

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
KANSAS CITY, MISSOURI**

MEDICAL SUPPLY CHAIN, INC.,)	
<i>Plaintiff,</i>)	
v.)	Case No. 05-0210-CV-W-ODS
NOVATION, LLC)	Attorney Lien
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.)	
<i>Defendants.</i>)	

**Suggestion in Opposition to
Novation, LLC, VHA Inc., And University Healthsystem Consortium’s Motion To Transfer Venue
Or Alternatively Motion To Dismiss Complaint For Failure To State A Claim**

Comes now the plaintiff Medical Supply and respectfully requests the court deny the defendants motion (Doc. 26, 27) for the following reasons:

Statement of Facts

Medical Supply brought claims that VHA, UHC and Novation have conspired and combined to monopolize the market for hospital supplies and the related markets of hospital supplies through e-commerce and healthcare technology company finance with the other named defendants in a RICO conspiracy to prevent competition and thereby overcharge Medicare and Medicaid.

On April 18, 2005 at 7:11 pm ET, the defendant Neoforma, Inc. a publicly traded company announced SEC mandated disclosures in a judicially noticeable press release under Rule 201(b) of the Federal Rules of Evidence that the defendant hospital supply distributors VHA, UHC and Novation are in a long term agreement with Neoforma, an electronic marketplace distributor competitor of Medical Supply Chain, Inc. and that VHA and UHC have determined Neoforma’s services are materially higher than they would be in a competitive market:

“VHA and UHC also have indicated that, based in part on the findings of their consultant, they believe **a market competitive price of the services provided by Neoforma should be**

significantly less than the current fee. They also have indicated that they intend to renegotiate the outsourcing agreement to which Neoforma, VHA, UHC and Novation are all parties...” [emphasis added]

Neoforma, Inc. press release, Exb 1. Medical Supply has alleged the defendants’ actions to keep Medical Supply from distributing hospital supplies and the defendants’ long term anticompetitive contracts have created artificially inflated hospital supply prices as part of their RICO common enterprise to submit False Claims to the US Government. While disclosing VHA, UHC and Novation’s communications as required under SEC regulations, Neoforma disputes its services are not competitive.

Medical Supply opposes dismissal, having standing under the Sherman and RICO acts and having sufficiently pled its federal and state claims. Medical Supply also opposes transfer of venue which would defeat the interests of justice.

¶¶VHA, UHC and Novation’s Argument Medical Supply’s Claims and Issues Are Precluded

The defendants plead claim and issue preclusion but use the word “transaction” only once and in a denial on page 14 that they participated in the GE real estate transaction, in effect denying being in privity with the defendants Medical Supply brought its second action against. *Williams v. Marlar*, 267 F.3d 749 (8th Cir., 2001). Privity is also a word absent from their preclusion arguments but a required element of res judicata.

Medical Supply can now bring an action for damages based on what it tried to prevent. “As this court explained in *Baker Group, L.C.*, claim preclusion cannot apply to a claim that arises after the first suit is filed, as is the case here. Accordingly, we reverse and remand to the district court.” *Lundquist v. Rice Memorial Hospital*, 238 F.3d 975 at 978 (8th Cir., 2000)

Despite never being allowed discovery, after two years, Medical Supply has obtained a lot of information unavailable to it when the emergency relief in the form of a temporary restraining order and preliminary injunctive relief were being sought in Kansas District Court. Medical Supply now raises timely new claims against the defendants based on transactions not covered by the previous action or reasonably discoverable.

The VHA, UHC and Novation defendants seek to preclude issues from being resolved in this case that were never ruled on in the prior trial or appellate court decisions. “A prerequisite to the use of issue preclusion is that the issue actually be litigated.” *Jack Faucett Associates, Inc. v. American Tel. and Tel.*

Co., 744 F.2d 118 at 132 (C.A.D.C., 1984). There is no issue preclusion related to the theft of intellectual property, contract or interference with contract which were expressly dismissed without prejudice. Most saliently, Judge Murguia recognized the earliness of the litigation by repeatedly and expressly stating Medical Supply did not allege price fixing, the present complaint against different defendants is primarily a retail price maintenance, price fixing case under federal and state antitrust law.

