

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

SAMUEL K. LIPARI,)	
)	
Plaintiff,)	
)	
v.)	Case No. 07-CV-00849-FJG
)	
GENERAL ELECTRIC COMPANY, et al.,)	
)	
Defendants.)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S RULE 59(e) MOTION TO
ALTER OR AMEND THE JUDGMENT**

Defendants General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, Jeffrey Immelt, Heartland Financial Group, Inc., Christopher McDaniel and Stuart Foster (collectively, “Defendants”) oppose Plaintiff’s “Motion Under Fed. R. Civ. P. 59(e), to Alter or Amend Judgment” (Doc. 61). In support of its opposition to Plaintiff’s motion, the Defendants state as follows:

I. Plaintiff Has Failed to Satisfy Any of the Necessary Grounds For Amending or Altering A Judgment Under Rule 59(e).

A district court has broad discretion in determining whether to grant a Fed.R.Civ.P. 59(e) motion to alter or amend a judgment, and the court’s decision will not be reversed absent a clear abuse of that discretion. Innovative Home Health Care, Inc. v. P.T.-O.T. Assoc. of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998) (citations omitted). ““An abuse of discretion will only be found if the district court's judgment was based on clearly erroneous factual findings or erroneous legal conclusions.”” Id. (quoting Perkins v. US West Communications, 138 F.3d 336, 340 (8th Cir.1998)).

Rule 59(e) motions serve a limited function of correcting “manifest errors of law or fact or to present newly discovered evidence.” *Id.* (quoting Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988)). Such motions are not available to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment. Miller v. Baker Implement Co., 439 F.3d 407, 414 (8th Cir. 2006).

a. There Is No Newly Discovered Material Evidence Which Would Support An Alteration or Amendment of the Court’s Judgment.

Plaintiff’s Rule 59(e) motion fails to present any new evidence that: (1) is material to the allegations and judgment entered in this case; and (2) could not have been discovered by Plaintiff prior to the Court’s dismissal of his complaint. The only new “evidence” presented in Plaintiff’s motion relates to:

- (1) A civil settlement between the US Department of Justice and Cox Medical Centers (¶ 14);
- (2) A May 16, 2008 show cause order entered by the Honorable Carlos Murguia in a companion case (¶ 17); and
- (3) A bankruptcy proceeding in the case of In re Justin R. Sherwood and Jennifer Sherwood, Case No. 07-50584-JWV-11 (Bankr. W.D. Mo.) (¶ 19-24).

The civil settlement and the bankruptcy proceeding described above have no bearing on the sufficiency of the Plaintiff’s allegations or the evidence supporting his allegations. As such, this “new evidence” has no effect on the Court’s Judgment dismissing the Plaintiff’s claims. With respect to the Plaintiff’s citation to Judge Murguia’s show cause order, Plaintiff has grossly mischaracterized the basis for issuance of the order, and has failed to disclose the Court’s ultimate resolution of the issue.

Plaintiff states that Judge Murguia “indicated that [the Court] was giving consideration to reopening the plaintiff’s federal antitrust and racketeering claims by making a show cause order against the defendants.” Doc. #61, ¶ 17. This blatantly mischaracterizes the Court’s Order. Prior to issuing the Order, Judge Murguia had dismissed Plaintiff’s federal claims, and he had overruled a Rule 59(e) motion filed by Plaintiff. Plaintiff appealed this ruling to the Tenth Circuit, and the Tenth Circuit affirmed the dismissal.

Following the Tenth Circuit’s affirmation of the dismissal, Plaintiff tried to resume filing pleadings in the district court. Specifically, Plaintiff filed a Rule 60(b) motion, which the district court struck. In striking this motion, Judge Murguia ordered the Plaintiff to show cause why his filing had not violated Rule 11. Plaintiff’s response to this Order was to file a Rule 59(e) motion, which also attempted to show cause in response to the Court’s Order. Because the Defendants believed that they had no right to file a response to the Plaintiff’s Rule 59(e) motion (i.e., his response to the Court’s show cause order), they did not file a responsive pleading. Thereafter, on May 16, 2008, the Court directed the Defendants to file a response, or “the court will consider plaintiff’s motion (Doc. 128) without the benefit of defendants’ response, as set out in Rule 7.4.” Thus, contrary to Plaintiff’s claim that Judge Murguia was “giving consideration to reopening the plaintiff’s federal antitrust and conspiracy claims,” Judge Murguia was simply giving the Defendants an opportunity to respond to the Plaintiff’s Rule 59(e) motion.

