

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

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

**REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Plaintiff’s Complaint should be dismissed just as the prior two lawsuits that alleged the same conduct, occurrences and transactions have been terminated. Medical Supply Chain, Inc. (and thereby Samuel Lipari) have had ample opportunities to attempt to state claims for relief but, in each instance, failed. This third try—with Lipari, individually, seeking to supplant the Court’s earlier rulings—is no more worthy of consideration. For the reasons discussed below, as well as those presented in the defendants’ initial motion and memorandum,¹ the lawsuit should be dismissed.

A. Samuel Lipari is not the Proper Party.

Samuel Lipari (“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. His misunderstanding of Missouri law,

¹ The defendants maintain that dismissal is appropriate for any and all reasons stated in their Motion to Dismiss and Legal Memorandum. But in an effort to reduce the amount of briefing before the Court, defendants have presented select arguments in this Reply rather than rearguing all issues in their original Motion. By doing so, the defendants are not waiving any of their original arguments and herein incorporate them by reference. Of additional note, to the extent plaintiff relies upon *Conley v. Gibson*, 355 U.S. 41 (1957) and its progeny (Opp. at p. 5), the Supreme Court has now retired it as stating the minimum pleading requirement in federal court. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1970 (2007) (must be “plausibility in the complaint”; *see also Alvarado v. KOB-TV*, 493 F.3d 1210 (10th Cir. 2007).

however, not only renders this allegation insufficient as a matter of law, but leads to the further conclusion that Lipari is not the proper party to raise these claims.

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. In particular, Missouri law provides that dissolution does *not* transfer title to any of the corporation’s “property.” *Id.* The property here—the claims alleged in the Complaint—remain titled in the corporation and are not “assigned” to Lipari as the “founder and Chief Executive Officer” merely by reason of the dissolution.

One of the cases defendants cited in their opening brief—which Lipari did not care to address—both begins and ends the point. In *Gunter v. Bono*, 914 S.W.2d 437 (Mo. App. E.D. 1996), the Court specifically discussed the “proper party” issue holding that a suit must be brought in the dissolved corporation’s name, and stating it is “the correct procedure for litigation involving dissolved corporations.” *Id.* at 440. There, individuals had filed suit against a borrower concerning a note the corporation had executed prior to dissolution. The court determined the corporation (not the individuals) was the proper party.

Plaintiff’s non-Missouri authorities are inapposite, not only because they involve state statutes unlike Missouri’s law, but also because Missouri’s legislature changed the common law “escheat” rule in 1991 by expressly declaring that dissolution does not transfer title to property and that the dissolved corporation continues its existence, among other things, to sue and be sued. R.S.Mo. § 351.476. Lipari’s sole Missouri authority is also off the mark in that the plaintiff there was the recipient of a written assignment agreement from the dissolved corporation as part of the “winding up,” the plaintiff was not identified as “founder” or “Chief Executive Officer” and there

was no issue raised as to whether the dissolved corporation itself was the proper party. *See Smith v. Taylor-Morley, Inc.*, 929 S.W.2d 918, 924 (Mo. App. E.D. 1996).

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*. Following Missouri law, the Court recognized that, even though the corporation had been dissolved, the claims nevertheless remained with the corporation. In any event, as discussed below, even if Lipari has somehow succeeded to Medical Supply's alleged causes of action, the privity between Lipari and Medical Supply precludes the Complaint.² The judgments in two prior cases, alleging identical underlying transactions, occurrences and facts, plainly bar the instant lawsuit.

Finally, 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).

B. Because Medical Supply's claims are barred by the doctrine of *res judicata*, Lipari cannot maintain this cause of action regardless of the "proper party" identity.

Medical Supply's earlier lawsuits in *Medical Supply I* and *II* were based upon the same conduct, transactions and set of operative facts alleged here. Because these lawsuits have been

² Lipari also suggests that there have been "rulings" in other suits he has brought where the courts have not declined jurisdiction over the cases on the issue of "standing." (Opp. at pgs. 2-4.) There is plainly an insufficient legal record to analyze these supposed rulings let alone adjudge the merits of decisions in cases where these defendants are not parties. This Court and these defendants are not bound by any such alleged "orders," whatever they may be.

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 are barred by reason of *res judicata*.³

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* *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006). 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).

Lipari contends *res judicata* does not apply because: (1) the state law claims in *Medical Supply II* were dismissed without prejudice and (2) *Medical Supply II* is on appeal and is not a final judgment. Both arguments lack any merit.

³ Even if Lipari is the proper party, his causes of action are barred by *res judicata*. 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.*

1. ***Medical Supply II* was dismissed for multiple separate reasons, including for violation of Fed. R. Civ. P 8. Thus, *res judicata* attaches to plaintiff's state law claims and this suit must be dismissed.**

In *Medical Supply II* this Court decided multiple motions to dismiss from multiple defendants. In dismissing the Complaint, this Court stated:

The court has reviewed the pending motions to dismiss and responses, along with the complaint and plaintiff's prior cases in this district. Even presuming all well-pleaded allegations as true, resolving doubts in favor of plaintiff, and viewing the pleadings in the light most favorable to plaintiff, the court finds that dismissal of plaintiff's complaint is warranted **for several reasons**.

Medical Supply Chain, Inc. v. Neoforma, Inc., 419 F. Supp.2d 1316, 1326 (D. Kan. 2006) (emphasis added).

