

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

MEDICAL SUPPLY CHAIN, INC.,	)	
<i>Plaintiff,</i>	)	
v.	)	Case No. 05-2299
NOVATION, LLC	)	
NEOFORMA, INC.	)	
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFFER	)	
ANDREW CESERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY	)	
WATKINS BOULWARE, P.C.	)	
<i>Defendants.</i>	)	

**RESPONSE TO NOVATION DEFENDANTS’ MOTION FOR ORAL HEARING**

Comes now, the plaintiff Medical Supply Chain and Samuel K. Lipari through their counsel, Dennis Hawver, Esq. Response to the Novation defendants motion for oral hearing, (Doc. 76 ). The plaintiff believes oral argument over the dismissal motions is unnecessary and based on the defendant’s motion it is unlikely to further the interests of justice. The plaintiff therefore respectfully requests the court deny the Novation defendants’ motion for an oral hearing.

**STATEMENT OF FACTS**

1. The Novation defendants ( herein Novation, LLC (“Novation”), VHA Inc. (“VHA”), University Healthsystem Consortium (“UHC”), Robert Baker, and Curt Nonomaque ) seek an oral hearing on their motion to dismiss.

2. The Novation defendants are currently facing prospects that their attempt to merge the remaining two electronic marketplaces for hospital supplies, the defendant Neoforma and the unnamed coconspirator GHX, LLC will be stopped by a Delaware Court (Exb. 1) or the Securities and Exchange Commission (Exb. 2) on the eve of the next US Senate Judiciary Antitrust Subcommittee hearings on monopolization of hospital supplies.

3. The Novation defendants in understandable urgency reiterate that the plaintiff's complaint should be dismissed for reasons contrary to controlling law.

#### **MEMORANDUM OF LAW**

The plaintiff has previously and completely refuted these assorted representations in its memorandums opposing the defendants' motions to dismiss and motions to sanction. The plaintiff now again addresses the issues raised by the Novation defendants:

**“(1) Plaintiff’s claims are barred by collateral estoppel;”**

Claim preclusion clearly does not apply to the Novation defendants who were not parties to the previous action. The Novation defendants were not in privity or controlling the previous actions. The US Supreme Court in *Lawlor v. National Screen Service Corporation* resolved these issues:

##### **a. Privity**

The Novation defendants are not parties in privity for the purposes of collateral estoppel. “Restatement, Judgments, § 83, Comment a: ‘those who control an action although not parties to it \* \* \*; those whose interests are represented by a party to the action \* \* \*; successors in interest. \* \* \*’ *Id* ar fn 19

“It is sufficient here to point out that the five defendants do not fall within the orthodox categories of privies;” *Id.* at pg. 329

**b. prior outcome of injunction no bar**

Nor does the plaintiff’s failure to prevail against the previous defendants estop the present action:

“There is no merit, therefore, in the respondents’ contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents’ novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*.”

*Id.* at pg. 329.

**c. Necessary Parties**

Nor does the plaintiff’s failure to prevail against the previous defendants estop the present action:

“in any event there was no obligation to join them in the 1942 case since as joint tort-feasors they were not indispensable parties; and that their liability was not ‘altogether dependent upon the culpability’ of the defendants in the 1942 suit.”

*Id.* pg. 328.

**d. Identity of claims**

Under federal law, collateral estoppel may be invoked only if “the issue previously decided is identical with the one presented in the action in question.”

*Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir.1995).

The current complaint states claims for subsequent conduct and conduct not yet ripe in the earlier litigation. “...if future damages are unascertainable, a

cause of action for such damages does not accrue until they occur. *Zenith*, 401 U.S. at 339, 91 S.Ct. at 806.” *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at FN4 (C.A.10 (Kan.), 1989). See also *Barnosky Oils Inc., v. Union Oil Co.*, 665 F.2d 74, 82 (6th Cir. 1981). US Bank was still attempting to perform the financing part of the contract after Medical Supply filed its injunctive relief. If “the initial refusal is not final, each time the victim seeks to deal with the violator and is rejected, a new cause of action accrues. See *Pace Indus.*, 813 F.2d at 237-39; *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714-15 (11th Cir.1984).” *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at 933-4 (C.A.10 (Kan.), 1989).

