IN THE SUPREME COURT OF MISSOURI

SAMUEL K. LIPARI	)
	) Circuit Case No. 0816-04217
Plaintiff	)
	) Court of Appeals No. WD70832
vs.	) Supreme Court No. ___________
	) Court of Appeal, Western District
NOVATION LLC, *et al*	) Circuit Court for Jackson County
	)
Defendant	)

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ___________ or after opinion X

The date the record on appeal was filed 3/30/2009

The date the Court of Appeals opinion was filed 3/09/2010

The date the motion for rehearing was filed and ruled on N/A

The date the application for transfer was filed in the

Court of Appeals 3/23/2010

and ruled on 4/27/2010

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IN THE SUPREME COURT OF MISSOURI

SAMUEL K. LIPARI	)
	) Circuit Case No. 0816-04217
Petitioner	)
	) Court of Appeals No. WD70832
vs.	) Supreme Court No. ___________
	) Court of Appeal, Western District
NOVATION LLC, *et al*	) Circuit Court for Jackson County
	)
Respondent	)

<u>APPLICATION FOR TRANSFER</u>

WHETHER A COURT CAN NULLIFY MISSOURI ANTITRUST STATUTES §§ 416.011 TO 416.161 BY EXERCISING DISCRETION TO DISMISS CLAIMS SUFFICIENTLY PLED UNDER CONTROLLING PRECEDENT

The appellees were dismissed from the 16th Circuit court for failure to state a claim. The Western District Court of Appeals upheld the trial court. The dismissal is an exercise of discretion to disregard elements pled according to the requirements in *Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo. App.W.D., 1998). The dismissal by the court that has the effect of nullification of the antitrust statues, an area of law that the State of Missouri legislature and Missouri courts pioneered as a means of preserving the cost controlling benefits of competition.

The appeals court opinion raises for the first time a federal issue by materially basing its affirmation on specific defects in the pleading by the appellant a *pro se* petitioner whose petition alleges was repeatedly unlawfully

deprived of Missouri licensed counsel by the defendants denying the appellant his Due Process, First and Sixth Amendment rights under the US Constitution, raising a right to review of this court's failure to enforce these rights by the US Supreme Court under *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

The present budget of Missouri is in crisis over the revenue creating jobs lost and escalating costs of healthcare resulting from restraint of trade in supplies, the largest component of healthcare costs.

STATEMENT OF FACTS

1. The appellant's petition stated allegations of a specific agreement by the defendants to unlawfully restrain trade in hospital supplies in the geographic market of the State of Missouri. See Legal File vol. 1 pages 104-105.

2. The appellant's petition stated numerous averments of supporting facts substantiating the allegation that the defendants had monopoly share of the hospital supply market that was greater than 70% giving the defendants the power to restrain trade: *i.e*. Legal File vol. 1 pages 49, 50, 99 (80% of the hospital supply market, 100% of the electronic market for hospital supplies), 105, and ¶¶ 356, 357.

3. The appellant's petition stated numerous averments of supporting facts relative to specific individual defendants of when they entered into the alleged agreement to restrain trade in hospital supplies in the relative market and the unlawful acts each defendant to attempt the monopolization and to exercise the continuing monopoly.

4. The appellant's petition stated in detail the harm to Missouri citizens from the artificially inflated hospital supply costs that led to Medicaid recipients being cut from benefits and the budgetary crisis currently being experienced in the Missouri State Legislature from the factory jobs lost because of the lack of competition to control costs for healthcare in Missouri.

5. The appellant's petition stated in detail the injury to himself as a sole proprietor dealer of hospital supplies excluded from the market by the defendants' antitrust conspiracy and unlawful acts to unreasonably restrain trade in the period covered by the initial petition (January 27th, 2006 to February 25, 2008) and continuing through the period covered by each successive amended petition to March, 2009. See Legal File vol. 1 page 12 ¶¶ 102 and 104 and vol. 4 pages 547, 549, 562. 573, 165 at ¶¶ 23, 39. 165, 230

6. Each petition and amended petition stated the elements for a violation of Missouri State statutes §§ 416.011 TO 416.161 prohibitions against conspiracy to restrain trade, monopoly and attempted monopoly under the element's stated in the controlling state and federal precedents in numbered headings with the supporting averments of facts located in the petition's table of contents. See Legal File vol. 1 pages 12 ¶¶ 102

7. Each petition on its face gave notice of conformance with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) where the appellant was alleging a specific agreement entered into by the defendants to participate in the Novation

LLC cartel, not the possibility of an agreement inferred by conduct that concerned the court in *Twombly*. See Legal File vol. 1 page 15 at ¶ 26.

8. Neither the order of the trial court of the appellate court resulted in opening access to the Missouri market for hospital supplies monopolized by the defendants' cartel.

SUGGESTION IN SUPPORT

The appellant was entitled to proceed in state court on claims expressly dismissed by federal court without prejudice and preclusion of claims and on ***subsequent*** antitrust conduct. See *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) and *Zenith Radio Corp. v. Hazeltine Research, Inc*., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

The appellant's attempted monopolization claims were not barred by the *Noerr-Pennington* doctrine from *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) which does not immunize unlawful acts (Legal File vol. 1 pages 40-56 at ¶¶ 216- 329) to influence government for the purpose of monopolization. However the petition needed to provide supporting facts to allow a court to determine the monopolizations schemes including state government officials such as the "Insure Missouri", the proposed cancer research center, and the repeated deprivation of counsel from the plaintiff were unlawful, thus the necessity for a longer petition.

Upholding the appellate court on this last factor (deprivation of counsel for redress) will entitle the appellant to review in the U.S. Supreme Court under 28

U.S.C. 1257 (3) because the state chartered law firms and state licensed attorneys that repeatedly deprived the appellant of counsel have now benefited from that infringement on the appellant's federally protected rights under the Due Process clause; the Sixth and First Amendments of the US Constitution since the fruit of that misconduct – a deficiency in the appellant's *pro se* petition is the foreseeable result and sole objective of the defendants in furthering their antitrust conspiracy to prevent the appellant from entering the market for hospital supplies.

The appellant hereby expressly raises this federal claim resulting from the W.D. of Missouri Appeals court decision the appellant now seeks to review. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897).

