UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
(Through assignee Samuel K. Lipari)	)	
SAMUEL K. LIPARI	)	
Plaintiff,	)	
v.	)	Case No. 05-2299
NOVATION, LLC	)	
NEOFORMA, INC.	)	
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFER	)	
ANDREW CECERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY, P.C.	)	
Defendants.	)	

PLAINTIFF'S FED. R. CIV. P. 59(e), TO ALTER OR AMEND THE JUDGMENT
AND ANSWER TO ORDER TO SHOW CAUSE

Comes now the plaintiff Samuel K. Lipari in his individual capacity and as an assignee of all rights of Medical Supply Chain, Inc. a dissolved Missouri corporation and respectfully submits this motion under Fed.R.Civ.P. 59(e), to alter or amend the judgment. The plaintiff seeks to alter or amend the court's order striking the plaintiff's motion to reopen the present action under F.R.Civ. P. Rule 60(b). The plaintiff also answer's the court Show Cause Order.

Statement of Facts

1. The plaintiff filed a *pro se* motion on February 13, 2008 for new trial on this court's dismissal order denying the plaintiff's *pro se* standing and dismissing the plaintiff's federal claims with prejudice under F.R.Civ. P. Rule 60(b). See Exb 1 Motion for New Trial and Exb 2 Plaintiff's Response to Defendant's Opposition.

2. The plaintiff filed his motion after this court recognized his standing to proceed *pro se* as the assignee of his dissolved corporation's claims under Missouri State Law governing corporations in styled *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW, the same case or controversy as Case No. 05-2299 as defined by Article III of the U.S. Constitution and 28 U.S.C. § 1367:

"Missouri law does, however, allow a dissolved corporation to assign its claims to a third-

party. *See, e.g., Smith v. Taylor-Morley, Inc.*, 929 S.W.2d 918 (Mo. Ct. App. 1996) (upholding dissolved corporation's written assignment of rights to a purchase contract). The assignee may sue to recover damages for the dissolved corporation's claims. *Id.* (holding assignee of dissolved corporation's rights under a purchase contract could sue for injuries to dissolved corporation for breach of the purchase contract). Here, plaintiff alleges that he is the assignee of all rights and interests of Medical Supply, including the claims in this lawsuit. Accepting as true all material allegations of the complaint and construing the complaint in favor of plaintiff, the court finds that plaintiff has met his burden at this stage of the proceeding. Defendant's motion is denied with respect to standing."

Order signed by Judge Carlos Murguia recognizing plaintiff's standing as assignee of MSC's claims. Exb 3 Order *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW at page 2.

3. This court's order recognizing the plaintiff's status as assignee of his federal claims occurred after this court's decision on August 7, 2006, striking four motions filed by the plaintiff.

4. A reasonable conclusion can be drawn by a reviewing court that the plaintiff's materially identical arguments supporting *pro se* standing as an assignee of MSC's claims produced two different results because of the intervening decision of the US Supreme Court in *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007) overruling the Tenth Circuit and requiring facts pled in a complaint to be accepted as true.

5. The February 13, 2008 Rule 60(b) filing was a motion and not a pleading.

6. This court ordered the plaintiff's F.R.Civ. P. Rule 60(b) motion struck without a hearing.

7. This court's order to show cause threatens sanctions against the plaintiff that violate the court's authority and jurisdiction under the Federal Rules of Civil Procedure.

8. The court's void order striking the plaintiff's Rule 60(b) if not reversed is a participation in the defendants' unlawful actions to deprive the plaintiff of the representation of an unimpaired attorney documented at length in the plaintiff's complaint dismissed by the court.

9. Judge Carlos Murguia's repeated sanctioning of the plaintiff for being correct on the application of controlling law of this circuit and in direct contradiction of the express language of Congress providing multiple private rights of action in the USA PATRIOT Act and in contradicting the US Supreme Court on the lack of preclusion for subsequent antitrust and RICO acts in the Medical Supply litigation has the foreseeable *ad terrorem* effect of depriving the plaintiff of counsel and of capital to enter the market for hospital supplies monopolized by the Novation LLC cartel.

