

APPEAL NO. 08-3115

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

SAMUEL K. LIPARI

Appellant

v.

GENERAL ELECTRIC CO., ET AL.

Appellees

**AN APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

REPLY BRIEF OF APPELLEE

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SEYFARTH SHAW LLP

January 12, 2009

DISCLOSURE OF SEYFARTH SHAW LLP UNDER RULE 26.1

COMES NOW the defendant, Seyfarth Shaw LLP, and pursuant to Rule 26.1, Eighth Circuit Rules of Appellate Procedure, states that it owns two affiliates which operate under the name of Seyfarth Shaw at Work. Seyfarth Shaw at Work is a d/b/a for WorkRight Training, LLC and WorkSharp Technologies, Inc. WorkRight Training, LLC is a limited liability company. WorkSharp Technologies, Inc. is a C corporation. Both are wholly-owned by Seyfarth Shaw LLP, and are based at 131 S. Dearborn, Chicago, Illinois. No publicly held corporation owns any part or share of Seyfarth Shaw LLP or its affiliates.

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STATEMENT OF THE ISSUES

I. Whether under RICO, 18 U.S.C. § 1961 *et seq.* the District Court erred in granting Defendant's motion to dismiss when the Plaintiff did not have standing to bring a RICO claim, Plaintiff did not adequately plead all elements of his RICO cause of action, and Plaintiff did not assert any such claims against Defendant, Seyfarth Shaw LLP.

II. Whether under Federal Rule of Civil Procedure 59(e) the District Court abused its discretion in denying Plaintiff's motion to alter or amend the court's judgment when the Plaintiff failed to present any new facts and evidence that were not previously discoverable and attempted to bring new legal arguments.

III. Whether under 28 U.S.C. § 144 the District Court abused its discretion in denying Plaintiff's motion to recuse when Plaintiff did not bring the motion until after the entry of judgment and did not present any facts or evidence to support his motion.

STATEMENT OF FACTS

In his opening brief in this appeal, Lipari set forth many, though not all, of the facts relevant to this appeal. Appellee, Seyfarth Shaw LLP will not restate each of those facts but instead will set forth below the additional facts relevant to the issues presented by this appeal.

1. This action was originally filed on March 22, 2006 in the Circuit Court of Jackson County, Missouri as Case No. 0616-CV07421. In his initial Complaint, Lipari named defendants General Electric; General Electric Capital Business Asset Funding Corporation; GE Transportation Systems; Global Signaling LLC; Carpets N More; and Heartland Financial. Plaintiff's Petition, No. 0616-CV07421 (March 22, 2006) (Appellant's Supp. Apdx. 342).

2. This action was subsequently removed by the Defendants to the United States District Court of the Western District of Missouri on November 9, 2007, after Lipari was granted leave to file an amended Petition on October 31, 2007. Not. of Removal to the Western District, No. 0616-CV07421 (October 31, 2007) (Appellant's Supp. Apdx. 23).

3. In his Complaint, Lipari claims to be the "assignee" of the claims of Medical Supply Chain, Inc. Complaint, ¶16. The only claims sought to be asserted against Defendant, Seyfarth Shaw LLP, are based solely on the Racketeer Influenced

and Corrupt Organizations Act (“RICO”).¹ The only section of that statute relied upon is 18 U.S.C. §1962(d). Complaint, ¶146.

4. The facts of Lipari’s claims against defendant Seyfarth Shaw LLP are listed in the following paragraphs of the Complaint:

¶131: “Seyfarth Shaw LLP . . . direct[ed] . . . *ex parte* communications with federal and state judicial officials.”

¶141: “Seyfarth Shaw LLP . . . secured a Northern District of Illinois U.S. District Court order . . . requiring petitioner to travel to Chicago. . .”

¶171: “Seyfarth Shaw LLP stepped up the retaliation against Michael Lynch. . .”

¶288: “Seyfarth Shaw LLP cause[d] the break-in and illegal electronic surveillance in a suburb of Chicago, Illinois to unlawfully influence the outcome of federal and Illinois state court cases related to McCook Metals and its owner Michael W. Lynch an associate of the petitioner.”

