

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN (KANSAS CITY) DIVISION

MEDICAL SUPPLY CHAIN, INC.,) Case No. 05-0210-CV-W-ODS
)
Plaintiff,)
)
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. GRUNDHOFFER)
ANDREW CESERE)
THE PIPER JAFFRAY COMPANIES)
ANDREW S. DUFF)
SHUGHART THOMSON & KILROY)
WATKINS BOULWARE, P.C.)
)
Defendants.)
)

**SUGGESTIONS IN SUPPORT OF DEFENDANT NEOFORMA’S MOTION TO
DISMISS COMPLAINT, OR ALTERNATIVELY TO REQUIRE AMENDMENT,
PURSUANT TO F.R.C.P. RULES 8 AND 9**

Defendant Neoforma, Inc. has received a 115-page, 613 paragraph complaint that reads more like a novella than a pleading – rambling unintelligibly through twists and turns of presumed facts and innuendo – and containing no less than sixteen purported causes of action. Because this pleading does not comport with the requirements of Rules 8 and 9 of the Federal Rules of Civil Procedure, Neoforma cannot respond to it as it is currently pled. The complaint should be dismissed, or alternatively plaintiff should be ordered to amend.

I. ARGUMENT

A. Plaintiff's Complaint Is So Uncertain and Obtuse As To Be Defective

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a “short and plain statement of the claim showing that the pleader is entitled to relief . . .” (Fed. R. Civ. P. 8(a)(2)). This requirement is echoed in Rule 8(e), which requires the pleading to be “simple, concise, and direct.” (Fed. R. Civ. Proc. 8(e)). The purpose of Rule 8 is to allow for a simplified pleading system that focuses litigation on the merits of a claim. (*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)). Under Rule 10(b), paragraphs should generally address only a single set of circumstances and claims should be stated in separate counts to state “the clear presentation of the matters set forth.” (Fed. R. Civ. Proc. 10(b)).

A complaint may be dismissed when, because of its length, repetitiveness, and inclusion of irrelevant material, it becomes unintelligible. (*Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 439 (8th Cir. 1983) (complaint containing 144 paragraphs and 98 pages was properly dismissed when “[t]he style and prolixity of these pleadings would have made an orderly trial impossible.”); *see also Larson v. Stow*, 1994 U.S. App. LEXIS 25930 *4 (8th Cir. 1994); (dismissing a seventy-page complaint with ninety-six paragraphs and at least twenty-three counts); *McHenry v. Renne*, 84 F.3d 1172, 1177-1178, 1180 (9th Cir. 1996) (“Something labeled as a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity . . . fails to perform the essential functions of a complaint”)).

Here, plaintiff's 115-page disconnected and incoherent complaint is anything but simple, concise, short and plain, and does not meet the standards of precision required in an operative pleading. Rather, it contains a hodgepodge of claims, evidence and conclusory statements, none

of which identify clearly what causes of action are being asserted against which defendants, or the evidence that supports those causes of action. Following are a few illustrations.

The complaint purports to invoke the Court’s jurisdiction under the Declaratory Judgment Act (Complaint, ¶ 1), yet none of the counts asking for relief nor the paragraphs in the prayer seem to ask for a declaration. The pleading also claims that diversity jurisdiction exists under 8 U.S.C. §1332 (Complaint, ¶ 1), yet other paragraphs allege that both the plaintiff and one of the defendants are located in Missouri (Complaint, ¶¶ 10, 24).

For reasons unexplained, plaintiff quotes the President: “Most health care costs are covered by third parties. And therefore, the actual user of health care is not the purchaser of health care. An there’s no market forces involved with health care.’ President George W. Bush, Second Presidential Debate, October 14, 2004.” (Complaint ¶ 47). And he quotes governors, for example: “Tens of millions of Americans – and hundreds of thousands of Kansans – are regularly risking their health and financial security because the cost of health insurance is too often out of their reach.” (*Id.* ¶ 75). There is a quotation from a purported venture capital expert (*id.* ¶ 49), from the New York Times (*id.* ¶¶55, 56), and others (*id.* ¶¶ 54, 58). It is wholly unclear how these statements relate to Neoforma’s actions or any claims alleged against Neoforma. Rather, they seem more a tract on plaintiff’s apparent views of healthcare policy; but in any event, they are not part of a proper pleading.

The complaint tells stories of alleged harm to numerous third party groups in great detail: to hospitals, nursing homes and home healthcare services (Complaint, ¶ 59), of bankruptcies (*id.* ¶69), about the insurance system (*id.* ¶¶ 72-75), and of supposed Medicare fraud (*id.* ¶¶ 76-81).

How this relates to the more than \$3 billion of damages plaintiff claims it is personally owed is totally obscure.

