IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY, KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-2299-CM**
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION TO SUBSTITUTE PLAINTIFF

Plaintiff's motion to substitute another person as plaintiff, under Fed. R. Civ. P. 17(a), 15(a) and 25(c),[1] should be denied. The request is futile and barred by the doctrine of judicial estoppel. Plaintiff has maintained throughout this case, and in the nearly identical case previously dismissed by this Court, that Medical Supply Chain, Inc. ("Medical Supply") is the injured party and the "real party in interest" to assert the various claims alleged. It now seeks to substitute Medical Supply's sole shareholder, Samuel Lipari, as the plaintiff in this case because, among other "reasons," the repeated sanctioning of plaintiff's counsel for "correctly pleading the law" will hinder Medical Supply Chain's ability to retain substitute counsel in the event Medical Supply is deprived of its current counsel (Motion, p. 2, ¶ 6); Medical Supply cannot represent itself in the event it is deprived of its current counsel because it is a corporate entity (*id*. at ¶ 7); Samuel Lipari is the "real party in interest" as Medical Supply's founder, chief executive and sole owner of registered stock (*id*. at p. 1); Medical Supply's state law claims "are based on contracts Samuel K. Lipari personally made

[1] Rule 25(c) is inapplicable. Plaintiff contends it is entitled to substitution under Rule 25(c) because "[i]f Samuel K. Lipari dissolves or fails to renew the corporate resignation of Medical Supply Chain, Inc., its assets would revert back to the personal property of Samuel K. Lipari effectively transferring the interest in this litigation from the company to the founder and owner." (Motion, p. 7.) Rule 25(c) requires a transfer of interest, which plaintiff argues *may* occur at some time in the future. This does not meet the requirements under Rule 25(c).

and was personally subject to" (*id*. at p. 2, ¶ 4); Lipari would "forfeit his rights against the defendants unjustly should a dismissal with prejudice result from Medical Supply's deprivation of counsel" (*id*. at p. 2, ¶ 8); and Medical Supply "could not have known of the existence of a doctrine opposing the enforcement of federal antitrust laws in the Kansas District Court and the Tenth Circuit Court of Appeals or a secession from the rule of law over this market" (*id*. at p. 3). None of the bases plaintiff offers are proper grounds for seeking substitution under Rules 17(a) or 15(a). The motion constitutes nothing more that plaintiff's latest strategy aimed at extending the life of this frivolous litigation.

Plaintiff is Judicially Estopped from Claiming Samuel Lipari is the Real Party in Interest.

Medical Supply previously brought suit against many of the same defendants named in the pending action and asserting almost identical claims. *See Medical Supply Chain, Inc. v. US Bancorp*, 2003 WL 21479192 (D. Kan. 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004). Throughout the course of that litigation, Medical Supply was the only named plaintiff claiming injury at the hands of the defendants. *Id*. After Medical Supply's first lawsuit was dismissed, it brought this nearly identical lawsuit in the United States District Court for the Western District of Missouri. *See* Complaint (document No. 1). Throughout this second litigation, Medical Supply has asserted claims and injury as a result of defendants' purported illegal conduct as the "real party in interest." Only now, with Medical Supply apparently on the brink of being deprived of its current counsel, does it fabricate the argument that Samuel Lipari is the "real party in interest." The Court should not permit this contrivance because Medical Supply is judicially estopped from making this spurious claim.

Judicial estoppel is a discretionary remedy this Court may invoke "to prevent improper use of judicial machinery." *Autos, Inc. v. Gowin*, 2005 WL 2459153, *4 (D. Kan. 2005) (*quoting New*

Hampshire v. Maine, 532 U.S. 742, 750 (2001)). The rule ordinarily applies to inconsistent positions assumed by a party in the course of the same judicial proceeding or in subsequent proceedings involving identical parties and questions. *Id*. (*citing In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975).) "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Johnson v. Lindon City Corp*., 405 F.3d 1065, 1069 (10th Cir. 2005) (citation omitted). In *Johnson*, the Tenth Circuit reviewed factors typically used to determine when to apply judicial estoppel, stating:

> "First, a party's later position must be 'clearly inconsistent' with its earlier position. . . . Moreover, the position to be estopped must generally be one of fact rather than of law or legal theory. . . . Second, whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance in a later proceeding would create the perception that either the first or second court was misled. . . . The requirement that a previous court has accepted the prior inconsistent factual position ensures that judicial estoppel is applied in the narrowest of circumstances. . . . Third, whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Id. (citations and internal quotation marks omitted.)

Plaintiff's motion to substitute easily satisfies this three-part test. First, plaintiff seeks to reverse its long-held position that Medical Supply is the proper plaintiff in this case and substitute Samuel Lipari as the "real party in interest." Among plaintiff's discernable arguments for seeking substitution, Medical Supply asserts that Lipari, as Medical Supply's founder, chief executive and sole owner of registered stock, should be substituted because the alleged state law claims are based on contracts Lipari "personally made and was personally subject to . . . ."; Lipari is in privity with Medical Supply and would forfeit his rights if a dismissal with prejudice is entered as a result of Medical Supply being deprived of its current counsel; and Lipari would suffer "irreparable loss

because the State of Kansas lacks the resources to compensate him" for the harm he has suffered at the hands of state officials' abuse of process and denying him access to federal courts. (*See* Motion, p. 2.) Plaintiff even cites Missouri law in support of unilaterally piercing Medical Supply's own corporate veil. *Id*. at p. 6. However, there is no indication in Medical Supply's motion *how* substituting Lipari as plaintiff would resolve any of these "issues."

