

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

MEDICAL SUPPLY CHAIN, INC.,)
<i>Plaintiff,</i>)
v.) Case No. 05-2299-KHV
NOVATION, LLC) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.) Attorney Lien
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>)

**MEMORANDUM IN SUPPORT OF FIRST PLAINTIFF’S MOTION FOR PARTIAL SUMMARY
JUDGMENT UNDER F. R. CIV. P. LOCAL RULE 56.1**

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel Bret D. Landrith and makes the above captioned memorandum in support of plaintiff’s first motion for partial summary judgment. Medical Supply respectfully requests rulings that each defendant is distinct from the RICO enterprise, that a defendant's liability for RICO conspiracy does not require that defendant to participate in the operation or management of the enterprise, that RICO liability extends to aiders and abettors and that the law firm Shughart, Thomson & Kilroy, Watkins, Boulware, P.C. (Shughart, Thomson & Kilroy) is properly a RICO Defendant. The plaintiff’s suggestion that summary judgment motions be bifurcated was not controverted and the plaintiff expects to file fact based summary judgment motions based on the defendants’ *per se* antitrust violations. Medical Supply respects the court grant this pure legal question summary judgment for the following reasons:

STATEMENT OF FACTS FOR PARTIAL SUMMARY JUDGMENT ON LEGAL ISSUES

1. On September 2, 2005, The Kansas City Business Journal published an article about the racketeering conduct of Shughart Thomson & Kilroy’s nearest Kansas City competitor Shook, Hardy and Bacon LLP. See Exb. 1

2. The Notre Dame law School Professor G. Robert Blakey was interviewed and stated it was wrong for the law firm not to be made a defendant in the civil RICO action against the tobacco companies. See Exb. 1, pg. 1
3. On August 15, 2005, the US Justice Department filed a post trial proposed finding of fact in the civil racketeering case against tobacco companies mentioning at least 15 Shook Hardy lawyers by name and referring to the firm more than 250 times. See Exb. 1, pg. 1, Exb 2 generally.
4. On August 24, 2005, the US Justice Department filed a post trial brief arguing with controlling legal authority that the law firm Shook, Hardy and Bacon LLP had the requisite intent to be liable as a RICO person. See Exb 3 generally.
5. Medical Supply filed an amended complaint against Unknown Healthcare, for Brian Kabbes, for Lars Anderson, for Susan Paine, for Andrew Cesere, for Piper Jaffray, for Mutual Fund Services, for Institutional Trust, for Corporate Trust, for US Bank Private and for US Bancorp, NA some of whom are the current defendants on See Exb 4 generally.
6. The complaint described the defendants' conduct violating the Hobbs Act against racketeering in keeping Medical Supply out of the market to further the defendants' monopolization of the hospital supplies by falsely using the USA Patriot Act "know your customer" provision and the US Bank's official role enforcing the USA Patriot Act. See Exb 4 pg. s 44-47
7. The witnessed conduct was attested to by Sam Lipari in an affidavit at the end of the complaint. See Exb 4 pg.68
8. The plaintiff was unsuccessful in obtaining injunctive relief to prevent the defendants' monopolization.
9. Medical Supply notified the non defendant hospital supply cartel members participating in the agreement to boycott Medical Supply in December 2004. See Novation Complaint Exb 5 pg.s 85-86.
10. Shughart Thomson & Kilroy a law firm stepped up their efforts to obstruct justice and prevent medical Supply from having representation and legal resources to expose the cartel's monopolization of hospital supplies. See Novation Complaint Exb 5 pg. 108-111
11. The Shughart Thomson & Kilroy lawyer Andrew DeMarea filed a fraudulent Kansas Disciplinary complaint against Medical Supply's counsel for appealing a trial court ruling the Tenth Circuit panel

admitted was incorrect about the USA Patriot Act statute. See De Marea Complaint Exb 6 pg.1, See also Tenth Circuit Sanction order, Exb 7.

12. Andrew DeMarea's former boss, Kansas US District Court Magistrate James P. O'Hara altered his testimony on the stand on January 21, 2005 revealing for the first time the defendants' continuing pattern and practice of racketeering to Medical Supply's President and counsel. See Novation Complaint Exb 5 pg., See also Magistrate O'Hara Testimony Sup 1 Atch 9 pg.s 609-669
13. Medical Supply then documented the newly discovered pattern events and incorporated the into the complaint filed against the defendants for damages resulting from the earlier injury Medical Supply had tried to enjoin. See Supplement 1, Federal Bureau of Investigation Complaint and Sup.1 Atch 1 thru 13.
14. The extra legal or outside of court racketeering to obstruct justice, intimidate and retaliate against witnesses and victims is still continuing and has led to injury of Medical Supply principals. See affidavit of Sam Lipari Exb. 8 generally.

ARGUMENTS AND AUTHORITIES

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Material facts are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In considering a summary judgment motion, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255; see also *Washington Post Co. v. United States Dep't of Health and Human Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989).

Additionally, summary judgment is appropriate for purely legal questions. See generally Moore's Federal Practice, P56.20(3.-2)(2ded. 1976). A determination on a strict legal issue can "narrow the issues in [a] case, advance the progress of the litigation, and provide the parties with some guidance as to how they proceed with the case." *Warner v. United States*, 698 F. Supp. 877, 879 (S.D. Fla. 1988). "Summary judgment can thus serve to set the issues for trial The outcome of [the] dispute will have an immediate

impact on the proofs to be offered at trial in support of the elements of the statutory causes of action."

Disandro v. Makahuena Corp., 588 F. Supp. 889, 892 (D. Haw. 1984); see also *Lies v.*

Farrell Lines, Inc., 641 F.2d 765, 768-69 (9th Cir. 1981).

The party opposing the motion "may not rest upon the mere allegations or denials of his pleadings¹ to avoid summary judgment. *Bacchus*, 939 F.2d at 891 (quoting *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510)." *Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089 at 1097-1098 (10th Cir., 1999).