*Lawlor v. National Screen* also clarifies this issue:

“The conduct presently complained of **was all subsequent to the 1943 judgment**. In addition, there are **new antitrust violations alleged** here—deliberately slow deliveries and tie-in sales, among others—not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, **it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case**. In the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly; **five other producers had granted exclusive licenses to National Screen, with the result that the defendants' control over the market for standard accessories had increased to nearly 100%**. Under these circumstances, whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, **the 1943 judgment does not constitute a bar to the instant suit.**” [ emphasis added]

*Lawlor v. National Screen Service Corporation*, 349 U.S. 322 at 328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955)

### **Collateral Estoppel Is Inapplicable To The Novation Defendants**

The defense has no clothes. Clearly the three required elements for claim preclusion or collateral estoppel do not exist:

“The three requirements for application of claim preclusion are: (1) identity or privity of the parties; (2) identity of the cause of action; and (3) a final judgment on the merits. *Id.* Where these three requirements are met, claim preclusion applies to bar the maintenance of a subsequent suit.”

*Heard v. Board of Pub. Util. of Kansas City, Ks*, 316 F.Supp.2d 980 at 982

(D. Kan., 2004)

**“(2) Plaintiff fails to allege concerted action in support of its conspiracy claims;”**

There is no heightened pleading standard for conspiracy or antitrust conspiracy. The claims adequately apprise the defendants of the gravamen of their conduct: Under the law, a conspiracy may consist of any mutual agreement or arrangement, knowingly made, between two or more competitors. *Law v. Nat'l Collegiate Athletic Ass'n* 185 F.R.D. 324, 336, n.19 (D. Kan. 1999). The plaintiff has met the burden of pleading a conspiracy by "identif[ying] the co-conspirators and describ[ing] the nature and effect of the alleged conspiracy." *Alco Standard Corp. v. Schmid Bros.*, 647 F.Supp. 4, 6 (S.D.N.Y.1986).

The hospital supply competitors VHA and UHC's joint ownership and agreement to exclusively use the electronic marketplace Neoforma is such a prohibited combination and conspiracy.

The hospital supply competitors VHA and UHC's formation of the defendant limited liability company Novation is identified in the complaint as a

conspiracy to restrain trade specifically prohibited under *Dagher v. Saudi Refining Inc.*, No. 02-56509 (Fed. 9th Cir. 6/1/2004) (Fed. 9th Cir., 2004).

The plaintiffs other Sherman 1 claims are equally undismissable. See *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 478, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) ("The alleged conduct — higher service prices and market foreclosure — is facially anticompetitive and exactly the harm that antitrust laws aim to prevent."); *United States v. VISA U.S.A., Inc.*, 344 F.3d 229, at 241-43 (2d Cir.2003) (rules for vendor participation causing reduction in output and consumer choice had anticompetitive effect); *Primetime 24 Joint Venture v. National Broadcasting Co.*, 219 F.3d 92, 103-04 (2d Cir.2000) (refusing to dismiss where complaint alleged agreement resulting in denial of a necessary input to a competitor).

**“(3) Plaintiff fails to sufficiently allege monopoly power or the elements of attempt to monopolize;”**

The complaint alleges and Neoforma and the Novation defendant parties surprisingly subsequently proved the plaintiff’s claims for Sherman 1 combination and conspiracy in restraint of trade antitrust violations through their conduct and official press releases. See Exbs. 3 and 4:

“The current 10-year exclusive outsourcing agreement was originally entered into in March 2000 and was most recently amended in August 2003 as a result of negotiations between the parties to the contract. Under the terms of that amendment, the quarterly maximum payment from Novation to Neoforma was established at \$15.25 million, or \$61.0 million per year, beginning in 2004.”

Exb 3 Neoforma SEC disclosure press release pg. 1

“In addition, at the effective time of the Merger, VHA and UHC, which respectively owned 8,611,217 and 2,130,302 shares of Neoforma common

stock prior to the Merger, representing approximately 41.5% and 10.3% of Neoforma outstanding common stock, respectively had 2,004,190 and 495,810 of their shares of Neoforma common stock converted into the right to receive \$10.00 per share in cash in the Merger. The remainder of the shares that they held were exchanged, immediately prior to the closing of the Merger, for membership interests in GHX representing approximately an 11.6% ownership interest in GHX for VHA and a 2.9% ownership interest in GHX for UHC, pursuant to exchange agreements.”