The appellant respectfully believes the trial court and appellate courts were in error and have ruled contrary to *stare decisis* rulings on the point of law[1] regarding the trial court's discretion to dismiss antitrust claims containing the elements of each violation under Missouri State statutes §§ 416.011 TO 416.161 that conform to the elements required *Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo. App.W.D., 1998).

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[1] "We recognize that generally, when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from…" *Porter v. Erickson Transport Corp*., 851 S.W.2d 725 at 736 (Mo. App. S.D., 1993)

The petition also stated the elements required to state a claim under federal precedent in accordance with the Missouri Antitrust Act provision sufficiency of claims "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." § 416.141 RSMo 1978. *Fischer, Etc. v. Forrest T. Jones & Co*., 586 S.W.2d 310, 313 (Mo. banc 1979).

The elements for each antitrust claim including standing and conspiracy are pled to the requirements of the currently controlling federal antitrust cases *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*;Gen. Indus. Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 806-807 (8th Cir.1987); *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425, 438-40 (3d Cir.1993); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd*., 924 F.2d 1484, 1491 (9th Cir. 1991); *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc*., No. 03-14588 (Fed. 11th Cir. 6/30/2004) (non market conspirators); and *Central Telecommunications, Inc. v. TCI Cablevision, Inc*., 800 F.2d 711 at 724 (C.A.8 (Mo.), 1986).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) does not provide a basis for a Missouri court to reject a petition alleging a specific express agreement to restrain trade. The *Twombly* decision applies only to whether a complaint plausibly ***inferred*** a conspiracy to restrain trade.

The Eighth Circuit has recently reviewed the changes in pleading resulting from *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) and has resolved whether federal courts must impose a heightened pleading standard including the

detailed factual allegations and specific facts the defendants argued required the plaintiff/appellant's conspiracy allegations to be dismissed over:

> "After *Twombly*, we have said that a plaintiff "must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims, rather than facts that are merely consistent with such a right." *Stalley v. Catholic Health Initiative*, 509 F.3d 517, 521 (8th Cir. 2007); *Wilkerson v. New Media Tech. Charter Sch*., 522 F.3d 315, 321-22 (3d Cir. 2008). **While a plaintiff need not set forth "detailed factual allegations,"** *Twombly*, 127 S. Ct. at 1964, **or "specific facts" that describe the evidence to be presented**, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam), the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. *Twombly*, 127 S. Ct. at 1965 n.3"
>
> *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009).

The plaintiff/appellant in his initial petition and proposed amended petitions met the standard of including sufficient factual allegations to provide the grounds for his claims required in *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009).

Missouri's existing standard for pleading civil conspiracy including *Macke Laundry Serv. Ltd. v. Jetz Serv. Co*., 931 S.W.2d 166, 175 (Mo.App.1996) does not create a heightened pleading standard over *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009). And the petition and amended petitions met the requirement to provide supporting factual averments to substantiate the

plausibility of the defendants' conduct being part of a complex antitrust conspiracy to restrain trade under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

Respectively submitted,

S/Samuel K. Lipari

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Samuel K. Lipari *Pro se*
803 S. Lake Drive
Independence, Mo 64053

Attachment 1- Rule 83.05 (e)(1) Appeal Order Under Rule 84.16(b)

Attachment 2 - Rule 83.05 (e)(2)(f)(2) Application to Transfer Under Rule 83.02

Attachment 3 - Rule 83.05 (f)(3) Order For Application to Transfer Under Rule 83.02

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 4th day of May 2010, by email, hand delivered and or first class mail postage prepaid to:

John K. Power, Husch Blackwell Sanders LLP, 4801 Main Street, Suite 1100 Kansas City, MO 64105 Attorney for NOVATION LLC, VHA INC., UNIVERSITY HEALTHSYSTEM CONSORTIUM, VHA MID-AMERICA LLC, THOMAS SPINDLER, ROBERT BEZANSON, GARY DUNCAN, MARYNARD OLIVERIUS, SANDRA VAN TREASE, CHARLES ROBB, MICHAEL TERRY, COX HEALTH CARE SERVICES OF THE OZARKS INC., ST LUKE'S HEALTH SYSTEM INC., STORMONT-VAIL HEALTHCARE INC., ROBERT BAKER, CURT NONOMAQUE, GHX LLC, NEOFORMA INC.

Michael J. Thompson, 4801 Main Street, Suite 1100, Kansas City, MO 64105 Attorney for HUSCH BLACKWELL SANDERS LLC

William E. Quirk, Shughart Thomson & Kilroy, P.C. 120 W 12TH ST, Suite 1600, Kansas City, MO 64105 Attorney for SHUGHART, THOMSON & KILROY

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Jay E. Heidrick, Shughart Thomson & Kilroy, P.C. 32 Corporate Woods, Suite 1100, 9225 Indian Creek Parkway Overland Park, Kansas 66210 Attorney for JERRY GRUNDHOFER, RICHARD DAVIS, ANDREW CECERE,

William G. Beck, Peter F. Daniel, J. Alison Auxter, Lathrop & Gage LC, 2345 Grand Boulevard, Suite 2800, Kansas City, MO 64108 Attorney for LATHROP & GAGE

Clerk of the Western District Court of Appeals, 1300 Oak Kansas City, MO 64106

S/Samuel K. Lipari

____

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NOTICE
THIS OPINION IS NOT FINAL UNTIL ALL POST HANDDOWN MOTIONS HAVE BEEN DISPOSED OF AND THE MANDATE HAS ISSUED AND RECEIVED.

Missouri Court of Appeals
Western District

SAMUEL K. LIPARI,	)	WD70832
Appellant,	)	
v.	)	ORDER FILED:
NOVATION, LLC, ET AL.,	)	March 9, 2010
Respondents.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Michael W. Manners, Judge

Before Thomas H. Newton, C.J., Lisa White Hardwick, and Cynthia R. Martin, JJ.

ORDER

Per Curiam:

Mr. Samuel K. Lipari appeals from trial court judgments granting motions to dismiss and a motion for judgment on the pleadings. For reasons stated in the memorandum provided to the parties, we affirm. Rule 84.16(b).

Attachment 1

Missouri Court of Appeals
Western District

SAMUEL K. LIPARI,	)	
	)	**WD70832**
Appellant,	)	
v.	)	**MEMORANDUM FILED:**
	)	
NOVATION, LLC, ET AL.,	)	**March 9, 2010**
	)	
Respondents.	)	

MEMORANDUM PROVIDING REASONS FOR ORDER AFFIRMING JUDGMENT UNDER RULE 84.16(b)[1]

Mr. Samuel K. Lipari appeals from trial court judgments granting motions to dismiss and a motion for judgment on the pleadings. Because the trial court did not err in granting these motions, we affirm.

