, 860 S.W.2d at 315.

Lipari's claim for *prima facie* tort should be dismissed because he has failed to plead an intentional lawful act by the defendant. Rather, Lipari alleges:

To whatever extent said activities of Defendants including procuring the disbarment and interference with the petitioner's potential may not violate antitrust laws or tortuously (*sic*) interfere with contract or business expectancy, *said acts and activities of Defendants are still unlawful and fraudulent.*

(L.F.I. 118, Petition, p. 107 (emphasis added)).

Plaintiff's allegations specifically state that defendants' alleged misconduct was "unlawful and fraudulent." Therefore, Lipari has failed to plead an essential element of *prima facie* tort. *Nazeri*, 860 S.W.2d at 315 (holding that allegations that a defendants' statements were "untrue" failed to state a claim for *prima facie* tort.).

Additionally, Lipari's allegations again fall short of the factual pleading requirements found in Rule 55.05 of the Missouri Rules of Civil Procedure. For his *prima facie* tort claim, Lipari simply sets forth each element and makes a conclusory allegation that purports to satisfy the element. These conclusory

allegations are insufficient and should be disregarded. *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004).

Lipari has failed to allege sufficient facts to support his claim for *prima facie* tort. Count VI of the Petition was properly dismissed.¹⁸

V. As an Alternative, Service of Process Over Piper Jaffray Companies and Andrew Duff was Improper Entitling them to Dismissal

Lipari failed to obtain sufficient, legally cognizable service of process over Piper Jaffray Companies and Andrew Duff. As this ground for dismissal was not appealed, these two Respondents are entitled to the dismissal at least on this alternate basis.

The returns of service on Mr. Duff and Piper Jaffray Companies are not complete or properly notarized. (L.F.I. 360–61.) Lipari does not show that either he or any other person has been authorized by the State of Missouri or the State of Kansas to serve process. In both states, in order for a special process server to serve a summons and petition, the person must be specially appointed by the court. Mo. R. Civ. P. 54.20; K.S.A. § 60-303. There is no such proof here. Nor is there any proof of service by the Sheriff in Johnson County, Kansas. Finally, there is no evidence that any counsel retained by plaintiff properly served process.

¹⁸ Lipari's *prima facie* tort claim against U.S. Bancorp and U.S. Bank was dismissed with prejudice. 2008 WL 4190784 *6–7 (D. Kan., Sept. 4, 2008).

Plaintiff also cannot serve a local office of Piper Jaffray Companies in order for that service to be proper upon Mr. Duff, a resident of the state of Minnesota. Under K.S.A. § 60-304(h), service upon an employer is proper only if the employee is employed in the State of Kansas but does not reside there. K.S.A. § 60-304(h) (“defendant is a non-resident who is employed in this state”). There is no allegation or evidence that Mr. Duff is employed in the State of Kansas. Moreover, plaintiff has not complied with subsection (h) in that no affidavit has been filed with respect to proper service.

Likewise, the purported returns of service in Jackson County, Missouri, using summonses issued by the clerk of the Jackson County Circuit Court, are simply improper with respect to the type of service made in this case. The forms of return also are improper because they are not signed or notarized. (L.F.I. 360–61.)

In sum, service was improper, insufficient, and the circuit court lacked jurisdiction to proceed against defendants Piper Jaffray Companies and Andrew Duff. Dismissal was proper.

VI. The Circuit Court Properly Denied Lipari’s Motions to Amend his Petition.

In February of 2008, Lipari filed a petition against twenty-seven defendants, alleging acts which he claimed constituted antitrust violations, tortious interference

with business relationships, fraud, and *prima facie* tort. On August 8, 2008, the circuit court issued its order dismissing Lipari's claims against twenty-five of the defendants (including each of these Respondents) because plaintiff failed to assert the facts necessary to state a valid legal claim. Thereafter, plaintiff sought leave from the court to cure the legal deficiencies of his petition and also to add fifty-four defendants to the suit.

It is well within a court's discretion to deny a motion seeking leave to amend where the petition, as amended, cannot cure its legal deficiencies. *Law Offices of Gary Green, P.C. v. Morrissey*, 210 S.W.3d 421, 426 (Mo. App. 2006) (holding that the trial court did not abuse its discretion by denying plaintiff's motion for leave to amend because the petition, as amended, failed to state a claim upon which relief could be granted); *see Moore v. Firststar Bank*, 96 S.W.3d 898, 904 (Mo. App. 2003) (holding that the trial court did not abuse its discretion by denying plaintiff's motion for leave to amend because the petition, as amended, failed to cure its legal deficiencies). "Whether a party will be allowed to amend its pleadings is primarily a matter within the sound discretion of the trial court and is reviewed only for an abuse of discretion." *Sheehan v. Northwestern Mut. Life Ins. Co.*, 44 S.W.3d 389, 394 (Mo. App. 2000). As such, a court should deny a motion seeking leave to amend where the petition, as amended, fails to state a claim upon

which relief can be granted. *Law Offices of Gary Green*, 210 S.W.3d at 426; *see Moore v. Firststar Bank*, 96 S.W.3d at 904.

