

**IN THE UNITED STATES COURT
DISTRICT OF KANSAS**

SAMUEL K. LIPARI,

Plaintiff,

v.

**U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION,**

Defendants.

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Case No. 2:07-cv-02146-CM-DJW

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS AND STRIKE**

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I. INTRODUCTION

The Court is all too familiar with the history of this litigation having presided over several previous lawsuits, each of which was based upon the same set of facts. On or around November 12, 2002, Medical Supply Chain, Inc. (“Medical Supply”) first filed this case in the United States District Court for the District of Kansas bringing federal and state law claims against these defendants and others. (See Complaint in *Medical Supply I*, attached as **Exhibit A** (“*Medical Supply I*”).) On June 16, 2003, this Court dismissed the lawsuit. 2003 WL 21479192 (D. Kan., June 16, 2003). Medical Supply appealed the decision to the Tenth Circuit Court of Appeals where it was affirmed. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished). The Tenth Circuit also found that Medical Supply’s counsel had filed a frivolous appeal and remanded the matter to this Court to determine sanctions. (See Order, attached as **Exhibit B**.)

While this Court determined the sanctions amount in *Medical Supply I*, see 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed another action in the Western District of Missouri, again naming U.S. Bancorp and U.S. Bank National Association (U.S. Bank) as defendants and including the same federal and state law claims as in *Medical Supply I*. (See Complaint in *Medical Supply II*, attached as **Exhibit C** (“*Medical Supply II*”).) The Missouri court transferred the matter to this Court which granted defendants’ motion to dismiss and issued further sanctions against both Medical Supply’s former counsel and Medical Supply. 419 F. Supp.2d 1316 (D. Kan. 2006). Medical Supply has appealed the *Medical Supply II* judgment to the Tenth Circuit. See Docket of Tenth Circuit (Case No. 06-3331).

Now, Mr. Lipari (instead of the apparently dissolved Medical Supply) sets forth the identical factual allegations for the **third** time under the guise of state law causes of action. Originally filed in Missouri state court and removed to the Western District of Missouri, that court recently transferred the action here. For the reasons that follow, the Court should dismiss this lawsuit with prejudice

following the precedents of *Medical Supply I* and *Medical Supply II* and, further, take such further actions as appropriate to curb the filing of any more lawsuits based upon these alleged facts.

II. PLAINTIFF’S CLAIMS SHOULD BE DISMISSED

The plaintiff’s Complaint should be dismissed with prejudice because: (1) plaintiff does not have standing to maintain this action; (2) plaintiff’s claims against the defendants are barred by *res judicata*; (3) plaintiff’s Complaint fails to comply with Fed. R. Civ. P. 8; or (4) plaintiff’s Complaint fails to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6). For any or all of these reasons, this Court must dismiss plaintiff’s Complaint with prejudice.

A. Plaintiff Does Not Have Standing To Maintain This Action

Samuel Lipari purports to bring this action alleging he is “the sole assignee of rights for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer. . . .” See Complaint at p. 1. The plaintiff does not explain in the Complaint how Medical Supply was dissolved, though he previously advised this Court that he voluntarily dissolved it. (See **Exhibit D**.) In any event, Lipari may not maintain this action in his personal capacity.

Under Missouri law, a dissolved Missouri corporation continues business in the name of the corporation in order to wind up its business and affairs. See R.S.Mo. §§ 351.476, 351.486.¹ A sole shareholder is prohibited from bringing a cause of action that was held by the dissolved corporation. By way of example, in *Hutchings v. Manchester Life and Cas. Management Corp.*, 896 F. Supp. 946 (E.D. Mo. 1995), the plaintiff (sole shareholder) attempted to assert several causes of action belonging to a dissolved corporation. However, because the Complaint sought relief based on the plaintiff’s personal capacity rather than as a trustee acting on behalf of the dissolved corporation, the

