

**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 DEFENDANTS’ RENEWED MOTION TO DISMISS AND/OR STRIKE

Comes now the plaintiff Medical Supply Chain, Inc. and makes the present motion to strike the defendants’ pleading entitled Defendants’ Renewed Motion To Dismiss And/Or Strike (Doc. 32). The plaintiff respectfully requests the court strike the defendants’ second motion to dismiss for the following reasons:

1. The defendants US Bancorp NA (USB), U.S. Bank National Association, Piper Jaffray Companies (PJC), Jerry A. Grundhofer, Andrew Cesere and Andrew S. Duff had previously filed motions to dismiss, (Docs. 6,7, and 13). The defendants’ law firm filed a separate motion to dismiss (Doc. 20).
2. The defendants US Bancorp NA (USB), U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesere and Andrew S. Duff used a motion for sanctions Doc. 22 and a memorandum in support Doc. 23 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 and patently frivolous grounds for dismissal not raised in the earlier motions and memorandums to dismiss/strike and sanction the plaintiff and does not address the controlling authorities prohibiting dismissing or striking the plaintiff’s claims cited by the plaintiff in its reply suggestions opposing dismissal.

4. The plaintiff would be unnecessarily burdened by having to answer the defendants extra dismissal attempts.
5. The defendants' motion strongly infers a corrupt influence over this jurisdiction that is scandalous.

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."

The defendants in ¶1 make the non-law based argument that the plaintiff's damages are too great therefore Medical Supply is entitled to no relief. Medical Supply's first lawsuit against the defendants *Medical Supply Chain v. US Bancorp N A, et al*, Case No. 02-cv-02539-CM, sought only injunctive and declaratory relief requiring the defendants to accept \$6000.00 from Medical Supply for providing escrow accounts. The defendants opposed that relief by introducing to the court the amount of money Medical Supply would lose if the escrow accounts were denied and the USA PATRIOT Act suspicious activity report was filed. This information was provided to Judge Murguia in a letter from the defendants prior to their appearance to defend the action and this prospective irreparable harm was then described in the plaintiff's amended complaint, filed in 2002.

As the defendants have been repeatedly served notice of, two cases dictate the amount the defendants are now required to pay Medical Supply. "The damages sustained by American Carriers were the reasonably foreseeable consequences to Westinghouse's refusal to close on its agreement to make the loan." *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 at 921 (Mo. App.W.D., 1994). "A party injured by a breach of contract is entitled to the value of the performance of the contract, that is, the injured party is entitled to the benefit of the bargain, that being whatever net gain he or she would have made under the contract." *Rasse v. GE Capital Small Business Finance Corp.*, 2002 MO 808 (MOCA, 2002). Because the defendants' conduct violated so many established Sherman I and II prohibitions, the full value of the performance of each contract as contemplated by Medical Supply and the defendants will be trebled under antitrust law. However, the defendants have at all times flaunted these antitrust prohibitions because as the

complaint states, their illegal monopoly profit is immeasurably greater than the monetary relief Medical Supply is entitled to.

The defendants through their later racketeering efforts with the other defendants (that like Medical Supply are hospital supply distributors) knowingly inflicted additional recoverable damages equal to the original amount and are liable for what the plaintiff would have made, had Medical Supply not been obstructed through the defendant's racketeering under *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir.1994) regardless of their speculative nature (the direct competitor loss profit exception to speculativeness explained in *Ideal Steel Supply Corp. v. Anza*, No. 03-7381 (Fed. 2nd Cir. 7/2/2004) (Fed. 2nd Cir., 2004)).

This court is prevented from dismissing the plaintiff's damages without hearing evidence by the Clear Tenth Circuit precedent. Compensatory damages will be given for the net amount of loss or gain prevented by one's breach. *Resolute Ins. Co. v. Percy Jones, Inc.*, 10 Cir., 198 F.2d 309. See generally *Corbin on Contracts*, Vol. 5, Sec. 1022. Failure to hear evidence of Medical Supply's damages, dismissing them out of hand as the defendants demand is long established as a cause for reversal:

“Consideration has, by us, been accorded to such deliverances upon a broad pattern; and those cases immediately hereinbefore cited, although not exhaustive, appear to be, as well, reflective of generally prevailing opinion, as instructive concerning the pertinent, and ultimately controlling thinking of this court, and of the Supreme Court of the United States.”

DeVries v. Starr, 393 F.2d 9 at 19-20 (C.A.10 (N.M.), 1968).

The Knowingly False Res Judicata and Collateral Estoppel Arguments

The defendants in ¶¶ 2, 3,4 and 5 knowingly mislead the court by falsely asserting that the plaintiff's Sherman Act, RICO and USA PATRIOT Act claims¹ are barred by res judicata and/or collateral estoppel when the defendants do not answer the plaintiff's assertion that *Lawlor v. National Screen Service Corporation*, 349 U.S. 322at 328 75 S.Ct. 865, 99 L.Ed. 1122 (1955) prohibits this court from dismissing

¹ The plaintiff's current action charges the defendants with violation of 18 U.S.C. §1030 in which the USA PATRIOT Act specifically creates a private right of action. The violation is alleged to have occurred after the amending of the complaint in the plaintiff's first action against the US Bank defendants (defendants *Medical Supply Chain v. US Bancorp N A, et al*, Case No. 02-cv-02539-CM) and no *res judicata* or issue preclusion applies. Similarly, the Kansas District Court and the Tenth Circuit court of appeals declined to rule on whether misuse of USA PATRIOT Act suspicious activity reporting is actionable under Sherman II when used to further monopolization, despite the plaintiff's repeated requests that the court make a preclusive ruling on this issue. See attached Motion for En Banc Rehearing at pg. 20.

the plaintiff's post injunctive relief claims for now ripened monetary damages. However Lawlor controls this point:

“A combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought. And, as already noted, a prior judgment is res judicata only as to suits involving the same cause of 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 damage action.”