MEMORANDUM IN SUPPORT

The plaintiff's motion is within ten days of the court's order striking the plaintiff's Rule 60(b) motion and therefore is properly a motion pursuant to Fed.R.Civ.P. 59(e), to alter or amend the judgment:

> "A motion to alter or amend presents the court with the opportunity to rectify manifest errors of law or fact and to review evidence newly discovered. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450-51, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982); *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1461, 137 L.Ed.2d 564 (1997); *Barrett v. Fields*, 941 F.Supp. 980, 984-85 (D.Kan. 1996)."

Fields v. Atchison, Topeka, and Santa Fe Railway Company, 5 F.Supp.2d 1160 at 1161 (D. Kan., 1998).

The plaintiff has conformed to Rule 7.3 of the local rules for the District of Kansas.

A Rule 59(e) motion may be granted if any of the following three conditions are presented to the court: (1) an intervening change in the controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. *Brumark Corp. v. Samson Resources Corp*., 57 F.3d 941, 948 (10th Cir.1995).

The plaintiff seeks relief from the striking of his motion for new trial based on (3) "the need to correct clear error or prevent manifest injustice."

The plaintiff answer's this court's Show Cause Order by citing to controlling case law that the plaintiff's Rule 60(b) motion is proper.

I. Standard of review

The Tenth Circuit will review the district court's denial of a Rule 60(b)(6) motion for abuse of discretion. *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir.1996) Simply stated, for the appeals court to find an abuse of district court's discretion and reverse, the appellate court must have a definite and firm conviction that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. Moreover, relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances. *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991), cert. denied, 506 U.S. 828, 113 S.Ct. 89, 121 L.Ed.2d 51 (1992).

Denial of the plaintiff's Motion for New Trial over changes in law since the dismissal of the plaintiff's federal claims can be appealed. See *John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co*., 239 F.2d 815 at 816-817 (3rd Cir., 1956).

II. Clear Errors of the Court

The court lacks the authority or power to strike the plaintiff's motion under Rule 12(f) and Rule 37. The striking violates the plaintiff's fourteenth amendment right to a hearing, and a judgment of sanctions in such a case would be void for want of jurisdiction.

A. Plaintiff's Motion For New Trial Properly Before The Court

The plaintiff sought a new trial on the order dismissing his claims based on intervening decisions by this court and the US Supreme Court, including Judge Carlos Murguia's determination he had standing as the assignee of Medical Supply Chain's Claims in this same case or controversy.:

> "A Rule 60(b) motion addresses the district court's judgment and must be presented initially to the district court. 12 James Wm. Moore, et al., Moore's Federal Practice § 60.60[1] and authorities cited therein. Thus, the Respondent's Rule 60(b) motion challenges a judgment of this Court and is properly before this Court."

Mitchell v. Rees, 430 F.Supp.2d 717 at 721 (M.D. Tenn., 2006). Also "…a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. E.g., *Dunlap v. Litscher*, 301 F.3d 873, 876 (C.A.7 2002)." *Mitchell v. Rees, id* 430 F.Supp.2d 717 at 722 (M.D. Tenn., 2006).

Under Rule 60(b), a court may set aside a default judgment "on motion and under such terms as are just" for any of the following reasons:

> "(1) mistake, inadvertence, surprise, or excusable neglect;(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) or any other reason justifying relief from the operation of the judgment. Fed.R.Civ.P. 60(b)."

