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 FOR RELIEF FROM JUDGMENT

Medical Supply's claims in the captioned case ended nearly two years ago when this Court dismissed its Complaint. The Tenth Circuit then dismissed its appeal as untimely. There is no merit to Mr. Lipari's motion. Moreover, Samuel Lipari is not authorized to represent Medical Supply Chain, Inc. in this case and, thus, the motion must be denied.

A. Course of Proceedings

On October 22, 2002, Medical Supply Chain, Inc. ("Medical Supply") filed a Complaint in the United States District Court for the District of Kansas alleging numerous claims arising from the alleged refusal of U.S. Bank to provide certain escrow account services (*Medical Supply I*). Shortly thereafter, Medical Supply amended its Complaint and added claims for the violation of the Sherman and Clayton Acts, the Hobbs Act, the USA Patriot Act, and certain state law claims seeking injunctive and declaratory relief as well as hundreds of millions of dollars in alleged damages.

On June 16, 2003, this Court dismissed the Complaint. *Medical Supply Chain, Inc. v. US Bancorp. et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003). The Tenth Circuit Court of Appeals affirmed and ordered Medical Supply's counsel to show cause why he should not be sanctioned. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished) (Exhibit "A"). On December 30,

2004, this Court found that Medical Supply's counsel had filed a frivolous appeal and remanded the matter to the district court for a determination of the sanctions amount. (Exhibit "B").

While this Court was considering the sanctions issue in *Medical Supply I*, *see* 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed another action in the United States District Court for the Western District of Missouri (*Medical Supply II)*. The *Medical Supply II* Complaint reasserted most of Medical Supply's previously dismissed federal and state law claims. The Missouri federal court transferred this action to this Court. On March 7, 2006, this Court granted renewed motions to dismiss, denied the motion to substitute plaintiff as moot and issued sanctions jointly against Medical Supply and its former counsel. 419 F. Supp.2d 1316, 1335-36 (D. Kan. 2006). On November 16, 2007, the Tenth Circuit Court of Appeals dismissed the untimely appeal, 508 F.3d 572 (10th Cir. 2007), and the mandate thereafter issued.[1]

B. Samuel Lipari is not authorized to file the motion on behalf of the Plaintiff, Medical Supply Chain, Inc.

The Court should not permit Mr. Lipari to file pleadings on behalf of Medical Supply as he is not the plaintiff in the captioned case and has demonstrated no authority, legal or otherwise, to represent Medical Supply Chain, Inc. in this Court. *See* D. Kan. Rule 83.5.1; *In re Arnold*, 56 P.3d 259 (Kan. 2002); *Atchison Homeless Shelters, Inc. v. Atchison County*, 946 P.2d 113 (Kan. App. 1997). Absent a duly licensed attorney filing a pleading on behalf of the corporation Medical Supply Chain, Inc., the document should be stricken and the relief requested denied. This Court previously struck Lipari's pleadings in this case finding he could not represent the plaintiff. (Exhibit "C," p. 4, Order dated August 7, 2006.)

[1] Samuel Lipari, as the alleged assignee of Medical Supply's previously dismissed state law claims, has filed claims against U.S. Bancorp and U.S. Bank that were first filed in *Medical Supply I* or *Medical Supply II*. *Lipari v. U.S. Bancorp and U.S. Bank*, Case No. 2:07-CV-02146-CM.

C. The Motion Lacks Merit.

As Mr. Lipari's pleading recognizes, Fed. R. Civ. P. 60 (b)(6) exists only to provide relief in extraordinary circumstances.[2] None exist here. Medical Supply had full opportunity to litigate all of the issues raised from 2002-2006 and they were decided against the company. It would be an inconceivable waste of the Court's resources, a strike at the presumed finality of judgments (particularly after all appeals have run their course) to say nothing of the cost and expense to the parties, for Mr. Lipari's unsubstantiated claim of "injustice" to be given further consideration.

Although Mr. Lipari correctly states the standard under which Rule 60(b) motions are reviewed, *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1533 (10th Cir. 1992), the case does not support him. In particular, the Court held that a change in law or judicial view from an established rule of law – which Mr. Lipari argues occurred here – is not such an extraordinary circumstance to justify relief under Rule 60(b)(6). *Id*. at 1535; *see also Kustom Signals, Inc. v. Applied Concepts, Inc.*, 247 F. Supp.2d 1233, 1244 (D. Kan. 2003).

