UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAMUEL K. LIPARI	)
(Assignee of Dissolved	)
Medical Supply Chain, Inc.)	) Case No. 03-3342
Plaintiff	) (KS Dist. Court Case
	) No. 02-2539-CM)
vs.	)
	)
US BANCORP, NA	)
US BANK, NA	)
PIPER JAFFRAY	)
ANDREW CECERE	)
SUSAN PAINE	)
LARS ANDERSON	)
BRIAN KABBES	)
UNKNOWN HEALTHCARE SUPPLIER	)
Defendants	)

CORRECTED MOTION FOR RELIEF FROM JUDGMENT

Comes now the plaintiff Samuel K. Lipari, assignee of Medical Supply Chain, Inc. and presents the following corrected motion and memorandum for a new trial under Rule Fed. R. Civ. P. 60(b) for relief from the adverse final judgment of the appellate court's *sua sponte* sanctions and decision to uphold the trial court's Rule 12(b)(6). The plaintiff appellant has placed the name of the court of appeals above the caption.

Statement of Facts

1. The Tenth Circuit Court of Appeals sanctioned the plaintiff/appellant for arguing the trial court held the plaintiff to an impermissibly heightened pleading standard.

2. The Tenth Circuit acted *sua sponte* and imposed sanctions under the court's original jurisdiction capacity.

3. The court also contradicted the US Congress express language granting private rights of action under the USA PATRIOT Act.

4. The litigation between the parties over the original underlying events continues to this date as Kansas District Court case *Lipari v. US Bancorp et al*. Case no. 07-cv-02146-CM-DJW and has not reached the trial phase.

5. This court was overruled by the US Supreme Court for imposing the same heightened pleading standard appealed by the plaintiff where his complaint had clearly stated two legally separate co-conspirators Neoforma, Inc. and Novation LLC in an agreement with US Bank and US Bancorp to restrain trade in the national market for hospital supplies and averred significant details in support of the claim which were treated with disbelief by the trial and appellate courts.

MEMORANDUM OF LAW

Rule 60(b)(6) of the Federal Rules of Civil Procedure permits a court to relieve a party from final judgment as justice demands, but such relief is limited to "extraordinary situations." See *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co*., 962 F.2d 1528, 1533 (10th Cir. 1992). An intervening change in controlling law can provide the basis of an exception to the mandate rule. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1520 (10th Cir. 1997) ("the 'mandate rule,' provides that a district court must comply strictly with the mandate rendered by

the reviewing court.") (quotations omitted), cert. denied, 118 S.Ct. 1034 (1998). specifically where the mandate applied to a matter *sub judice*. *Ute Indian Tribe*, 114 F.3d at 1521.

The Tenth Circuit itself was overruled for imposing an impermissible heightened standard of pleading and for not treating the plaintiff's averments as truthful in the pre-discovery phase:

> "Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "`give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U. S. ___, ___ (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U. S. 41, 47 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, supra, at ___ (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); *Neitzke v. Williams*, 490 U. S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974)).

Erickson v. Pardus, No. 06-7317 (U.S. 6/4/2007) (2007).

This action has never ended for *sub judice* purposes because the underlying state court claims over the same conduct have not been tried. For purposes of determining the finality of an order, it must dispose of all claims. (Ordinarily, a judgment is not final unless it disposes of all claims against all parties) *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 (Fed. 1st Cir., 2005).

The Supreme Court case most often cited for preclusion effect of a prior 12(b)(6) dismissal was a dismissal in entirety:

> "2. The Rule 12(b)(6) dismissal that was the source of the Supreme Court's oft-cited footnote in Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), stating that "[t]he dismissal for

> failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a `judgment on the merits,'" id. at 399 n. 3, 101 S.Ct. 2424, was likewise a dismissal of "all of the actions `in their entirety,'" id. at 396, 101 S.Ct. 2424."
> *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at fn 2 (Fed. 1st Cir., 2005).