In re Wallace, 298 B.R. 435 at 439 (B.A.P. 10th Cir., 2003)

The difference in rulings regarding the plaintiff's standing to pursue his claims pro se are exactly the exceptional or "extraordinary circumstances" in which a New Trial under Rule 60(b) is appropriate:

> "Moreover, **an inconsistent application of the law that deprives a party of a right accorded to other similarly situated parties presents, "extraordinary circumstances" warranting post-judgment relief, including under Rule 60(b)(6).** See e.g., *Gondeck v. Pan American World Airways Inc*., 382 U.S. 25, 26-27, 86 S.Ct. 153, 15 L.Ed.2d 21 (1965)(granting post-judgment relief on rehearing, in the interest of justice **to remedy a misinterpretation of the**

law); *Cincinnati Insurance Co. v. Byers*, 151 F.3d 574, 580 (6th Cir.1998)(extraordinary circumstances based upon a post-judgment change in the law); *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir.1985)(finding **extraordinary circumstances and granting relief from judgment based on intervening decision of Ohio Supreme Court**); *Jackson v. Sok*, 65 Fed. Appx. 46, 49 (6th Cir.2003)(per curiam)(upholding grant of Rule 60(b) **motion based on intervening change in the applicable law**)." [Emphasis added]

Mitchell v. Rees, 430 F.Supp.2d 717 at 725 (M.D. Tenn., 2006).

This action is the same case or controversy currently before the court in *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW under Article III of the U.S. Constitution and 28 U.S.C. § 1367 and which this court continued to exercise jurisdiction over even during the plaintiff's appeal as this court also did during the interlocutory appeal in *Medical Supply I*.

By dismissing Medical Supply's state claims without prejudice, a determination not opposed or appealed at the time by the defendants, the trial court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp*., 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the Memorandum & Order granting dismissal was a mere interim order. *Id*.

B. Court Lacked Power to Strike Plaintiff's Motion Under Rule 12(f)

The court lacks the authority or power to strike the plaintiff's motion under Rule 12(f). Rule 12(f) of the Federal Rules of Civil Procedure ("Rule 12(f)") provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). According to the language of Rule 12(f), motions to strike apply only to pleadings and not to motions. See *Knight v. United States*. 845 F. Supp. 1372, 1374 (D. Ariz. 1993); *Krass v. Thomson-CGR Med. Corp*., 665 F. Supp. 844, 847 (N.D. Cal. 1987).

It is clearly established that the plaintiff's motion was not a pleading the court could strike:

"On its own initiative or on a party's motion, the court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter in order to avoid the time, effort, and expense necessary to litigate spurious issues. FED.R.CIV.P. 12(f); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), rev'd on other grounds, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). A "pleading" includes a complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, or third-party answer. FED.R.CIV.P. 7(a). Motions to strike are a drastic remedy, which courts generally disfavor. *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd*., 647 F.2d 200, 201 (D.C.Cir.1981) (citing 5 C FED. PRAC. & PROC. 2d § 1380 at 783); *Morse v. Weingarten*, 777 F.Supp. 312, 319 (S.D.N.Y.1991); *Mirshak v. Joyce*, 652 F.Supp. 359, 370 (N.D.Ill.1987); *Schramm v. Krischell*, 84 F.R.D. 294, 299 (D.Conn.1979)."

Naegele v. Albers, 355 F.Supp.2d 129 (D.D.C., 2005).

Judge Carlos Murguia is responsible for knowing this is the controlling law of this circuit:

> "Moreover, there is no provision in the Federal Rules of Civil Procedure for motions to strike motions and memoranda; only motions to strike unsigned papers under Rule 11, third-party claims under Rule 14(a), and certain matters in pleadings under Rule 12(f) are contemplated by the Federal Rules of Civil Procedure. Motions and memoranda are not included within the definition of "pleading" under F.R.C.P. 7(a). See James Moore & Jo Desha Lucas, 2A Moore's Federal Practice p 12.21 at 12-164 (Matthew Bender, 2d ed 1991) ("a Rule 12(f) motion to strike is not appropriate with regard to affidavits, parties, or any other matter other than that contained in the actual pleadings")."