Additionally, the “Cause of Action for Interference with Business Expectancies” – a claim solely asserted against the “GE defendants” – includes the allegations that “The General Electric defendants through their agents Seyfarth Shaw . . . intentionally interfered with the petitioner’s business expectancy. . .” See ¶¶371,

¹ While the Counts in the Complaint which purport to assert claims for “breach of contract” and “interference with business expectancies” mention Seyfarth Shaw LLP, no claim is asserted against it in those Counts, and no damages are sought against this defendant under those Counts. See Complaint, ¶¶384, 386, 391.

373-376. However, no direct allegations, claims or prayers for relief are asserted against Seyfarth Shaw LLP in this Count of the Complaint.

The “cases related to McCook Metals and its owner Michael W. Lynch” were all filed and prosecuted in the United States District Court for the Northern District of Illinois and the United States Bankruptcy Court for the Northern District of Illinois.²

According to the Complaint in this case, Seyfarth Shaw LLP represented General Electric and General Electric Capital. Complaint, ¶¶123, 143. Lipari does not allege that Seyfarth Shaw LLP has ever represented him or Medical Supply Chain, Inc., or that this law firm owed him a legal duty of any kind.

Lipari claims that his assignor, Medical Supply Chain, Inc., was damaged by the actions of the defendants, in that defendants kept Medical Supply Chain “out of the hospital supply market.” Complaint, ¶126. See also, ¶140 (“protecting the hospital supply distribution market”); ¶¶371, 372, 379, 380, 383.

Seyfarth Shaw LLP is an Illinois limited liability partnership based in Chicago, Illinois. Complaint, ¶21. It does not have offices or attorneys in the Western District of Missouri. Motion of Separate Defendant, Seyfarth Shaw LLP to Dismiss, No. 07-0849-CV-W-FJG, 3 (Feb. 11, 2008).

² *Great Lakes Processing, et al. v. Seyfarth Shaw LLP*, Case No. 2002-CH-09478, Circuit Court of Cook County, Illinois, filed May 15, 2002; *Joseph Baldi, et al. v. Longview Aluminum, LLC, Michael Lynch, et al.*, Case No. 1:02-cv-04608, United States District Court, Northern District of Illinois, filed June 27, 2002; *Michael Lynch, et al. v. Seyfarth Shaw*, Case No. 02-01106, Adversary Proceeding, United States Bankruptcy Court, Northern District of Illinois.

Thus, the only claim against defendant Seyfarth Shaw LLP is an alleged violation of RICO, 18 U.S.C. §1962, based upon actions which occurred – if at all – only in the State of Illinois, and which somehow impacted Medical Supply Chain’s entry into the hospital supply market.

SUMMARY OF ARGUMENT

This appeal arises from the District Court’s July 30, 2008 Order granting Defendants’ motion to dismiss and the District Court’s October 31, 2008 Order denying Lipari’s motion to alter or amend the judgment and motion to recuse. Order of the District Court, No. 07-0849-CV-W-FJG (W.D. Mo. July 30, 2008) (App. Brief, Ex. 1) and (W.D. Mo. October 31, 2008) (App. Brief, Ex. 2). When dismissing Lipari’s Racketeer Influenced and Corrupt Organizations (“RICO”) claims under 18 U.S.C. § 1961 *et seq.*, the District Court concluded that the “plaintiff’s alleged injuries are ‘indefinite and unprovable’ and he has no standing to assert a claim under the RICO statute.” Order of the District Court at 8 (W.D. Mo. July 30, 2008). Lipari appealed these decisions to the United States Court of Appeals of the Eighth Circuit. Not. of Appeal, No. 07-0849-CV-W-FJG (W.D. Mo. August 12, 2008) (App. Brief, Ex. 3).