Plaintiff, Medical Supply Chain, Inc. (Medical Supply), has brought this suit against the Defendants¹ pursuant to Sections 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq.. Medical Supply alleges violations of both Sections 1962(c) and (d).¹ To prove the alleged violations of Section 1962(c), Medical Supply must show: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas v. United States*, 522 U.S. 52, 62 (1997). *S. P. R.L. v. Imrex Co., Inc.*, 473 U. S. 479, 496 (1985); *BancOklahoma Mortgage Corp. v. Capital Title Co. Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999). *Robbins v. Wilkie*, 2002 C10 944 ¶20 (USCA10, 2002).

Whether § 1962(c) should be interpreted to require a substantial effect on interstate commerce is an open question in Tenth circuit. However, neither the Supreme Court nor any courts of appeals have held that the effect must be substantial, and a number of our sister circuits have held that a de minimis effect on interstate commerce is sufficient to satisfy this statutory requirement. See *United States v. Shyrock*, 342 F.3d 948, 984 (9th Cir. 2003) (holding that the district court properly instructed the jury that § 1962(c)'s jurisdictional element was satisfied if the jury found "a de minimis affect [sic] on interstate commerce"); *United States v. Marino*, 277 F.3d 11, 35 (1st Cir. 2002) (holding that "the government does not need to show that the RICO enterprise's effect on interstate commerce is substantial"); *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001) (holding that a "RICO enterprise's necessary relationship to interstate commerce" is "de minimis"); *United States v. Miller*, 116 F.3d 641, 674 (2d Cir. 1997) (holding that "the

¹ Sections 1962(c) and (d) provide:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debts.

(d) 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(c)-(d).

government need only prove that the individual subject transaction has a de minimis effect on interstate commerce" in order to satisfy § 1962(c)).

An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity." 18 U.S.C. § 1961(4). Racketeering activity includes, among other things, acts prohibited by any one of a number of criminal statutes. 18 U.S.C. § 1961(1). A "pattern" is demonstrated by two or more instances of "racketeering activity" that occur within 10 years of one another. 18 U.S.C. § 1961(5). In this case, the alleged racketeering acts are violations of 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud).

To demonstrate violations of Section 1962(d), Medical Supply must prove: (1) that two more people agreed to violate Section 1962(c), and (2) that the defendant knew of and agreed to the overall goal of the violation. *United States v. Philip Morris Inc.*, 130 F.Supp.2d 96 (D.D.C. 2001).

In the present Motion, Medical Supply seeks partial summary judgment striking certain affirmative defenses of Defendants and on particular issues of law relating to proof of liability. Medical Supply argues first that, as a matter of law, each Defendant is distinct from the alleged RICO enterprise. Second, Medical Supply argues that, as a matter of law, a Defendant's liability for RICO conspiracy under Section 1962(d) does not require proof that such Defendant participated in the operation or management of the alleged enterprise. Finally, Medical Supply argues that, as a matter of law, liability for committing a racketeering act under Section 1962(c) extends to those Defendants who aided and abetted the commission of that act.

A. EACH DEFENDANT IS DISTINCT FROM THE ALLEGED RICO ENTERPRISE

Medical Supply seeks partial summary judgment that each Defendant is distinct from the RICO enterprise.² To establish an enterprise under Section 1962(c), a plaintiff must allege and prove the existence of two distinct entities: (1) a 'person' and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S.158, 161 (2001). In *King*, the Court concluded that a RICO defendant, or 'person', must be distinct from the RICO 'enterprise' that the defendant is associated with or employed by. *Id.* at 161-62.

² Medical Supply seeks summary judgment not on some abstract issue, as Defendants argue, but rather on its request to strike the affirmative defenses denying distinctness. Thus, the Court's conclusion on the distinctness element and is proper under Fed.R.Civ.P. 56.

Regardless of how the enterprise is defined (if at all), Medical Supply has proven the distinctness element in this case. Courts have already held that an "association-in-fact" enterprise can be a group of corporations. See *Philip Morris*, 116 F.Supp.2d at 152-53. Moreover, there is no dispute that each individual Defendant is a separate legal entity or an individual with the capacity of being a RICO person. Thus, if this Court should find an enterprise comprised of at least two of the Defendants, the Defendants will be distinct from the enterprise itself. Of course, Medical Supply must also prove, as it acknowledges, the requirements of the alleged enterprise — common purpose, organization, and continuity — in order to prevail on its RICO claims. *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988)). However, there is no reason to postpone a definitive determination on distinctness.

Accordingly, Medical Supply's Motion for partial summary judgment removing potential affirmative defenses of failure to identify a RICO enterprise separate and distinct from the Defendants themselves should be granted.

B. A DEFENDANT'S LIABILITY FOR CONSPIRACY UNDER 18 U.S.C. § 1962(d) DOES NOT REQUIRE THAT DEFENDANT TO PARTICIPATION THE OPERATION OR MANAGEMENT OF THE ENTERPRISE

In *Salinas*, the Supreme Court held that liability under Section 1962(c) is not a prerequisite to finding liability under Section 1962(d). See *Salinas*, 522 U.S. at 66. In that case, the defendant was charged with criminal violations of Sections 1962(c) and (d) but was convicted on the conspiracy charge alone. In concluding that a RICO conspiracy defendant need not commit a substantive RICO offense under Section 1962(c), the Court explained that "it is sufficient that the [defendant] adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65. The Court noted that RICO's conspiracy section is to be interpreted in light of the common law of criminal conspiracy. See *id.*³ The tenth Circuit stated:

“Because this conspiracy provision lacks an overt act requirement, a defendant can be convicted under § 1962(d) upon proof that the defendant knew about or agreed to facilitate the commission of acts sufficient to establish a § 1962(c) violation. See *Salinas v. United States*, 522 U.S. 52, 63-66 (1997).”

United States v. Smith, No. 03-4240 at pg.1 (Fed. 10th Cir. 7/6/2005) (Fed. 10th Cir., 2005).

³ "If conspirators have a plan which calls for some conspirators to perpetrate a crime and others to provide support, the supporters are as guilty as the perpetrators ... so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators." *Salinas*, 522 U.S. at 64.

Accordingly, one who opts into or participates in a Section 1962(d) conspiracy to violate Section 1962(c) is liable for the acts of his co-conspirators even if that defendant did not personally agree to commit, or to conspire with respect to, any particular one of those acts. *Id.*

This liability for the “passive conspirator” exists notwithstanding *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). Some defendants claim that the law requires a showing of "operation or management of the enterprise" to demonstrate a RICO conspiracy under Section 1962(d). Even though the Supreme Court did hold in *Reves* that, to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs, one must participate in the operation or management of the enterprise itself," the passive conspirator immunity argument fails for the following reasons.