¹ Although this matter was transferred from the Western District of Missouri, “The transfer of a case to another district does not alter the applicable law. The transferee court must apply the same law applicable in the transferor court.” *Hill’s Pet Products, a Div. of Colgate-Palmolive Co. v. A.S.U., Inc.*, 808 F. Supp. 774, 776 n.3 (D. Kan. 1992). Missouri law is therefore applicable for the determination of this motion. Moreover, the capacity to sue or be sued is determined by the law of the state of incorporation or, in the case of an individual, the state of domicile. Fed. R. Civ. P. 17(b). Thus, the Missouri corporation statutes apply.

court dismissed the plaintiff's Complaint in its entirety. *Id.*; see also *Gunter v. Bono*, 914 S.W.2d 437, 440-41 (Mo. App. E.D. 1996); *Mabin Constr. Co. v. Historic Constr., Inc.*, 851 S.W.2d 98, 103 (Mo. App. W.D. 1993).

The same holds true in this matter. The plaintiff is making claims belonging to the dissolved corporation, Medical Supply. Even if he was the sole shareholder, Lipari cannot maintain this action in his personal capacity. See also *Tal v. Hogan*, 453 F.3d 1244, 1254-55 (10th Cir. 2006), *cert. denied* 127 S. Ct. 1334 (2007) (applying Oklahoma law).

This Court has also previously found these claims belonged to the corporation when it denied Lipari's attempt to substitute himself as the plaintiff in *Medical Supply II*. (See Order August 7, 2006 attached as **Exhibit E**.) In rejecting the substitution request, the Court recognized that, even though the corporation had been dissolved, the claims nevertheless remained with the corporation.

Finally, Medical Supply's prior representations to this Court and the Tenth Circuit Court of Appeals also compel finding that Lipari has no standing to bring this suit. In each of the previous matters (which stem from the same set of facts and circumstances here), the plaintiff alleged the causes of action belonged to Medical Supply. Judicial estoppel thus prevents Lipari from now asserting these claims in his personal capacity in contradiction to the repeated prior representations to this Court and the Tenth Circuit. See *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005).

Simply put, this suit is yet another attempt to evade this Court's earlier rulings (just as the *Medical Supply II* Complaint filed in Missouri federal court was an effort to forum shop and avoid the *Medical Supply I* result). Mr. Lipari does not have standing in his personal capacity to bring Medical Supply's claims and this Court should dismiss this action with prejudice.

B. The Federal Rules of Civil Procedure require the plaintiff's Complaint to be pled in a simple, concise and direct manner. Even if Lipari does not lack

standing to sue, the Complaint violates the Federal Rules of Civil Procedure and should be dismissed with prejudice.

Plaintiff's Complaint may also be dismissed for failing to comply with Fed. R. Civ. P. 8. Rule 8(e)(1) states that "Each averment of a pleading shall be simple, concise, and direct." Here, plaintiff's Complaint is 75 pages and consists of 264 paragraphs, many of which are nothing more than plaintiff's ramblings. For example, paragraphs 61 through 67 contain statements that a venture capital firm visited Medical Supply; that Medical Supply believed much of the assets in venture funds were from overvalued equities in telecom technology; that the collapse of WorldCom would depress these venture markets; that Medical Supply's technology is superior to that of several other companies, including Cerner; and that Medical Supply would not compromise itself by being aligned with an existing healthcare supplier. Paragraphs 252-57 contain citations to newspaper articles; testimony before the Missouri Legislature; statistics on the cost of health care; and the number Missouri residents without access to Medicaid. Plaintiff's Complaint is full of baseless conspiracy theories and hollow allegations that have no relation to the supposed causes of action. Rule 8 dismissal is appropriate here just as it was in *Medical Supply II*. See *Huggins v. Hilton*, 180 Fed. Appx. 814 (10th Cir. 2006); *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 439 (8th Cir. 1983).

In *Medical Supply II*, this Court addressed this same issue and dismissed Medical Supply's Complaint for failing to comply with Rule 8. There, this Court stated that the Complaint "falls miles from Rule 8's boundaries. . . . In sum, plaintiff's complaint is so exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331.

