

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

SAMUEL K. LIPARI,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 07-0849-CV-W-FJG
)	
GENERAL ELECTRIC COMPANY, <i>et al.</i> ,)	
)	
Defendants.)	

**SUGGESTIONS OF SEPARATE DEFENDANT
BRADLEY J. SCHLOZMAN IN OPPOSITION TO
PLAINTIFF’S RULE 59(e) MOTION**

Pursuant to FED. R. CIV. P. 59(e), separate defendant Bradley J. Schlozman hereby files his suggestions in opposition to the MOTION TO ALTER OR AMEND JUDGMENT [Doc. 61] filed herein by the *pro se* plaintiff Samuel K. Lipari (“Lipari”).

On July 30, 2008, the Court entered an order dismissing Lipari’s case against all defendants, finding that Lipari lacked standing to assert a civil RICO claim under 18 U.S.C. § 1961, *et seq.*, and declining to retain jurisdiction over Lipari’s remaining state law claim. ORDER, at 8-9 [Doc. 59]. Having disposed of all of Lipari’s claims, a CLERK’S JUDGMENT was thereafter entered the same day [Doc. 60]. On August 5, 2008, Lipari filed his MOTION TO ALTER OR AMEND JUDGMENT [Doc. 61] pursuant to FED. R. CIV. P. 59(e). In that motion, Lipari argues that the Court’s original ruling was erroneous based on the evidence and arguments then before the Court. In addition, Lipari seemingly raises three “new” matters (not discussed in his original pleadings), to wit:

- (1) a \$60 million civil settlement obtained by the Justice Department against the Lester E. Cox Medical Centers on July 22, 2008,
- (2) a May 16, 2008 SHOW CAUSE ORDER entered by the Honorable Carlos Murguia in the case of *Medical Supply Chain, Inc. v. Novation LLC, et al.*, Case No. 05-2299-CM (D. Kan.), and
- (3) a July 16, 2008 hearing that transpired in the bankruptcy proceeding, *In re Justin R. Sherwood and Jennifer Sherwood*, Case No. 07-50584-JWV-11 (Bankr. W.D. Mo.).

In addition, Lipari insinuates (but does not formally move) that the Court should recuse itself from the case. Lipari's Rule 59(e) pleading is not meritorious.

District courts enjoy broad discretion in ruling on motions to reconsider. *Concordia College Corp. v. W.R. Grace & Co.*, 999 F.2d 326, 330 (8th Cir.1993). Rule 59(e) states that “[a]ny motion to alter or amend a judgment shall be filed no more than 10 days after the entry of the judgment.” FED. R. CIV. P. 59(e). The Eighth Circuit has explained that Rule 59(e) “was adopted to clarify a district court’s power to correct its own mistakes in the time period immediately following entry of judgment.” *Innovative Home Health Care v. P. T.-O. T. Assoc. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir.1998). In this regard, motions under Rule 59(e) serve the limited function of correcting “manifest errors of law or fact or to present newly discovered evidence.” *Id.* However, the Eighth Circuit has cautioned:

Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.

Id. Rule 59(e) motions, further, are not proper vehicles for raising new arguments or legal theories. *Capitol Indemnity Corp. v. Russellville Steel Co., Inc.*, 367 F.3d 831, 834 (8th Cir.2004).

In order to prevail on a Rule 59(e) motion, a movant must show that “(1) the evidence was discovered after trial; (2) the movant exercised due diligence to discover the evidence before the end of trial; (3) the evidence is material and not merely cumulative or impeaching; and (4) a new trial considering the evidence would probably produce a different result.” *United States v. Metropolitan St. Louis Sewer District*, 440 F.3d 930, 933 (8th Cir. 2006). In reviewing the materials and arguments contained in Lipari’s Rule 59(e) pleading, it is evident that he cannot satisfy the *prima facie* case for relief set forth by the Eighth Circuit.

With regard to Lipari’s rehash of his earlier arguments, it is well settled that Rule 59(e) arguments that merely restate arguments previously made to the Court will not justify an amendment or alteration to a judgment. *Schoffstall v. Henderson*, 223 F.3d 818, 827 (8th Cir. 2000); *Gill v. Columbia 93 School District*, 1999 WL 33486650, op. at *1 (W.D. Mo. Sep. 2, 1999) (“[A Rule 59(e)] motion may not be used as a vehicle for a losing party to rehash arguments previously considered and rejected by the district court”).