First, *Reves* involved a Section 1962(c) substantive RICO offense not a Section 1962(d) RICO conspiracy offense. In *Reves*, the Supreme Court held that an accounting firm could not be liable under Section 1962(c) for incorrectly valuing a farm cooperative's assets listed on its financial statements. *Reves*, 507 U.S. at 179. The Court reasoned that the firm had not "conduct[ed] or participated ... in the conduct" of the enterprise's affairs because it did not participate in the "operation or management of the enterprise itself." *Id.*

All circuits but the Ninth have concluded that *Reves* addressed only the extent of conduct or participation necessary to violate Section 1962(c), and did not address the principles of conspiracy law under Section 1962(d).⁴ See *Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001); *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998); *Napoli v. United States*, 45 F.3d 680, 683-84 (2d Cir. 1995); *MCM Partners, Inc. v. Andrews-Bartlett & Assoc.*, 62 F.3d 967, 979 (7th Cir. 1995); *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995); *United States v. Quintanilla*, 2 F.3d 1469, 1485 (7th Cir. 1993) ("to hold that under section 1962(d) the government must show that an alleged coconspirator ... participated to the extent required in *Reves* would add an element to RICO conspiracy that Congress did not direct"). The tenth Circuit stated:

⁴ As noted, only the Ninth Circuit has ruled that *Reves*' "on or management" test applies to RICO conspiracy charges. See *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1128-29 (9th Cir. 1997). However, *Neibel* was decided before *Salinas*, and the Ninth Circuit has not yet revisited its ruling. Moreover, *Neibel* relied upon *United States v. Antar*, 53 F.3d 568, 581 (3d Cir. 1995), another pre-*Salinas* decision, which the Third Circuit subsequently ruled was no longer good *Smith v. Berg*, 247 F.3d at 534.

"[T]he word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required." *Reves II*, 507 U.S. at 179, 113 S.Ct. at 1170 (footnote omitted). *Id.* (footnote omitted). Outsiders, such as the Title Companies, who are associated with a RICO enterprise and participate in the operation or management of the enterprise may also be liable under 1962(c). *Reves II*, 507 U.S. at 185, 113 S. Ct. at 1173."

BancOklahoma Mortgage Corp. v. Capital Title Co. Inc., 194 F.3d 1089, 1100 (10th Cir. 1999).

Thus, *Reves*' "operation or management" standard applies only to substantive RICO offenses under Section 1962(c) and not to a conspiracy to violate RICO under Section 1962(d).

Second, after *Reves*, the Supreme Court specifically set forth in *Salinas* the standard for liability under Section 1962(d). See *Salinas*, 522 U.S. at 65. Such conspiracy liability requires a showing that: (1) two or more people agreed to commit a substantive RICO offense, and (2) the defendant knew of and agreed to the overall objective of the violation. *Id.*; See *Posada-Rios*, 158 F.3d at 857 (citing *Salinas*); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000) (same). There can be no question that the Supreme Court was aware of its decision in *Reves* when it decided *Salinas*, and there is nothing inconsistent between the two decisions.

Thus, reading *Reves* and *Salinas* together, it is clear that a defendant may be held liable for conspiracy to violate Section 1962(c) if it knowingly agrees to violate the elements of Section 1962(c), one of which is the "operation or management" of a RICO enterprise.⁵ However, liability for a RICO conspiracy under Section 1962(d) does not require the same proof of participation in the "operation or management" of the alleged RICO enterprise, just as it does not require proof of commission of all the

⁵ Relying upon *Beck v. Prupis*, 529 U.S. 494 (2000), Defendants could assert that *Salinas* is irrelevant for the purpose of civil RICO claims. *Beck* involved a chief executive officer whose employment was terminated when he discovered that certain of his company's officers were engaged in racketeering. The Court ruled that the termination, allegedly in furtherance of a RICO conspiracy, was not independently wrongful under any substantive RICO provision and did not give rise to a cause of action under Section 1962(c). In *Beck*, the only mention of *Salinas* appears in a footnote:

"[w]e have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation." *Beck*, 529 U.S. at 501 n.6. However, this sentence does not in any way repudiate or undercut the *Salinas* holding. The *Beck* decision turns rather on the injury requirement of Section 1964(c). *Id.* Thus, violations of Section 1962(d) continue to be defined under and governed by *Salinas*.

other elements of the Section 1962(c) substantive offense. *Salinas*, 522 U.S. at 65; see also *Smith*, 247 F.3d at 537.

Accordingly, Medical Supply's Motion for partial summary judgment that a Defendant's liability for RICO conspiracy does not require that Defendant to participate in the operation or management of the enterprise should be granted.

C. WHETHER LIABILITY FOR A PARTICULAR RACKETEERING ACT EXTENDS TO AIDERS AND ABETTORS MUST BE DETERMINED AT TRIAL

To establish a "pattern of racketeering activity" for purposes of Section 1962(c), Medical Supply must show that each Defendant committed at least two acts of racketeering, "the last of which occurred within ten years ... after the commission of a prior racketeering act." 18 U.S.C. § 1961(5). Medical Supply argues that a defendant's liability for a particular racketeering act may be established by proof that the Defendant aided and abetted the commission of that racketeering act. *Pereira v. United States*, 347 U.S. 1, 9 (1954) (a person who aids and abets another in the commission of mail fraud, a violation of § 1341, also violates §1341); *United States v. Shifman*, 124 F.3d 31, 36 (1st Cir. 1997).

Aiding and abetting is no longer applicable to securities fraud under RICO *after Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). In *Central Bank*, the Supreme Court held that there can be no private civil liability for aiding and abetting securities fraud under Section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5. *Central Bank*, 511 U.S. at 185. After examining the language and structure of the Act, the Court concluded that "the text of the 1934 Act does not itself reach those who aid and abet a Section 10(b) violation." *Id.* At 183.