Exb 4 Neoforma SEC disclosure press release pg. 1

The complaint does describe the Novation defendant’s market power in many places. The following three paragraphs from the complaint are an example:

¶56 states: “By 8/21/04 The NY Times reported that the Justice Department had opened a broad criminal investigation of the medical-supply industry revealing that Novation is being subjected to a criminal inquiry:

“Novation's primary business is to pool the purchasing volume of about 2,200 hospitals, as well as thousands of nursing homes, clinics and physicians' practices, and to use their collective power to negotiate contracts with suppliers at a discount. In many cases, the contracts offer special rebates to hospitals that meet certain purchasing targets. **Although Novation is not well known outside the industry, it wields formidable power because it can open, or impede, access to a vast institutional market for health products.**” [emphasis added]

¶433 states:

“The defendant Novation LLC is the largest Hospital Group Purchasing Organization selling over 30 billion dollars in hospital supplies a year and controlling the purchasing in 2000 hospitals nationwide.”

¶434 states:

“The defendants possess market power having the power to exclude competitors from 2000 of the nation’s hospitals, which Novation controls under long term purchasing contracts. The defendants possess market power in the ability to charge manufacturers and suppliers fees to have their products sold to Novation’s members and additional fees to manufacturers and suppliers for allowing their products to be sold though the web where member hospitals are required to purchase products through Neoforma,

Inc. The defendants possess market power in having exclusive access to Piper Jaffray's investor research coverage and annual healthcare conferences, elements essential to effectively obtain capitalization through an initial public offering. The defendants possess market power in having exclusive access to the commercial banking facilities of US Bancorp NA."

The complaint identifies the defendant Neoforma and the nondefendant coconspirator GHX, LLC as the only other electronic marketplaces for hospital supplies (¶40) besides Medical Supply Chain and that Neoforma will be merged with GHX, LLC to monopolize the web based market for hospital supplies.

The complaint adequately alleges a conspiracy to monopolize under Section 2. To establish such a claim, plaintiff must plead and prove (1) a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1556 (10th Cir. 1995).

**"(4) Plaintiff fails to adequately allege harm to competition;"**

The plaintiff's complaint documents harm to the market from the defendants' artificial inflation of hospital supply prices. A trilogy of recent Supreme Court decisions reflect that it is unnecessary at the pleading stage to state every element of a claim, 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).

**"(5) Plaintiff lacks standing;"**

The plaintiff Medical Supply Chain, Inc., like the sole proprietorship Medical Supply Chain and Sam Lipari the founder and CEO of Medical Supply Chain, Inc. ( a statutory trustee of the corporation under Missouri § 351.525 RSMo) and now the proprietor of Medical Supply Chain, a hospital supply business excluded from the market by the continuing acts of the defendants has standing.

Missouri's rule 52.13(e) states "When a corporation has been sued and served with a process or has appeared while in being, and is thereafter dissolved or its charter forfeited, the action shall not be affected thereby ...." Accordingly, under § 351.525, "[t]he statutory trustees succeed to the interest of the corporation by operation of law ". *Sab Harmon Indus. v. All State Bldg. Sys.*, 733 S.W.2d 476, 483 (Mo.App.1987).

It has been asserted that like the trial court in case World of Sleep's conclusion that World of Sleep's lost profits from potential sales to the licensee stores were too speculative because "there is no history at all of any profit or loss on these dealings during the years involved in this case *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 at 1478 (C.A.10 (Colo.), 1985). This error contradicts established Tenth Circuit and US Supreme Court law:

"If proof of a profit and loss history were required, no plaintiff could ever recover for losses resulting from his inability to enter a market. However, such recoveries are 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).

**“(6) Plaintiff fails to plead any of the required elements for an antitrust claim based on interlocking directors;”**

The defendants omit that Rule 8 of the federal rules of civil procedure governs. No special pleading requirements attach in antitrust cases, beyond those specifically set out by Congress; antitrust plaintiffs thus enjoy the same general standard for stating a claim as other litigants. See *Radovich v. National Football League*, 352 U.S. 445, 453-54, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); *Nagler v. Admiral Corporation*, 248 F.2d 319, 323-24 (2d Cir.1957).