Factual and Procedural Background

On February 25, 2008, Mr. Lipari filed a *pro se* six-count, one-hundred-and-eight page petition against twenty-seven defendants seeking three billion, two-hundred million dollars in

[1]This informal, unpublished memorandum is provided to the parties to explain the rationale for the order affirming judgment. This memorandum is not a formal opinion and is not uniformly available. It shall not be reported, cited, or used in unrelated cases before this court or any other court. A copy of this memorandum shall be attached to any motion filed for rehearing or for transfer to the Supreme Court. Rule references are to the Missouri Rules of Civil Procedure 2009.

damages.[2] He averred that he was acting on his "personal property interest as the sole assignee of rights for … Medical Supply Chain, Inc. [MSC]," a Missouri corporation that he founded and led prior to its dissolution. He professed to be bringing an action against "members of a hospital supplies cartel for their conduct in keeping [MSC] out of the Missouri market for hospital supplies." He alleged that Respondents violated Missouri antitrust law, sections 416.011 to 416.161,[3] and asserted claims under Missouri common law for tortious interference with business relations, fraud, and *prima facie* tort.

MSC had previously attempted to litigate similar claims in federal court, but these petitions resulted in dismissal and sanctions. *See, e.g.*, *Med. Supply Chain, Inc. v. U.S. Bancorp, NA*, No. Civ.A. 02-2539-CM, 2003 WL 21479192 (D. Kan. June 16, 2003) (dismissing complaint for failure to plead claims upon which relief could be granted), *aff'd*, 112 Fed. Appx. 730 (10th Cir. 2004) (additionally ordering plaintiff and counsel to show cause why they should not be sanctioned for a frivolous appeal); *Med. Supply Chain, Inc. v. Gen. Elec. Co.*, No. Civ.A. 03-2324-CM, 2004 WL 956100 (D. Kan. Jan. 29, 2004) (granting motion to dismiss federal claims but denying motion for sanctions), *aff'd in part, rev'd in part*, 144 Fed. Appx. 708 (10th Cir. 2005) (affirming dismissal but reversing on the issue of sanctions); *Med. Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp. 2d 1316 (D. Kan. 2006) (dismissing federal claims with prejudice, dismissing state law claims without prejudice, and imposing sanctions), *appeal dismissed* 508 F.3d 572 (10th Cir. 2007); *Lipari v. U.S. Bancorp NA*, No. Civ.A. 07-2146-CM,

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[2] The named defendants were as follows: Novation, LLC; VHA, Inc.; VHA Mid-America, LLC; University Healthsystem Consortium; Thomas Spindler; Robert Bezanson; Gary Duncan; Maynard Oliverius; Sandra Van Trease; Charles Robb; Michael Terry; Cox Health Care Services of the Ozarks, Inc.; Saint Luke's Health System, Inc.; Stormont-Vail Healthcare, Inc.; Curt Nonomaque; Robert Baker; Husch Blackwell Sanders LLP; Piper Jaffray Companies; Andrew Duff; Polsinelli Shughart P.C. [formerly known as Shughart Thomson & Kilroy, P.C.]; Jerry Grundhofer; Richard Davis; Andrew Cecere; GHX LLC; Neoforma, Inc.; Lathrop & Gage, L.C.; Robert Zollars.

[3] Statutory references are to RSMo 2000 and the Cumulative Supplement 2008.

2008 WL 4190784 (D. Kan. Sept. 4, 2008) (dismissing all claims except for misappropriation of trade secrets claim), *aff'd.* Nos. 08-3287, 08-333, 08-3345, 2009 WL 2055125 (10th Cir. July 16, 2009); *Lipari v. Gen. Elec. Co.*, No. 07-0849-CV-W-FJG, 2008 WL 2977032 (W.D. Mo. July 30, 2008) (dismissing all federal claims and dismissing state claims), *aff'd.* No. 08-3115, 2009 WL 4418996, 1 (8th Cir. Dec. 4, 2009).

After Mr. Lipari filed the 2008 petition in state court, fourteen defendants[4] (Novation LLC, *et al.*) moved to dismiss Mr. Lipari's petition for failure to state a claim.[5]
Defendants Curt Nonomaque and Robert Baker moved to dismiss the claims against them based on lack of personal jurisdiction and alternatively joined in Novation, LLC, *et al.*'s motion to dismiss for failure to state a claim. Defendants Piper Jaffray and Andrew Duff moved to dismiss the claims against them based on invalid service of process, as well as adopting and incorporating all of the other defendants' arguments and motions to dismiss. GHX, LLC filed a motion to dismiss for failure to state a claim asserting essentially the same arguments as those contained in Novation LLC, *et. al*'s motion. Neoforma, Inc. also moved for dismissal based on these arguments. Husch Blackwell Sanders, LLP moved to dismiss claims against it based on Mr. Lipari's failure to plead facts alleging the essential elements of the causes of action.

[4] Novation, LLC; VHA, Inc.; University Healthsystem Consortium; VHA Mid-America, LLC; Thomas Spindler; Robert Bezanson; Gary Duncan; Maynard Oliverius; Sandra Van Trease; Charles Robb; Michael Terry; Cox Health Care Services of the Ozarks, Inc.; Saint Luke's Health System, Inc.; and Stormont-Vail Healthcare, Inc..

[5] The motion asserted that Mr. Lipari's antitrust claims should be dismissed because (1) the claims were time barred; (2) Mr. Lipari had no standing to assert the antitrust claims; (3) Mr. Lipari was collaterally estopped by his federal litigation; (4) his claims were barred by the *Noerr-Pennington* doctrine, which in general immunizes legislative action and "genuine efforts to induce valid legislative action" from antitrust liability in order to avoid conflict with freedom of expression and the right to petition. *Defino v. Civic Ctr. Corp.*, 780 S.W.2d 665, 667 (Mo. App. E.D. 1989); (5) he failed to allege concerted action; and (6) he failed to adequately allege a monopoly or an attempt to monopolize. The motion further argued Mr. Lipari's tortious interference claim should be dismissed because it failed to allege elements of the cause of action, that Mr. Lipari's *prima facie* tort claim should be dismissed because the claim contradicted the theory of the tort, and that Mr. Lipari's fraud claim should be dismissed because he failed to plead essential elements of the cause of action.