However, the plaintiff does not raise securities law based claims. It is clear from the averments in the complaint that Neoforma, Inc. (NEOF) and Robert Zollars are subject to civil liability under the securities laws to shareholders. Neoforma, Inc. (NEOF) and Robert Zollars have previously defended against shareholder liability lawsuits without disclosing that Neoforma, Inc.'s technology and market potential described in its prospectuses and quarterly reports was compromised against the interests of the company's shareholders in agreements to enforce the artificially inflated prices of the established "bricks and mortar" distributors UHC, VHA and Novation, LLC.

An argument can be made that *Central Bank* eliminates aiding and abetting in non securities fraud based RICO claims. See the discussion of *American Honda Motor Co., Inc., Dealerships Relations Litigation*. 958 F.Supp. 1045 (D. Md. 1997) under Law firm RICO liability *infra*. However in the Tenth Circuit this issue does not yet appear to be resolved against civil aiding and abetting liability and RICO aiding and abetting is still liberally applied in criminal cases.

The Tenth Circuit has clearly set out the elements of aiding and abetting:

“The elements of aiding and abetting are also well-settled. *Jones*, 44 F.3d at 869.[*United States v. Jones*, 44 F.3d 860, 869 (10th Cir. 1995).] Under 18 U.S.C. § 2, the Government must prove beyond a reasonable doubt the defendant: (1) "willfully associate[d] with the criminal venture," and (2) "aid[ed] such venture through affirmative action." *Jones*, 44 F.3d at 869. Mere presence at a crime scene is insufficient to prove aiding and abetting. See *id.* Although knowledge a crime is being committed is relevant, some showing of intent to further the criminal venture must be introduced at trial. See *id.*”

United States v. Delgado-Uribe, No. 03-8003 (10th Cir. 4/13/2004) (10th Cir., 2004). The Tenth Circuit still applies the shared intent standard for aiding and abetting in criminal acts:

“This Court has held that, in order to be convicted of aiding and abetting, a defendant must "share[] in the intent to commit the [underlying] offense." *U.S. v. Thurmond*, 7 F.3d 947, 950 (10th Cir. 1993)...We agree with the First Circuit and therefore conclude that Mr. Vallejos possessed the intent necessary to be found guilty of aiding and abetting a carjacking if he "shared some knowledge" of Mr. Sanchez's intent to commit the carjacking.”

United States v. Vallejos, No. 04-2216 (Fed. 10th Cir. 8/19/2005) (Fed. 10th Cir., 2005). The Tenth Circuit’s most extensive defining of the elements required for aiding and abetting liability is contained in *USA v. Jackson*, 213 F.3d 1269 (10th Cir., 2000)

"Whoever ... aids, abets, counsels, commands, induces or procures [the] commission [of a crime] is punishable as a principal." 18 U.S.C. 2(a). "To be guilty of aiding and abetting the commission of a crime, the defendant must willfully associate himself with the criminal venture and seek to make the venture succeed through some action of his own." *United States v. Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999). *United States v. Smith*, 133 F.3d 737, 742 (10th Cir. 1997) ("To be liable as an aider and abettor under 18 U.S.C. 2, the evidence must establish a defendant associated himself with a criminal venture; participated in the venture as something he wished to bring about; sought by his actions to make the venture succeed; and the evidence must establish both the commission of the offense by someone and the aiding and abetting by the defendant."), cert. denied, 524 U.S. 920 (1998). Thus, the crime of aiding and abetting is a specific intent crime because it requires the defendant to act willfully by participating in the venture and also requires the defendant to have the specific intent to make the venture succeed through his or her acts.”

USA v. Jackson, 213 F.3d 1269 at 1292 (10th Cir., 2000). The Jackson court also discussed the participation requirement for furthering the RICO enterprise:

"[A]cts committed in furtherance of the commission of a crime by another constitute 'abetting.'" *Slater*, 971 F.2d at 632 (citation omitted). "Participation in the criminal venture may be established

by circumstantial evidence and the level of participation may be of 'relatively slight moment.'" *United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997).

In *Slater*, we rejected the same argument raised by Mr. Jackson and pointed out one

"may 'abet' the crime of possession with intent to distribute by procuring the customers and maintaining the market in which the possession is profitable, even though you do nothing else to help the possessor get or retain possession. Middlemen aid and abet the offense of possession with intent to distribute."

971 F.2d at 632 (quoting with approval *United States v. Wesson*, 889 F.2d 134, 135 (7th Cir. 1989)). Furthermore, if we were to hold one cannot be convicted of aiding and abetting the possession of a controlled substance with the intent to distribute without proving possession, this would be tantamount to holding one cannot be convicted of aiding and abetting without committing the principal offense. Such a result would dismantle the crime of aiding and abetting. *Id.* at 632-33.

While the government must show that a defendant engaged in two or more predicate acts to state a claim under one of RICO's substantive provisions (Section 1962(a), (b), or (c)), Salinas rejected such a requirement with respect to RICO's conspiracy provision (Section 1962(d)), Philip Morris, 130 F.Supp.2d at 99, although it did not specifically address the role of the Reves' "operation or management" test in assessing liability under Section 1962(d)."

USA v. Jackson, 213 F.3d 1269 at 1299 (10th Cir., 2000).

Accordingly, RICO aiding and abetting liability is appropriately defined and does not have to be determined at trial. Medical Supply's Motion for partial summary judgment that a Defendant's liability for RICO aiding and abetting liability does not have to be determined at trial.

D. WHETHER A LAW FIRM IS IMMUNE FROM CIVIL RICO CLAIMS.

The defendants have argued that the defendant Shughart Thomson and Kilroy is immune from liability as a RICO defendant. While no law supporting this assertion has been advanced, it would appear from the renewed motions to dismiss and motions to sanction Medical Supply and its attorney that law firm RICO liability is an issue to be resolved in this action.

Medical Supply researched its claims before filing its complaint in the Western District of Missouri and found that the Eight Circuit had resolved the issue of whether an inherent civil immunity to private RICO liability existed for law firms. There is no immunity and a law firm is properly a RICO defendant.