The Court also denied Medical Supply's request to amend its Complaint in *Medical Supply II*. Given the long history of plaintiff's pleadings in both *Medical Supply I* and *II*, "amendment would be futile." *Id.* at 1332. This Court also observed that the defendants had sought

sanctions under Rule 11 and had given Medical Supply's attorneys the required 21 days to amend the complaint pursuant to Rule 11(c)(1)(A), yet Medical Supply had failed to do so. The Court also found that Medical Supply had recently changed attorneys and the new attorney had chosen not to amend the complaint and thus adopted it as his own. *Id.* Therefore, Medical Supply's Complaint was dismissed in its entirety.

This Court should also dismiss the current Complaint in its entirety. Like *Medical Supply II*, Lipari's Complaint in this matter does not contain a short, concise statement of facts and "falls miles from Rule 8's boundaries." 419 F. Supp.2d at 1331. Mr. Lipari, through Medical Supply, has had countless opportunities to file pleadings but refuses to comply with Rule 8. Therefore, this Court should refuse any request to amend, and dismiss this Complaint in its entirety, with prejudice, under Rule 8 of the Federal Rules of Civil Procedure.

C. Even if Lipari does not lack standing, Plaintiff's Claims and Causes of Action have twice been dismissed by a Court of competent jurisdiction and are therefore barred by the Doctrine of *Res Judicata*.

Even if Lipari may file suit in his personal capacity, his causes of action are barred by *res judicata*. Medical Supply's earlier lawsuits in *Medical Supply I* and *II* (**Exhibits A and C**)² were based upon the same conduct, transaction and set of operative facts alleged here. Because these lawsuits have been dismissed twice by this Court, *see* 2003 WL 21479192; 419 F. Supp.2d 1316, the causes of action against U.S. Bancorp and U.S. Bank in this suit should be dismissed by reason of *res judicata*.

As above, Lipari alleges here that he is the assignee "of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. . . ." Complaint, ¶ 37. Even if

² Medical Supply also filed another suit in this Court, *Medical Supply Chain, Inc. v. General Electric Co., et al.*, which was also dismissed. *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100 (D. Kan., Jan. 29, 2004), *aff'd in part*, 144 Fed. Appx. 708 (10th Cir. 2005). Many of the same allegations are included in this Complaint.

so, under Missouri law, “[A]n 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, 556-557 (Mo. App. S.D. 2004) (quoting, *Carlund Corp. v. Crown Center Redevelopment*, 849 S.W.2d 647, 650 (Mo. App. 1993)); see also *Centennial State Bank v. S.E.K. Constr. Co., Inc.*, 518 S.W.2d 143, 147 (Mo. App. 1974). As a result, Lipari must stand in Medical Supply’s shoes and can occupy no better position than Medical Supply would have if it sued these defendants directly. *Id.* Accordingly, “common law principles compel the conclusion that any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari].” *Id.*

The preclusion principle of *res judicata* prevents “the relitigation of a claim on grounds that were raised or **could have been raised** in the prior suit.” *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990) (emphasis added), *cert. denied*, 498 U.S. 823 (1990). The doctrine of *res judicata* bars relitigation of a claim if: “(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases.” *Id.*; see also *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997), *cert denied*, 522 U.S. 1090 (1998); *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987).³ When a “cause of action” or “claim” “arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same claim or cause of action for purposes of *res judicata*.” *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997).

This suit is barred by *res judicata* because, among the many reasons for dismissal of *Medical Supply II*, the Court found that Medical Supply’s Complaint violated Fed. R. Civ. P. 8 and was “so

³ Section 24 of the Restatement (Second) of Judgments also provides that : When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar[,] . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Thus, “a claim is barred by *res judicata* if it arises out of the same nucleus of operative facts as the prior claim.” *Lane v. Peterson, supra*, 899 F.2d at 742.

exceptionally verbose and cryptic that dismissal is appropriate.” 419 F. Supp.2d at 1331. Amendment was not permitted and the Complaint was dismissed in its entirety. *Id.* at 1332.