Shughart Thomson & Kilroy similarly moved to dismiss the petition because of pleading defects, collateral estoppel, and statutes of limitation. Jerry Grundhofer, Richard Davis, and Andrew Cecere moved for dismissal on similar grounds. On August 8, 2008, the trial court entered a partial judgment granting these eight separate motions to dismiss.

Defendant Lathrop and Gage, L.C. (Lathrop) filed an answer to the petition on May 9, 2008, and raised affirmative defenses. Mr. Lipari responded by asking the trial court to require Lathrop to make a more definitive statement and by moving to strike Lathrop's affirmative defenses. On November 12, 2008, Lathrop moved for judgment on the pleadings, arguing that Mr. Lipari's petition was time-barred and that he failed to adequately allege a cause of action against the law firm. On December 29, 2008, the trial court entered a separate judgment sustaining Lathrop's motion. At that time, one of the defendants, Mr. Robert Zollars, had not been served.

On January 5, 2009, Mr. Lipari moved to amend the petition to correct pleading deficiencies and to add parties and claims. He also stated that he intended to seek "injunctive relief from the Missouri Board of Bar Governors ... to overcome the plaintiff's inability to obtain legal counsel as a result of the antitrust defendants [sic] extortion over Missouri licensed attorneys." However, on January 9, 2009, Mr. Lipari then filed a notice of appeal. On January 13, 2009, unaware that Mr. Lipari had filed a notice of appeal, the trial court granted Mr. Lipari's motion to amend the petition. The following day the trial court vacated its order because it reasoned that Mr. Lipari's appeal vested jurisdiction in this court. On February 24, 2009, this court, however, dismissed Mr. Lipari's appeal for lack of jurisdiction. Because Mr. Zollars had never been served, the trial court never obtained jurisdiction over him, and its order was, therefore, not final and appealable.

Subsequently, on March 2, 2009, after Defendants had filed opposition pleadings to Mr. Lipari's request for leave to amend his petition, the trial court entered an order stating that it would consider Mr. Lipari's motion for leave to amend the petition again. However, its order expressly required Mr. Lipari to file his proposed amended pleading—"Proposed First Amended Petition"—in the trial court, along with a renewed motion within ten days of the order. Instead, Mr. Lipari filed a second motion to amend the petition, along with a one-hundred and forty-four page "Second Proposed Amended Petition." This second proposed amendment added, *inter alia*, additional claims against new defendants and incorporated matters alleged to have occurred after January 5, 2009, the date Mr. Lipari originally moved for leave to amend. Noting Mr. Lipari's failure to comply with its March 2 order, in an order on March 23, 2009, the trial court denied Mr. Lipari's first and second motions for leave to amend. Mr. Lipari filed a third motion for leave to amend, attaching a third proposed amended petition. He also filed a motion for relief from the judgment denying the second amended petition. Both of those motions were denied. On March 27, 2009, the trial court granted Lathrop's motion to dismiss Mr. Zollars as the last pending matter in the case. Mr. Lipari appeals.

Standard of Review

We review a trial court's grant of a motion to dismiss *de novo* to determine "whether the petition invokes principles of substantive law." *Heidbreder v. Tambke*, 284 S.W.3d 740, 742 (Mo. App. W.D. 2009) (internal quotation marks and citation omitted). We determine if the facts pleaded in the petition and the inferences which can reasonably be drawn from them state any basis for relief. *Manzer v. Sanchez*, 29 S.W.3d 380, 383 (Mo. App. E.D. 2000). We treat the facts pleaded as true and construe averments in the plaintiff's favor. *Johns v. Fox (Estate of Fox)*, 955 S.W.2d 945, 946 (Mo. App. S.D. 1997). Where the trial court does not state a reason

for the dismissal, we presume the petition was dismissed on grounds alleged in the motion. *Heidbreder*, 284 S.W.3d at 742. If any ground alleged in the motion can sustain the dismissal, we affirm. *Id.*

A motion for judgment on the pleadings presents the question of "whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Twehous Excavating Co., v. L.L. Lewis Invs., L.L.C.*, 295 S.W.3d 542, 546 (Mo. App. W.D. 2009) (internal quotation marks and citation omitted). Consequently the well-pleaded facts are treated as true and their reasonable inferences are drawn in favor of the non-moving party. *Id.*

We review a trial court's denial of a motion for leave to amend a petition for abuse of discretion. *Manzer*, 985 S.W.2d at 939. Considerations of whether leave to amend should be granted include: hardship to the moving party if leave is denied, the reasons any new matter was not included in earlier pleadings, the timeliness of the request, whether inadequacies in the pleading could be cured by an amendment, and any injustice to the opposing party if the motion is granted. *Id.*

Legal Analysis

Mr. Lipari presents ten points for our review. The first four points, the sixth, and the tenth point challenge the trial court's grant of Respondents' motions to dismiss and Lathrop's motion for judgment on the pleadings. His fifth point challenges the trial court's denial of the motion for leave to amend the petition, and points seven through nine challenge other pre-trial orders.

We initially note that many of Mr. Lipari's points fail to substantially comply with the standards set forth by Rule 84.04. While noncompliance is grounds for dismissal of an appeal, if we can discern the issues involved, in our discretion we may address the merits of the case.

Rueschhoff Physical Therapy, Inc. v. Preferred Provider Therapists, Inc., 980 S.W.2d 130, 133 n.1 (Mo. App. E.D. 1998). Because we believe we can discern the issues, in the interest of judicial efficiency we address the merits of Mr. Lipari's arguments. We discuss the contentions out of order because the disposition of some points renders analysis of the others moot.

Dismissal of the petition for failure to state a claim

The thrust of Mr. Lipari's appeal appears to be that the trial court erred in dismissing his petition against the majority of Respondents and in granting Lathrop's motion for judgment on the pleadings. He argues that the trial court erroneously adopted "the defendant's arguments in the motions to dismiss and for judgment on the pleadings that *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) created a heightened pleading standard over ruling [sic] existing Missouri civil conspiracy, conspiracy to commit fraud, Prima facie tort, Tortuous [sic] interference, and Antitrust controlling state authorities on sufficiency of pleading."