1. Claims against Law Firms under Section 1962(c) and (d)

The law firm sued for RICO violations in *Handeen v. Lemaire* 12 F.3d 1339 (8th Cir. 1997) represented a client who had been convicted of aggravated assault. The victim of the aggravated assault had obtained a civil judgment against the client. The attorneys counseled the client and his family to avoid liability on the judgment by filing bankruptcy and then inflating his debts and concealing earnings. The victim sued the family and the law firm under RICO, alleging that they had violated section 1962(c) by

conducting the affairs of the bankruptcy estate (the enterprise) through a pattern of racketeering activity. The district court dismissed the RICO claims (as well as related state law causes of action). The Eighth Circuit reversed.

The *Handeen* court conceded that after *Reves*, RICO liability did not attach to those who furnished a client (even one engaged in a RICO enterprise) "with ordinary professional assistance" and that "RICO is not a surrogate for professional malpractice actions." *Id.* at 1348. Nevertheless, the court found that *Reves* did not insulate the law firm from liability from RICO where the firm, in representing its clients in a bankruptcy proceeding, allegedly directed the clients to create false promissory notes and other sham debts to dilute the estate; defended the family's fraudulent claims against objections; prepared filing and schedules with the court which contained erroneous information; formulated and promoted fraudulent repayment plans; participated in a scheme to conceal the client's new job (and increased earnings); and otherwise controlled the bankruptcy estate to permit the client to avoid the judgment against him. *Id.* at 1350.

"[T]his would not be a case where a lawyer merely extended advice on possible ways to manage an enterprise's affairs . . . Instead, if the Firm truly did associate with the enterprise to the degree encompassed by the Complaint, we would not hesitate to hold that the attorneys "participated in the core activities that constituted the affairs of the [estate]. . ."

Id. A multidistrict proceeding arose as a result of allegations that high level executives of American Honda received kickbacks from various dealers in exchange for favors, primarily increased allocates of automobiles or the award of new dealerships, in *American Honda Motor Co., Inc., Dealerships Relations Litigation*. 958 F.Supp. 1045 (D. Md. 1997). The claims were not dissimilar to Medical Supply's claims against the defendants for monopolizing hospital supplies through kickbacks from manufacturers and bribes paid to hospital administrators. Included among the defendants was the law firm of Lyon & Lyon, which was accused of participating in the concealment of the illegal scheme. The plaintiffs asserted RICO violations under section 1962(c) based on acts of alleged mail fraud arising from the mailing of false statements that American Honda would deal with the plaintiffs fairly and distribute Honda products to them in a fair and reasonable manner.

The plaintiffs alleged that Lyon & Lyon was not only American Honda's general counsel but also had attorneys serving as voting directors of the company. Lyon & Lyon conducted training sessions at sales meetings and handled allegations of misconduct, including conflict of interest complaints involving

dealers or potential dealers. The plaintiffs alleged that after Lyon & Lyon received dealer complaints about the kickback scheme, it took action s to conceal the scheme, amounting to obstruction of justice. Lyon & Lyon attorneys allegedly counseled witnesses to give evasive or incomplete testimony and intentionally limited an investigation of the kickback allegations by not interviewing key witnesses. Lyon & Lyon attorneys also allegedly directed American Honda to make false and misleading assertions about the results of its investigation in a hearing. *Id.* at 1056-57.

Lyon & Lyon's motion to dismiss the section 1962(c) claim against it was denied. In denying the motion, the American Honda court initially found that Lyon & Lyon had a sufficient role in the enterprise's activities to satisfy the Reves "operation or control" test:

[F]or over ten years Lyon & Lyon took on the responsibility of pretending to enforce American Honda's conflict of interest policy and of not following up on dealer complaints in order to perpetuate the kickback scheme. Concealment is a necessary element of any ongoing illegal activity, and a person who is in charge of the coverup plays an operational and management role in the enterprise conducting that activity.

Id. at 1057. However, the American Honda court did not feel that Lyon & Lyon's participation in the management of the racketeering enterprise was in and of itself sufficient to impose RICO liability on the law firm. It is not enough, however, for a defendant to have 'conduct[ed] or participate[d] directly or indirectly, in the conduct of [an] enterprise's affairs' in order for him to be held liable under § 1962(c). He also must have done so 'through a pattern of racketeering activity.'" *Id.* The American Honda court noted that the predicate acts of racketeering charged by the plaintiffs were acts of mail fraud, and that Lyon & Lyon did not mail any of the fraudulent materials involved. *Id.* Moreover, the court did not dispute the "conventional wisdom that feels that aiding and abetting liability under § 1962(c) does not survive the Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver...*" *Id.* at 1057-58.

Nevertheless, the American Honda court concluded that "[t]his does not mean, however, that aiding and abetting principles do not apply in considering whether a defendant has participated in the enterprise 'through a pattern of racketeering activity,' *i.e.*, whether he has committed at least two predicate acts." *Id.* at 1058. Rather, where a person involved in the management or control of a racketeering enterprise aids and abets in the commission of predicate acts, the person faces liability under § 1962(c), because a distinction must be made between aiding and abetting a violation of section 1962(c) (an offense

which does not survive the holding of *Reves* and *Central Bank of Denver*) and aiding and abetting in the commission of a substantive offense constituting a predicate act.

“Unless the distinction is recognized, in most cases there would be no principled basis for imposing § 1962(c) liability upon a class of defendants whom Congress surely intended should be within the statute's purview: leaders of enterprises who do not themselves commit predicate acts but who cause others to do so. *Id.*

..

Although Lyon & Lyon may only have aided and abetted the commission of the predicate acts of mail fraud, as indicated above its management role in concealing the scheme is sufficient to meet the "operation and management" test of *Reves*. Plaintiffs have therefore stated a viable § 1962(c) claim against Lyons & Lyons.”

American Honda Motor Co., Inc., Dealerships Relations Litigation. 958 F.Supp. 1045 at 1059 (D. Md. 1997). *American Honda* thus suggests that the concealment of a pattern of racketeering by one who also exercises some element of control over the racketeering enterprise is sufficient to impose section 1962(c) liability.

2. Conspiracy Claims against Law Firms under Section 1962(c) and (d)

Where a plaintiff is able to establish that the professional conspired by agreeing to commit at least two predicate acts of racketeering in violation of section 1962(d), the plaintiff may be able to state a RICO violation even without satisfying the "operation or management" standard enunciated in *Reves* as required for a claim under section 1962(c). Medical Supply's complaint avers Shughart Thomson & Kilroy's control over the RICO acts designed to protect and conceal the enterprise's ongoing scheme to artificially inflate prices of hospital supplies in the national market in furtherance of the defendants' scheme to overcharge Medicare, Medicaid and Champus.