The trial court and the court of appeals, despite repeated requests, refused to determine if the threat of a USA PATRIOT Act suspicious activity report was a Sherman §2 violation and of course could not have determined if VHA, UHC, and Novation's coconspirators and common enterprise member US Bank's filing of a suspicious activity report to help Piper Jaffray and Novation monopolize hospital supplies and defraud government insurance programs is a Sherman §2 violation because it had not yet happened and the Kansas District court refused to consider allegations related to US Bank, US Bancorp and Piper Jaffray being in a combination or conspiracy with Novation, UHC and VHA as stated numerous times in the Kansas complaint.

The defendants might mistake the meaning of the Kansas trial judge's comments regarding the USA PATRIOT Act, even though they quote the order in their suggestion: "Indeed, the district judge noted, with regard to Plaintiff's USA Patriot Act violations (which are also made here) that "plaintiff's allegation [is] so completely divorced from rational thought that the court will refrain from further comment" See Exhibit 1 at pp. 14-15." Suggestion at page 2. While the fact allegations tracked the statute's prohibited conduct exactly, the sole requirement for pleading sufficiency the trial judge seems to be expressing his disdain for the USA PATRIOT Act, and Medical Supply certainly supports the desire to criticize the act. There is no preclusive effect to these comments as an interpretation of the act that might preclude the national interest in Congress's enforcement as expressly stated. The plaintiff or the defendants would have to challenge the constitutionality of the statute.

Transfer of Venue is Inappropriate

Section 1404(a) of Title 28 provides that: "for the convenience of parties and witnesses, in the interest of justice, a district may transfer any civil action to any other district where it might have been brought." An authority on the standards for each element is *American Standard, Inc. v. Bendix Corp.* which states the burden to show particularized inconveniences for attorneys representing the defendants whose

local counsel are in this district or the defendants witnesses, identifying them by name, the subject of their testimony and how they will be inconvenienced, when both venues are in sight of each other. Finally the movant must show the variety of ways the transfer could be in the interest of justice. See *American Standard, Inc. v. Bendix Corp.*, 487 F.Supp. 254 at 261-263 (W.D. Mo., 1980).

The Chief Justice of the Tenth Circuit Court of Appeals, Deanell R. Tacha in a confidential order dated March 23, 2005 determined the conduct this lawsuit describes in relationship to improper influence alleged in the Kansas District court is in the nature of bias, even over the case the defendants allege to preclude this action where the magistrate was not assigned. See Exb. 2 Affidavit of Sam Lipari, pg. 2. The conduct this lawsuit describes extended to the Tenth Circuit see attached letter to Clerk Fisher. See Exb 3. Most disturbingly, there is a pattern and practice of intimidating witnesses and their counsel in Kansas District court cases described in depth in Sam Lipari's affidavit that endangers the parties. Obviously, a transfer to the District of Kansas cannot be in the interest of justice.

The judicial economy argument while an immeasurably less important factor in light of the documented misconduct is also in error. Medical Supply, awaiting an order on a reconsideration of the dismissal of the Bancorp case and while in the General Electric case became concerned that the Kansas District court did not have sufficient resources to adjudicate the two antitrust cases. A letter was written to the Chief Administrative Judge of the District of Kansas explaining the basis for Medical Supply's concerns:

"I have written this letter in the hopes that these concerns will cause an inquiry into what resources the court would need to adequately administer justice in an antitrust case and should those resources not be available, it would give the parties in these two cases the opportunity to consider other forums."

Letter to Chief Judge John W. Lungstrum, November 7, 2003. Alas, the Kansas District court did not even have the resources to answer the letter. However it was added to the GE case record by court order and it is Exb. 4 to this document.

Medical Supply has never the less sought to address the judicial economy concern by making a motion (now contested) to consolidate the earlier Kansas case with the present action in Missouri District Court. There is a substantial basis for this because as the GE appeal brief gave notice to the conspirators, the United States ex rel action against the current defendants for Medicare, Medicaid and Champus fraud is in Kansas City, Missouri.

“[T]he FCA "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir.1995).”

Costner v. URS Consultants, Inc., 153 F.3d 667 at 677 (C.A.8 (Ark.), 1998). Both of these complex litigations share common issues of law and fact. The remaining Kansas case is on limited remand and the fact issue the Kansas District court has been tasked to determine is uncontested. The issue at law over whether Appellate sanctions should be imposed is contested but outside the limited remand jurisdiction of the Kansas court.

Finally, Medical Supply’s substantive rights would be changed. The Western District of Missouri was chosen for the Eighth Circuit rule that contribution may be enforced among joint tortfeasors in an antitrust action. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 at 1186 (C.A.8 (Minn.), 1979). Medical Supply also seeks to enjoin indemnification between defendants. *Id* Both are required to deter the defendants who continued to injure Medical Supply even after receiving notice of the gravamen of the antitrust violations.

