

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

MEDICAL SUPPLY CHAIN, INC.,	)
<i>Plaintiff,</i>	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
<i>Defendants.</i>	)

**MOTION FOR RECONSIDERATION OF ORDER TRANSFERRING VENUE**

Comes now the plaintiff Medical Supply Chain, Inc. and makes the above captioned motion for reconsideration of the court’s order transferring this action to Kansas District court. Plaintiff respectfully makes this motion for the following reasons:

1. US Supreme Court and Eighth Circuit controlling authority states that bringing new claims against the same and additional defendants creates new causes of action. Under *Lawlor v. Nat'l Screen Services*, 349 U.S. 322 (1955), "the conduct presently complained of was all subsequent to the . . . [previous] judgment." *Id.* at 328, 330. Moreover, additional defendants were named (*Id.* at 325) and new antitrust violations were alleged. *Id.* at 328. See also *Wilford Banks v. International Union Electronic, Electrical*, No. 03-3982 at pg. 5-6 and fn 2 (Fed. 8th Cir. 12/3/2004) (Fed. 8th Cir., 2004)( distinguished from *Lawlor* on other grounds ) and *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 at pg. 36 (C.A.8 (Mo.), 1964).

2. The US District Court for the Western District of Missouri has declined to exercise clearly mandated federal jurisdiction “[A]n adverse party may, **by bringing a new proceeding**, invoke the power of the courts to scrutinize the conduct of the parties in the previous action. *Marshall v. Holmes*, 141 U.S. at

599, 12 S.Ct. at 65, quoting *Johnson v. Waters*, 111 U.S. 640, 667, 4 S.Ct. 619, 633, 28 L.Ed. 547 (1884)” [emphasis added] *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895 at 901 (C.A.2 (N.Y.), 1985).

3. The Western District of Missouri’s transfer of the present action to the District of Kansas where the plaintiff’s Chief Executive Officer was retaliated against and where the plaintiff was deprived of counsel for a US Supreme Court review and the defendants are as averred in the complaint, seeking the disbarment and removal of Medical Supply’s trial counsel is adverse to justice. The court is in error when it places the interest of the District of Kansas in controlling Medical Supply current case over the interests of the plaintiffs and the defendants who as averred in the complaint were also harmed as a result of the District of Kansas’s earlier decisions. No evidence was heard in the Kansas cases and the Kansas court has no special knowledge regarding the parties or these claims.

4. The plaintiff’s only remedy to the conduct occurring in the Kansas District court was appeal, and for making an appeal where the trial court abused his discretion, the plaintiff’s counsel was *sua sponte* sanctioned with the harshest penalty available to the court-double costs and attorney’s fees in excess of \$23,000.00 which the plaintiff’s counsel, ineligible to represent Medical Supply in the US Supreme Court due to the disciplinary actions of the defendants now appeals in forma pauperis. This clearly shows the ends of justice are defeated by placing the current action in a district where even appealing a clear error regarding a federal statute’s express language is punished and the parties representatives will not be able to advocate for their clients without fear.

5. The plaintiff’s complaint is crafted for a jurisdiction following federal law of notice pleading, the plaintiff would be deprived of it claims if transferred to the District of Kansas.

#### **ARGUMENTS IN SUPPORT OF MOTION FOR RECONSIDERATION**

A motion to reconsider gives the court an opportunity to correct manifest errors of law or fact and to review newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985), cert. denied, 476 U.S. 1171, 106 S.Ct. 2895, 90 L.Ed.2d 982 (1986). A motion to reconsider is appropriate if the court has obviously misapprehended a party's position, the facts, or mistakenly has decided issues not presented for determination. See *Refrigeration Sales Co. v. Mitchell-Jackson, Inc.*, 605 F.Supp. 6, 7 (N.D.Ill.1983), *aff'd*, 770 F.2d 98 (7th Cir.1985).

The court's decision to transfer the action to the District of Kansas observes that the facts of the current action are almost like those pled in the earlier Kansas action against the US Bancorp defendants. It would be an abuse of discretion based on an error of law to find that res judicata or collateral estoppel applies to the earlier action in the Kansas jurisdiction where the first action was brought. See *Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001) ("A district court abuses its discretion if it commits an error of law."). In Kansas, the law of res judicata and claim preclusion parallels *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122:

"The court first noted that the doctrine of res judicata has two aspects: claim preclusion and issue preclusion and stated that under the claim preclusion aspect of res judicata:

"An issue is res judicata when four conditions concur: (1) identity in the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made. [Citation omitted.]" 242 Kan. at 690, 751 P.2d 122.

The *Jackson Trak Group, Inc.* court also stated:

"Under Kansas law, collateral estoppel may be invoked where the following is shown: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment, (2) the parties must be the same or in privity, and (3) the issue litigated must have been determined and necessary to support the judgment. [Citation omitted.]" 242 Kan. at 690-91, 751 P.2d 122.

In order to invoke the doctrine of res judicata or collateral estoppel, all of the elements must be met.