This Court went on to clearly state its dismissal of the Complaint was appropriate for separate and distinct reasons:

Although the court limited its analysis to Rule 12(b)(6), claim preclusion and Rule 8, the court does not intend to imply that defendants' additional grounds for dismissal are without merit. Rather, **three separate grounds for dismissal are sufficient**, and the court declines to continue its analysis.

Id. at n.5 (emphasis added).

One of the “separate” reasons for dismissing the *Medical Supply II* Complaint was Medical Supply's failure to comply with the pleading requirements of Fed. R. Civ. P. 8. This Court found that Medical Supply's Complaint was “so exceptionally verbose and cryptic that dismissal is appropriate” and that “[p]laintiff's complaint, as a whole, violates Federal Rules of Civil Procedure 8(c) and 8(e)(1).” 419 F. Supp.2d at 1331. The Court therefore dismissed the Complaint—the *entire* Complaint—without distinction as to state or federal claims. Additionally, this Court denied Medical Supply's Motion to Amend, finding that such amendment would be futile. *Id.* at 1332.

It is widely held that, when a trial court dismisses a complaint and denies leave to amend, such a ruling is deemed a final adjudication on the merits. *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*); *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.”); *Professional Management Associates, Inc. v. KPMG, LLP*, 345 F.3d 1030, 1032 (8th Cir., 2003) (holding same as *Landscape Properties, supra*); *King v. Hoover Group, Inc.*, 958 F.2d 219, 223 (8th Cir. 1992); *see also Williams v. U.S.*, 54 Fed. Appx. 290 (10th Cir. 2002); *Collins v. Johnson Cty., KS*, 56 Fed. Appx. 852 (10th Cir. 2002); *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).

The defendants here were also defendants in *Medical Supply II*, and *Medical Supply II* arose out of the same set of facts and circumstances as this suit. Thus, the dismissal of *Medical Supply II* under Rule 8, combined with denial of leave to amend, results in a dismissal *with* prejudice sufficient to trigger *res judicata* as a matter of law. The Court made it clear to plaintiff, “[e]nough is enough.” 419 F. Supp.2d at 1334.

Lipari argues that when this Court dismissed the federal claims in *Medical Supply II*, it dismissed the state claims without prejudice.⁴ But Lipari ignores the Court's clear ruling that dismissal was warranted for three *separate* reasons, including Rule 8. Lipari has failed to address or even mention defendants' arguments as to the Rule 8 dismissal in *Medical Supply II* or its *res*

⁴ Contrary to Lipari's argument (Opp. at pp. 6-7), there was no “express reservation of right” to refile the state law claims alleged in *Medical Supply II* against U.S. Bancorp and U.S. Bank following the Rule 8 dismissal. In federal court, the dismissal of pendent claims on jurisdictional grounds is not an express reservation to maintain a second suit. *See Maher v. GSI Lumonics, Inc.*, 433 F.3d 123, 127 n.7 (1st Cir. 2005). Here, the Court found that diversity jurisdiction did not exist, 419 F. Supp.2d at 1323, but declined supplemental jurisdiction under 28 U.S.C. § 1367(a), *id.* at 1330. The Court's judgment did not explicitly preserve any right of Lipari to file suit again.

judicata effect. This argument is therefore uncontroverted and defendants' Motion to Dismiss must be granted.

2. This Court's dismissal of *Medical Supply II* is a final determination on the merits and Medical Supply's pending appeal is irrelevant.

Lipari argues that, because *Medical Supply II* is on appeal before the Tenth Circuit, there has been no final adjudication of the claim. Like the rest of his arguments, this position lacks legal support.

In *In re Ewing*, 852 F.2d 1057, 1060 (8th Cir. 1988), the plaintiff contended that *res judicata* did not apply because the trial court's ruling in a separate action was on appeal to the Eighth Circuit. The plaintiff therefore contended that it was not a final adjudication. The Eighth Circuit rejected this argument by stating:

We disagree. It is well established in the federal courts that "the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court." *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497-98 (D.C. Cir. 1983) (citing *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188-89, 61 S. Ct. 513, 515-16, 85 L.Ed. 725 (1941) (dictum); *Reed v. Allen*, 286 U.S. 191, 199, 52 S. Ct. 532, 533, 76 L.Ed. 1054 (1932)). *See also* 1B J. Moore, Moore's Federal Practice ¶ 0.416[3], at 521-22 ("The federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo*." (footnotes omitted)).

Id.

It is clear that the pending appeal of *Medical Supply II* has no bearing on the *res judicata* analysis of this Court's prior decision. This Court dismissed plaintiff's entire Complaint in *Medical Supply II* under Rule 8, among other reasons. It was a final adjudication on the merits and plaintiff's claims are now barred.

CONCLUSION

Mr. Lipari is not the proper party to this suit. The alleged claims belong to Medical Supply Company, Inc. under Missouri's law of corporate dissolution. Regardless, Lipari may only receive

the rights held by Medical Supply. Because Medical Supply's claims are barred by *res judicata*, Lipari has no right to maintain this action. For these and the reasons stated in defendants' prior Motion and Legal Memorandum, this Court must grant Defendants' Motion to Dismiss.

Respectfully submitted,

/s/ Mark A. Olthoff

MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP, U.S. BANK NATIONAL
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 3rd day of October, 2007, to:

Ira Dennis Hawver, Esq.
6993 Highway 92
Ozawkie, KS 66070

Attorney for Plaintiff

/s/ Mark A. Olthoff
Attorney for Defendants