The burden to state a claim for interlocking directors is exceedingly low:

“Defendant also maintains that plaintiff has failed to state a claim under § 8 of the Clayton Act, 15 U.S.C. § 19. Section 8 prohibits interlocking directorates of competing corporations if elimination of competition between them by agreement would violate any of the antitrust laws. Defendant intends to seek majority representation on plaintiff's board of directors after the acquisition of seventy five percent of the plaintiff's stock (SEC FORM S-7 at 16). *United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614 (S.D.N.Y.1953), the district court granted summary judgment against the defendant, ordering the resignation of a director from the board of one or both of two competitor corporations upon which he sat, because of a potential anticompetitive agreement.10 In light of *Sears*, we hold that plaintiff has adequately stated a claim under § 8 of the Clayton Act.”

*American Medicorp, Inc. v. Humana, Inc.*, 445 F.Supp. 573 at 587 (E.D. Pa., 1977). At footnote 10, the *American Medicorp* court goes on to explain the purpose for easily triggering interlocking directorate liability:

“[w]hat Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. The legislation was essentially preventative.

\* \* \* \* \*

While it may be acknowledged that the clause is not crystal clear, to infuse it with the meaning contended for by the defendants would

defeat the Congressional purpose "to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation." This conclusion is compelled because of the futility of trying to decide whether a given hypothetical merger would violate the pertinent sections of the antitrust laws. Sears, supra, at 616-617. (Footnotes omitted)."

The complaint states the defendants had interlocking directors to facilitate their monopoly and that antitrust law violations occurred:

¶235 states:

"The May 25, 2000 announcement also revealed the interlocking directors used by the Defendants to restrain trade in hospital supplies. In connection with the new agreements, two of the seven seats on the Neoforma.com Board of Directors will be filled by VHA designees after closing of the transaction."

¶ 368 states:

"(US Bancorp has interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC.; the Defendant Novation and Premier. US Bancorp helped the Defendant Novation acquire control of the Defendant Neoforma and partner it with GHX LLC. creating a monopoly of over 80% of healthcare e-commerce)."

¶ 424 states:

"Medical Supply Chain, Inc. has been excluded from the hospital supply market with agreements between UHA and VHA's Novation in combination with their electronic marketplace Neoforma, Inc. US Bancorp NA, and The Piper Jaffray Companies exchanged directors with Novation and participated in exclusive agreements with Novation and Neoforma to keep hospitals using technology products from companies US Bancorp NA and Piper Jaffray had an interest in. The purpose of these agreements was to injure the hospital supply consumers with artificially inflated prices."

¶ 500 states:

"The Defendants use of interlocking directors in joint ventures and LLC's formed by competing suppliers, manufacturers and distributors and use of interlocking directors on the boards of healthcare technology and supply chain management companies violate Section 8 of the Clayton Act, 15 U.S.C. § 19."

¶ 502 states:

“Defendants through the use of interlocking directors collectively have at all times material to this complaint maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies in the several States of the United States; and have used, attempted to use, or combined and conspired to use, their monopoly power and interlocking directors to affect competition in the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies sale of the same in the several States of the United States in violation of 15 U.S.C. § 19.”

**“(7) Plaintiff attempts to plead fraud without identifying a single misleading statement or omission;”**

The plaintiff’s complaint identifies numerous misrepresentations. The following paragraphs from the complaint merely describes Novation’s fraudulent misrepresentation of 2005 costs in the 2004 annual inflation forecast:

¶124 states:

“The “inflation savings” scheme is perpetuated to this day by annual inflation forecasts created and distributed by Premier and Novation, LLC. The documents appear to be legitimate economic forecasts to aid hospital-purchasing directors and include macroeconomic analysis of economic conditions that have the potential to effect product prices. For those uninitiated into the secrets of the fraud, the long-term contracts with the hospital’s GPO either Premier or Novation, LLC appear to have protected the hospital against the full effect of projected increases in the manufacturer’s list prices.”

¶125 states:

“The fraud however is easily verified. The economic forecasts of Novation LLC and Premier speak for themselves. The lists of products and services and the projected price changes invariably show price increases exceeding the annual inflation index rate for the contract protected hospital supply market leader manufacturers and below annual inflation index price changes for non-hospital supply specialty items, even declining prices in some markets with competition. To offset these glaringly obvious comparisons, Novation LLC and Premier make much use (misuse) of macro inflationary data to project increases in commodities they do not control. “

¶126 states:

“As an example, Novation LLC’s 2005 projections utilize temporary surges in products like farm produce from fuel cost increases in 2004 to creatively portray large increases in products not under contract providing cover for the fraudulently increased prices of the GPO’s participating suppliers.”