Section 416.141 provides that "sections 416.011 to 416.161 shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." *See Rueschhoff Physical Therapy, Inc.*, 980 S.W.2d at 133. However, this application of federal decisions interpreting parallel antitrust statutes does not mean that we apply federal rules of civil procedure or cases interpreting those rules. "[F]ederal law controls, of course, as to procedure in federal courts, and the state law controls as to procedure in state courts. Otherwise, turmoil results." *Baker v. State*, 796 S.W.2d 426, 427 (Mo. App. S.D. 1990) (internal quotation marks and citation omitted). Consequently, *Twombly*'s interpretation of federal pleading standards does not create a pleading standard for antitrust violations in Missouri. Rather, we apply Missouri pleading rules.

> secret meetings and utilizing email and 'Blackberry' text messaging to determine state policy and administration rulemaking.
>
> ....
>
> 293. Kansas Attorney General Paul Morrison knew that the petitioner's counsel Bret D. Landrith had been wrongfully disbarred to conceal federal crimes committed by Kansas State judicial branch officials.
>
> ....
>
> 304. Kansas Attorney General Paul Morrison did not disclose to members of the Kansas legislature was that [sic] as Attorney General, Paul Morrison had directed Kansas Highway Patrol Superintendent Colonel William Seck to target the petitioner through the Kansas Highway Patrol and caused the petitioner's father's logistics business trucks to be stopped on Kansas Highways and his drivers to be arrested.

The petition then purports to allege causes of action. The first count of Mr. Lipari's petition alleged a violation of section 416.031.1, which prohibits "[e]very contract, combination or conspiracy in restraint of trade or commerce." The second count of the petition alleged a violation of section 416.031.2, which makes it "unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce." In the third count, Mr. Lipari alleged that Respondents engaged in a conspiracy to violate section 416.031. Count four alleged tortious interference with business relations, count five alleged fraud, and count six alleged *prima facie* tort.

A petition is required to contain allegations of fact supporting each essential element of the petitioner's claims. *Berkowski v. St. Louis County Bd. of Election Comm'rs*, 854 S.W.2d 819, 823 (Mo. App. E.D. 1993). Moreover, "'[t]he pleadings must identify the facts upon which the plaintiff's claim rests.'" *Id.* at 823. The purpose of this fact-pleading requirement "is to present, define, and isolate the controverted issues so as to advise the trial court and the parties of the issues to be tried and to expedite the trial of a cause on the merits." *Ford Motor Credit Co. v. Updegraff*, 218 S.W.3d 617, 621 (Mo. App. W.D. 2007) (internal quotation marks and citation omitted). The petition cannot rely on mere conclusions. *Id.*

Missouri is a fact-pleading state, which gives a motion to dismiss substantially more "bite" under our rules than under federal notice-pleading. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. banc 1993). Pleadings in Missouri serve to identify the triable issues and the facts upon which the plaintiff's claim rests. *Id.* at 380. A validly pled petition must "aver substantive principles of law that entitle the plaintiff to relief, and it must aver ultimate facts sufficient to inform the defendant of the underlying events that the plaintiff contends gave rise to the cause of action." *Taylor v. Richland Motors*, 159 S.W.3d 492, 496 (Mo. App. W.D. 2005). The motion to dismiss challenges the adequacy of these identifications and whittles out baseless claims. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 379.

Mr. Lipari's petition fails to comply with Missouri's pleading standards and was properly dismissed for failure to state a claim. Rule 55.05 provides that "[a] pleading that sets forth a claim for relief . . . shall contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief." Mr. Lipari's petition failed to set forth a short and plain statement of the facts showing he was entitled to relief. Instead the petition sets forth eighty-eight pages of paragraphs characterized as facts containing allegations such as:

> 114. To this date less than one third of Federal Bureau of Investigation employees even have access to the Internet at their workspace desks ...
>
> ....
>
> 120. Two U.S. Attorneys that appeared connected to the criminal investigation of Novation, LLC have died and three more in the Ft Worth office of the US Department of Justice with antitrust experience have been terminated.
>
> ....
>
> 140. Karl Rove utilized Alberto Gonzales [sic] takeover of the US Department of Justice to reign in the independence of the US Attorneys around the nation to strengthen the protection racket of the conspiracy hub and to further protect the control of the hospital supply distribution through the Novation LLC cartel.
>
> ....
>
> 243. The hospital supply cartel defendants, Karl Rove the former deputy chief of staff to the Bush administration and the Republican National Committee had worked extensively with Governor Matt Blunt, Henry Herschel and Ed Martin in

Mr. Lipari's counts fail to set forth facts supporting the essential elements of the claims. Rather, Mr. Lipari "re-alleges the averments of facts in [the] complaint and its attachments" and sets forth conclusory statements contending that the elements of the cause of action are satisfied. He fails to specify which factual references he intends to incorporate, nor does he specify which of the twenty-seven defendants committed the actions for which he seeks redress. While Rule 55.12 permits a plaintiff to adopt statements within a different part of the same pleading by reference, "[i]t is not the role of the defendant to define the cause of action for the plaintiffs, and then to defend against it. Nor is it the role of the court on a motion to dismiss to shape extraneous recitations ... into a cause of action to match the rubric for remedy the pleader attributes." *Hester v. Barnett*, 723 S.W.2d 544, 561-62 (Mo. App. W.D. 1987). Further, an incorporation fails if it "does not inform the defendant as to the nature and extent of the incorporation." *Id.* at 561-62.

Because Mr. Lipari's petition fails to identify the facts supporting each element of the causes of action, it consequently fails to either notify the defendants of the allegations against them or to isolate the issues and allow them to be tried. While ultimate facts may be inferred from the plaintiff's allegations, *see Berkowski*, 854 S.W.2d at 823, this does not mean trial courts and parties are obligated to sift through plaintiff's petition to speculate on which facts the plaintiff will contend support the claim for relief.[6] Consequently, the trial court did not err in granting Respondents' motion to dismiss for failure to state a claim.

Timeliness of Lathrop and Gage's Motion for Judgment on the Pleadings

[6] As noted in *Hester v. Barnett*: "It would have been simple for the pleader merely to specify by number or letter the enumerated allegations the plaintiffs meant to incorporate." 723 S.W.2d 544, 561 (Mo. App. W.D. 1987).