The defendants seek to have the court contradict a trilogy of recent Supreme Court decisions reflecting the Court’s renewed determination to ensure that district judges properly defer to the pleading party in deciding Rule 12(b)(6) motions to dismiss. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). See Fairman, Christopher M., [The Myth Of Notice Pleading](#) *Arizona Law Review* pgs. 1018-19, Vol. 45:987 (2003).

To prove a § 1 violation, a plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade. See *Tops Mkts.*, 142 F.3d at 95; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993).

It appears VHA, UHC and Novation have conceded the defendants are liable under Sherman § 1 for Medical Supply’s *per se* price fixing claim. The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003) (citations omitted). The distributor competitors UHC and VHA’s creation of an

LLC (Novation) to set prices *ex ante* is itself unlawful *per se* under the Sherman Act. *Dagher v. Saudi Refining Inc.*, No. 02-56509 (Fed. 9th Cir. 6/1/2004) (Fed. 9th Cir., 2004).

The April 18th, 2005 Neoforma press release clearly describes an agreement between competing legally distinct distributors that unreasonably restrains trade in the form of uncompetitively high charges for its electronic marketplace service. However, below the facial § 1 elements of the press release are Medical Supply's allegations that VHA and UHC have placed member hospital money into Neoforma at artificially inflated initial public offering stock prices and that these hospitals that could have been Medical Supply's customers.

Just the long term agreements used jointly by Novation mandating Neoforma and GHX membership and that punish hospitals for even looking at other sources including Medical Supply state a Sherman § 1 claim: "[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action." *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004).

Medical Supply alleged that VHA, UHC and Novation participated in a broad scheme to overcharge Medicare, the devices used by the conspirators included long term contracts with hospitals to exclude competitors including and most especially Medical Supply which as a web based distributor could not be allowed to survive and lower prices. The complaint documents in detail how upstream inputs required by Medical Supply to enter the market including the escrow accounts and the profit from the GE Transportation lease were withheld by VHA, UHC and Novation's coconspirators in furtherance of the scheme.

"Under the liberal pleading standards of the Federal Rules, the allegations and the reasonable inferences to which they give rise sufficiently outline the illegal agreement, the "conscious commitment to a common scheme designed to achieve an unlawful objective," that the law requires to state this type of claim. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir.1980), cert. denied, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). An unlawful agreement to fix prices is sufficiently clear from the pleading to state a claim for both horizontal and vertical price-fixing."

In re Mercedes-Benz Anti-Trust Litigation, 157 F.Supp.2d 355 at 362 (N.J., 2001). The defendants also seek to impose the who what when and where requirement on interlocking directorates. No heightened standard applies.

Medical Supply alleges it was prevented from entering the market by US Bank and later GE who were directed by the coconspirator defendants to break written contacts and deprive Medical Supply of inputs it required to enter as a competitor. Recovery is clearly available under section 4 of the Clayton Act. See, e.g., *Zenith*, 395 U.S. at 129, 89 S.Ct. at 1579. (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969))”*World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 at 1478 (C.A.10).

In *Covad Communications*, the mere breaking of the agreement between the plaintiff and the monopolist alone become adequate to state a claim. “[A]llegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws.” [emphasis added] *Covad Communications Co. v. Bellsouth Corp.*, at ¶63 2002 C11 260 (USCA11, 2002), reversed on other grounds. The US Supreme Court recently stated this point of law:

“The leading case imposing § 2 liability for refusal to deal with competitors is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U. S. 585, in which the Court concluded that ***the defendant's termination of a voluntary agreement with the plaintiff*** suggested a willingness to forsake short-term profits to achieve an anticompetitive end.” [emphasis added]

Verizon Communications Inc. v. Law Offices of Trinko, 540 U.S. ____ (U.S. 1/13/2004) (2004).