The District Court did not err in granting the Defendant Seyfarth Shaw, LLP’s motion to dismiss. Appellant Samuel K. Lipari (“Lipari”) failed to plead his RICO claim adequately. Furthermore, Lipari did not have standing to bring his RICO claim

because he did not suffer an injury to business or property. Lipari's attempts in his appellate brief to argue he suffered such an injury fall short. Nowhere within his brief does Lipari provide an example of how Appellee, Seyfarth Shaw, LLP, caused him loss to property or business.

The District Court did not abuse its discretion by denying Lipari's Rule 59(e) motion to alter or amend the judgment. In his motion, Lipari did not present the Court with any new facts or evidence. Lipari cannot use the belated motion to introduce newly discovered evidence that could have been introduced at an earlier stage of trial proceedings. *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988). Nor can Lipari use the motion to introduce new legal theories. *Id.* Thus, the District Court correctly denied Lipari's motion to alter or amend the judgment.

Lastly, the Appellate Court should uphold the District Court's ruling in denying Lipari's motion to recuse. Lipari's motion to recuse, which was filed *after* the entry of judgment, was not timely. A party must bring a motion to recuse at the earliest possible moment after the movant learns of the facts demonstrating a basis for the claim. *Twist v. Department of Justice*, 344 F.Supp.2d 137 (D. D.C. 2004). Lipari simply did not meet this standard.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED DEFENDANT'S MOTION TO DISMISS LIPARI'S RICO CLAIMS.

In reviewing the District Court's decision granting the Defendant's motion to dismiss, the Court applies the standard of *de novo* review. See *Owen v. General Motors Corp.*, 533 F.3d 913, 918 (8th Cir. 2008); *Students for Sensible Drug Policy Found. v. Spellings*, 523 F.3d 896, 899 (8th Cir. 2008); *Breedlove v. Earthgrains Baking Co., Inc.*, 140 F.3d 797, 799 (8th Cir. 1998). When doing this, the Court takes all allegations made in the Complaint as true. *Owen*, 533 F.3d at 918 (8th Cir. 2008).

However, this deference does not extend to creating a cause of action where none is properly stated, particularly in a RICO case. As Judge Carlos Murguia (from the District of Kansas) instructed Lipari in a similar case:

Under Rule 9(b), plaintiff must allege with particularity not only each element of a RICO violation, but also the predicate acts of racketeering. *Phillips USA, Inc. v. Allflex USA, Inc.*, 1993 WL 191615, at *2 (D.Kan. May 21, 1993) (quoting *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir.1992)). To properly allege the predicate acts, plaintiff must specify the "who, what, where, and when" of each purported act. *Id.* (citation omitted).

Medical Supply Chain, Inc. v. Neoforma, Inc., 419 F.Supp.2d 1316, 1329 (D. Kan. 2006).

Thus, under RICO, specific acts must be alleged; the Complaint must do more than merely recite boiler-plate language from the statute. *DIRECTV, Inc. v. Cavanaugh*, 321 F.Supp.2d 825 (E.D. Mich. 2003).

A. Lipari does not have standing to sue under RICO because he has suffered no injury to business or property.

When bringing a cause of action under RICO, a plaintiff only has standing to sue if he “1) sustained an injury to business or property 2) that was caused by a RICO violation.” *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) (citing *Hamm v. Rhone-Poulenc Rorer Pharms., Inc.*, 187 F.3d 941, 951 (8th Cir. 1999)).

Dismissal is proper if the plaintiff lacks standing or the complaint evidences another insuperable bar to relief. See *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 384 (8th Cir. 1993), *cert. denied*, 508 U.S. 957 (1993). In a RICO case, the requirement for standing is even more strict. The United States Supreme Court has established a proximate cause standard when considering whether a plaintiff has standing to bring a RICO case.

The RICO violation must be both the “but for” and proximate cause of the injury to the plaintiffs business or property. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). In other words, [Plaintiff] must show: (1) that but for Defendants' conduct of an enterprise through a pattern of racketeering, he would not have been injured; and (2) some direct relation between the injury asserted and the injurious

conduct alleged. *Corley v. Rosewood Care Ctr., Inc. of Peoria*, 388 F.3d 990, 1005 (7th Cir. 2004).