As to the “newly discovered” matters cited by Lipari in his Rule 59(e) pleading, Lipari’s motion utterly fails to demonstrate the materiality of the evidence, or, if the incidents are in some manner material, why the new matters are not merely cumulative of the incidents previously and exhaustively set forth in his COMPLAINT. In its ORDER finding that Lipari lacked standing to assert a civil RICO claim, the Court concluded that Lipari’s contentions failed to meet the requisite legal standard and were too “indefinite and unprovable” to establish standing. None of the three “newly discovered” matters cited by Lipari are relevant or tangentially related to this preliminary finding by the Court. Consequently, Lipari has failed to show how the Court’s consideration of this additional evidence would probably produce a different result.

In addition, as noted *supra*, Lipari insinuates in his Rule 59(e) that the Court should recuse itself from hearing this case. Lipari, however, has not formally moved for recusal. Lipari's present complaint is legally unsupported and entirely untimely. 28 U.S.C. §§ 144, 455(a), (b)(1). Furthermore, the timing of Lipari's arguments about judicial recusal are certainly suspicious. As succinctly noted in another case by the Eighth Circuit:

[I]n denying [the] Rule 59(e) motion, the district court also denied [the plaintiff's] separate motion for recusal. We conclude that the district court did not abuse its discretion in doing so. Moreover, because it was not filed until after the district court had granted summary judgment to Crane on the merits of the case, the motion was untimely.

Rabushka ex rel. United States v. Crane, 122 F.3d 559, 566 (8th Cir. 1997). *See also In re Kansas Public Employees Retirement Systems*, 85 F.3d 1353, 1360 (8th Cir.1996) (recusal motion untimely and interposed for suspect tactical reasons, "can and should" be denied on that basis alone); *Neal v. Wilson*, 112 F.3d 351, 357 n.6 (8th Cir.1997) (disapproving of tactic of waiting until after district court issued unfavorable ruling before moving for recusal). To the extent that Lipari's current pleading can be read as a motion to recuse, it should be denied.¹

For the foregoing reasons, separate defendant Bradley J. Schlozman respectfully requests that the Court deny forthwith the MOTION TO ALTER OR AMEND JUDGMENT [Doc. 61] filed herein by the *pro se* plaintiff Samuel K. Lipari.

¹ Lipari's Rule 59(e) pleading also complains that the Court dismissed his case without allowing his proposed amendment to add additional parties (AT&T and Sprint Inc.) to the litigation. Adding more parties, however, will not address or solve Lipari's lack of standing and thus their absence from this lawsuit does not entitle Lipari to relief under Rule 59(e). *Compare U.S. ex rel. Lee v. Fairview Health System*, 413 F.3d 748, 749 (8th Cir. 2005) ("Futility is a valid basis for denying leave to amend.").

Respectfully submitted,

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By */s/ Jeffrey P. Ray*

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² Authorized by the Department of Justice, on March 24, 2008, to provide individual capacity representation to Bradley J. Schlozman, former Interim United States Attorney, Western District of Missouri, in the case of *Samuel Lipari v. General Electric Co., et al.*, 07-0849-CV-W-FJG (W.D. Mo.). 28 C.F.R. § 50.15(a)(2).

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that on this 8th day of August, 2008, a true and correct copy of the foregoing **SUGGESTIONS OF SEPARATE DEFENDANT BRADLEY J. SCHLOZMAN IN OPPOSITION TO PLAINTIFF'S RULE 59(e) MOTION** was electronically filed with the Clerk of the Court using the CM/ECF system, which then sent electronic notification of such filing to:

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The undersigned Assistant United States Attorney further certifies that, a true and correct copy of the foregoing **SUGGESTIONS OF SEPARATE DEFENDANT BRADLEY J. SCHLOZMAN IN OPPOSITION TO PLAINTIFF'S RULE 59(e) MOTION** was placed in the United States first class mail, postage prepaid, addressed to the following non-ECF participant:

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/s/ Jeffrey P. Ray
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