The defendants in asserting the complaint only confusingly describes one relevant market are not aiding the court’s informed resolution of this matter. The complaint expressly states three relevant nationwide markets, each of which VHA, UHC and Novation are alleged to restrain trade in. The market for hospital supplies, the market for hospital supplies in e-commerce where the enhanced efficiency of the web based and artificial intelligence enhanced procurement services Neoforma, Inc., GHX LLC and Medical Supply Chain, Inc. is not substitutable or interchangeable by Novation’s fax machine and early electronic data interface or EDI individual order taking between human clerks. Interchangeability may be measured by, and is substantially synonymous with, cross-elasticity. *Brown Shoe Co. v. United States*, 370 U. S. 294, 325 (1962). Finally, the complaint adequately alleges VHA, UHC and Novation participated with US Bancorp and Piper Jaffray in restraining the market for capitalization of healthcare technology companies, the third expressly stated relevant market. Long term contracts used to lock out competitors from a relative markets are described in *Telecor Communications, Inc. v. Southwestern Bell Telephone*, 2002 C10 1017 (USCA10, 2002).

The appropriate analysis of the sufficiency of Sherman 2 relative market averments cannot stop at the expressly stated markets, however. It is well settled that defining the relevant market is an issue of fact, *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986). *Westman* itself inspires an inquiry into the difference between forms of product distribution which this court requires evidence and a finder of fact to resolve.

The complaint details that two competing hospital supply distributors, VHA and UHC tied their member hospitals held by long term contracts into a market of 2300 hospitals controlled by their agreement in restraint of trade called Novation LLC. This adequately alleges a relative market of 2300 hospitals that VHA, UHC and Novation have agreed to give the Neoforma, GHX, LLC joint venture or strategic alliance 100% of.

The averments in Medical Supply's complaint also clearly state that in combination and conspiracy, VHA, UHC and Novation participated with US Bancorp and Piper Jaffray in restraining trade in the upstream market of capitalizing healthcare technology companies including Medical Supply to deny critical inputs required to enter the market for hospital supplies controlled through Novation.

The defendants are inaccurate in denying the complaint does not allege fraudulent misrepresentations. Price Fixing through Novation's misrepresentation of economic inflation and that it was getting discounts through group purchasing power to exclude hospitals from dealing with competitors including Medical Supply places Medical Supply within the proximate victim element of Missouri fraud. *In re Mercedes-Benz Anti-Trust Litigation*, 157 F.Supp.2d 355 (N.J., 2001) collects cases on price fixing's inherent fraudulent misrepresentation. The complaint alleges fraud on the Kansas District court through misrepresentations by Shughart Thomson and Kilroy and its agents meeting the standard for fraud on the court and RICO fraud set out in *Raymark Industries, Inc. v. Stemple*, 714 F.Supp. 460 (Kan., 1988).

No more averments needed to be made in the complaint to give the defendants notice of the gravamen of the charges against them and that the allegations included that the conduct was committed in a common conspiracy (complaint clearly alleges a specific claim of civil conspiracy to commit fraud and that it further alleges that Zahm and Guy participated in the conspiracy.) *Deere & Co. v. Zahm*, 837 F.Supp. 346 at fn1 (Kan., 1993). A conspiracy may exist between two or more individual persons or individual corporations or by a mixture of people and corporations. Essentially, civil conspiracy exists on the actions

of people to bring about an illegal result. *Intern. U., United Auto., Etc. v. Cardwell Mfg. Co.*, 416 F.Supp. 1267 at 1290 (Kan., 1976).

Joint and Several Liability among participants in antitrust conspiracy (as it would also be in antitrust combination) is a vital instrument for establishing deterrence. See *Paper Systems Inc. v. Nippon Paper Industries Co., Ltd.* 281 F.3d 629 at 633 (C.A.7(Wis.) 2002), referencing Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages among Multiple Tortfeasors*, 98 Yale L.J. 831 (1989). No basis for dismissal of any claim asserted by the defendant VHA, UHC and Novation can be dispositive unless it addressed the failure of a claim to meet pleading requirement against all defendant parties.

The complaint adequately alleges violation of § 1962(c), the elements contained in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), *aff'd*, post, [473 U.S.] p. 606 [105 S.Ct. 3291, 87 L.Ed.2d 437]...the statute requires no more than this.” *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 at 385 (C.A.8 (Mo.), 1993). VHA, UHC and Novation merely argue that the complaint does not describe their individual conduct violating § 1962(c). This is however an invalid argument. The complaint alleges VHA, UHC formed Novation to defraud Medicare and that VHA, UHC acquired control of Neoforma and that Novation used Neoforma to police the fraudulent pricing of the enterprise. To direct a business's normal activities is to participate in the conduct of an enterprise within the meaning of RICO.