RWB Servs., LLC v. Rally Capital Servs., LLC, 502 F.Supp.2d 787, 791 (N.D. Ill. 2007) (reversed on other grounds). As the Eighth Circuit has observed:

Plaintiffs have standing in a civil RICO case only if the RICO violations both factually and proximately caused injury to the plaintiffs' business or property. See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992). Proximate cause is a flexible common-law concept imported from tort law into RICO jurisprudence by way of the antitrust laws. See *id.* at 267-68. Since but-for causation, or causation in fact, has no logical ending point, the concept of proximate cause cuts off liability for those damages only distantly caused by a defendant's bad acts. Using proximate cause as a standing requirement in civil RICO cases is justified on three grounds. First, the proximate cause requirement reduces the need for apportioning between damages caused by the defendant's actions and damages caused by independent factors. Second, it prevents two or more parties along the chain of causation from obtaining duplicative recovery. Third, the need for deterrence can be met with recoveries by more directly injured parties. See *id.* at 269-70.

Newton v Tyson Foods Inc., 207 F.3d 444, 447 (8th Cir. 2000).

Standing to sue under RICO requires “some direct relation between the injury asserted and the injurious conduct alleged.” *Lyons v Philip Morris Inc.*, 225 F.3d 909, 914 (8th Cir. 2000), quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) (RICO); see also *Associated Gen. Contractors, Inc. v. Carpenters*, 459 U.S. 519, 540-45 (1983). Similarly, this Circuit has held:

First, in examining the statutory language by reason of in § 1964(c), the Supreme Court held that, to have standing under RICO, the plaintiff must have been injured by conduct which constitutes racketeering activity, that is, RICO predicate acts, and not by other conduct of the defendant. See *Sedima [S. P. R. L. v. Imrex Co.]*, 473 U.S. [479,] at 496-97 [(1985)], citing *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985)). This was because the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. *Id.* at 497. The Supreme Court further refined the RICO standing requirement in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266-68 (1992) (Holmes), by refusing to read RICO expansively to allow all factually injured plaintiffs to recover. The Court rejected but for causation and instead construed RICO to require proximate cause, that is, some direct relation between the injury asserted and the injurious conduct alleged.

Hamm v. Rhone-Poulenc Rorer Pharm., 187 F.3d 941, 952 (8th Cir. 1999). See also, *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283 (8th Cir. 1994).

In *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113 (2d Cir. 2003), *cert. denied*, 540 U.S. 1012 (1993), the Court affirmed dismissal of a RICO complaint, where the alleged racketeering activities were not the proximate cause of the plaintiffs' alleged injuries.

In this case, Lipari attempts to explain that he lost a concrete property interest when he was deprived of the right to lease the building. Brief of Petitioner-Appellant at 29, No. 08-3115 (8th Cir.). He fails to describe how this action was a deprivation,

or how Appellee, Seyfarth Shaw LLP participated in a deprivation activity. For example, Seyfarth Shaw LLP did not acquire the building after Lipari was refused his right to lease. See *United States v. Nardello*, 393 U.S. 286, 290, 89 S. Ct. 534 (1969). Nor did the Seyfarth Shaw LLP seek the right for itself. See *United States v. Gotti*, 459 F.3d 296, 300 (2d Cir. 2006). Furthermore, even if the above is seen as an injury to Lipari, there is absolutely no relation, much less a “*direct* relation,” between the injuries alleged by Lipari and the alleged acts of Seyfarth Shaw in Illinois.

Thus, Lipari lacks standing to sue under RICO, and the Court should uphold the decision of the District Court, dismissing all claims against Seyfarth Shaw LLP.

B. Lipari did not state a claim upon which relief can be granted when asserting his RICO claim.

Within his Complaint, Lipari attempts to plead a cause of action for RICO. In order to succeed on his RICO claim, Lipari must prove the following four elements: “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Craig Outdoor Advertising, Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027 (8th Cir. 2008) (internal citation omitted).