Searcy v. Social Sec. Admin.(Unpublished), 956 F.2d 278 (C.A.10 (Utah), 1993). See Exb. 4

C. Court Lacked Power to Strike Plaintiff's Motion Under Rule 37

The other source for a court's striking authority under the Federal Rules of Civil Procedure is Rule 37. Rule 37(b), Federal Rules of Civil Procedure, authorizes courts to employ various sanctions, including "striking out pleadings or parts thereof ... or rendering a judgment by default," Rule 37(b)(2)(C), when "a party ... fails to obey an order to permit or provide discovery, including an order made under subdivision (a) of this rule," Rule 37(b)(2). But, there has been no discovery in this case or controversy (the defendants have not even produced requested documents in the continuing state contract claims litigation).

In similar circumstances as this case, the US Supreme Court found a trial court could not strike a filing to punish a party. In *Hovey v. Elliott*, 167 U.S. 409, 413, 444, 17 S.Ct. 841, 843, 854, 42 L.Ed. 215 (1897), the court held that a court may not strike an answer and enter a default merely to punish a contempt of court. The contempt involved in that case was the failure to pay into the registry of the court a fund which was the subject of the litigation. The Court held that the entry of default in those circumstances violated the defendant's fourteenth amendment right to a hearing, and held further that the judgment in such a case would be "void for want of jurisdiction, and may therefore be collaterally attacked," *id*. at 444, 446-47, 17 S.Ct. at 854, 855.

Hovey v. Elliott was subsequently limited by the decision *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 349-54, 29 S.Ct. 370, 379-81, 53 L.Ed. 530 (1909). Hammond only held, however, that a court had the power to strike an answer and enter default when a party failed to produce evidence. "(T)he

generating source of the power (to strike the answer and enter default) was the right to create a presumption flowing from the failure to produce." *Id*. at 351, 29 S.Ct. at 380. See also *Norman v. Young* :

> "*Hammond* pared the *Hovey* decision by holding that a court could properly strike an answer and enter default judgment under circumstances where a party fails to produce documents as ordered. The court stated that trial courts have inherent power to presume the bad faith and untruth of an answer where the proof was suppressed provided it was essential to the disposition of the case."

Norman v. Young, 422 F.2d 470 at 473 (10th Cir., 1970)

Here the court was not resolving a dispute over discovery which has not yet occurred in the Medical Supply Chain litigation and could make no competent judgments on facts in dispute.

III. Court's Order Striking Rule 60(b) is Void

The court's denial or striking of plaintiff's Rule 60(b) motion deprives the plaintiff of an important federal right, warranting a certificate of probable cause. See *Smith*, 50 F.3d at 821 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)).

This court's order striking the plaintiff's Rule 60(b) motion is void:

> "For a judgment to be void under Rule 60(b)(4), it must be determined that the rendering court was powerless to enter it. If found at all, voidness usually arises for lack of subject matter jurisdiction or jurisdiction over the parties. It may also arise if the court's action involves a plain usurpation of power or if the court has acted in a manner inconsistent with due process of law. 11 In the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted. "

V. T. A., Inc. v. Airco, Inc., 597 F.2d 220 at 224-225 (C.A.10 (Colo.), 1979)

Judge Carlos Murguia has usurped power denied him under the Federal Rules of Civil Procedure. The plaintiff has the clearly established right to seek relief from any post judgment order including an award of attorney fees that might result from the court's previous sanctions or threatened show cause sanctions:

> "Here, the judgment against Pinckney was void. Thus, Pinckney was entitled to restitution under Section 60(b)(4). *Jordan v. Gilligan*, 500 F.2d 701, 704 (6th Cir.1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975) (a Rule 60(b) motion is proper where appellants failed to object to an award of attorney's fees and expenses until after the judgment is entered and execution proceedings were undertaken); *Vander Zee v. Karabatsos*, 683 F.2d 832 (4th Cir.1982) (garnisher entitled to restitution of payment made on void judgment)."

Watts v. Pinckney, 752 F.2d 406 at 410 (C.A.9 (Ariz.), 1985).