55.25(a). Mr. Lipari's argument would therefore set the same deadline for an answer and for a motion that may only be made after answers are filed. As such, his argument runs afoul of both our rules and of logic.

Third, Mr. Lipari's argument that the motion was premature because the defendant Mr. Zollars had not been served also lacks merit. Relying on *Habahbeh v. Beruti*, 100 S.W.3d 851, 853 (Mo. App. W.D. 2003), he contends that as a result of the failure to serve Mr. Zollars, the pleadings were still open. *Habahbeh* holds that where a defendant has not been served, we lack appellate jurisdiction because a final judgment has not been entered. *Id.* Consequently, *Habahbeh* does not support Mr. Lipari's proposition. Mr. Lipari cites no authority holding that judgment on the pleadings between a plaintiff and a defendant is improper because the plaintiff has failed to serve another named defendant. The concern with having pleadings closed is that the issues be adequately framed. *See Stephens v. Brekke*, 977 S.W.2d 87, 94-95 (Mo. App. S.D. 1998). Here, Mr. Lipari has not argued that the failure to serve Mr. Zollars prevented the issues between Mr. Lipari and Lathrop from being framed, nor has Mr. Lipari demonstrated any resulting prejudice. As a result, we do not find the trial court's judgment on Lathrop's motion to be procedurally improper. Consequently, Mr. Lipari's fourth point is denied.

Trial Court's Refusal to Grant Mr. Lipari Leave to Amend

In the fifth point, Mr. Lipari contests the trial court's ruling denying the second motion for leave to amend his petition. He contends that the trial court abused its discretion in denying the second motion because the trial court was without jurisdiction when it entered its March 2, 2009, order requiring him to submit his first amended petition. He argues that the trial court was without jurisdiction on March 2, 2009, because Mr. Lipari had filed a notice of appeal on December 29, 2008, and our mandate in *Lipari v. Novation LLC*, WD70534 was issued on

In the fourth point, Mr. Lipari argues that the trial court erred in granting Lathrop's motion for judgment on the pleadings. He appears to contend that (1) Lathrop's motion should have been treated as a motion for summary judgment, thereby requiring notice and discovery under Rule 74.04; (2) Lathrop should have filed its motion within thirty days of being served; (3) and judgment on the pleadings should not have been granted while the remaining defendant, Mr. Zollars, had not been served.

We find Mr. Lipari's contentions without merit. First, Rule 55.27(b) provides that when matters outside the pleadings "are presented to and not excluded by the court the motion [for judgment on the pleadings] shall be treated as one for summary judgment, and disposed of as provided in Rule 74.04." *See also Keim v. Big Bass, Inc.*, 949 S.W.2d 122, 124 (Mo. App. E.D. 1997). Nothing in the record indicates that Lathrop submitted matters outside the pleadings. Mr. Lipari, however, filed a response to Lathrop's motion to which he attached over 200 pages of exhibits. "Matters outside the pleadings" may refer to "pretrial discovery, depositions, affidavits and stipulations of the parties," or "answers to interrogatories, and admissions on file, together with affidavits filed in support of the motion." *Twehous*, 295 S.W.3d at 545-46 (internal quotation marks and citations omitted). Mr. Lipari's exhibits consisted of, *inter alia*, pleadings previously filed in the case, news stories printed from web sites, press releases written by MSC alleging conspiracy, and docket sheets and motions from MSC's federal cases.

Rule 55.27(b) converts a motion for judgment on the pleadings to a motion for summary judgment in order to allow "all parties . . . reasonable opportunity to present all materials made pertinent to such a motion." Rule 74.04 then provides procedural safeguards before a grant of summary judgment by affording the non-moving party notice, requiring the moving party to

demonstrate with particularity that there is no genuine issue of material fact, and giving the non-moving party an opportunity to respond. *Keim*, 949 S.W.2d at 123-24.

Here, we question whether Mr. Lipari's materials could reasonably be considered "matters outside the pleadings" such that Rule 55.27(b) was implicated. Moreover, the motion is not required to be converted where "[t]he record is devoid of any evidence that the trial court considered materials outside the pleadings in rendering judgment." *Twehous*, 295 S.W.3d at 546. Nothing in the trial court's judgment granting Lathrop's motion indicates that it considered anything outside of the pleadings. Further, even if Rule 74.04 were implicated, its requirements may be waived by the non-moving parties' acquiescence. *Keim*, 949 S.W.2d at 124-25. Where it is the non-moving party whose presentation converts the motion to one for summary judgment, the party is presumed to have notice. *Geary v. Mo. State Employees' Ret. Sys.*, 878 S.W.2d 918, 921 (Mo. App. W.D. 1994). Additionally, Mr. Lipari cannot be said to have been denied reasonable opportunity to present pertinent materials where the only materials presented were his own. Consequently, we cannot find that Mr. Lipari was prejudiced by his own inclusion of 200-some pages of exhibits in his response to Lathrop's motion. *See* Rule 84.13(b) (we do not reverse unless error materially affected the merits of the action).

Second, Mr. Lipari's argument that Rule 55.27(a) required Lathrop's motion to be filed within thirty days of being served is also without merit. Rule 55.27(a) governs filing timelines for responsive motions and does not govern Lathrop's motion for judgment on the pleadings. Rule 55.27(b) requires that a motion for judgment on the pleadings may be made "[a]fter the pleadings are closed but within such time as not to delay the trial." In general, pleadings are closed when answers have been filed. *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676, 679 (Mo. App. E.D. 1997). A defendant has thirty days from service of the petition to file an answer. Rule

March 12, 2009. Mr. Lipari's argument ignores that the appeal was dismissed on February 24, 2009, because the trial court's judgment was not final and we lacked jurisdiction.

"Until a final judgment is rendered, jurisdiction remains in the trial court, despite the filing of a notice of appeal." *Reynolds v. Reynolds*, 109 S.W.3d 258, 269-70 (Mo. App. W.D. 2003). Jurisdiction only vests in the appellate court after the trial court's final judgment is entered. *Id.* When a party files a notice of appeal prematurely, it does not divest the trial court of jurisdiction. *Id.* Consequently, the trial court retained jurisdiction over the case until final judgment was entered on March 27, 2009,[7] and its March 2, 2009 order was validly entered.