One tangent is the exuberant discussion of resources of the Department of Justice, to which five paragraphs are devoted. (*Id.* ¶¶ 96-100). An unnumbered paragraph and paragraphs 101-106 recite how plaintiff lost a similar case in the District of Kansas -- as well as before the 10th Circuit -- where plaintiff's attorney was sanctioned. While that may ultimately be relevant to *res judicata* and collateral estoppel in this case, or possible sanctions here, it is not easy to see how that advances any claim for relief against Neoforma or any other defendant in this action. Similarly, in a section of the complaint from paragraph 399 to 418, plaintiff delivers a diatribe about an apparent insult by a magistrate, and complains about attorneys in prior litigation matters.

Paragraphs 107 and 108 seems to be a legal brief, citing numerous cases, and railing against the decision of the District of Kansas and the 10th Circuit—but not part of a cognizable pleading. Another legal brief on contract law is at paragraphs 356-358.

A great deal of space is devoted to the history of provision of healthcare in the country, going back to 1979, before Neoforma ever even existed. (Complaint, ¶ 109 *et seq.*) Paragraphs 162-168 tell the tale of a prior company with which plaintiff's president was associated, but do not explain how that pertains to Neoforma, which was not around then. At paragraphs 299-309 we learn how plaintiff went about serving process in a different lawsuit that did not involve Neoforma. And there is a description of a busted real estate deal with General Electric Company, which led to yet another lawsuit that plaintiff lost, but which had nothing to do with Neoforma. (Complaint, ¶¶ 337-355).

The foregoing examples are merely at the tip of the iceberg. Virtually all of the complaint contains irrelevant material, and it is virtually impossible for the reader to figure out to what any defendant, let alone Neoforma, needs to do to respond coherently.

Further, plaintiff identifies fourteen defendants in the complaint, including Neoforma, yet it does not clearly specify which defendants are the subjects of its causes of action. (*See, e.g.*, Complaint ¶¶ 472, 476, 477, 479, 497, 500). As such, Neoforma cannot ascertain by whom and against whom each of the fourteen causes of action is alleged. Every defendant is lumped grandly together into far-reaching conspiracies, much of which presumably took place before Neoforma is ever even alleged to have existed. This defect in the complaint renders it fatally uncertain. It should be dismissed, or alternatively, amended.

Simply put, Neoforma cannot reasonably be required to frame a responsive pleading to the incoherent jumble of conclusory allegations, statements, and “quotable quotes” that make up plaintiff’s complaint. Under the circumstances, plaintiff should suffer dismissal of its complaint altogether or, alternatively, plaintiff should be ordered to amend and comply with well-established pleading rules.

B. Plaintiff’s Purported Claims of Fraud Are Not Pled With The Particularity Required By Rule 9

At a minimum, Rule 9(b) requires that allegations of fraud include the time, place and content of the alleged misrepresentation. (*Bennett v. Berg*, 685 F.2d 1053, 1062) (8th Cir. 1982)). The bald conclusory fraud allegations in plaintiff’s complaint, unsupported by any specific evidence, do not satisfy plaintiff’s obligations under Rule 9(b). For proper pleading, a plaintiff must include the time and place of the representation, and it must also include the identity of the persons making the representations, and the manner in which the representations were false. (*Id.*;

see also Eastman Kodak Credit Corp. v. Gustin, 1990 U.S. Dist. LEXIS 11410 *4 (D. Mo., 1990)). These elements are critical to support such a claim.

Here, not only is plaintiff's complaint deficient because it fails to contain a "plain and concise" statement of its claims under Rule 8, it is also deficient because the complaint contains allegations of fraud without the particularity required by Federal Rule of Civil Procedure 9. For instance, paragraph 555 alleges "[e]ach of the acts, practices, misrepresentations, violations and other wrongs complained of above have been engaged in by defendants with malice and with specific and deliberate intent to oppress, defraud, deceive and injure plaintiff." However, the "wrong(s) complained of above" are amorphous statements, allegations, and ubiquitous commentary spread over 554 other paragraphs. Paragraph 556 additionally states that "defendants were engaged in concealed fraudulent conduct," without any further specificity as to what was concealed, or what was presumably fraudulent. These conclusory allegations are insufficient under Rule 9 to state fraud claims against Neoforma.

The time, place, and identity elements allow the defendant to determine whether the representation could have been made as alleged. For example, the defendant may be able to determine from the complaint that the person alleged to have made the representation was not or could not have been present when the statement was made. Or the timing may demonstrate that the person made the statement long after any time that could have caused the plaintiff to rely upon it. In sum, plaintiff needs to fill in huge holes in its deficient complaint by stating who made the alleged representations, when and where they were made, and why they were false. If it does not have enough information to provide these details, then it should not make such charges.

II. CONCLUSION

For the foregoing reasons, defendant Neoforma respectfully requests that this Court grant this motion and dismiss plaintiff's complaint altogether, or alternatively to require plaintiff to amend.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2005, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following::

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