IV. Court Must Vacate Strike and Show Cause Order

Judge Carlos Murguia unlawfully instructed the Kansas District Court Clerk to violate the established policies of the Kansas District Court and not to give the plaintiff notice of its present Show Cause Order through service by mail or by emailing the order to the plaintiff's email address included by the plaintiff in every filing expressly for the purpose of taking property from the plaintiff without Due Process and to violate his oath of office and become a participant in the defendants' conspiracy to artificially inflate hospital supplies through the Novation LLC cartel and to commit racketeering acts to extrinsically deprive the plaintiff of the opportunity to present hiss evidence.

Judge Carlos Murguia unlawfully instructed the Kansas District Court Clerk not to mail the plaintiff notice after the plaintiff observed that the failure to give notice of a minute order accelerating the deadline to respond to the defendants' motion to dismiss in *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW would have similarly deprived the plaintiff of his property. It is now recognized Judge Carlos Murguia unlawfully instructed the Kansas District Court Clerk to violate the established policies of the Kansas District Court and not to give the plaintiff notice of its Minute Order through service by mail or by email in *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW.

When Judge Carlos Murguia acts overtly to deny the plaintiff of Due Process whether by violating the Federal Rules of Civil Procedure and striking the plaintiff's Rule 60(b) Motion or by depriving the plaintiff of notice and an opportunity to oppose sanctions, Judge Carlos Murguia's orders are void and must be set aside as a consequence of the plaintiff's present Motion for Reconsideration.

"A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside." 7 J. Moore, Moore's Federal Practice, p 60.25 at 301 (2d ed. 1973). See also *Barkley v. Toland*:

> "Rule 60(b)(4) authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly."
>
> *Barkley v. Toland*, 7 Kan.App.2d 625, 646 P.2d 1124 at 1127-1128 (Kan. App., 1982).

Judge Carlos Murguia's prior decisions in this litigation appear to be the product of similar unlawful conduct against the plaintiff who was sanctioned previously in the order dismissing his federal claims on conduct subsequent to *Medical Supply I* that violated clearly established law on preclusion:

> "The preclusion of claims that "could have been brought" does not include claims that arose after the original complaint was filed in the prior action, unless the plaintiff actually asserted the claim in an amended pleading, but res judicata does not bar the claim simply because the plaintiff elected not to amend his complaint. *Pleming v. Universal-Rundle Corp*., 142 F.3d 1354, 1357 (11th Cir. 1998). This is true even if the plaintiff discussed the facts supporting the subsequent claim in support of his claims in the prior case. *Id*. at 1358-59."

Sherrod v. School Board of Palm Beach County, No. 07-13747 (11th Cir. 4/7/2008) (11th Cir., 2008).

Judge Carlos Murguia violated the show cause notice requirement. The Rule to Show Cause requires a reasonable opportunity to respond. "Under Federal Rule of Civil Procedure 11(c), a court may, after notice and reasonable opportunity to respond, impose an "appropriate sanction" upon attorneys, law firms, or parties if the court finds they have violated subdivision (b) of that Rule. Fed.R.Civ.P. 11(c). Rule 11(b) provides that by presenting a motion to the court, the attorney is certifying that the document (1) "is not being presented for any improper purpose, such as to harass;" and (2) the legal claims made are nonfrivolous. Fed.R.Civ.P. 11(b). An attorney's conduct is evaluated objectively when it is challenged under Rule 11: the applicable standard is that of the reasonable attorney admitted to practice before this court. See *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988).

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests that the court grant the plaintiff relief from the order striking the plaintiff's Motion to reopen its Memorandum and Order dismissing the plaintiff's claims, and from the Order to Show Cause recognizing the plaintiff had standing and properly filed a motion for New Trial.

Respectfully Submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

I certify I have caused a copy to be sent via electronic case filing to the undersigned opposing counsel on 4/8/08.

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S/ Samuel K. Lipari
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