While this Court did not reach the Rule 12(b)(6) arguments for dismissal of the state law claims in *Medical Supply II*, 419 F. Supp.2d at 1330, in setting forth an alternative basis for dismissal under Rule 8, and denying any amendment, the Order constituted a final adjudication on the merits of the claims sufficient to trigger *res judicata*. See *Micklus v. Greer*, 705 F.2d 314, 317 n.3 (8th Cir. 1983) (noting that dismissal under Rule 8 without leave to amend is deemed dismissal on the merits sufficient to trigger *res judicata*); see also *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997) (“It is well settled that denial of leave to amend constitutes *res judicata* on the merits of the claims which were the subject of the proposed amendment.”); *Serrano v. Union Planters Bank, N.A.*, 2007 WL 951612 *3 (W.D. Tex., Mar. 19, 2007) (dismissing claims *inter alia* for failing to meet Rule 8 standards and *res judicata* where the same claims were dismissed in a prior lawsuit).

Both U.S. Bancorp and U.S. Bank were defendants in *Medical Supply I* and *II* just as here. *Medical Supply I* and *II* were premised on the same facts and causes of action alleged by the plaintiff in this matter.⁴ While Medical Supply is not named as a party to this suit, Mr. Lipari purports to bring this suit based upon his privity with Medical Supply’s interest. As stated, Lipari can have no greater right than that possessed by Medical Supply. *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-57 (Mo. App. S.D. 2004). Because Medical Supply’s causes of action against both U.S. Bancorp and U.S. Bank would be barred by *res judicata* by reason of the Rule 8 dismissal in

⁴ Plaintiff’s claim for violation of trade secrets under R.S.Mo. § 417.450 specifically was included in *Medical Supply I* (Exhibit A Count VII). This is a claim which **was or could have been raised** in *Medical Supply II* (and was raised in factual allegations, Exhibit C at ¶¶ 316-332, and the dismissed RICO Count XV, at ¶¶ 587-88) and therefore does not defeat dismissal under the doctrine of *res judicata*. See *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990).

Medical Supply II, Lipari has no right to maintain this action as an assignee. This matter should be dismissed in its entirety with prejudice.

D. Even if Not Barred by Lipari’s lack of standing, Rule 8 or *Res Judicata*, Plaintiff’s Claims Should Be Dismissed For Failure to State a Claim under Rule 12(b)(6).

In deciding a motion to dismiss, this Court must accept the well-pled factual allegations in the Complaint as true and grant the plaintiff the benefit of any inferences that are reasonably supported by those factual allegations. However, the “court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). Stated differently, this Court need not “blindly accept the legal conclusions drawn by the pleader from the facts.” *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Plaintiff’s allegations here are conclusory, invite unwarranted inferences and the various tort and common law claims asserted are meritless on their face, even when viewed in the light most favorable to plaintiff. Accordingly, dismissal is appropriate in this case.

1. Count I: Damages for Breach of Contract

Plaintiff’s breach of contract claim is without merit. The elements of a breach of contract claim are: (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder with respect to a definite subject matter; (3) a valid consideration; (4) part performance by one party and prevention of further performance by the other; and (5) damages measured by the contract and resulting from its breach. *Scher v. Sindel*, 837 S.W.2d 350, 354 (Mo. App. E.D. 1992).

The basis for plaintiff’s breach of contract claim is that Lipari and Brian Kabbes of U.S. Bank exchanged email negotiations regarding Medical Supply’s desire for escrow services including that Kabbes e-mailed Lipari a contract; that Lipari and Kabbes agreed to lower the normal fees for escrow agent services; U.S. Bank compensation; the investment of long and short term held

funds; the name of the escrow agent; and payment schedule (Complaint at ¶ 201). Plaintiff further alleges that defendants performed diligence to determine whether to contract with Medical Supply (*id.* at ¶ 202); and that Kabbes also requested corporate good standing documentation from Medical Supply which was provided (*id.* at ¶ 203).⁵

It is hornbook law that the existence of a valid and enforceable contract is dependent upon agreement of the parties, or meeting of the minds, upon the terms of that contract. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. App. S.D. 2002). As the *Hammons* court stated:

