

**CASE NO. 06-3331**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**MEDICAL SUPPLY CHAIN, INC,**

*Plaintiff - Appellant,*

**v.**

**NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL  
ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTH SYSTEM  
CONSORTIUM, ROBERT J. BAKER, US BANCORP N.A., U.S. BANK  
NATIONAL ASSOCIATION, JERRY A. GRUNDHOFER, ANDREW  
CECERE,  
PIPER JAFFRAY COMPANIES, ANDREW S. DUFF,  
SHUGHART THOMSON & KILROY, WATKINS BOULWARE, P.C.,  
and NOVATION, LLC**

*Defendants - Appellees,*

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**On Appeal from the United States District Court  
for the District of Kansas**

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**APPELLEES' MOTION TO DISMISS UNTIMELY APPEAL**

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TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE  
TENTH CIRCUIT:

Pursuant to Fed. R. App. P. 27, Appellees Neoforma, Inc., Robert J.  
Zollars, Volunteer Hospital Association, Curt Nonomaque, University Health  
System Consortium, Robert J. Baker, US Bancorp N.A., U.S. Bank National

Association, Jerry A. Grundhofer, Andrew Cecere, Piper Jaffray Companies, Andrew S. Duff, Shughart Thomson & Kilroy, Watkins Boulware, P.C., and Novation, LLC (hereinafter, collectively, “Appellees”) file this Motion to Dismiss Untimely Appeal. Appellees would respectfully show this Court as follows:

1. On March 7, 2006, the U.S. District Court for the District of Kansas entered an Order dismissing the claims of Appellant Medical Supply Chain, Inc. and granting Motions for Sanctions filed by several of the Appellees. See March 7, 2006 Order (Exhibit 1).

2. On March 14, 2006, the Chief Executive Officer of Appellant Medical Supply Chain, Inc., Samuel K. Lipari, who is neither a party nor an attorney representing a party, purported to file on behalf of himself and Medical Supply Chain, Inc. a Motion for Reconsideration of the March 7, 2006 Order. See Motion for Reconsideration (Exhibit 2). Mr. Lipari was never substituted as a party and no attorney ever executed the Motion for Reconsideration or filed a pleading to adopt it.

3. On August 7, 2006, the U.S. District Court for the District of Kansas entered an Order striking the Motion for Reconsideration filed by Lipari. The Court found that Lipari was not a proper party to the action and that he could not represent Medical Supply Chain, Inc. in this action.

Further, the District Court noted that Medical Supply Chain, Inc. “has a history of filing frivolous lawsuits and motions, for which the Court has sanctioned plaintiff on several occasions” and warned that “[f]uture attempts to resurrect this case could result in the court imposing additional sanctions.” See August 7, 2006 Order at pp. 4-5 (Exhibit 3).

4. Appellant Medical Supply Chain, Inc. filed its Notice of Appeal on September 8, 2006. See Notice of Appeal (Exhibit 4).<sup>1</sup>

5. The Federal Rules of Appellate Procedure require that a Notice of Appeal be filed “within 30 days after the judgment or order appealed from is entered.” FED. R. APP. PROC. 4(a)(1)(A). If a motion of the type contemplated by Section 4(a)(4) is filed, the time period for the Notice of Appeal is tolled during the pendency of that motion, and the Notice of Appeal is due within 30 days of the “entry of the order disposing of the last such remaining motion.” *Id.* at 4(a)(4)(B)(ii).

6. Appellant’s docketing statement confirms that Appellant appeals from the March 7, 2006 Order and that it did not file its Notice of Appeal

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<sup>1</sup> Although the Local Rules for this Circuit require the Appellant to pay the fee and file its docketing statement within 10 days of the Notice of Appeal, Appellant did not pay the fee until October 3, 2006 and did not file its docketing statement until October 16, 2006. Thus, the Appellant’s docketing statement was not available to Appellees for purposes of preparing this Motion within 15 days of the filing of the Notice of Appeal. See 10th Circuit Rule 27.2(A)(3).

until September 8, 2006. See Appellant’s Docketing Statement (Exhibit 5). Moreover, Appellant does not identify Lipari’s Motion for Reconsideration as a motion that tolled the time period for the appeal. See *id.* at p. 2. If the Motion to Reconsider did not toll the time period for the appeal, Appellant’s Notice of Appeal was filed 185 days after the Order from which appeal is taken—which is 155 days late.

7. However, ***even if*** Lipari’s Motion for Reconsideration ***did toll*** the time period for filing the Notice of Appeal, Appellant’s appeal is ***still untimely*** because it was not filed within 30 days of the Order striking the Motion for Reconsideration. Under Federal Rule of Appellate Procedure 4(a)(4)(B)(ii), the Notice of Appeal was due on September 6, 2006 and Appellant did not file the Notice of Appeal until September 8, 2006.

8. This Court can exercise jurisdiction over this appeal only if Appellant’s Notice of Appeal is timely filed. *Allender v. Raytheon Aircraft Co.*, 439 F.3d 1236, 1239 (10th Cir. 2006). As the U.S. Supreme Court has noted, the 30 day deadline of Federal Rule of Appellate Procedure 4 is both “mandatory and jurisdictional.” *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 264 (1978) (noting that the purpose of the time limit is “to set a definite point of time when litigation shall be at an end, unless

within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands.”) (citations and internal quotation omitted). Because Appellant’s Notice of Appeal was not filed within 30 days of either the Order dismissing this case or the Order overruling the Motion for Reconsideration, it is untimely and this Court lacks jurisdiction over this appeal. The appeal should be dismissed.

9. On November 17, 2006, pursuant to 10 Cir. R. 27.3(c), John Power, counsel for Appellees Novation, LLC, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker, called on behalf of Appellees Ira Dennis Hawver, Appellant’s counsel. The purpose of the call was to ascertain Appellant’s position regarding the relief sought in the motion. Appellant’s counsel stated that he would oppose the motion.

WHEREFORE, PREMISES CONSIDERED, Appellees pray that this Court dismiss this appeal and order all costs to be borne by the party incurring those costs. Appellees also pray that this Court grant such other and further relief to which Appellees may be justly entitled.

Respectfully Submitted,

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**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that: (1) this Motion was submitted electronically to the Clerk at the e-mail address [esubmission@ca10.uscourts.gov](mailto:esubmission@ca10.uscourts.gov) on November 21, 2006; (2) no privacy redactions were necessary and every document submitted in Digital Form or scanned PDF is an exact copy of the written document being filed with the Clerk; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (specifically, Norton AntiVirus Corporate Edition, Program Version 7.61.939, Scan Engine Version 4.1.0.22, Virus Definition File 10/25/2006 rev. 39) and, according to the program, are free of viruses.

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## CERTIFICATE OF SERVICE

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of the materials submitted to the Clerk in Digital Form were simultaneously provided to counsel for all other parties hereto by e-mail on November 21, 2006.

In addition to e-mail, copies were mailed by first class U.S. Mail, postage prepaid, this same date to:

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