IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF MISSOURI

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS, STRIKE OR TRANSFER

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I. INTRODUCTION

The procedural history surrounding this suit is lengthy. On or about 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 claims under federal and state law. *See* Complaint in *Medical Supply I*, attached as **Exhibit A** ("*Medical Supply I*"). On June 16, 2003, Judge Murguia dismissed the federal claims with prejudice and dismissed the state claims without prejudice. 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 Appx. 730 (10th Cir. 2004) (unpublished).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 further found that Medical Supply's appeal was frivolous and that Medical Supply's then counsel should show cause why he should not be sanctioned. *See* 112 Fed. Appx. at 731-32. On or about December 30, 2004, the Tenth Circuit issued another Order wherein it found that Medical Supply's counsel had filed a frivolous appeal. The Tenth Circuit remanded the matter to the District Court for a determination of sanctions. *See* Order, attached as **Exhibit B**.

While the District Court determined the sanctions issue in *Medical Supply I*, *see* 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed an identical action in the Western District of Missouri on March 4, 2005. *See* Complaint in *Medical Supply II*, attached as **Exhibit C** ("*Medical Supply II*"). In *Medical Supply II*, U.S. Bancorp and U.S. Bank National Association (U.S. Bank) were named again as defendants in the Complaint again which included claims based in federal and state law. *See* **Exhibit C**. The defendants sought transfer of *Medical Supply II* to the District of Kansas, citing that the District of Kansas maintained jurisdiction over the matter pending resolution of the sanctions proceedings in *Medical Supply I*. Judge Smith granted defendants' motion and transferred *Medical Supply II* to the District of Kansas. *See* Order, attached as **Exhibit D**. The defendants then renewed their motions to dismiss in the District of Kansas. On or about March 7, 2006, Judge Murguia 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* to the Tenth Circuit where it remains pending. *See* Docket of Tenth Circuit (Case No. 06-3331).

This lawsuit should be dismissed. The plaintiff does not have standing to make these claims; the plaintiff's claims are barred by *res judicata*; the Complaint fails to comply with the pleading requirements of Fed. R. Civ. P. 8; and plaintiff's allegations fail to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). Finally, plaintiff's allegations regarding or 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 under Fed. R. Civ. P. 12(f) as immaterial, impertinent and scandalous.

In the alternative, due to its extensive familiarity with this matter and the pending appeal of *Medical Supply II*, this case should be transferred to the District of Kansas pursuant to 28 U.S.C. § 1404. Despite the fact both Medical Supply and its former attorney have been sanctioned by both the Tenth Circuit and the District of Kansas, Samuel Lipari has now filed this third action asserting the same claims on the same set of facts against U.S. Bancorp and U.S. Bank. Mr. Lipari, as principal of Medical Supply, chose the Kansas District Court in originally bringing *Medical Supply I* in 2002. Yet he now attempts to avoid the numerous and negative rulings from that Court and the Tenth Circuit. Such actions amount to nothing short of forum shopping.

II. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED

The plaintiff's Complaint should be dismissed with prejudice for any of the following reasons: (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. 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

The plaintiff brings this action "as 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 the Kansas District Court that he voluntarily dissolved it. (*See* **Exhibit E**.) Regardless of whether it was voluntarily dissolved or dissolved by the State, the plaintiff may not maintain this action in his personal capacity.

Missouri statutes governing both voluntary dissolution and administrative dissolution state that a dissolved corporation may continue business in the name of the corporation to wind up its business and affairs. *See* R.S.Mo. §§ 351.476, 351.486. Missouri law prohibits a sole shareholder from bringing a cause of action that was held by the dissolved corporation. In *Hutchings v. Manchester Life and Cas. Management Corp.*, 896 F. Supp. 946 (E.D. Mo. 1995), the *pro se* plaintiff filed a cause of action against several defendants for causes of action belonging to a dissolved corporation where the plaintiff was the sole shareholder. The court noted the law of Missouri that a shareholder cannot maintain suit on behalf of a corporation because a shareholder does not have legal ownership of corporation property. *Id.* at 947. The court further noted that, when a corporation is dissolved, only the statutory trustees of the corporation may wind up the corporation's business. *Id.* at 948. The court found that the Complaint sought relief based on the plaintiff's personal capacity rather than as a trustee acting on behalf of the dissolved corporation. Therefore, the 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 that were held by the dissolved corporation, Medical Supply Chain, Inc.[1] Even if he was the sole shareholder, founder and CEO of Medical Supply, he cannot maintain this action in his personal capacity. Thus, this action should be dismissed with prejudice.

B. Plaintiff's Claims and Causes of Action are Barred by the Doctrine of *Res Judicata.*

Even if plaintiff may file suit in his personal capacity, his causes of action are barred by the doctrine of *res judicata*. Medical Supply's earlier lawsuits in *Medical Supply I* and *II* (**Exhibits A & C**)[2] were based upon the same conduct, transaction, set of operative facts and claims alleged here. These lawsuits have been dismissed twice by the District of Kansas. *See* 2003 WL 21479192; 419 F. Supp.2d 1316. Thus, plaintiff's instant causes of action against U.S. Bancorp and U.S. Bank are barred by *res judicata*.