“*Negotiations or preliminary steps towards a contract do not constitute a contract. The existence of a contract necessitates a ‘meeting of the minds’ which the court determines by looking at the intention of the parties as expressed in their words or acts. Whether a contract is made and, if so, what the terms of that contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties.*”

Id. (quoting *Gateway Exteriors, Inc. v. Suntime Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. E.D. 1994) (emphasis supplied). At best, Medical Supply and U.S. Bank were *negotiating* a potential written contract which never came to fruition. Obviously, had there been a meeting of the minds between the parties, a written contract memorializing all of these terms would have been executed. Plaintiff’s supposition that an oral contract was formed based on the negotiation of the terms of a potential written agreement is insufficient to support its claim. *Hammons*, 63 S.W.3d at 325.

No reasonable person reviewing the facts as set forth in plaintiff’s Complaint could conclude that a contract was formed between Medical Supply and U.S. Bank. Plaintiff cannot legitimately allege that any U.S. Bank representative, including Kabbes, stated or even implied that the escrow accounts had been approved by U.S. Bank. It is clear that the changes allegedly suggested by Kabbes and agreed to by Medical Supply were indicative of parties negotiating a potential contract.

⁵ Defendants note that plaintiff nowhere pleads the existence of a purported contract with U.S. Bancorp. It is also clear that the supposed contract is alleged to have been between U.S. Bank and Medical Supply, not Lipari.

Therefore, plaintiff's cause of action for breach of contract fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6).

2. Count II: Damages for Fraud and Deceit

Count II of the Complaint purports to claim damages for fraud and deceit. Plaintiff alleges that Brian Kabbes falsely represented that U.S. Bank would not perform escrow services to Medical Supply because of the "know your customer" provisions of the Patriot Act. (Complaint ¶ 210.) As support for this claim, plaintiff includes approximately ten single spaced pages of what he claims was a call between representatives of Medical Supply and the defendants. (Complaint ¶¶ 214, 215.) Plaintiff then alleges the following in paragraph 216:

MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce U.S. BANK'S promise with the defendants' officer Brian Kabbes upon learning that U.S. BANK was not going to provide the escrow services. MSCI and and (*sic*) SAMUEL LIPARI justifiably relied upon the fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of U.S. BANK's Commercial Trust department and instead contacted U.S. BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

Plaintiff further alleges that the defendants made the fraudulent misrepresentation with knowledge of its falsity or with reckless disregard as to "whether it was true or false to the point of not checking and realizing that the increased duties of the 'know your customer' for new account holders had not been enacted." (Complaint ¶ 217.)

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. Ct. App. 1997).

Plaintiff's fraud claim delineated in Count II is legally insufficient. Assuming all facts as true, even if the defendants stated the "know your customers" provision of the Patriot Act was the reason for not providing escrow accounts, there is no allegation that this statement was made with the intent for Medical Supply to act upon it. Thus, regardless if the statement is false and justifiably relied upon by Medical Supply (which defendants strongly deny), no reasonable person could interpret that the statement was made by the defendants with the intent for Medical Supply to act or refrain from acting in a particular manner.

Further, plaintiff's claim that it relied upon this statement is nonsensical. Plaintiff asserts that because Medical Supply relied on the statement, Mr. Lipari did not call the St. Louis branch of U.S. Bank, but instead called U.S. Bancorp, which angered Lars Anderson and Susan Paine. This nonsensical allegation does not show the plaintiff justifiably relied on the statement or that any action it took in reliance on the statement was detrimental to the plaintiff. For these reasons, plaintiff's fraud claim in Count II should be dismissed with prejudice pursuant to Rule 12(b)(6).

3. Count III: Misappropriation of Trade Secrets under R.S.Mo. § 417.450.

Under Missouri law, the misappropriation of trade secrets occurs when one acquires a trade secret through improper means such as theft or bribery; or when one discloses a trade secret without consent or knew or had reason to know that the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy. *See H&R Block Eastern Tax Services, Inc. v. Enchura*, 122 F. Supp.2d 1067, 1074 (W.D. Mo. 2000).