Additionally, Mr. Lipari appears to assert that he was entitled to notice and an opportunity to respond to this court's dismissal of the appeal under Rule 75.01. Rule 75.01 governs the trial court's entry of orders during the thirty-day period after its entry of judgment; it does not govern appellate procedure and is inapposite to his argument. Nor is the case Mr. Lipari cites, *State ex rel. Kairuz v. Romines*, 806 S.W.2d 451, 454 (Mo. App. E.D. 1991), pertinent to the argument because it concerns notice requirements under Rule 75.01. Since the trial court had valid jurisdiction to enter its March 2, 2009 order, Mr. Lipari's fifth point is denied.

Mr. Lipari's Remaining Points

"[A]n issue is moot if a judgment rendered has no practical effect upon a controversy." *State ex rel. Chastain v. City of Kansas City*, 289 S.W.3d 759, 766 (Mo. App. W.D. 2009). We do not determine questions of law "disconnected from the granting of actual relief." *Id.* In his

[7] Rule 81.05(b) provides that "[i]n any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purposes of appeal." *See Reynolds v. Reynolds*, 109 S.W.3d 258, 271 (Mo. App. W.D. 2003).

first, second, third, and sixth points, Mr. Lipari challenges other theories raised in the motions to dismiss which could have formed a basis for the trial court's judgment of dismissal on August 8, 2008. We have determined that Mr. Lipari's petition was properly dismissed because of the petition's pleading deficiencies, and we have determined that the trial court had valid jurisdiction to deny Mr. Lipari leave to amend this petition. Because we affirm if any ground alleged in the motion can sustain the dismissal, these four points are moot. *See Heidbreder*, 284 S.W.3d at 742.

In points seven, eight, and nine, Mr. Lipari challenges the trial court's orders regarding discovery. Because we are affirming the trial court's judgments, rulings on these points would have no practical effect; therefore, they are moot.

Conclusion

For the foregoing reasons, the trial court's judgments are affirmed.

IN THE STATE OF MISSOURI
WESTERN DISTRICT COURT OF APPEALS

SAMUEL K. LIPARI	)
	)
Petitioner	) **Case No.**
	)
vs.	) W.D. Case no. WD70832
	)
NOVATION LLC, *et al*	) 16th Cir. Case No. 0816-04217
	)
Respondent	)

APPLICATION FOR TRANSFER TO MISSOURI SUPREME COURT UNDER RULE 83.02

Is transfer sought prior to opinion ___________ or after opinion X

The date the record on appeal was filed 3/30/2009

The date the Court of Appeals opinion was filed 3/09/2010

The date the motion for rehearing was filed and ruled on N/A

The date the application for transfer was filed in the

Court of Appeals 3/23/2010

and ruled on N/A

Party		**Attorney**
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Attachment 2

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WHETHER A COURT CAN NULLIFY MISSOURI ANTITRUST STATUTES §§ 416.011 TO 416.161 BY EXERCISING DISCRETION TO DISMISS CLAIMS SUFFICIENTLY PLED UNDER CONTROLLING PRECEDENT

The appellees were dismissed from the 16th Circuit court for failure to state a claim. The Western District Court of Appeals upheld the trial court. The dismissal is an exercise of discretion to disregard elements pled according to the requirements in *Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo. App.W.D., 1998). The dismissal by the court that has the effect of nullification of the antitrust statues, an area of law that the State of Missouri legislature and Missouri courts pioneered as a means of preserving the cost controlling benefits of competition.

The appeals court opinion raises for the first time a federal issue by materially basing its affirmation on specific defects in the pleading by the appellant a *pro se* petitioner whose petition alleges was repeatedly unlawfully deprived of Missouri licensed counsel by the defendants denying the appellant his Due Process, First and Sixth Amendment rights under the US Constitution, raising a right to review of this court's failure to enforce these rights by the US Supreme Court under *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

The present budget of Missouri is in crisis over the revenue creating jobs lost and escalating costs of healthcare resulting from restraint of trade in supplies, the largest component of healthcare costs.

STATEMENT OF FACTS

1. The appellant's petition stated allegations of a specific agreement by the defendants to unlawfully restrain trade in hospital supplies in the geographic market of the State of Missouri. See Legal File vol. 1 pages 104-105.

2. The appellant's petition stated numerous averments of supporting facts substantiating the allegation that the defendants had monopoly share of the hospital supply market that was greater than 70% giving the defendants the power to restrain trade: *i.e*. Legal File vol. 1 pages 49, 50, 99 (80% of the hospital supply market, 100% of the electronic market for hospital supplies), 105, and ¶¶ 356, 357.

3. The appellant's petition stated numerous averments of supporting facts relative to specific individual defendants of when they entered into the alleged agreement to restrain trade in hospital supplies in the relative market and the unlawful acts each defendant to attempt the monopolization and to exercise the continuing monopoly.

4. The appellant's petition stated in detail the harm to Missouri citizens from the artificially inflated hospital supply costs that led to Medicaid recipients being cut from benefits and the budgetary crisis currently being experienced in the Missouri State Legislature from the factory jobs lost because of the lack of competition to control costs for healthcare in Missouri.

5. The appellant's petition stated in detail the injury to himself as a sole proprietor dealer of hospital supplies excluded from the market by the defendants' antitrust conspiracy and unlawful acts to unreasonably restrain trade in the period

covered by the initial petition (January 27th, 2006 to February 25, 2008) and continuing through the period covered by each successive amended petition to March, 2009. See Legal File vol. 1 page 12 ¶¶ 102 and 104 and vol. 4 pages 547, 549, 562. 573, 165 at ¶¶ 23, 39. 165, 230

6. Each petition and amended petition stated the elements for a violation of Missouri State statutes §§ 416.011 TO 416.161 prohibitions against conspiracy to restrain trade, monopoly and attempted monopoly under the element's stated in the controlling state and federal precedents in numbered headings with the supporting averments of facts located in the petition's table of contents. See Legal File vol. 1 pages 12 ¶¶ 102

7. Each petition on its face gave notice of conformance with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) where the appellant was alleging a specific agreement entered into by the defendants to participate in the Novation LLC cartel, not the possibility of an agreement inferred by conduct that concerned the court in *Twombly*. See Legal File vol. 1 page 15 at ¶ 26.

8. Neither the order of the trial court of the appellate court resulted in opening access to the Missouri market for hospital supplies monopolized by the defendants' cartel.