1. Lipari did not and cannot show that there was “enterprise” between the defendants.

In order to establish a cognizable claim for relief under either subsection (b) or subsection (c) of 18 U.S.C. §1962, Lipari must allege the existence of an “enterprise” which is separate and apart from the “pattern of racketeering activity” in which the

enterprise (allegedly) engages. *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987); *Old Time Enterprises, Inc. v. Int'l Coffee Corp.*, 862 F.2d 1213 (5th Cir. 1989); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580 (5th Cir. 1992); *First Capital Asset Mgmt. v. Satinwood*, 385 F.3d 159 (2d Cir. 2004); *Walsh v. America's Tele-Network Corp.*, 195 F.Supp.2d 840 (E.D. Tex. 2002); *Bruss Co. v. Allnet Communication Servs.*, 606 F.Supp. 401 (N.D. Ill. 1985). “The enterprise must have a common or shared purpose, some continuity of personnel, and an ascertainable structure distinct from the pattern of racketeering.” *Asa-Brandt, Inc. v. ADM Investor Services, Inc.*, 344 F.3d 738, 752. In other words, Lipari must show not only that the parties had a relationship, but that this relationship was conspiratorial in nature. *Id.*

Reading the Complaint most liberally for Lipari, he only alleges a disparate set of facts, in order to allege a “pattern” of “racketeering” activity. He makes no claim that the “enterprise” has any existence separate from this loose set of facts and does not show a relationship conspiratorial in nature. Therefore, the District court correctly granted Defendant’s motion to dismiss because the Complaint clearly fails to assert this necessary element for a RICO cause of action.

- 2. Lipari (a) failed to show that Appellee, Seyfarth Shaw LLP, committed a predicate act and (b) failed to plead any act with particularity.**

In order to state a claim for relief against a defendant under RICO, the plaintiff must allege specific acts representing “racketeering activities,” i.e. criminal acts. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Harvey v. Harvey*, 931 F.Supp. 127 (D. Conn. 1996), aff’d 108 F.3d 329 (2d Cir. 1997); *Dempsey v. Sanders*, 132 F.Supp.2d 222 (S.D. N.Y. 2001); *Williams v. Dow Chemical Co.*, 255 F.Supp.2d 219 (S.D. N.Y. 2003). The claimed predicate acts must be pled with particularity, or the plaintiff will suffer dismissal. *Equitable Life Assurance Soc’y v. Alexander Grant & Co.*, 627 F.Supp. 1023 (S.D. N.Y. 1985).

Notably, none of the acts of Seyfarth Shaw LLP alleged in the Complaint rises to the level of a criminal act. Obtaining a court order for Lipari to give his testimony, engaging in “*ex parte*” communications (which is of course denied), and even somehow “retaliating” against a non-party in some other litigation do not constitute criminal acts, and the Complaint does not claim them to be. Thus, the Complaint fails to state a claim under RICO, because it does not properly allege sufficient predicate acts by this defendant.

In Lipari’s brief, he attempts to assert that his Complaint adequately pleads a cause of action for fraud. Brief of Petitioner-Appellant at 32. “A party must plead the circumstances of each element of fraud with particularity.” *Owen v. General Motors Corp.*, 533 F.3d 913, 920 (8th Cir. 2008). “This means the who, what, when, where, and how: the first paragraph of any newspaper story.” *Great Plains Trust Co. v. Union*

Pacific R. Co., 492 F.3d 986, 995 (8th Cir. 2007) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.), *cert. denied*, 498 U.S. 941, 111 S.Ct. 347, 112 L.Ed.2d 312 (1990)).

When asserting fraud against Seyfarth Shaw LLP in his complaint, Lipari certainly did not write the “first paragraph of a newspaper story.” In fact, after reading Lipari’s fraud allegations, the reader has more questions than answers as to the “who, what, when, where, and how.” Lipari merely makes general assertions, which does not meet the stringent pleading requirement for fraud.

Thus, the District court correctly granted Defendant’s motion to dismiss because the Complaint clearly fails to assert this necessary element for a RICO cause of action.