See *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (RICO extends to those who participate in the operation or management of an enterprise, including outsiders associated with the enterprise who participate in the direction of its activities through a pattern of racketeering activity); *Handeen v. Lemaire*, 112 F.3d 1339, 1349 n.12 (8th Cir. 1997) (same). “The fact that some defendants were not involved in each aspect of the overall enterprise did not require severing them or the charges against them.” *U.S. v. Cardall*, 885 F.2d 656 at 668 (C.A.10 (Utah), 1989)

The plaintiff's complaint describes many contracts and transactions conducted and controlled by VHA, UHC and Novation. “Even a commercial contract can serve as the basis of a RICO enterprise. See *River City Mkts., Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1462 (9th Cir.1992) (“Virtually every business contract can be called an `association in fact.”); *Loma Linda Univ. Med. Ctr., Inc. v. Farmers Group, Inc.*, No. Civ-S-94-0681 WBS/JFM, 1995 WL 363441, at *2 (E.D.Cal. May 15, 1995) (noting that

"contractual relationships can establish a RICO enterprise")." *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 29 F.Supp.2d 1253 at 1259 (Kan., 1998).

Medical Supply's complaint ascribes different predicate conduct to each individual: "The plaintiff set forth separately the acts complained of by each defendant." *Wiesner v. Willkie Farr & Gallagher*, 785 F.Supp. 408, 411 (S.D.N.Y.1992) (citing *Zerman v. Ball*, 735 F.2d 15, 22 (2d Cir. 1984)). See also *Gottstein v. National Ass'n for Self Employed*, 53 F.Supp.2d 1212 at 1223 (Kan., 1999).

Since irrefutably at least one RICO predicate is adequately pled, Medical Supply has adequately alleged RICO conspiracy: "A RICO conspiracy allegation requires at least the pleading of the existence of one or more overt acts by the defendant in furtherance of the conspiracy and the assent of each defendant to the conspiracy. *Seville Industrial Machinery v. Southmost Machinery*, 742 F.2d 786 (3d Cir. 1984); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir.1981), cert. denied 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982). Where persons associate "in fact" for criminal purposes, each person may be held liable under RICO for his, her, or its participation in conducting the affairs of the association in fact through a pattern of racketeering activity." *Raymark Industries, Inc. v. Stemple*, 714 F.Supp. 460 at 474 (Kan., 1988).

VHA, UHC and Novation were alleged to be at the center of the enterprise having the common goal of defrauding Medicare, Medicaid Champus and private insurers:

"VNA Plus alleges that Apria was involved in the day-to-day operations of the VNA Plus/Apria enterprise by its direct control over the billing services and practices of the enterprise. At a minimum, VNA Plus has alleged that Apria had "some part in directing" the affairs of the Apria/VNA Plus enterprise. *Reves*, 507 U.S. at 179, 113 S.Ct. 1163. For the above reasons, we find that VNA Plus has adequately alleged that Apria participated in the RICO enterprise.

VNA Plus, Inc. v. Apria Healthcare Group, Inc., 29 F.Supp.2d 1253 at 1259 (Kan., 1998).

The plaintiff was not a party to the communications between VHA, UHC, NOVATION, their subsidiary Neoforma, Inc. and the other defendants including US Bancorp and Piper Jaffray. Without discovery, it is inappropriate to dismiss the plaintiffs' claims on a heightened pleading requirement basis for facts they cannot yet know. "[A]lthough the plaintiffs have been allowed to amend their complaint, they have not had the benefit of discovery. We think it only fair to give them that benefit before requiring them to plead facts that remain within the defendants' private knowledge." *Abels v. Farmers Commodities Corp.*, 259 F.3d 910 at 921 (8th Cir., 2001).

In *Independent Drug Wholesalers Group, Inc. v. Denton*, 833 F.Supp. 1507 at 1517-1518 (Kan., 1993), the court dealt with the dismissal sought by a defendant that was not a principal in the RICO conspiracy and asserted requisite intent had not been established. The court found the individual defendant's intent was irrelevant when the complaint and facts alleged against the enterprise as a whole were sufficient.