In this matter, Mr. Lipari alleges that he is the purported assignee "of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. . . ." Complaint, ¶ 37. 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, Mr. Lipari stands in Medical Supply's shoes and can occupy no better

[1] Judicial estoppel also prevents plaintiff's attempt to assert these claims. *See Autos, Inc. v. Gowin*, 2005 WL 2459153 *4 (D. Kan. 2005). In his first two lawsuits, plaintiff maintained that the causes of action belonged to Medical Supply. That must be his continuing contention in the Tenth Circuit or else the current appeal must be dismissed. Clearly, the assertion that plaintiff *pro se* may assert these claims on behalf of Medical Supply is inconsistent with the prior allegations in *Medical Supply I* and *II*. *See Johnson v. Linden City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005); *Gebert v. Transport. Admin. Servs.*, 260 F.3d 909, 917 (8th Cir. 2001). Notably, Judge Murguia denied plaintiff's motion to substitute a new party plaintiff in *Medical Supply II*. *See* 19 F. Supp.2d at 1336.

[2] Plaintiff also filed another suit in Kansas District Court, *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM which was also dismissed. Many of the same allegations are included in this Complaint.

position than Medical Supply would have if it sued defendants directly. *Id.* Thus, "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] The Eighth Circuit has held that 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 the doctrine of *res judicata* due to Judge Murguia's March 7, 2006 Order dismissing *Medical Supply II.* Among the many reasons for dismissal, Judge Murguia found that Medical Supply's Complaint violated Rule 8 of the Federal Rules of Civil Procedure and was "so exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331. Judge Murguia denied Medical Supply's request to amend the Complaint and dismissed the Complaint in its entirety. *Id.* at 1332.

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[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.

While the Court declined to retain supplemental jurisdiction over the state law claims, by dismissing *Medical Supply II* under Rule 8, and denying Medical Supply's request to amend, Judge Murguia's Order constituted a final adjudication of the suit 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) (holding 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) (holding, "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.")

As in this matter, both U.S. Bancorp and U.S. Bank were defendants in *Medical Supply II. Medical Supply II* was premised on the same facts and causes of action sought by the plaintiff in this matter and it was dismissed by a court of competent jurisdiction. Thus, any action by Medical Supply is barred by the doctrine of *res judicata*.[4]

While Medical Supply is not identified as a party to this suit, Mr. Lipari brings suit as a purported assignee of the Medical Supply's interest. As stated, Mr. 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 cause of action against both U.S. Bancorp and U.S. Bank is barred by *res judicata*, Mr. Lipari has no right to maintain this action as an assignee and this matter should be dismissed in its entirety with prejudice.

C. Even if Not Barred by *Res Judicata*, Plaintiff's Claims Should be Dismissed Under Rule 8 of the Federal Rules of Civil Procedure

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,

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[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 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).

plaintiff's Complaint is 75 pages and consists of 264 paragraphs, many of which are simple ramblings of the plaintiff. 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 causes of action set forth by Mr. Lipari in this action.

In *Medical Supply II*, Judge Murguia addressed this same issue and dismissed Medical Supply's Complaint for failing to comply with Rule 8. In *Medical Supply II*, Judge Murguia held 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.

In *Medical Supply II*, Judge Murguia also denied Medical Supply's request to amend its Complaint. Judge Murguia found that, given the long history of plaintiff's pleadings in both *Medical Supply I* and *II*, "amendment would be futile." *Id.* at 1332. Judge Murguia also noted 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. Finally, Judge Murguia found that Medical Supply had recently changed attorneys and the new attorney had chosen not to amend the complaint and thus adopted it has his own. *Id.* Therefore, Judge Murguia dismissed the action in its entirety.

This Court should also dismiss plaintiff's Complaint in its entirety. Like *Medical Supply II*, plaintiff'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, as principal of Medical Supply, has had numerous opportunities to file a pleading that complies with Rule 8 but refuses to do so. Therefore, this Court should deny any request to amend, and dismiss this Complaint in its entirety, with prejudice, under Rule 8 of the Federal Rules of Civil Procedure.

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

Plaintiff's claims fail to state a claim upon which relief can be granted. 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 are conclusory, invite unwarranted inferences and the various tort and statutory 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 plaintiff, Samuel Lipari ("Lipari") and Brian Kabbes of U.S. Bank exchanged email negotiations regarding plaintiff'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. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. E.D. 1994) (emphasis supplied). Plaintiff 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. Nowhere in the Complaint does

[5] Defendants note that plaintiff nowhere pleads the existence of a purported contract with U.S. Bancorp.

plaintiff 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. 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 claim for misappropriation of trade secrets fails to state a claim. Plaintiff alleges that U.S. Bancorp obtained "unconsented knowledge of MSCI's trade secrets and made use thereof." However, it was Medical Supply and Mr. Lipari who selected U.S. Bank and 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, plaintiff makes numerous 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. 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]

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[6] It is apparent from even a cursory review of the Complaint that the law firm and Magistrate O'Hara had no involvement with anything touching upon plaintiff's claim until the law firm was engaged to provide representation of certain defendants in the Kansas District Court case. Magistrate O'Hara's first involvement with plaintiff apparently was with a subsequent suit that plaintiff filed. *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM.