The plaintiff’s complaint similarly described Novation’s specific fraudulent misrepresentations about the US Surgical price advantage:

¶393 states:

“On December 20, 2004, U.S. Surgical, a business unit of Tyco Healthcare, was awarded suture contracts by Novation. The long-term exclusive contracts run from April 1, 2005 through March 31, 2008. The contracts announcement stated VHA and UHC have the potential to purchase as much as \$900 million in the eight product categories that make up Novation’s complete wound closure and endomechanical offering.”

¶395 states:

“Novation provided a suture conversion calculator to validate for its members that they would save 20 – 25% using the new US Surgical contract. A hospital member of Novation used the aforementioned suture conversion calculator and found that their actual prices for sutures on the new contract are going to be 36% higher the previous contract, yet the hospital was told by Novation that they will realize the above stated savings (20-25% savings). “

¶396 states:

“Novation fraudulently deceived its member hospitals into believing the new US Surgical suture contract would save them 20-25 percent. Instead of delivering savings, Novation and Tyco increased the list or book price for the sutures. The hospitals were given a fraudulent means to calculate their “savings” the suture conversion calculator that showed savings in the range of 20-25%. However, when the prices for Ethicon products, the sutures that had been used by the hospital were run through the same calculator, the hospital realized the new US Surgical contract prices were actually 36% higher.”

Since it is clear the complaint identifies many fraudulent misrepresentations by the Novation defendants, it is unfathomable why the Novation defendants have made the representation to the court that the complaint identifies no fraudulent misrepresentations.

**“(8) Plaintiff pleads tortious interference without pleading that Defendants knew about or intentionally interfered with any contract;”**

¶406 states:

“The coconspirators UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars did however renew their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US Bancorp and consulting with representatives for US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth Circuit Court of Appeals to uphold the trial court’s erroneous ruling. The cartel also renewed their efforts to have Medical Supply’s sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US Bancorp and actually effected a frenzy of disbarment attempts against Medical Supply’s counsel in the period from December 14, 2004 to February 3rd, 2005, all originating from the cartel’s agents Shughart Thomson and Kilroy’s past and current share holders.”

¶425 states:

“Because of these illegal anticompetitive agreements with Novation and Neoforma, Inc., Piper Jaffray and then US Bancorp refused to deal with Medical Supply Chain, Inc. US Bancorp broke a contract with Medical Supply Chain, Inc. to provide escrow accounts needed to capitalize Medical Supply’s entry into the hospital supply marketplace, using the pretext of the USA PATRIOT Act. US Bancorp and Piper Jaffray simultaneously stole Medical Supply’s intellectual property, which has since been openly used by Novation and Neoforma. US Bancorp and Piper Jaffray have continued to extort property from Medical Supply Chain on behalf of the hospital supply cartel by obstructing entry to the market for hospital supplies through the threat of malicious USA PATRIOT Act reports.”

¶427 states:

“In June of 2004, Novation/ Neoforma, Inc. again stopped Medical Supply from entering the market for hospital supplies using exclusive dealing agreements with General Electric and GE’s electronic marketplace cartel GHX, LLC. These agreements caused GE to break a written contract to purchase a commercial real estate lease from Medical Supply. The contract included Medical Supply’s requirement to use the proceeds to capitalize Medical Supply’s entry to market since it was under the extortion of US Bancorp threatened and malicious USA PATRIOT Act reporting. Medical Supply is currently attempting to resolve its contract with GE and obtain injunctive relief and treble damages under Sherman I and II.”

**“(9) Plaintiff attempts to plead a claim for prima facie tort, but fails to plead the requisite intentional lawful act that injured plaintiff (indeed, Plaintiff specifically pleads that Defendants’ conduct was unlawful);”**

The complaint identifies many lawful acts which the Novation defendants’ direct conduct and participative conduct becomes actionable as prima facie torts. For instance, identifies Andrew DeMarea’s filing of a lawful ethics complaint to unlawfully deprive Medical Supply of counsel. The complaint also describes the use of the USA PATRIOT Act suspicious activity report to prevent the plaintiff from entering the market for hospital supplies.

**“(10) Plaintiff attempts to assert a RICO claim, but fails to allege a racketeering act, a pattern of racketeering, or a RICO injury;**

The plaintiff has adequately alleged the existence of a RICO enterprise and that the Novation defendants is part of the association in fact that comprises the enterprise.