Lawlor v. National Screen Service Corporation, 349 U.S. 322 at 327-329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). As quoted on page 1-2 of plaintiff's “Suggestion in Opposition to defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Shughart Thomson & Kilroy, P.C., Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff Motion To Transfer, Dismiss And/Or Strike” dated April 19th, 2005.

Similarly, the defendants do not address the plaintiff's use of the US Supreme court's ruling in *Hazeltine*:

“In these instances, the cause of action for future damages, if they ever occur, **will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.** Cf. *Schenley Industries v. N.J. Wine & Spirit Wholesalers Assn.*, 272 F.Supp. 872, 887—888 (NJ 1967)” [emphases added]

Zenith Radio Corp v. Hazeltine Research, Inc, 401 U.S. 321 at 340, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). Both of these cases clearly show that the earlier failed action seeking injunctive relief and declaratory relief² to prevent possible future harm does not preclude the present action for damages.

The defendants US Bancorp NA (USB), U.S. Bank, Piper Jaffray Companies (PJC), Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff have not addressed the plaintiff's claims against them for conspiring with General Electric to deny Medical Supply the proceeds from the sale of the lease on the Blue Springs office building which occurred after the amended complaint was filed in *Medical Supply Chain v. US Bancorp NA, et al*, Case No. 02-cv-02539-CM and were never raised in that action. The plaintiff can maintain separate actions against different defendants in the same Sherman conspiracy. See generally *M. Sobol, Inc. v. A. H. Robins Company*, 446 F.2d 546 (2nd Cir., 1971) (per curiam).

² Declaratory relief is not monetary relief. See *Berglee v. First Nat. Bank, Brookings, South Dakota*, 147 F.3d 698 at 699 (C.A.8 (S.D.), 1998)

Similarly, the defendants *Medical Supply Chain v. US Bancorp N A, et al*, Case No. 02-cv-02539-CM make no analysis of the myriad other transactions the present complaint alleges occurred subsequent to the earlier complaint which equally could not be barred through preclusion.

The Defendants' Arguments For Pre Discovery Dismissal Are Scandalously Contrary To US Law

After service of the plaintiff's reply memorandums citing the controlling US law applicable to the complaint's factual averments, it can no longer be argued by the defendants that they are entitled to a dismissal. If any authority disputes the US Supreme Court, the defendants have not raised it. The plaintiff's complaint is identical in elements of pleading for its claims to the complaint filed in *Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al*, 8th Cir. 03-1441 and 03-1554. The case known as "Limo" concerned the group boycott/refusal to deal by dominant motor vehicle manufacturers seeking to control a downstream market for limousine conversion by causing the withholding of a critical input-trade journal advertising. See attachment 2 and 3. Because of the quality of practicing attorneys in Missouri and the Eight Circuit, spurious arguments like Ford and GM do not monopolize newspaper publishing were not made to defeat the will of the US Congress and Missouri legislature. Also, the judges in a jurisdiction that has not openly seceded from US Law did not admonish or sanction Craftsman's counsel for raising the claims and the judges followed their own precedent and other controlling authority while writing polite and respectful opinions.

An earlier defendant, General Motors raised the sufficiency of pleading arguments raised by the defendants US Bancorp, U.S Bank, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesere, Andrew S. Duff, Novation, Neoforma, UHC and VHA in a similar motion to dismiss. See attachment 4 and 5. The trial court (See attachment 6) followed clear established US Law in all circuits and the US Supreme Court stating:

"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)."

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]

GM lost its defense and a jury verdict was trebled as required for the antitrust claims. The case was appealed to the Eight Circuit and upheld by the appellate panel on the issues related to whether Craftsman Limousine sufficiently stated a claim. See attachment 7.

The defendants argue issue preclusion, an affirmative defense that has been unsubstantiated and is contrary to the record and controlling law, should never the less justify dismissing the Medical Supply complaint for failure to state a claim. A US court cannot dismiss Medical Supply’s complaint on these grounds:

“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).

When a party to an action repeatedly requests that the court act contrary to controlling law without making arguments for new law or even addressing US Supreme court authority commanding an opposite result on the same fact scenario, the party (if it is represented by competent counsel and not acting pro se) is communicating a very ugly message. The clear inference of US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesere, Andrew S. Duff and Shughart Thomson and Kilroy is that they have a corrupt influence over this jurisdiction. Medical Supply has strongly argued that this is not the case, but surprisingly it is an argument that the Tenth Circuit continues to repudiate. See attachment 8. The defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesere and Andrew S. Duff’s renewed dismissal should be dismissed.

CONCLUSION

Whereas for above stated reasons, the plaintiff Medical Supply respectfully requests that the court strike the pleading filed by US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry

A. Grundhofer, Andrew Cesere and Andrew S. Duff entitled Defendants' Renewed Motion To Dismiss
And/Or Strike (Doc. 32).

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 9th, 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

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