Obviously, to the extent that Medical Supply's artful pleading avoids dismissal of a section 1962(d) conspiracy claim against an outside professional firm who cannot be held liable under section 1962(c) because he or she has no voice in directing the affairs of the enterprise, the protections of *Reves* may be severely curtailed.

"[C]ourts risk eviscerating *Reves* by blanketly approving conspiracy convictions when substantive convictions under section 1962(c) are unavailable . . . As one commentator has explained, '[i]f Congress' restriction of section 1962(c) liability to those who operate or manage the enterprise can be avoided simply by alleging that a defendant aided and abetted or conspired with someone who operated or managed the enterprise, *Reves* would be rendered almost nugatory.'"

United States v. Antar, 53 F.3d 568, 580-82 (3d Cir. 1995) (citing Smith and Reed, Civil RICO, § 504 at 5-39 (1994)). However, the extent of Medical Supply's allegations against Shughart Thomson and

Kilroy reveal the law firm was the primary agency in securing the objectives of the unlawful enterprise in artificially inflating hospital supply prices for another three years. The complaint alleges the law firm conspired with other defendants in the cartel and was the architect of the racketeering campaign against Medical Supply's legal representation outside of court and also the extra legal influence over the Kansas District Court and the Tenth Circuit.

3.The Parallel to Shook Hardy & Bacon's Tobacco RICO Conduct

Medical Supply's allegations against Shughart Thomson & Kilroy closely parallel the nature of unlawful racketeering acts committed by Shook Hardy and Bacon LLP and described by US Department of Justice. U.S. Justice Department attorneys alleged lawyers from Shook Hardy & Bacon LLP acted with "fraudulent intent" in past efforts to protect cigarette manufacturers from lawsuits. Post-trial documents filed Aug. 15 and Aug. 24 in a civil racketeering case against tobacco companies mention at least 15 Shook Hardy lawyers by name and refer to the firm more than 250 times.

A September 2, 2005 Kansas City Business Journal print edition article quoted the Notre Dame Law School professor G. Robert Blakey who stated the government's many mentions of the lawyers in the case are "an indication they could have sued them," "Lawyers should not be above the law, but in practice they are," He said tobacco lawyers were defendants in just two of the 50 states' cases against tobacco companies. Professor Blakey said it's routine practice to excuse lawyers from conspiracy suits, in part because of the extra cost of litigating against a law firm's defenses. Professor G. Robert Blakey's comments as printed in the Kansas City Business Journal are however critical of the US Department of Justice for not including the private law firm or its attorneys as civil defendants, saying: "It's an indefensible practice," and "It's indefensible if lawyers could have been sued but they were not." See "U.S. attorneys take some shots at Shook Hardy" Mark Kind, Kansas City Business Journal - September 5, 2005 Exb 1.

Because of the continuing racketeering conduct directed at Medical Supply and its counsel by Shughart Thomson & Kilroy, Medical Supply had to name Shughart Thomson & Kilroy as a defendant even at the cost of the diversity jurisdiction that would have guaranteed all of its claims are resolved in federal court. The racketeering controlled and furthered by Shughart Thomson & Kilroy's employees, past employees and agents has denied Medical Supply access to the US Supreme Court and is in imminent danger of depriving Medical Supply of its counsel.

The US Department of Justice's Proposed Findings of Fact and Post Trial Brief reveal that the attorneys including those of the law firm Shook Hardy and Bacon, representing the tobacco companies expanded litigation fraud to even controlling the nation's scientific research relating to tobacco for the purpose of conducting and furthering the goals of the unlawful enterprise. The US Justice Department's Post Trial Brief summarizes the RICO conduct of the tobacco companies in a way that makes it clear that the essential controlling agency and chief instrument of furthering the RICO enterprise were the management of the fraud by law firms including Shook Hardy and Bacon.

“As indicated previously, however, litigation exposure was not the only reason for the suppression of scientific information. See Wigand WD, 80:24-81:5. The suppression also acted to directly support Defendants' enterprise by utilizing numerous means of concealing information that would have allowed the American public to learn the truth about smoking, both its addictiveness as well as its negative health consequences.

- First, Defendants destroyed documents to prevent them from being released outside of the companies. See, e.g., US 21677 (O) (RJR scientists confirm they will remove documents from the research and development files if it becomes clear the documents will expose RJR in litigation); US 34839 (A) at 3682 (in notes of a BATCo meeting in 1986 it was reported that research documents would be destroyed under the guise of “spring cleaning”).

- Second, Defendants encouraged their employees, particularly scientists, not to create documents that contained sensitive information, particularly information related to smoking and health and addiction. BATCO and B&W implemented the “mental copy rule” to prevent the creation of sensitive documents. The “mental copy” rule asked employees to “imagine that the memo, note or letter you are about to write will be seen by the person that you would least like to read it.” The employee is then to “send a ‘mental copy’ of your document to a newspaper, one of your competitors, a government agency, or potential plaintiff. Now: would you still write the memo? If so -would you still write it in the same way?” US 87012 at 4434 (A). See also, US 87003 at 1805-1806 (O) (setting forth Philip Morris's company policy encouraging employees not to create sensitive documents because they may one day have to answer for the contents of the document “while sitting in a witness chair in a court room in a lawsuit”).

- Third, Defendants employed lawyers to review and edit scientific documents to ensure that no contentious information was included in company files. See, e.g., US FF § III.E, ¶¶ 5116-5127, 5184-5221.

- Fourth, Defendants established company policies to ship or secret scientific information outside of the United States. For example, Philip Morris established a foreign research facility known as INBIFO and established company policies to prevent research documents from the foreign research facility from entering or being kept in the United States. Farone WD, 21:16-22:9, 147:11-152:15; Farone TT, 10/07/04, 1938:2-1939:16. Similarly in 1994, Tommie Sandefur, the CEO and Chairman of B&W ordered that its sister companies around the world stop sending research materials to the United States. Read PD, U.S. v. Philip Morris, 05/01/02, 178:5-16, 179:2-181:4; (US 47616) (A); Read TT, 3/22/05, 16437:22-16441:12.