### **Enterprise**

Allegations of the existence of a RICO enterprise must meet only the "notice pleading" requirements of Fed.R.Civ. Pro. 8. Trustees of Plumbers and Pipefitters 886 F.Supp. 1134, 1144-45 (S.D.N.Y.1995)' *Nat'l Pension Fund v.*

*Transworld Mech., Inc.*, 886 F.Supp. 1134, 1144-45 (S.D.N.Y.1995); *Azurite Corp. v. Amster & Co.*, 730 F.Supp. 571 (S.D.N.Y.1990).

The enterprise was alleged to have committed predicate acts in violation of 18 U.S.C. § 1962(c) and they were alleged with the required specificity and identified which defendants committed which acts.

"To sufficiently state a RICO claim, [p]laintiffs must plead (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity." *Cyber Media Group, Inc. v. Island Mortgage Network, Inc.*, 183 F.Supp.2d 559, 578 (E.D.N.Y. 2002) (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985))."

*Calabrese v. Csc Holdings, Inc.*, 283 F.Supp.2d 797 at 807 (E.D.N.Y., 2003). See also *Krear v. Malek*, 961 F.Supp. 1065 (E.D. Mich., 1997):

"Regardless, plaintiffs have sufficiently alleged an "enterprise" in that they have alleged an association-in-fact between Lease Equities, NBF, NBF Cable, Turner and Malek. See *Frank v. D'Ambrosi*, 4 F.3d 1378, 1386 (6th Cir.1993). In *Frank*, the Sixth Circuit stated that: "To satisfy the enterprise requirement, an association-in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the pattern of racketeering activity in which it engages." *Id.* (citing *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981)).

Plaintiffs have properly alleged that the racketeering activity, i.e., the sale of notes through Lease Equities to perpetuate the alleged Ponzi scheme, is distinct from the association-in-fact which associated for legitimate business purposes, to wit: Lease Equities entered into legitimate leases with third parties; NBF Cable entered into legitimate cable television contracts; and Lease Equities was a secured creditor of NBF Cable.

Third, plaintiffs have sufficiently alleged, under § 1962(d), that defendants conspired to violate §§ 1962(b) and (c). To state a claim under § 1962(d), a plaintiff must plead that the defendant agreed to join the conspiracy, agreed to commit predicate acts, and knew that those acts were part of a pattern of racketeering activity. See *Glessner v. Kenny*, 952 F.2d 702, 714 (3rd Cir. 1991). While plaintiffs have not used the word "agreement" per se, they have stated that defendants Malek, Turner and Lease Equities "have conspired to violate RICO," and have well-pleaded a set of facts from which a conspiracy can be inferred in the FARCS. See *Baumer v. Pachi*, 8 F.3d 1341, 1346 (9th Cir.1993); *Manning v. Stigger*, 919 F.Supp. 249, 254 (E.D.Ky.1996)."

*Krear v. Malek*, 961 F.Supp. 1065 at 1070-1071 (E.D. Mich., 1997).

### **Conspiracy**

The complaint alleges the Novation defendants are part of a RICO conspiracy. Plaintiffs have alleged that the defendant First Franklin engaged in a conspiracy to commit the acts mentioned above in violation of 18 U.S.C. § 1962(d). 18 U.S.C. § 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

### **No Overt Act Required**

The Supreme Court's 1997 decision *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352, is controlling. The Supreme Court held that plaintiffs need only allege that defendants "knew of and agreed to facilitate the scheme." *Id.* at 478.

There is no requirement of some overt act or specific act in the [RICO] statute before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.' § 371:

"A [RICO] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor ... One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a [RICO] conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, and so punishable in itself."

*Salinas*, 118 S.Ct. at 476-77.

The Novation defendants do not refute the conduct of the other defendants. Having established a RICO conspiracy, the Novation defendants must make a factual showing to escape. "Once a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Diaz*, 176 F.3d 52, 97 (2d Cir.1999) (quoting *United States v. Amato*, 15 F.3d 230, 235 (2d Cir.1994)). Plaintiff's § 1962(d) allegations suffice to satisfy *Salinas*.