"Exceptional circumstances are not present every time a party is subjected to potentially unfavorable consequences as a result of an adverse judgment properly arrived at. . . . [Plaintiff] had a full and fair opportunity to litigate his claim. The district court properly found that he [was not entitled to relief]. Accordingly, [plaintiff] is not entitled to relief under Fed. R. Civ. P. 60(b)(6)." *Atkinson v. Prudential Property Co.*, 43 F.3d 367, 373-74 (8th Cir. 1994). *Colorado Interstate Gas Co.* is consistent with this statement of the law. None of the points raised in the motion rise to the level of extraordinary circumstances to justify vacating the judgment in this case.[3]

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[2] Defendants note that Mr. Lipari has filed a virtually identical motion in *Medical Supply Chain, Inc. v. U.S. Bancorp, et al.*, Case No. 02-2539-CM, which is also opposed.

[3] Lipari begins his motion with a "Statement of Facts" section. However, the statements are argumentative and substantially without support.

First, Mr. Lipari asserts that "an impermissible heightened standard of pleading" was applied to Medical Supply's Complaint. It is clear that the Court did not apply such a standard in *Medical Supply I*, 2003 WL 21479192, because the United States Court of Appeals for the Tenth Circuit decided this issue and, in its December 30, 2004 Order, stated clearly that "[o]ur review shows that the district court did not apply a heightened pleading standard to the amended complaint." (Exhibit "B," p. 3.) In this case, the Court gave several reasons why dismissal was required including *res judicata*. 419 F. Supp. 2d 1316. Lipari is not entitled to further judicial consideration of the point.

Second, Lipari suggests additional "evidence" ought to be considered. However, Rule 60(b)(2) relief must be sought within one year of the judgment. Fed. R. Civ. P. 60(c)(1). Moreover, as the exhibits to Lipari's brief clearly show, the additional "facts" all relate to occurrences that took place prior to the dismissal of Medical Supply's case and there is no assertion that the evidence was unavailable.

Finally, Lipari makes the bold argument that this Court's prior dismissal is not a final judgment.[4] Mr. Lipari misunderstands federal procedure and the finality principle identified in *Colorado Interstate Gas Co.* The Court specifically entered judgment on the merits against the plaintiff on all federal claims while dismissing the state law claims without prejudice. The judgment was final with respect to the federal claims. Any argument that this captioned case is somehow continuing because the state law claims were dismissed without prejudice is plainly wrong. Lipari's reliance on *AVX Corp. v. Cabot Corp.*, 424 F.3d 28 (1st Cir. 2005) is misplaced. Unlike the Court's dismissal of the entire Complaint here, in *AVX* the court had dismissed only two counts (leaving

[4] Likewise, Lipari seems to argue that the Tenth Circuit Court of Appeals merely "declined to exercise jurisdiction over the appeal." The consequence of Medical Supply's failure to file a timely notice of appeal was the mortal blow to any further appellate review. Medical Supply (and Lipari) must accept that there is no action *sub judice* with respect to Case No. 05-2299-CM. Lipari also suggests the Court is biased and does not believe his allegations. Such a challenge has no legal or factual support.

others pending) and the parties subsequently filed a joint stipulation of dismissal without prejudice. There is no room for doubt that the Court's March 7, 2006 judgment is final.

Because of the motion's rancor, defendants are not about to leave it unopposed. Nevertheless, having to respond to this baseless pleading, in an action where no claims have pended for nearly two years, is a perversion of the judicial process. The Tenth Circuit Court of Appeals has made it clear that litigants who continue to file vexatious and abusive motions, the effect of which is to simply harass parties, will not be tolerated. Courts have gone so far as to bar persons from filing additional papers absent some prior approval process. *See Johnson v. Stock*, 2005 WL 1349963 (10th Cir., June 8, 2005); *Lundahl v. NAR Inc.*, 2006 WL 1495070 (D. Idaho, May 24, 2006). At a minimum, Mr. Lipari should be precluded from further filings in this case, particularly where he has no authority to act on behalf of Medical Supply Chain, Inc. in the captioned action.[5]

Respectfully submitted,

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[5] In its August 7, 2006 Order, this Court made the following observation: "[T]he court reiterates that it dismissed plaintiff's case with prejudice and sanctioned plaintiff for violations of Federal Rule of Civil Procedure 11(b) and 28 U.S.C. § 1927. Plaintiff has a history of filing frivolous lawsuits and motions, for which the court has sanctioned plaintiff on several occasions. ***Future attempts to resurrect this case could result in the court imposing additional sanctions.***" (Exhibit "C," p. 5) (emphasis added).

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above item was filed in PDF format with the Court pursuant to its *Case Management / Electronic Case Files* program and thereby a notice of filing was e-mailed to counsel of record herein, all on the 21st day of February, 2008.

A copy was also served via United States mail, postage prepaid, to:

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