The following is a summary of the allegations plaintiff makes to support his misappropriation claim:

- On or about October 10, 2002 plaintiff gave a copy of the Medical Supply business plan and associate program booklets to U.S. Bank employee Douglas Lewis to apply for the escrow accounts Medical Supply was seeking. (Complaint ¶ 108);
- The business plan and associate booklets “had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained therein.” (Complaint ¶ 109);
- The letter of introduction also addressed the confidential nature of the documents (Complaint ¶ 110);
- After delivery, Mr. Lipari was given a loan application and agreed to return the next day (Complaint ¶ 114);
- On or about November 6, 2002, Mr. Lipari sought to retrieve the documents given to Mr. Lewis on October 10, 2002 (Complaint ¶ 189);
- Upon retrieving the booklets, he noticed that the binders had been separated and copies or faxes had been made of the associate program and business plans as shown by “tractor marks” from a copy or fax machine (Complaint ¶¶ 192, 193);
- That the defendants instructed Mr. Lewis to disassemble the documents and make copies in violation of the notice of limitations and disclosure (Complaint ¶ 229);
- U.S. Bank exceeded its authorized use and copied and/or transmitted the documents to three U.S. Bancorp employees (Complaint ¶ 230);
- That U.S. Bancorp, its officers, and its subsidiary “U.S. BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI’s trade secrets and made use thereof (Complaint ¶ 232).

Plaintiff’s cause of action for misappropriation of trade secrets fails to state a claim. While plaintiff alleges that U.S. Bancorp obtained “unconsented knowledge of MSCI’s trade secrets and made use thereof,” it was Medical Supply and Mr. Lipari who selected U.S. Bank for the purposes of providing escrow services. *See* Complaint ¶¶ 45, 47. Further, the plaintiff admits in his Complaint that, before seeking escrow services from the defendants, plaintiff voluntarily contacted Piper Jaffray and submitted his idea and business plan for consideration of Medical Supply as a venture capital candidate. *See* Complaint, ¶¶ 55-60.

These facts show that plaintiff's claim for misappropriation of trade secrets cannot stand. It was the plaintiff who sought out U.S. Bank; the plaintiff who submitted the alleged trade secrets to U.S. Bank; and the alleged trade secrets had already been divulged (by the plaintiff) to Piper Jaffray (U.S. Bancorp's subsidiary at the time). Moreover, the plaintiff fails to allege how any of the defendants misused the materials or how he was damaged by the misuse. For these reasons, this Court must dismiss Count III of plaintiff's Complaint with prejudice pursuant to Rule 12(b)(6).

4. Count IV: Damages for Breach of Fiduciary Duty

Plaintiff generally alleges that defendants owed it a "fiduciary duty" but fails to provide any factual basis for this particular allegation. A claim for breach of fiduciary duty has four elements: (1) the existence of a fiduciary relationship between the parties, (2) a breach of that fiduciary duty, (3) causation, and (4) harm. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. Ct. App. 2000). A fiduciary is a person having a duty to "act primarily for the benefit of another in matters connected with his undertaking." *See* Restatement (Second) Agency 13 cmt. a (1957); Restatement (Second) of Trusts § 2 (1958). While Missouri has not adopted a precise common-law definition, a "fiduciary relationship" may exist when "a special confidence [is] reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence." *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 751 (Mo. Ct. App. 1990). Plaintiff cannot, however, unilaterally foist a fiduciary duty upon a defendant in the absence of some agreement or conduct by the defendants to accept such a responsibility. *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996). Nor does a business relationship give rise to a fiduciary relationship. *Kratky v. Musil*, 969 S.W.2d 371, 377 (Mo. Ct. App. 1998).

No fiduciary relationship between plaintiff and defendants ever existed. Accordingly, Count IV should be dismissed.