**"[o]nce a RICO enterprise is established, a defendant may be found liable even if he does not have specific knowledge of every member and component of the enterprise." *Mason Tenders District Council Pension Fund v. Messera*, 1996 WL 351250 at \*6 (S.D.N.Y.1996) ("Whether or not this conduct is viewed as being at the core of the enterprise ..."). Furthermore, "[t]he RICO statute has been repeatedly construed to cover both insiders as well as those peripherally connected to a RICO enterprise, particularly where the "outsiders" are alleged to have engaged in kick-backs in order to influence the enterprise's decision." *Id.* *Azzielli v. Cohen Law Offices*, 21 F.3d 512, 514-15, 521 (2d Cir.1994) (Judge Kearse held that the district court should not have dismissed the § 1962(c) claim against defendant who served as "the middle person in [a] flip sale" of a building ""by allowing his name to be used on the bogus contract and showing up at the closing."")."**

*In re Sumitomo Copper Litigation*, 104 F.Supp.2d 314 (S.D.N.Y., 2000).

To be convicted of conspiracy to violate RICO under § 1962(d), the conspirator need not himself have committed or agreed to commit the two or more predicate acts, as long as each agreed to act in furtherance of the scheme. *Salinas v. United States*, 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). Under this statute, there is no requirement of some overt act in furtherance of the conspiracy. *Id.*

**(11) Plaintiff's USA Patriot Act claim is legally defective because there is no private cause of action under that Act as a matter of law."**

There are numerous expressly stated private causes of action under USA PATRIOT Act Public Law 107–56 “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001” contains private rights of action even expressly stated in the acts subheadings; SEC. 223. CIVIL LIABILITY FOR CERTAIN UNAUTHORIZED DISCLOSURES and the plaintiff’s averred malicious reporting to which there is a private right in SEC. 355 which states:

“(3) MALICIOUS INTENT.—Notwithstanding any other provision of this subsection, voluntary disclosure made by an insured depository institution, and any director, officer, employee, or agent of such institution under this subsection concerning potentially unlawful activity that is made with malicious intent, **shall not be shielded from liability** from the person identified in the disclosure.” [ emphasis added ].

Additional private rights of action are communicated in sections that immunize “good faith” disclosure of information from third parties. The qualifying of immunity to third parties’ causes of action for civil liability are expressions of Congressional intent for private rights of action; i.e. § 215 of USA Patriot amends FISA § 501(e) (as amended): “A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production.”

### **US District Courts Recognize USA PATRIOT Act Private Rights of Action**

It is unclear how the Novation defendants state such a clearly erroneous assertion as the non existence of private rights of action under the USA PATRIOT Act when it is contradicted by case law:

“Section 315 of the Patriot Act amends and expands 18 U.S.C. § 1956(c)(7), a RICO provision that establishes money-laundering as a predicate act. Pub.L. No. 107-56, § 315; or 18 U.S.C. § 1961(1).”

*European Community v. Japan Tobacco, Inc.*, 186 F.Supp.2d 231 at pg. 238 (E.D.N.Y., 2002).

“...as part of the USA-PATRIOT Act, the Congress again amended § 2520 to add that an aggrieved party could recover from an intercepting "person or entity, *other than the United States*." Pub.L. No. 107-56, § 223, 115 Stat. 293, 384”

*Williams v. City of Tulsa, Ok*, 393 F.Supp.2d 1124 (N.D. Okla., 2005)

“Finally, section 2520(a) was again amended in 2001 by the USA Patriot Act, which added the phrase "other than the United States" following "person or entity." See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Thus, as currently enacted, section 2520(a) states that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C.A. § 2520(a) (West Supp. 2003) (emphasis added).”

*Huber v. North Carolina State University*, No. COA03-145 (N.C. App. 4/20/2004) (N.C. App., 2004).

**“3. Moreover, Plaintiff’s recent procedural machinations have further demonstrated that this case has been brought in bad faith.”**

The complaint alleges the Novation defendants knew of and participated in the efforts to deny the plaintiff legal representation. The Novation defendants overtly participated in a pleading to prevent Sam Lipari from being substituted. In evaluating a dismissal the allegations in the complaint are taken as true. The question of dismissal does not concern the conduct of the plaintiff to avoid unjustly being deprived of redress through representation.

### **Conclusion**

The motion for oral hearing adequately demonstrates that the further advocacy of the Novation defendants would not aid a law based resolution of the appropriateness of dismissal. Additionally, no discovery has been granted and would be required to amend the plaintiff's complaint to address any deficiencies in pleading. The plaintiff respectfully requests that the court deny the Novation defendants' motion for oral hearing.

Respectfully submitted,

/s/ Dennis Hawver

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### **Certificate of Service**

I certify that on March 5th, 2006 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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