*Hawkinson v. Bennett*, 265 Kan. 564, 962 P.2d 445 at 465 (Kan., 1998). The current action does not include all the elements required for preclusion. The Kansas case *Jackson Trak Group By and Through Jackson Jordan, Inc. v. Mid States Port Authority*, 751 P.2d 122 disposes of all arguments and defenses raised by the defendants under the law of the jurisdiction this court seeks to transfer Medical Supply's action to:

#### **A. No Preclusion Where the Kansas District Court Expressly Declined Jurisdiction**

"We note, however, that the doctrine of res judicata is held not to apply to issues raised in the previous case which were not decided by the court or jury. Hence, the doctrine of res judicata does not preclude relitigation of an issue raised by the pleadings in the prior action, but not considered either by stipulation of the parties or otherwise. More importantly, a judgment is not res judicata as to any matters which a court expressly refused to determine, and which it reserved for future consideration, or which it directed to be litigated in another forum or in another action. *American Home Assur. v. Pacific Indem. Co., Inc.*, 672 F.Supp. 495 (D.Kan.1987); 46 Am.Jr.2d, Judgments § 419, p. 588-89."

*Jackson Trak Group By and Through Jackson Jordan, Inc. v. Mid States Port Authority*, 751 P.2d 122 at 128, 242 Kan. 683 (Kan., 1988).

#### **B. Action For Injunction Does Not Preclude A Separate Cause Of Action For Damages**

Kansas is even more expressly contrary to the defendants' dismissal arguments than *Lawlor*:

"Further, a suit for an injunction is a separate cause of action from a suit for damages, and therefore res judicata does not preclude a subsequent action for damages. *Thompson-Hayward Chem. Co. v. Cyprus Mines Corp.*, 8 Kan.App.2d 487, 660 P.2d 973 (1983). Here, in the injunction action, the Phillips County District Court properly refused to address the contractual issue of damages for wrongful seizure."

*Jackson Trak Group By and Through Jackson Jordan, Inc. v. Mid States Port Authority*, 751 P.2d 122 at 128, 242 Kan. 683 (Kan., 1988).

### **C. Damages In Contemplation By Both Parties Will Not Be Reduced in Kansas**

Of major concern to the defendants who cannot reasonably deny that Medical Supply was refused the required inputs of capital through escrow accounts and the repudiation of the real estate lease sale is being able to argue that Medical Supply's forward financials which were evaluated and accepted in both refusals to deal is the Kansas venue's utter elimination of the defendant's opportunity to with expert economic testimony reduce future profits damages that were in contemplation by both parties:

Damages recoverable for breach of contract include consequential damages which arise, in the usual course of things, from the breach itself, or as may reasonably be assumed to have been within the contemplation of both parties as the probable result of the breach. *Kansas State Bank v. Overseas Motosport, Inc.*, 222 Kan. 26, 563 P.2d 414 (1977). The important aspect of the recovery of such consequential or special damages under a breach of contract theory is the element of [242 Kan. 695] foreseeability. 22 Am.Jur.2d, Damages §§ 56, 57. In this case, it is certainly foreseeable that the parties would have contemplated damages for loss of use of the equipment if it were wrongfully seized by Mid States and held over a period of time.

*Jackson Trak Group By and Through Jackson Jordan, Inc. v. Mid States Port Authority*, 751 P.2d 122 at 128, 242 Kan. 683 (Kan., 1988).

### **D. Service of Process And Personal Jurisdiction Issues Change in Kansas**

The defendant hospital suppliers and their officers would be subject to uncontestable jurisdiction in Kansas under the state's long arm statutes:

"Any supplier, whether or not a resident or citizen of this state, who in person or through an agent or an instrumentality, engages in a consumer transaction in this state, thereby submits the supplier to the jurisdiction of the courts of this state as to any cause of action arising from such consumer transaction."

*Kluin v. American Suzuki Motor Corporation*, 2002 KS 285 (KS, 2002). In the Kansas District Court case *Ledbetter v. City of Topeka, Kan.*, 112 F.Supp.2d 1239 (Kan., 2000), Judge Murguia ruled that where the head of the municipal corporation City of Topeka received notice via registered mail taken by a person in her office, both the city and its chief executive to be substantively served under Kansas law:

“The record here indicates that plaintiff has effected service of process of defendant Wagnon through substantial compliance with § 60-304(a). Plaintiff served the summons and complaint upon defendant Wagnon at her place of business via certified mail. Plaintiff did not personally serve defendant Wagnon. Instead, the return of service was signed by personnel in defendant Wagnon's office. Although plaintiff did not follow § 60-304(a)'s mandate to first attempt service of process by certified mail at the residence of the defendant, defendant Wagnon received actual notice of the lawsuit. This actual notice is evidenced by defendant Wagnon's answer to plaintiff's complaint filed within 30 days from the receipt of plaintiff's complaint by personnel in defendant Wagnon's business office. See *Vogel v. Missouri Valley Steel, Inc.*, 229 Kan.492, 499, 625 P.2d 1123, 1128 (1981) ("Defendant had actual knowledge of the ... case[] and has shown no prejudice as a result of the alleged irregularity in service."). Although the service of process achieved in this case is not a model to follow, this court finds such service was proper under Kansas law.

Thus, plaintiff achieved proper service of process upon defendant Wagnon. Therefore, defendants' motions to dismiss are denied..”

*Ledbetter v. City of Topeka, Kan.*, 112 F.Supp.2d 1239 at 1245-1246 (Kan., 2000). The *Ledbetter* ruling dispatches the individual defendants' arguments they were not properly served by Medical Supply.

### CONCLUSION

Whereas for the above reasons, including the injustice to both the plaintiff and the defendants upon transfer of this action to the Kansas District Court, the plaintiff Medical Supply Chain respectfully requests the court reconsider its order transferring venue.

Respectfully Submitted

S/Bret D. Landrith

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### Certificate of Service

I certify that on June 27th, 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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