“Defendants insist that RICO plaintiffs must plead damages with particularity. Both Supreme Court precedent and the Federal Rules of Civil Procedure foreclose the adoption of Defendants' position. See *id.*; Fed. R. Civ. P. 8 (pleading requires short and plain statements meant to give notice to defendants); see also Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 Harv. J. on Legis. 1, 18-22 (1993) (criticizing several attempts at RICO reform through judicial revisionism including improper heightened pleading requirements). Defendants confuse the requirement to plead with particularity RICO acts predicated upon fraud pursuant to Rule 9(b) with Rule 8's more general notice pleading typically required of all litigants. See, e.g., *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989- 90 (10th Cir. 1992) (predicate acts of mail fraud require heightened pleading pursuant to Rule 9(b)); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) (Rule 9(b) requires particularity in pleading the predicate RICO acts of mail and wire fraud).”

Robbins v. Wilkie, 2002 C10 944 at ¶24 (USCA10, 2002). VHA, UHC and Novation are confused about the relevance of the conduct described to interfere in the administration of justice and to defraud the Kansas District court and to which the complaint avers that VHA, UHC and Novation ratified in an attempt to intimidate Medical Supply into not bringing the present claims:

“In the context of this case, it is momentous that a plaintiff "need only establish a tacit understanding between the parties, and this may be shown wholly through the circumstantial evidence of [each defendant's] actions." *Darden*, 70 F.3d at 1518 (8th Cir.1995)(quotation omitted). On the force of these authorities, we believe that Handeen's Complaint, broadly construed, provides an ample foundation to sustain a finding that the Firm "objectively manifested an agreement to participate directly, or indirectly, in the affairs of [the] enterprise through the commission of two or more predicate crimes." *Bennett*, 44 F.3d at 1372 (quotation omitted).”

Handeen v. Lemaire, 112 F.3d 1339 at 1354-55 (C.A.8 (Minn.), 1997).

Medical Supply disputes the theft of intellectual property is not a concrete RICO injury. In *Formax Inc. v. Hosert*, 841 F.2d 388, 389 (Fed. Cir. 1988), the court held that a civil RICO count was properly pleaded against a former employee “alleged to have stolen some drawings claimed to be trade secrets” from both the former employer and from one of the former employer’s vendors. The fraud on the court is also concrete “[A] cause of action, of course, is a form of ‘property,’ and when it arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as ‘business injury.’” *Malley-Duff & Assocs, Inc. v. Crown Life Ins. Co.*, 792 F.2d 341, 354 (3d Cir. 1986).” Likewise, fraud, as alleged in this case, that causes one to relinquish a cause of action arising out of his business is an

injury to "business or property." *Deck v. Engineered Laminates*, No. 02-3100 at page 1 (10th Cir. 11/17/2003) (10th Cir., 2003). Also the complaint seeks the injury Medical Supply was proximately caused losing sales to 2000 hospitals under the targeted direct competitor exception to concreteness under *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (C.A.4 (Md.), 1994)(cert. denied)*Ideal Steel Supply Corp. v. Anza*, No. 03-7381 (Fed. 2nd Cir. 7/2/2004) (Fed. 2nd Cir., 2004)

Medical Supply and its counsel have been vilified for asserting that the USA PATRIOT Act qualifies immunity for suspicious activity reports and that through Public Law 107–56 Congress changed the Annunzio-Wylie Money Laundering Act by expressly provided for civil liability for malicious suspicious activity reports against bank employees that would include US Bank, US Bancorp and Piper Jaffray’s use of the threat of a suspicious activity report to take property from Medical Supply and furthering a monopoly in hospital supplies where Novation is in open and publicized anticompetitive agreements with US Bancorp and Piper Jaffray. For just contradicting the clear error over the express wording of the USA PATRIOT Act, the Tenth Circuit deprived Medical Supply of its rights and *sua sponte* sanctioned its counsel with its most severe penalty and refused to permit review.

The Supreme Court of the State of Arkansas is out of the jurisdictional reach of the Tenth Circuit and one year after Medical Supply came to its informed and researched conclusion, the heroic and honorable justices ruled that a bank could not use the acts immunity to escape liability for filing a malicious suspicious activity report to cause the baseless criminal prosecutions of a landowner it sought to deprive of property. See *Bank Of Eureka Springs And John Cross v. Floyd Carroll Evans*, 109 S.W.3d 672 Syl. 10 (Ark. 2003). No doubt the Stanton Hazlett Kansas Disciplinary Office gang is saddling up to travel the highways and disbar these brave justices from the practice of law in Kansas under the pretext of incompetence.

Medical Supply’s present complaint adequately described the FINCEN database the defendants are using to threaten public health and it is actionable.

Respectfully Submitted

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Certificate of Service

I certify that on April 19th, 2005 I have served 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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