C. No arguments are made in Lipari’s brief regarding Seyfarth Shaw LLP.

Appellee Seyfarth Shaw LLP is only named twice in the Lipari’s Brief and then only obliquely in a conclusory manner with no facts. Brief of Petitioner-Appellant at 14 and 32. No attempt is made in the Lipari’s Brief to demonstrate how or why the District Court’s order of dismissal was inappropriate or improper as to this defendant.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN DENYING LIPARI’S MOTIONS TO ALTER OR AMEND JUDGMENT BECAUSE LIPARI DID NOT ASSERT ANY NEW ARGUMENTS OR FACTS WHICH COULD NOT HAVE BEEN PREVIOUSLY PRESENTED.

When evaluating the District Court’s decision denying a motion to alter or amend a judgment, the appellate court applies the “abuse of discretion” standard of review. *Innovative Home Health Care v. P.T. – O.T. Associates*, 141 F.3d 1284 (8th Cir. 1998); *Global Network Tech. v. Regional Airport Auth.*, 122 F.3d 661 (8th Cir. 1997).

Motions to alter or amend the court’s judgment are vested in the sound discretion of the trial court.

A district court has broad discretion in determining whether to grant a motion to alter or amend judgment, and this court will not reverse absent a clear abuse of discretion by the district court. See *Harris v. Arkansas Dept. of Human Serv.*, 771 F.2d 414, 416-17 (8th Cir. 1985).

Hagerman v. Yukon Energy Corp., 839 F.2d 407, 413-414 (8th Cir. 1988).

Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion. However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.

Wright, Miller & Miller, *Federal Practice and Procedure: Civil* §2810.1, p. 124 (1995).

Such motions are not to be used to re-hash arguments already rejected by the Court, nor to raise issues which could have been raised in the first instance. As the Eighth Circuit has stated:

“Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly

discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.” *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir.), as amended, 835 F.2d 710 (7th Cir. 1987) (quoting *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1983), aff’d, 736 F.2d 388 (7th Cir. 1984)).

Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988).

Moreover, this Court in *Hagerman* held: “A motion to alter or amend judgment cannot be used to raise arguments which could have been raised prior to the issuance of judgment. *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986). See also, *Whitlock v. Midwest Acceptance Corp.*, 575 F.2d 652, 653 n.1 (8th Cir. 1978).” 839 F.2d at 414.

Motions under Rule 59(e) are not appropriate if the movant merely asks the Court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally. *Global Network Tech.*, 122 F.3d 661 (8th Cir. 1997); *Concordia College Corp. v. W.R. Grace Co.*, 999 F.2d 326 (8th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994); *Innovative Home Health Care v. P.T. – O.T. Associates*, 141 F.3d 1284 (8th Cir. 1998). Indeed, a party’s failure to present his strongest case in the first instance does not entitle him to a second chance in the form of a motion for reconsideration. Such motions are therefore not appropriate if the

movant intends only that the court hear new arguments or supporting facts. See *Capitol Indemnity Corp. v. Russelville Steel Co.*, 367 F.3d 831 (8th Cir. 2004)(new legal arguments raised for the first time on Rule 59(e) motion are untimely and cannot be considered).

Motions for reconsideration should not be used to present arguments on theories or evidence which were previously made and rejected, or which were available but not proffered. *Concordia College Corp. v. Grace*, 999 F.2d 326 (8th Cir. 1993); *Paramount Pictures Corp. v. Video Broadcasting Systems, Inc.*, 1989 WL 159369 (D. Kan 1989) (citing *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986)).

Granting or denying a motion for new trial on the ground of newly discovered evidence rests largely in the sound discretion of the trial court; but it must first be shown to the court's satisfaction that such evidence could not, with reasonable diligence, have been produced at the trial. *United States v. Metropolitan St. Louis Sewer Dist.*, 440 F.3d 930 (8th Cir. [Mo.] 2006).