- Fifth, Defendants employed company lawyers as repositories or conduits for scientific documents in an attempt to shield documents from production, even though they were not truly protected by the attorney-client privilege. One of the most notorious of these arrangements involved the shipment of BATCo documents to B&W through outside counsel by the name of Robert Maddox. See US FF § III.E(3), ¶¶ 5136-5179.”

US Department Of Justice Post Trial Brief Exb 3 Page 85-86. The brief is informed of the outside professional liability requirement of control or management of the unlawful enterprise and it is clear that discovery and trial testimony revealed outside lawyers committed conduct meeting the liability standard:

”And as the Court is well aware, Defendants utilized their outside lawyers to further the goals of the Enterprise, including attorneys such as Janet Brown at Chadbourne & Parke, John Rupp at Covington & Burling, Andrew Foyle at Lovells, and others at Shook, Hardy & Bacon, Jones Day, and other firms.”

US Department Of Justice Post Trial Brief Exb 3 Page 12. Like Sam Lipari and his counsel Bret Landrith (see affidavit of Sam Lipari Exb. 8), key witnesses were made to fear for their lives in the defense firm efforts to obstruct justice:

“Defendants also seek to have the Court make an affirmative finding that Robert McDermott of Jones Day and Lee Stanford of Shook, Hardy and Bacon acted appropriately in their conversations with Dr. Huber before his 1997 deposition. JD FF, ch. 3, ¶ 547. The Court should reject Defendants’ request. Dr. Huber specifically testified that McDermott and Stanford implied to Huber that he did not “fully appreciate the full weight of Shook, Hardy & Bacon and Jones Day” representatives of the tobacco industry; the calls caused Huber to fear for the safety and financial security of his family. Huber PD, Texas v. American Tobacco, 9/20/97, , 101:4-8, 10-21.”

US Department Of Justice Post Trial Brief Exb 3 FN 22 Page 44.

Another parallel with the Medical Supply litigation is the role defense law firms directly played in cutting Medical Supply’s access to financial inputs in order to starve out the cartel’s opposition and prevent the litigation from being funded. A critical role of defense counsel in furthering the unlawful enterprise was in cutting off funding to projects that the Tobacco defense perceived as a threat:

“Defendants’ use of biased research for public relations and litigation purposes is well documented in the form of funding for CTR Special Projects, CIAR Applied Studies, and other Defendant-financed research initiatives such as ETS consultants recruited and managed by Covington & Burling and Shook, Hardy & Bacon. See US FF §§ I, III.A(1), III.A(2) and III.B. Evidence also unequivocally demonstrates Defendants’ successful efforts to terminate funding that they found threatening to the Enterprise. For example:

- When researchers at Microbiological Associates made progress with inhalation research funded by CTR, Defendants expressed dire concern. Philip Morris scientist Thomas Osdene wrote: “I am forced of the opinion that the program seems to be misdirected since its main mission seems to be to prove that smoking causes cancer.” US 24708 at 3038 (O). Defendants discontinued their funding and, before publication of results from the work, manipulated the report from the scientists involved and added an introduction that omitted the scientists’ conclusion that there was carcinogenic response in animals after exposure to cigarette smoke. See US FF § III.B(2)(ii)(bb).

- Dr. Gary Huber performed research at Harvard University pursuant to a contractual agreement with B&W, Liggett, Lorillard, RJR, and Philip Morris, and produced humantype diseases in the lungs of animals that inhaled cigarette smoke. After Huber reported to his tobacco company sponsors that his research demonstrated a response to inhaled cigarette smoke, including disease mechanisms similar to those associated with diseases in humans, Defendants cut off funding to Huber. In a 1980 meeting at a Boston hotel, Defendants’ attorneys told Huber that the reason funding for his research had been discontinued was because he was “getting too close to some things.” See generally Huber PD, Texas v. American Tobacco, 9/20/97; US FF § III.A. As the Court is well aware, Defendants subsequently fought to

keep the Huber story from the public by first, urging to “keep the faith, to hold the line,” when he was subpoenaed for deposition in 1997, and then employing every strategy at their lawyers’ disposal to keep the deposition under seal. Seven years after Huber’s deposition, the United States was finally able to obtain the transcript, over vigorous opposition by Defendants, by initiating a court action in the Eastern District of Texas. In re United States’ Motion to Modify Sealing Orders, 5:03MC-2 (E.D. Tex. June 8, 2004).”

US Department Of Justice Post Trial Brief Exb 3 Page 43-44.

Conversely, the Department of Justice’s proposed finding of facts illustrate that the law firms identified as RICO co-conspirators including Shook Hardy and Bacon directed financing so that projects that would further the unlawful enterprise and perpetuate the deception and death causing fraud received funds:

“Attorneys at Jacob, Medinger & Finnegan and Shook, Hardy & Bacon kept the Committee of Counsel apprised of the status of CTR Special Projects and also made recommendations to Defendants’ General Counsel and to each other as to whether projects should be conducted through CTR Special Projects. TIMN261386-1387 (US 21288) (A); 1005048374-8374 (US 35939) (A). See also Lisanti PD, Arch v. American Tobacco, 6/10/97, 80:9-81:19, 82:10-19.”

US Department Of Justice Proposed Findings of Facts Exb 2 ¶ 289. Also paralleling medical Supply’s experience with Shughart, Thomson & Kilroy, the Justice Department described Shook, Hardy & Bacon’s advice, guidance and direction to defendant corporate counsel to deliberately commit fraud in publicized research and to misrepresent the law:

“For example, on May 19, 1967, William Shinn of Shook, Hardy & Bacon, sent a letter to Alexander Holtzman, Philip Morris General Counsel, regarding CTR Special Projects, outlining a proposal to support and publicize research advancing the theory of smoking as beneficial to health as a stress reducer, even for "coronary prone" persons; representing that stress (rather than nicotine addiction) explains why smoking clinics fail; and proposing to publicize the "image of smoking as 'right' for many people . . . as a scientifically approved 'diversion' to avoid disease causing stress." 1005083882-3882 (US 20204) (O).