Plaintiff has asserted throughout this litigation and in the earlier lawsuit brought against many of the same defendants that Medical Supply entered into the alleged contracts at issue. Doc. No. 1; *Medical Supply*, 2003 WL 21479192 (D. Kan. 2003). Plaintiff also maintained in this case and in the prior lawsuit that defendants' purported conduct harmed Medical Supply. *Id*. at pp. 16-17; 114-15. No claims have been asserted on behalf of Samuel Lipari individually in either action, nor has plaintiff claimed Lipari was a party to any alleged contract. *Id*. Now, however, Medical Supply claims *Samuel Lipari* is actually the "real party in interest," that he "personally made and is subject to" the purported contracts that form the basis of plaintiff's claims (whatever that means) and has been and will be harmed in the future unless this Court grants its motion. Medical Supply's current position is contrary to its prior and long-held position that Medical Supply is the proper party to bring these claims.

Moreover, plaintiff seeks to substitute Lipari based in part on future contingencies that may or may not occur. This includes Medical Supply being deprived of its current counsel, being unable to retain substitute counsel, plaintiff's claims being dismissed with prejudice and sanctions being directly entered against Medical Supply. (*See* Motion, p. 2, ¶¶ 5, 6, 8 and 10.) In addition to constituting pure speculation about future events, these grounds are insufficient to support plaintiff's motion.

Second, plaintiff has maintained its position that Medical Supply is the proper party to bring these claims throughout this litigation and in an earlier, almost identical lawsuit. This position, asserted by plaintiff for over two years, has been accepted by the Court and the defendants in both actions. In fact, Medical Supply Chain's first lawsuit was dismissed by the Court based upon *Medical Supply Chain's* various claims and causes of action. Permitting plaintiff to now substitute Lipari as the plaintiff in this second lawsuit would create the perception that plaintiff misled either the first or second court regarding the proper party to bring these claims.

Third, granting plaintiff's motion would impose an unfair detriment on the defendants because doing so would extend the life of frivolous litigation requiring defendants to continue to incur substantial costs and legal fees. *Medical Supply's* claims were dismissed by this Court when brought in its first lawsuit against many of these same defendants. *Medical Supply* then brought this lawsuit a second time in Missouri in a blatant but unsuccessful attempt to forum shop its baseless claims. *Medical Supply* claimed injury at the hands of the defendants in both cases. Medical Supply now seeks substitution because it may lose its current counsel and, as a corporate entity, it cannot represent itself. Nothing, including sanctions imposed on Medical Supply's current counsel, prevents it from obtaining new counsel. Medical Supply's contention to the contrary is baseless.

For all of these reasons, plaintiff's motion under Rules 15 and 17 should be denied.

Amendment Under Rule 15(a) Should be Denied as Futile and Prejudicial to Defendants.

Plaintiff's motion to amend under Rule 15(a) also should be denied because it would be futile. Although Rule 15(a) requires leave to amend be freely given when justice so requires, "whether leave should be granted is within the trial court's discretion." *Hines v. Corrections Corporation of America*, 2005 WL 1398659, *1 (D. Kan. 2005). Plaintiff's motion to amend its complaint to substitute Lipari as plaintiff should be denied because the federal claims asserted in

plaintiff's Complaint, even if asserted by Lipari individually, should be dismissed under the doctrine of collateral estoppel. *Beckett ex rel. Continental Western Ins. Co*. v. U.S., 217 F.R.D. 541, 543 (D. Kan. 2003) ("A district court is justified in denying a motion to amend as futile . . . if the proposed amendment could not withstand a motion to dismiss or otherwise fails to state a claim."). Plaintiff asserts in its motion that Lipari has "at all times been in privity with Medical Supply." (*See* Motion, p. 2, ¶ 8.) As such, even if the Court permitted plaintiff to amend under 15(a) to allow Lipari to assert the federal claims set forth in plaintiff's Complaint, the claims still cannot withstand defendants' motion to dismiss (Documents Nos. 6 and 7) because they are barred by the doctrine of collateral estoppel.[2]

Moreover, as noted above, defendants would suffer substantial prejudice if plaintiff is permitted to amend its Complaint because amendment would extend the life of frivolous litigation requiring defendants to continue to incur substantial costs and legal fees. *In re Coronado Engineering, Inc.*, 2003 WL 23777743, *1 (Bankr. D. Kan. 2003) ("If the proposed [amendment] clearly is frivolous or advances a claim . . . that is legally insufficient on its face, the court may deny leave to amend.") Plaintiff's motion should be denied on this basis as well.

CONCLUSION

Medical Supply's motion lacks legal merit. Plaintiff only offers speculation about possible future events, claims of judicial malfeasance and unsupported argument to claim that Samuel Lipari is now the "real party in interest" in this litigation. Plaintiff's motion also reverses its position, accepted by this Court and the defendants in this case and in prior litigation, that Medical Supply is the injured party and proper plaintiff. Medical Supply is judicially estopped from adopting a contrary position at this stage in the case. The motion is nothing more than an attempt to artificially

[2] "The doctrine of collateral estoppel prevents a second litigation of the same issues between the same parties *or those in privity* with the parties." *Reed v. McKune*, 298 F.3d 945, 950 (10th Cir. 2002) (emphasis added).

extend the life of frivolous litigation. Moreover, because the federal claims set forth in the Complaint are barred by the doctrine of collateral estoppel, regardless whether brought by Medical Supply or Lipari, any amendment under Rule 15(a) would be futile.

For all of these reasons, Medical Supply's motion should be denied.

Respectfully submitted,

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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 21st day of October, 2005, to:

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