

**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>)

MOTION TO STRIKE NOVATION DEFENDANTS' RENEWED MOTION TO DISMISS

Comes now the plaintiff Medical Supply Chain, Inc. and makes the present motion to strike Novation, LLC, VHA Inc. ,University Healthcare Consortium, Robert Baker And Curt Nonomaque's (the Novation defendants) pleading entitled Renewed Motion To Dismiss Complaint For Failure To State A Claim (Doc. 35) filed 08/09/2005. The plaintiff reserves the right to answer the Novation defendants' second motion to dismiss should this court deny this motion to strike.

1. The defendants Novation, LLC, VHA Inc. University Healthcare Consortium. Robert Baker And Curt Nonomaque had previously filed motions to dismiss.
2. The defendants Novation, LLC, VHA Inc. ,University Healthcare Consortium, Robert Baker And Curt Nonomaque used a motion for sanctions and a memorandum in support to further assert baseless arguments that the plaintiff's complaint should be dismissed.
3. The defendants' Renewed Motion To Dismiss And/Or Strike includes new arguments and authorities that were available to their defense in December 2004 when they received notice of Medical Supply's claims.
4. The Novation defendants renewed motion to dismiss fails to address controlling authority raised by the plaintiff.

5. The Novation defendants renewed motion to dismiss fails to allege any privities or transactions (the word “privity” is not in their supporting memorandum and transaction occurs only once to describe the real estate deal). Tenth Circuit controlling authority requires evidence of privity and evidence the transaction is the same for the affirmative defenses of claim and issue preclusion to apply.
6. Because the affirmative defenses of claim and issue preclusion are evidentiary based and do not entitle a defendant to dismissal on the pleadings.
7. The plaintiff’s much criticized complaint is materially the same in form as the Western District of Missouri Case which met federal standards for pleading antitrust and state law based claims.
8. The plaintiff would be unnecessarily burdened by having to answer the defendants extra dismissal attempts.

MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION TO STRIKE

The defendants’ pleading is a prohibited second Rule 12 motion to dismiss. Palermo, Federal Pretrial Practice: Basic Procedure & Strategy 2001 states at page 21; “Rules 12(g) and 12(h), read together, provide in general, there shall not be more than one Rule 12 motion to dismiss....All defenses and grounds “then available” shall be asserted in the one motion; certain defenses shall be asserted in the Rule 12 motion, or in the initial responsive pleading (or amendment thereof) under threat of waiver.” “Plaintiff’s Complaint, full of irrelevant and unsupported allegations, lacks the factual allegations necessary to plead a right to recovery under any of Plaintiff’s theories of liability.”

The defendants argue that sanctions orders in unpublished decisions in other actions require this court to sanction Medical Supply and or its counsel in this action and the defendants also argue this court should similarly dismiss Medical Supply’s claims against Novation, LLC, VHA Inc., University Healthcare Consortium, Robert Baker And Curt Nonomaque. The dismissals in the actions the defendants cite in support of their assertion Medical Supply’s current claims should be dismissed are under review. Attached is Medical Supply ccounsel’s petition for certiorari in *Bret D. Landrith v. US Bancorp NA et al* Case No. 05-5503. asserting the *sua sponte* sanctioning of Medical Supply for being right about a private cause of action under the USA PATRIOT Act conflicts with rulings in a federal circuit court and the Arkansas Supreme Court. Exb 1.

The decision by Hon. Judge Judge Carlos F. Lucero to reverse the trial court and remand Medical Supply's action against the General Electric defendants for sanctioning because the complaint properly alleged that GE's CEO Jeffrey Immelt committed felonies under the Sherman Antitrust Act in personally restraining trade in the market for hospital supplies. The complaint avers based on published articles that Jeffrey Immelt conspired to keep Web based hospital supply distributors modeled on Medical Supply Chain, Inc. from entering the market and this conduct is unlawful and actionable under the Sherman Antitrust Act.

Hon. Judge Judge Carlos F. Lucero, the opinion's author knows or should know that standing in antitrust, like that under Racketeering Influenced Corrupt Organization (RICO) 18 U.S.C. § 1962 is based on proximate cause. Antitrust claims require only that a plaintiff be in the target area:

"This determination is predicated on the "target area test." *Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1388 (11th Cir.1990). The target area test requires that an antitrust plaintiff both "prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry" and that he is "the target against which anticompetitive activity is directed." *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 608 (11th Cir.1984), cert. denied sub nom., *Patterson v. Buena Vista Distribution Co.*, 474 U.S. 1013, 106 S.Ct. 544, 88 L.Ed.2d 473 (1985). Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market. *Associated General Contractors*, 459 U.S. at 539, 103 S.Ct. at 909."

Florida Seed Co., Inc. v. Monsanto Co., 105 F.3d 1372 at 1374 (C.A.11 (Ala.), 1997). The Tenth Circuit states in clearly controlling precedent that buyers and sellers in the market area have standing. In *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), Cert. denied, 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 399 (1973). the Tenth Circuit confirmed that **buyers and sellers in the defendants' market** are within the target area for relief under the antitrust laws.

