

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

<b>SAMUEL K. LIPARI,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 2:07-cv-02146-CM-DJW</b>
	)	
<b>U.S. BANCORP and</b>	)	
<b>U.S. BANK NATIONAL ASSOCIATION,</b>	)	
	)	
<b>Defendants.</b>	)	

**DEFENDANTS’ MEMORANDUM IN OPPOSITION TO PLAINTIFF’S  
MOTION TO STRIKE DEFENDANTS’ MOTION TO DISMISS**

Plaintiff’s Motion to Strike Defendants’ Motion to Dismiss should be denied. Plaintiff’s arguments, like this lawsuit, are meritless.

The defendants have not “lost” their Motion to Dismiss. To the contrary, the United States District Court for the Western District of Missouri granted the defendants’ request for alternative relief and transferred the matter to this Court. Defendants have only recently filed in this Court their Motion to Dismiss, which the Western District of Missouri did not address prior to transfer. Contrary to plaintiff’s assertion, it was not “lost” or denied and does not constitute a “second” (or “fifth”) motion to dismiss these claims—it is the *first* dispositive motion in this case.

The plaintiff also makes the untenable argument that U.S. Bancorp and U.S. Bank were compelled to appeal this Court’s dismissal of the state law claims in the prior case. Whether defendants may have had the option to appeal the Court’s ruling declining to assert supplemental jurisdiction over the state law claims, they clearly were not required to do so. Plaintiff’s argument and the authorities he relies upon do not support his position.

Next, the plaintiff asserts that the United States Court of Appeals for the Tenth Circuit has sole federal jurisdiction over these state claims by reason of the appeal in *Medical Supply Chain, Inc.*

*v. Novation*, Case No. 06-3331 (appealing this Court’s Case No. 05-CV-2299-CM and reported at 419 F. Supp.2d 1316 (D. Kan. 2006)) (“*Medical Supply II*”). If that is the case, this matter should be dismissed because there is a prior suit involving the identical causes of action and allegations between these parties. Claim splitting is prohibited, and Lipari’s own arguments show he has no justification for filing the same lawsuit in Missouri state court thereby wasting judicial resources and unnecessarily forcing these defendants to incur the cost and time to defend more meritless claims. By plaintiff’s own admission, either his Motion to Strike or this lawsuit is frivolous. Plainly, both lack any merit.

As briefed in defendants’ Motion to Dismiss, plaintiff’s arguments further show he does not have standing to maintain this action. If the Tenth Circuit has jurisdiction over the plaintiff’s claims, this proves that any right to bring a cause of action belongs solely to the corporation, Medical Supply Chain, Inc., and not Mr. Lipari. Accordingly, this matter should be dismissed.

In its earlier Order dismissing *Medical Supply II*, this Court ruled that Medical Supply’s prior claims should be dismissed for *multiple* reasons, including that the complaint violated Fed. R. Civ. P. 8. The Court also denied Medical Supply an opportunity to amend. While the Court may not have addressed the Rule 12(b)(6) grounds for dismissal of the state claims, it identified an equally justifiable ground for dismissal under Rule 8 which is deemed a dismissal *with prejudice* for purposes of *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.”); cf. *Serrano v. Union Planters Bank, N.A.*, 2007 WL 951612 (W.D. Tex., Mar. 19, 2007) (dismissing claims *inter alia* for failing to meet Rule 8



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the above and foregoing was filed via electronic case filing this 17th day of May, 2007, with a true and correct copy being delivered via United States mail, postage prepaid, to:

Mr. Samuel K. Lipari  
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Plaintiff

/s/ Mark A. Olthoff  
Attorney for Defendants