By dismissing Medical Supply's state claims without prejudice in *Medical Supply I*, a determination not opposed or appealed by the defendants, the trial court elected not to make a preclusive final judgment: "A final judgment embodying the

dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the *Medical Supply* dismissal was a mere interim order. *Id*.

I. The Clear Error of non legally separate defendants

The court and reviewing panel sanctioned the plaintiff because the independent co-conspirators in the complaint identified and described in antitrust conspiratorial agreement with the defendants were themselves not named as defendants. This ruling contradicted Medical Supply's use of *Lawlor*: ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.") *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329-330, 75 S.Ct. 865, 869, 99 L.Ed. 1122 (1955); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 132, 32 S.Ct. 641, 644, 56 L.Ed. 1009 (1912). This rule is current law:

> "Even if a plaintiff's right to relief arises from what is realistically viewed as a single episode, if it is a right against multiple parties—joint tortfeasors, if the right arises under tort law—he needn't join them in one suit, *Airtite v. DPR Ltd. Partnership*, 265 Ill.App.3d 214, 202 Ill.Dec. 595, 638 N.E.2d 241, 247 (1994); *Northern Assurance Co. of America v. Square D Co*., 201 F.3d 84, 88-89 (2d Cir.2000), unless there is privity among those parties, *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 330, 75 S.Ct. 865, 99 L.Ed. 1122 (1955)." [emphasis added]
>
> *Manicki v. Zeilmann*, 443 F.3d 922 at 926 (7th Cir., 2006).

II. The clear error over liability relating to the USA PATRIOT Act

The May 2005 United States Government Accountability Office Report to Congressional Requesters entitled "USA PATRIOT ACT Additional Guidance Could Improve Implementation of Regulations Related to Customer Identification and Information Sharing Procedures" (GAO-05-412 USA Patriot Act) supports the plaintiff's view that US Bank and US Bancorp were liable for threatening the plaintiff with a USA PATRIOT Act Suspicious Activity Report and for using the threat as extortion to injure the plaintiff and to protect the monopolization of the hospital supply market through the Novation LLC cartel that includes US Bank, US Bancorp, US Bancorp Piper Jaffray, the former Neoforma, Inc. now succeeded by GHX LLC and General Electric. Suspicious Activity Reports are not to be disclosed. Their purpose is clandestine surveillance. US Bank, US Bancorp and US Bancorp Piper Jaffray's overt and public use of the anti-money laundering provisions of the USA PATRIOT Act to threaten, extort or obstruct Medical Supply Chain, Inc.'s entry into the market for hospital supplies is against the

Suspicious Activity Report rules and is entirely actionable and creates liability for the defendants.

The Government Accountability Office Report emphasizes that for US Bank and US Bancorp to have been protected by the safe harbor, it was essential to follow the rules and procedures of section 314(b) and the requirements of Treasury's anti-money laundering program regulations contained in 31 C.F.R. § 103.110:

> The rulemaking process for section 314(b) addressed the need to encourage information sharing among financial institutions while still protecting customers' right to privacy and established a mechanism for financial institutions to satisfy the statutory notice requirement. Section 314(b) of the PATRIOT Act allows financial institutions, upon providing notice to Treasury, to share information regarding individuals, entities, and countries suspected of possible terrorist or money laundering activities. **The final rule requires that to be protected by the safe harbor from liability for sharing information pursuant to section 314(b), financial institutions must comply with the procedures prescribed by the rule, including providing notice annually to FinCEN of their intent to share information with other institutions. The rule also requires that prior to sharing information, a financial institution must verify that the financial institution with which information will be shared has also filed a notice with FinCEN.** FinCEN determines that the notice requirement sufficiently reminds financial institutions of their need to safeguard information that is obtained using section 314(b).

GAO-05-412 USA Patriot Act at pg. 20.

CONCLUSION

For the above stated reasons, the plaintiff appellant seeks that the court grant relief from its mandate and remand this action for trial.

Respectfully Submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

I certify I have sent a copy via email to the undersigned opposing counsel via email on 3/03/08.

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