Hon. Judge Carlos F. Lucero knew the complaint pled that Jeffrey Immelt was the president of GE Medical, then the CEO of the parent company GE and the founder of the legally separate entity GHX, LLC that memorialized the agreement between competitors including Neoforma, Inc. to restrain trade, allocate business, artificially inflate prices and exclude Medical Supply Chain, Inc. See Exb. 2 generally,

The complaint adequately alleged that Jeffrey Immelt had an independent personal stake giving him the capacity to be both an inter enterprise conspirator and an intra enterprise conspirator:

"In our view, in order for the concept of a conspiracy between a principal and an agent to apply in the antitrust context, the exception to the general rule should arise only where an agent acts to further his own economic interest in a marketplace actor which benefits from the alleged restraint, and causes his principal to take the anticompetitive actions about which the plaintiff complains. In

this way, the exception captures agreements that bring together the economic power of actors which were previously pursuing divergent interests and goals, the type of activity that section 1 was intended to oversee. *Copperweld*, 467 U.S. at 752, 104 S.Ct. at 2731.”

Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125 at 1136-1137 (C.A.3 (Pa.), 1995).

Hon. Judge Carlos F. Lucero and the Tenth Circuit panel’s decision to secede from current US law and immunize hospital supply cartel members has not yet congealed into articulable judge made rules that can apply in other cases. When Hon. Judge Carlos F. Lucero or Hon. Senior Judge John C. Porfilio designate an opinion to be published or when either develop a federal common law or judge made rule that can provide a standard for this district, their hospital supply cartel immunity decisions might then provide the guidance for Kansas courts that Novation, LLC, VHA Inc.,University Healthcare Consortium, Robert Baker And Curt Nonomaque desperately seek.

Sufficient Pleading Under Federal Rules

The pleading issues addressed by the trial court and appellate panel in both actions are irrelevant to the present complaint which pleads a conspiracy between multiple defendants that are legally independent and capable of conspiracy.

The defendants argue Medical Supply’s complaint against Novation, LLC, VHA Inc.,University Healthcare Consortium, Robert Baker And Curt Nonomaque should be dismissed when the pleading is materially equivalent to the “LIMO” (*Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al*, 8th Cir. 03-1441 and 03-1554) antitrust and state law complaint (Exb 3) which was tested in the Western District of Missouri and the Eight Circuit Court of Appeals on the same pleading sufficiency issues raised by Novation, LLC, VHA Inc.,University Healthcare Consortium, Robert Baker And Curt Nonomaque and found to have sufficiently stated antitrust and state law claims.

The defendants’ prohibited second motion to dismiss ignores the plaintiff’s citation to controlling authority for this jurisdiction that the plaintiff need not plead every element but is instead required only to make a simple statement and demand for relief. The Western District of Missouri ruled on antitrust and state claims (Exb 4) pled in exactly the same manner that the Medical Supply complaint pleads them and stated:

“Thus, a motion to dismiss is likely to be granted “only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. ” *Fusco v. Xerox Corn.*, 676 F.2d 332, 334 (8th Cir. 1982).”

Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al, No. 98-3454 Order on Dismissal (W.D. Mo. July 7, 1999). Judge Russell G. Clark, Senior Judge United States District Court for the Western District of Missouri went on to state:

“The Federal Rules of Civil Procedure require only notice pleading. Plaintiff must only set forth a short and plain statement showing that it is entitled to relief, not all the facts which establish that it is entitled to relief. FED. R. CIV. P. 8(a). Plaintiffs have sustained this low burden in the complaint against General Motors, as has Ford Motor Company in its allegations against plaintiff. The Court will, therefore, deny those motions to dismiss.” [emphasis added]

Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al, No. 98-3454 Order on Dismissal (W.D. Mo. July 7, 1999). Exb 4

A US court cannot dismiss Medical Supply’s complaint on the grounds asserted by Novation, LLC, VHA Inc.,University Healthcare Consortium, Robert Baker And Curt Nonomaque:

“None of these is a good ground on which to dismiss USG's complaint—and the latter two are not permissible even in principle, because the statute of limitations and issue preclusion are affirmative defenses. See Fed. R. Civ. P. 8(c). Complaints need not anticipate or attempt to defuse potential defenses. *Gomez v. Toledo*, 446 U.S. 635 (1980). A complaint states a claim on which relief may be granted when it narrates an intelligible grievance that, if proved, shows a legal entitlement to relief. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Bennett v. Schmidt*, 153 F.3d 516 (7th Cir. 1998). A litigant may plead itself out of court by alleging (and thus admitting) the ingredients of a defense, *Walker v. Thompson*, 288 F.3d 1005 (7th Cir. 2002) (applying this principle to the period of limitations), but this complaint does not do so; the district judge thought, rather, that the complaint had failed to overcome the defenses. As complaints need not do this, the omissions do not justify dismissal.”

United States Gypsum Company v. Indiana Gas Company, No. 03-1905 at 3-4 (7th Cir. 11/24/2003) (7th Cir., 2003).

CONCLUSION

Whereas for above stated reasons, the plaintiff Medical Supply respectfully requests that the court strike the impermissible second dismissal pleading filed by Novation, LLC, VHA Inc.,University Healthcare Consortium, Robert Baker And Curt Nonomaque.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on August 30th, 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:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700
Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland
Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas
City, MO 64105-2122 (also local counsel for the General Electric Defendants and Jeffrey Immelt)

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50
California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001
Fannin Houston, TX 77002

Attorneys for Defendants

S/Bret D. Landrith
Bret D. Landrith