IV. IN THE ALTERNATIVE, PLAINTIFF'S CLAIMS SHOULD BE TRANSFERRED TO THE DISTRICT OF KANSAS FOR FURTHER ADJUDICATION

In the alternative, defendants request this case be transferred to the United States District Court for the District of Kansas. 28 U.S.C. § 1404(a).[7] This is the third lawsuit stemming from the same operative facts where Medical Supply or Mr. Lipari has named U.S. Bancorp and U.S. Bank as defendants. As shown above, both of the previous actions have an extensive procedural history in the District of Kansas where this matter should be transferred.

Federal courts have consistently and uniformly ordered section 1404(a) transfers to other federal district courts when related lawsuits are pending in the transferring court, and have used quite strong language in so doing. For example, in *Prudential Insurance Co. of America v. Rodano*, 493 F. Supp. 954 (E.D. Pa. 1980), the court ordered transfer, stating:

> "The most compelling reason for transfer is that it would best serve the interests of justice. The presence of two related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served when federal cases arising out of the same issues are allowed to proceed separately."

Id. at 955; *see also Islamic Republic of Iran v. Boeing Co.*, 477 F. Supp. 142, 144 (D. D.C. 1979) ("Most importantly, litigation of liability issues closely similar to issues pending for over two years in another federal court would be a grossly inefficient use of judicial resources. Litigation of such related claims in the same forum is strongly favored.").

As in *Republic of Islam*, this lawsuit is virtually identical to both *Medical Supply I* and *Medical Supply II* which were adjudicated in Kansas. Should the Tenth Circuit remand *Medical Supply II* for further proceedings, the District of Kansas would retain jurisdiction. If this matter was

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[7] Title 28 U.S.C. Sec. 1404(a), states in its entirety:

> (a) For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

not transferred, U.S. Bancorp and U.S. Bank would be forced to defend *Medical Supply II* in the District of Kansas as well as this current matter in the Western District of Missouri. Both suits arise out of the same set of operative facts. Despite being patently unfair to these defendants to defend identical suits in different Districts, this would be an extreme waste of judicial resources and creates the possibility of conflicting rulings from different courts. These factors strongly favor transferring this lawsuit to the District of Kansas.

Several federal courts have recognized that avoiding multiplicity of litigation is given great, even decisive, weight in deciding whether to transfer a case under § 1404(a). *See Monsanto Technology, Inc. v. Syngenta Crop Protection, Inc.,* 212 F. Supp.2d 1101, 1103 (E.D. Mo. 2002) (In cases where issues substantially overlap, transfer is necessary if there is a serious danger of District Courts making inconsistent determinations on material issues); *Cali v. East Coast Aviation Services, Ltd.*, 178 F. Supp.2d 276, 295 (E.D. N.Y. 2001) (". . . courts have given great weight to the need to avoid multiplicity of litigation . . . litigation of related claims in the same tribunal is strongly favored. . . ."); *Dahl v. Hem Pharmaceuticals Corp.*, 867 F. Supp. 194, 197 (S.D. N.Y. 1994) ("It would be a patent misuse of judicial resources to require another Federal District Court (and perhaps another Court of Appeals) to review and become familiar with facts and circumstances already extensively excavated by another Federal Court") (emphasis added); *see also* Wright & Miller, *Federal Practice and Procedure*, Sec. 3854, pp. 441-42 and numerous cases cited therein.

When Judge Smith transferred *Medical Supply II* to the District of Kansas, he specifically rejected plaintiff's attempt at forum shopping and cited the case's extensive procedural history in the District of Kansas. Judge Smith wrote:

> Mere disappointment with the result of a case does not give a party the right to file an almost identical cause of action and, moreover, does not entitle a party to forum shop. Based on the District of Kansas' extensive experience with the almost

identical previous lawsuit and in the interest of justice, the above-captioned matter is transferred to the District of Kansas.

Exhibit D, p. 2.

Plaintiff originally chose the Kansas District Court as the forum for its lawsuit. Now, plaintiff engages in the most egregious form of "forum-shopping" in a baseless attempt to avoid further negative rulings from that Court and the Tenth Circuit. Such disregard for the courts, the judicial system, the interests of justice and the rights of these defendants should not be rewarded. Therefore, this Court should transfer this matter to the District of Kansas if it is not dismissed.

V. CONCLUSION

Defendants request that the Court enter its Order transferring this matter to Judge Carlos Murguia in the District of Kansas or in the alternative, dismiss plaintiff's Petition and strike plaintiff's allegations concerning District Judge Kathryn Vratil; District Judge Carlos Murguia; Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy; and grant defendants whatever other relief they are justly entitled.

Respectfully submitted,

/s/ Mark A. Olthoff

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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 19th day of January, 2007, to:

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

/s/ Mark A. Olthoff
Attorney for Defendants