Here, Lipari did not provide any new evidence nor assert *any* new legal arguments when making his Rule 59(e) motion. Lipari could have – and did – assert most of these arguments in his previous briefs. Thus, a “Motion to Reconsider” is singularly inappropriate and a waste of the Court’s and the parties’ time. The only

new argument Lipari presented (for “recusal”) could easily have been raised before, and by failing to raise it, he waived it.

Therefore, the District Court did not abuse its discretion by refusing to grant Lipari’s motion to alter or amend the court’s judgment

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN DENYING LIPARI’S MOTION TO RECUSE CHIEF JUDGE FERNANDO J. GAITAN, JR.

The court applies the “abuse of discretion” standard of review when deciding whether to reverse the district court’s decision on a motion of recusal. *Hooker v. Story*, 159 F.3d 1139, 1140 (8th Cir. 1998)(abuse of discretion standard of review applies to motion for recusal); *United States v. Probst*, 792 F.2d 111, 113 (8th Cir. 1986).

When determining whether to grant a motion of recusal, the court asks “Whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.” *Jacobs v. Lanterman Dev. Ctr.*, 202 Fed.Appx. 201, 202 (9th Cir. 2006)(internal citations omitted). See also *Probst*, 792 F.2d at 113.

Under the recusal statute, a motion to request a judge to recuse himself must be “timely.” 28 U.S.C. §144. The original statute measured the time from the “term” or “session” of the Court. Those archaic terms no longer apply in most districts, such as the Western District of Missouri. Where the Court does not have “terms” or

“sessions,” a motion to recuse must be filed as soon as possible after the case is filed and assigned to the judge. Such a motion must be filed at the earliest possible moment after the movant learns of the facts demonstrating a basis for the claim, *Twist v. Department of Justice*, 344 F.Supp.2d 137 (D. D.C. 2004), in order to prevent a party from awaiting the outcome of the matter before taking action. *Davis v. Cities Service Oil Co.*, 420 F.2d 1278 (10th Cir. 1970). Certainly it is too late to wait until after the Court has entered judgment before seeking the recusal of the court. *United States v. Berger*, 375 F.3d 1223 (11th Cir. 2004); *Te-Ta-Ma Truth Found. v. World Church of the Creator*, 246 F.Supp.2d 980 (N.D. Ill. 2003).

In addition, Lipari provided no current facts or evidence which would have justified even the consideration of recusal. Rather, as with his underlying complaints, Lipari has no more than speculation, woven together with a fair amount of imagination. Certainly, much more than this is required in order to support a request that a federal judge be recused from overseeing a case. See, e.g. *United States v. Platshorn*, 488 F.Supp. 1367 (S.D. Fla. 1980)(no recusal based on movant’s speculation).

Furthermore, due to his failure to bring facts and evidence in a timely fashion, Lipari has failed to meet the standard required for a court to grant a motion to recuse. A reasonable person would not question the judge’s impartiality in this case, because there is nothing upon which to reach a conclusion of partiality. Thus, the District

Court did not abuse its discretion when denying Lipari's motion to recuse Chief Judge Feranado J. Gaitan.

CONCLUSION

For the reasons set forth above, Appellee, Seyfarth Shaw LLP respectfully requests that this Court uphold the District Court's July 30, 2008 Order granting Defendant's motion to dismiss. Appellee Seyfarth Shaw LLP also respectfully requests that this Court uphold the District Court's October 31, 2008 Order denying Plaintiff's motion to amend or alter and motion to recuse.

Respectfully submitted,

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I hereby certify that two copies of the foregoing, and an electronic copy thereof, were duly served by first class mail delivery this ___th day of January, 2009, upon:

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CERTIFICATE OF COMPLIANCE

Comes now Appellee, Seyfarth Shaw LLP., by and through counsel, and pursuant to Rule 28.1 of the Federal Rules of Appellate Procedure, hereby states that its brief complies with the type-volume limitation in that this reply is comprised of 4,597 words.

Furthermore, pursuant to Rule 28A(d) of the Federal Rules of Appellate Procedure, Seyfarth Shaw LLP hereby states that the computer diskette provided herewith is scanned and is virus free.

The brief was prepared using Microsoft Word 2000.

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