SUGGESTION IN SUPPORT

The appellant was entitled to proceed in state court on claims expressly dismissed by federal court without prejudice and preclusion of claims and on ***subsequent*** antitrust conduct. See *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

The appellant's attempted monopolization claims were not barred by the *Noerr-Pennington* doctrine from *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) which does not immunize unlawful acts (Legal File vol. 1 pages 40-56 at ¶¶ 216- 329) to influence government for the purpose of monopolization. However the petition needed to provide supporting facts to allow a court to determine the monopolizations schemes including state government officials such as the "Insure Missouri", the proposed cancer research center, and the repeated deprivation of counsel from the plaintiff were unlawful, thus the necessity for a longer petition.

Upholding the appellate court on this last factor (deprivation of counsel for redress) will entitle the appellant to review in the U.S. Supreme Court under 28 U.S.C. 1257 (3) because the state chartered law firms and state licensed attorneys that repeatedly deprived the appellant of counsel have now benefited from that infringement on the appellant's federally protected rights under the Due Process clause; the Sixth and First Amendments of the US Constitution since the fruit of that misconduct – a deficiency in the appellant's *pro se* petition is the foreseeable

result and sole objective of the defendants in furthering their antitrust conspiracy to prevent the appellant from entering the market for hospital supplies.

The appellant hereby expressly raises this federal claim resulting from the W.D. of Missouri Appeals court decision the appellant now seeks to review. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897).

The appellant respectfully believes the trial court and appellate courts were in error and have ruled contrary to *stare decisis* rulings on the point of law[1] regarding the trial court's discretion to dismiss antitrust claims containing the elements of each violation under Missouri State statutes §§ 416.011 TO 416.161 that conform to the elements required *Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo. App.W.D., 1998).

The petition also stated the elements required to state a claim under federal precedent in accordance with the Missouri Antitrust Act provision sufficiency of claims "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." § 416.141 RSMo 1978. *Fischer, Etc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. banc 1979).

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[1] "We recognize that generally, when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from…" *Porter v. Erickson Transport Corp.*, 851 S.W.2d 725 at 736 (Mo. App. S.D., 1993)

The elements for each antitrust claim including standing and conspiracy are pled to the requirements of the currently controlling federal antitrust cases *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) *;Gen. Indus. Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 806-807 (8th Cir.1987); *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425, 438-40 (3d Cir.1993); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd*., 924 F.2d 1484, 1491 (9th Cir. 1991); *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc*., No. 03-14588 (Fed. 11th Cir. 6/30/2004) (non market conspirators); and *Central Telecommunications, Inc. v. TCI Cablevision, Inc*., 800 F.2d 711 at 724 (C.A.8 (Mo.), 1986).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) does not provide a basis for a Missouri court to reject a petition alleging a specific express agreement to restrain trade. The *Twombly* decision applies only to whether a complaint plausibly ***inferred*** a conspiracy to restrain trade.

The Eighth Circuit has recently reviewed the changes in pleading resulting from *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) and has resolved whether federal courts must impose a heightened pleading standard including the detailed factual allegations and specific facts the defendants argued required the plaintiff/appellant's conspiracy allegations to be dismissed over:

> "After *Twombly*, we have said that a plaintiff "must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims . . ., rather than facts that are merely consistent with such a right." *Stalley v.*

Catholic Health Initiative, 509 F.3d 517, 521 (8th Cir. 2007); *Wilkerson v. New Media Tech. Charter Sch*., 522 F.3d 315, 321-22 (3d Cir. 2008). **While a plaintiff need not set forth "detailed factual allegations,"** *Twombly*, 127 S. Ct. at 1964, **or "specific facts" that describe the evidence to be presented**, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam), the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. *Twombly*, 127 S. Ct. at 1965 n.3" *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009).

The plaintiff/appellant in his initial petition and proposed amended petitions met the standard of including sufficient factual allegations to provide the grounds for his claims required in *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009).

Missouri's existing standard for pleading civil conspiracy including *Macke Laundry Serv. Ltd. v. Jetz Serv. Co*., 931 S.W.2d 166, 175 (Mo.App.1996) does not create a heightened pleading standard over *Gregory v. Dillard's, Inc*., No. 05-3910 (8th Cir. 5/12/2009). And the petition and amended petitions met the requirement to provide supporting factual averments to substantiate the plausibility of the defendants' conduct being part of a complex antitrust conspiracy to restrain trade under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

Respectively submitted,

S/Samuel K. Lipari

____

Samuel K. Lipari *pro se*
803 S. Lake Drive
Independence, Mo 64053

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 23rd day of March 2010, by email, hand delivered and or first class mail postage prepaid to:

John K. Power, Husch Blackwell Sanders LLP, 4801 Main Street, Suite 1100 Kansas City, MO 64105 Attorney for NOVATION LLC, VHA INC., UNIVERSITY HEALTHSYSTEM CONSORTIUM, VHA MID-AMERICA LLC, THOMAS SPINDLER, ROBERT BEZANSON, GARY DUNCAN, MARYNARD OLIVERIUS, SANDRA VAN TREASE, CHARLES ROBB, MICHAEL TERRY, COX HEALTH CARE SERVICES OF THE OZARKS INC., ST LUKE'S HEALTH SYSTEM INC., STORMONT-VAIL HEALTHCARE INC., ROBERT BAKER, CURT NONOMAQUE, GHX LLC, NEOFORMA INC.

Michael J. Thompson, 4801 Main Street, Suite 1100, Kansas City, MO 64105 Attorney for HUSCH BLACKWELL SANDERS LLC

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Clerk of the Western District Court of Appeals, 1300 Oak Kansas City, MO 64106

S/Samuel K. Lipari

____

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Missouri Court of Appeals
Western District

April 27, 2010

IMPORTANT NOTICE

To: All Attorneys of Record

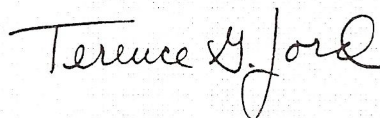
Re: SAMUEL K LIPARI, APPELLANT

vs.

NOVATION, LLC, ET AL., RESPONDENTS

WD70832

Please be advised that Appellant's motion for Transfer to Supreme Court is **DENIED.** See Rule 83.04.



Terence G. Lord
Clerk

cc: SAMUEL K LIPARI (000) 000-0000
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Attachment 3