5. Count V: Damages for *Prima Facie* Tort

Count V of the plaintiff's complaint should be dismissed for failure to plead the required elements of a *prima facie* tort. *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1983). The Missouri Supreme Court has held that *prima facie* tort is not "a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort. . . ." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993). The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant's act. *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is lawful. Plaintiff does not make his claim for *prima facie* tort in the alternative and at no point in the Complaint does plaintiff allege that any of the defendants' actions were lawful or truthful. Further, plaintiff alleges no facts to support the element that there was an intent to cause injury. Rather, plaintiff simply alleges that "U.S. BANK and U.S. BANCORP's (*sic*) committed these lawful acts with intent to injure MSCI." (Complaint ¶ 249(2).) While the requirements of Rule 12(b)(6) state that all allegations in the complaint must be accepted as true, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). For these reasons, Count V should be dismissed with prejudice pursuant to Rule 12(b)(6).

**III. PLAINTIFF'S CLAIMS REFERENCING DISTRICT JUDGE KATHRYN VRATIL;
DISTRICT JUDGE CARLOS MURGUIA; MAGISTRATE JUDGE JAMES P.**

O'HARA; AND THE LAW FIRM OF SHUGHART THOMSON & KILROY SHOULD BE STRICKEN

Throughout the Complaint, Lipari makes numerous scandalous comments and allegations directed at Judge Kathryn Vratil, Judge Carlos Murguia, Magistrate James P. O'Hara and the defendants' law firm of Shughart Thomson & Kilroy. These allegations concern the disbarment of Medical Supply's former attorney and are immaterial, impertinent and scandalous within the meaning of Rule 12(f). Plaintiff makes these allegations solely in an attempt to embarrass and vilify these Judges and the law firm engaged to represent these defendants. These supposed "facts" are irrelevant and immaterial to the claims. Fed. R. Civ. P. 12(f) provides "[u]pon motion made by a party before responding to a pleading . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court is afforded broad discretion in ruling on a motion to strike. *See Nationwide Ins. Co. v. Cent. Mo. Elec. Co-op.*, 278 F.3d 742, 748 (8th Cir. 2001) ("[A] district court enjoys liberal discretion under Rule 12(f).").

This Court should exercise its discretion and specifically strike paragraphs 24-28, 224, 225, and 249(e) of plaintiff's Complaint as these allegations are immaterial to the claims, add nothing to the Complaint and were included solely for a malevolent purpose. Each of these allegations is immaterial, impertinent and scandalous under Rule 12(f) and should therefore be stricken by this Court. *Young v. Dunlap*, 223 F.R.D. 520, 521-22 (E.D. Mo. 2004); *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp.2d 1255, 1258 (W.D. Mo. 2001).⁶

⁶ Defendants note that similar vitriol appeared in the *Medical Supply II* Complaint which has been dismissed. In any event, even a cursory review of the Complaint shows that the law firm and Magistrate O'Hara had no involvement with anything touching upon plaintiff's supposed claims until the law firm was engaged to provide representation of certain defendants in the *Medical Supply I* case. Magistrate O'Hara's first involvement with Medical Supply apparently was with a subsequent suit that it filed. *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM.

IV. CONCLUSION

Defendants request that the Court enter its Order granting the following relief:

- (1) *All claims* in Plaintiff's Complaint be dismissed *with prejudice*;
- (2) The Court admonish Mr. Lipari that, should he or Medical Supply bring another action based on the facts and transactions pled in *Medical Supply I*, *Medical Supply II* and this matter, Mr. Lipari or Medical Supply may be enjoined and a Show Cause Order will be issued (*see Serrano*, 2007 WL 951612 *3 (W.D. Tex., Mar. 19, 2007); *see also Johnson v. Stock*, 2005 WL 1349963 *3-4 (10th Cir. 2005) (unpublished));
- (3) That, should Lipari or Medical Supply choose to file a subsequent lawsuit based upon the facts pled in *Medical Supply I*, *Medical Supply II* or this case, Medical Supply and/or Lipari first satisfy all orders and judgments previously entered awarding sanctions and attorneys' fees against Lipari or Medical Supply;
- (4) That the allegations concerning District Judge Kathryn Vratil, District Judge Carlos Murguia, Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy be stricken;
- (5) For all other relief to which the Defendants are justly entitled.

Respectfully submitted,

/s/ Mark A. Olthoff

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ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 25th day of April, 2007, to:

Mr. Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Mark A. Olthoff
Attorney for Defendants