More importantly (although not all that surprisingly), Plaintiff has failed to inform this Court how Judge Murguia ultimately ruled on his Rule 59(e) motion. After the

Defendants filed their response to Plaintiff's motion, the Court struck Plaintiff's motion in its entirety. Additionally, Judge Murguia sanctioned Plaintiff by prohibiting him from submitting any other filings in that case unless he was represented by counsel. Thus, even if the Court did consider reopening the matter (which defendants deny), the consideration resulted in a denial of the reopening of the matter and sanctions against Lipari for his conduct. Of equal importance is that Lipari knew of the ruling for almost thirty (30) days before he filed the current Rule 59 motion. Thus Lipari knows that his claim of "newly discovered evidence" is without any basis. The Court should reject Lipari's attempts to mislead it. Any reference to the actions taken by Judge Murguia actually hinders, rather than helps, Plaintiff's arguments in support of his current Rule 59(e) motion.

b. Plaintiff Has Failed to Establish a Manifest Error of Law or Fact Which Would Support a Rule 59(e) Motion.

A Rule 59(e) motion should not be used as a device to rehash earlier unsuccessful arguments that a party made to the Court, or to raise new facts or arguments which could have been raised prior to the Court's ruling. *See* Global Network Technologies v. Regional Airport Authority, 122 F.3d 661 (8th Cir. 1997); Capitol Indemnity Corp. v. Russelville Steel Co., 367 F.3d 831 (8th Cir. 2004).

In attacking the Court's ruling as to Plaintiff's lack of standing, Plaintiff's Rule 59(e) motion essentially raises the same arguments and same facts that were included in Plaintiff's response to the Defendants' dispositive motions. No new issues (except for the untimely recusal argument) have been raised by Plaintiff. He simply wishes to resurrect prior arguments which were ultimately unsuccessful. For this additional reason, Plaintiff's Rule 59(e) motion should be denied in its entirety.

c. Plaintiff's Recusal Argument Lacks Merit.

Although Plaintiff has not formally moved for recusal, his Rule 59(e) motion insinuates that the Court should recuse itself from this case. Importantly, Plaintiff failed to raise this issue until after the Court dismissed Plaintiff's claims.

A motion for recusal must be timely. *See* 28 U.S.C. §144. A motion for recusal must be filed at the earliest possible moment after the movant learns of the facts demonstrating a basis for the claim. Twist v. Department of Justice, 344 F.Supp. 137 (D. D.C. 2004). This requirement prevents a party from using the disfavored tactic of waiting to move for recusal until after receiving an unfavorable ruling from the Court. *See* In re Kansas Public Employees Retirement Systems, 85 F.3d 1353, 1360 (8th Cir. 1996); Neal v. Wilson, 112 F.3d 351, 357 n.6 (8th Cir. 1997).

Plaintiff's post-eleventh-hour recusal argument is untimely. From all appearances, Plaintiff waited to raise this argument until after he received a ruling that he deemed to be unfavorable. Further, the "facts" supporting recusal, similar to the "facts" contained in Plaintiff's Complaint, are nothing more than conjecture and pure speculation. Therefore, Plaintiff's recusal argument is without merit.

II. Joinder in Arguments and Authorities of Co-Defendants.

In addition to the arguments and authorities cited in this brief, the Defendants join in the arguments and authorities raised by co-defendants Bradley Schlozman and Seyfarth Shaw LLP in their suggestions in opposition to Plaintiff's Rule 59(e) motion. *See* Docs. 62, 63.

III. Conclusion.

Based upon the foregoing, the Defendants request that the Court deny Plaintiff's Rule 59(e) Motion to Alter or Amend the Judgment, and for such further relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was forwarded this 19th day of August, 2008, by first class mail, postage prepaid to:

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And an electronic copy was filed via the CM/ECF system which will send a notice of electronic filing to the following:

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