US Department Of Justice Proposed Findings of Facts Exb 2 ¶ 290. Unfortunately, our legal system that could not justly resolve the misconduct of tobacco firms for decades is pretty hard wired for resolving the intentional false statements given investors in the publicly traded NASDAQ stock Neoforma, LLC (NEOF) and our legal system will also quickly allow hospitals to recover funds fraudulently placed in Novation LLC by VHA and UHC. The outside law firm coordinating the defense ends up approving or disproving funding commitments in the same way GE and Jeffrey Immelt were directed by the unlawful cartel’s legal defense (including chief counsel for the separate non defendant GE Medical Inc, and the Chief Counsel for GHX, LLC) not to honor GE’s real estate contract with Medical Supply:

“On June 3, 1986, Patrick Sirridge of Shook, Hardy & Bacon sent a letter to the following General Counsel: Alexander Holtzman of Philip Morris; Wayne Juchatz of Reynolds; Josiah Murray

of Liggett; Ernest Pepples of B&W; Paul Randour of American; and Arthur Stevens of Lorillard, recommending approval for additional funding of Henry Rothschild through CTR Special Projects. 507878840-8840 (US 20802) (A).”

US Department Of Justice Proposed Findings of Facts Exb 2 ¶ 292. The Justice Department’s brief on page 86 reveals why Medical Supply was required to make Shughart Thomson & Kilroy a defendant and why Notre Dame Law School Professor G. Robert Blakey faults the DOJ for not making Shook, Hardy and Bacon defendants in the tobacco litigation:

“Joint Defendants’ Proposed Findings suggest that the United States’ claims of suppression of information fail because the evidence adduced at trial represented only disparate actions taken by individual Defendants, not concerted actions by the Defendants taken together. See, e.g., JD FF, ch. 8, ¶¶ 811, 934. First, this assertion is simply wrong. The evidence at trial confirms that many of the actions to suppress information were joint efforts by all of the Defendants through the Committee of Counsel, through other joint organizations, or through Defendants’ law firms, including Covington & Burling and Shook, Hardy & Bacon. Second, Defendants apply a legal standard that does not exist. There is no requirement that each and every action taken in furtherance of the enterprise involve more than one Defendant. It is sufficient that the acts of suppression and destruction were undertaken in furtherance of the goals of the Enterprise (chiefly, denying causation and addiction and seeking protection against legal judgments). Contrary to Defendants contention, **no Court has held that a racketeering act must be “engaged in jointly by Defendants” to constitute a racketeering act that is actionable under RICO. Instead, it has long been the law under RICO that “it is irrelevant that each Defendant participated in the enterprise’s affairs through different, even unrelated crimes, so long as [the fact finder] may reasonably infer that each crime was intended to further or [was related to] the enterprise’s affairs.”** *United States v. Elliot*, 571 F.2d 880, 902-03 (5th Cir. 1978). Moreover, **acts taken in furtherance of the Enterprise, even before an individual Defendant joined the conspiracy are actionable under Section 1962(d) if they further the objectives of the Enterprise.** *Salinas v. United States*, 522 U.S. 52, 63-64 (1997).”[Emphasis added]

US Department Of Justice Post Trial Brief Exb 3 Page 86. The Justice Department argues that the findings of fact force a conclusion that the law firms themselves had the requisite fraudulent intent because individuals at these law firms and other entities undertook actions that were intended to protect against disclosure of Defendants’ fraudulent scheme and actions to promote its unlawful objectives. This argument is equally applicable to Shughart Thomson & Kilroy through their lawyer Andrea DeMarea fraudulently making a Kansas Disiplinary complaint against Medical Supply’s counsel Bret Landrith when his former managing and employing partner, now Magistrate James P. O’Hara’s sabotage of the African American James Bolden’s civil rights case and altered testimony was failing to remove medical Supply’s representation. The purpose of the defendant Shughart Thomson & Kilroy’s action was clearly to starve out Medical Supply’s counsel by fixing other unrelated cases and to cause his disbarment all in a deliberate ongoing scheme to prevent the defendants’ unlawful hospital supply cartel from being exposed and to

promote the cartel's continued ability to steal money from Medicare, Medicaid and Champus through false claims:

“Further, there is substantial undisputed evidence in the record that over the years, numerous executives and scientists of Defendants participated actively in the oversight and control of industry activities that were undertaken in execution of and in furtherance of the fraudulent scheme. These include, for example, the Chief Executive Officers of Philip Morris, Reynolds, B&W, Lorillard, American, and Liggett who served on the Board of Directors and/or the Executive Committee of the Tobacco Institute; the General Counsels of the Cigarette Company Defendants who were members of the Committee of Counsel; the Boards of Directors of CTR and CIAR, both of which were comprised of employees of Defendants; and the numerous other bodies whose structures, functions, and activities are described throughout the United States' Findings of Fact. See, e.g., US FF §§ I.B (CTR) & I.C (Tobacco Institute).

Similarly, the evidence shows that members of the Enterprise who are not Defendants in this case – including law firms such as Shook, Hardy & Bacon and Covington & Burling, and other agents of Defendants – also possessed the requisite fraudulent intent. **Individuals at these law firms and other entities undertook actions that were intended to protect against disclosure of Defendants' fraudulent scheme and actions to promote its unlawful objectives.** The evidence of this is identified throughout the United States' Findings.” [Emphasis added]

US Department Of Justice Post Trial Brief Exb 3 Page 106.

Accordingly, law firms have no special immunity for acts of fraud and racketeering. This court should summarily resolve that Shughart, Thomson & Kilroy has the capacity to be a RICO person.

CONCLUSION

Whereas the plaintiff has in its supporting memorandum shown that the controlling authority for our jurisdiction defines each defendant under the facts averred in the complaint to be distinct from the RICO enterprise, that a defendant's liability for RICO conspiracy does not require that defendant to participate in the operation or management of the enterprise, that RICO liability extends to aiders and abettors and that the law firm Shughart, Thomson & Kilroy, Watkins, Boulware, P.C. (Shughart, Thomson & Kilroy) is properly a RICO Defendant, the plaintiff Medical Supply respectfully requests the court grant this partial summary judgment.

Respectfully Submitted

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Certificate of Service

I certify that on September 6th, 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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