Here, Lipari's putative first amended petition still failed to assert valid legal claims. First, plaintiff still has not pled his antitrust claims "with enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007). For example, plaintiff's petition still does not raise a reasonable expectation that discovery will reveal evidence of defendants' contracting, combining, or conspiring with the co-defendants to restrain the hospital supply trade. Furthermore, plaintiff still has not pled his fraud claim "with particularity." *Hanrahan v. Nashua Corp.*, 752 S.W.2d 878, 882 (Mo. App. 1988) (dismissing fraud claim for failing to plead with particularity). And he still has not pled facts essential to recover for either tortious interference or *prima facie* tort. *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997) (holding that a court should grant a motion to dismiss for failure to state a claim when "the petition fails to allege facts essential to a recovery."). 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. App. 1998) (discretion is not abused when proposed amendment presents a meritless claim).

Moreover, the Missouri Rules of Civil Procedure, even if liberal toward amendment, are not a license for Lipari to prepare and serially propose ever more prolix petitions that do not cure prior deficiencies in his prior pleadings. The proposed Second and Third Amended Petitions added hundreds more paragraphs and sought to add more unrelated parties than the proposed First Amended Petition yet offers no more clarity. (L.F.II. ____.) In his opposition to the various dispositive motions, 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 until **after** the adverse rulings.¹⁹

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.* No defendant consented. The Court has discretion to deny leave to amend and that discretion is typically not disturbed on appeal. *Consumers Oil Co. v. American Nat'l Bank*, 713 S.W.2d 598, 600 (Mo. App. 1986). The defendants have expended time, effort and expense to litigate the allegations of the Petition. 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

¹⁹ The circuit court's March 2, 2009 Order (L.F.II. ____.) only granted leave for plaintiff to provide a copy of his First Amended Petition. He did not comply with the March 2, 2009 order.

has had a full, fair, complete opportunity to plead a valid claim and did not suffer prejudice from the denial of his motion. Each of the five factors weighs against the amendment. The proposed amendment came only after he suffered a dismissal and sought, twice, to have an immediate appeal from the judgments against him.

CONCLUSION

The judgment of the circuit court should be affirmed. Even if he is given a liberal opportunity to avoid strict compliance with this Court's rules, Mr. Lipari's purported claims fail to state causes of action as a matter of law, are barred by the applicable period of limitations or are barred by the doctrine of collateral estoppel. In addition, the claims against Piper Jaffray and Andrew Duff were properly dismissed by reason of improper or insufficient service of process. Finally, under the circumstances, the circuit court did not err in denying Lipari's requests to amend his petition. For any and all of the reasons stated, the judgment should be affirmed.

Respectfully submitted,

MARK A. OLTHOFF MO #38572
ANTHONY BONUCHI MO #57838
POLSINELLI SHUGHART PC
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509
molthoff@stklaw.com
abonuchi@stklaw.com

JAY E. HEIDRICK
POLSINELLI SHUGHART PC
6201 College Blvd., Suite 500
Overland Park, Kansas 66211
(913) 451-8788
(913) 451-6205 (FAX)
jheidrick@polsinelli.com

ATTORNEYS FOR RESPONDENTS
JERRY GRUNDHOFER,
ANDREW CESERE AND RICHARD
DAVIS

MARK A. OLTHOFF MO #38572
ANTHONY BONUCHI MO #57838
POLSINELLI SHUGHART PC
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509
molthoff@stklaw.com
abonuchi@stklaw.com

JAY E. HEIDRICK
POLSINELLI SHUGHART PC
6201 College Blvd., Suite 500
Overland Park, Kansas 66211
(913) 451-8788
(913) 451-6205 (FAX)
jheidrick@polsinelli.com

ATTORNEYS FOR PIPER JAFFRAY
COMPANIES AND ANDREW DUFF

WILLIAM E. QUIRK
POLSINELLI SHUGHART PC
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509
wquirk@polsinelli.com

ATTORNEYS FOR RESPONDENT
POLSINELLI SHUGHART PC (f/k/a
SHUGHART THOMSON & KILROY,
P.C.)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered via United States mail, postage prepaid, this ____ day of _____, 2009, to:

Mr. Samuel K. Lipari
3520 NE Akin Boulevard
Suite 918
Lee's Summit, MO 64064

Appellant

Peter F. Daniel, Esq.
Lathrop & Gage LC
2345 Grand Boulevard
Suite 2800
Kansas City, MO 64108-2684

Attorneys for Respondent Lathrop & Gage LC

John K. Power, Esq.
Husch Blackwell Sanders LLP
2300 One Kansas City Place
1200 Main Street
Kansas City, MO 64105

Attorneys for Respondent Husch Blackwell Sanders LLP

John K. Power, Esq.
Husch Blackwell Sanders LLP
2300 One Kansas City Place
1200 Main Street
Kansas City, MO 64105

Veronica Lewis, Esq.
Vinson & Elkins LLP
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201-2975

Kathleen Bone Spangler, Esq.
Vinson & Elkins LLP
2300 First City Tower
1001 Fannin Street
Houston, TX 77002-6760

Attorneys for Respondents Novation, LLC, VHA Inc., University Healthsystem Consortium, VHA Mid-America LLC; Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius; Sandra Van Trease; Charles Robb, Michael Terry, Cox Health Care Services of the Ozarks, Inc.; Saint Luke's Health System Inc. and Stormont-Vail Healthcare Inc.

Attorney for Respondents

**CERTIFICATE OF COMPLIANCE WITH MISSOURI
SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function of Word by which it was prepared, contains 11,050 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the diskette filed herewith containing this Brief of respondents in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

ATTORNEY FOR RESPONDENTS