

**United States Court of Appeals  
For the Tenth Circuit**

Docket No. 06- 3331 (10th Cir.)

KS Dist. Court Case No.: 05-2299  
Formerly W.D. MO. Case No. 05-0210

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**MEDICAL SUPPLY CHAIN, INC., SAMUEL K. LIPARI**

**v.**

**NOVATION, LLC, NEOFORMA, INC., ROBERT J. ZOLLARS,  
VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE,  
UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J.  
BAKER, US BANCORP, NA;US BANK; JERRY A. GRUNDHOFER;  
ANDREW CECERE; THE PIPER JAFFRAY COMPANIES;  
ANDREW S. DUFF; SHUGHART THOMSON & KILROY;  
WATKINS BOULWARE, P.C.**

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Appeal from  
the United States District Court  
for the District of Kansas

Hon. Judge Carlos Murguia presiding

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**Reply Brief Of The Appellant**

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Ira Dennis Hawver, Esq.  
Kansas Supreme Court Number 8337  
6993 Highway 92  
Ozawkie, Kansas 66070  
(785) 876 2233/ Fax (785) 876 3038  
Attorney for Medical Supply Chain, Inc. and  
Samuel K. Lipari

Ira Dennis Hawver, Esq.  
*On the brief*

**ORAL ARGUMENT REQUESTED**

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## REPLY ARGUMENTS

### **I. Appellee Response to Appellant’s issue I; “Whether The Trial Court Erred By Failing To Apply Transactional Analysis And Lawlor To Determine If Medical Supply And Lipari’s Claims Were Precluded By *Medical Supply I.*”**

Appellees’ Response does not contest any of the legal arguments or conclusions set forth in Medical Supply and Lipari’s brief regarding the inapplicability of preclusion to the defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker and Shughart Thomson & Kilroy who were not made defendants in earlier actions under *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). Under *Lawlor*, Medical Supply had a clear right to initiate separate litigation against the co-conspirators and to bring an action for damages against all conspirators for subsequent conduct. Claims against the defendants were dismissed in error.

Appellees at pg. 29 of their answer brief misrepresent that the current Medical Supply complaint avers no conduct subsequent to that averred in *Medical Supply I.* stating “because *no* transactions or conduct resulting in the assertion of

new claims are alleged to have arisen since the entry of the previous judgment.”

While this is manifestly untrue as it pertains to all defendants it is specifically untrue regarding US Bancorp, NA, US Bank, Jerry A. Grundhofer; Andrew Cecere, The Piper Jaffray Companies and Andrew S. Duff who were defendants or in comity with defendants in *Medical Supply I* and who are averred to take actions through their agent Shughart Thomson & Kilroy against Medical Supply’s counsel in 2004-2005 and, averred to interfere with Medical Supply’s attempt to capitalize its entry into market with the General Electric companies on July 1, 2003 ( Aplt adx. ¶ 355 pg. 103). The defendants are averred to continue the cartel’s daily inflation of hospital supply costs in several relevant markets identified by Medical Supply subjecting them to continuing renewed antitrust conspiracy under *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) and continuing renewed RICO liability until the defendants have made an affirmative showing they have withdrawn from the conspiracy. *United States v. Spero*, 331 F.3d 5 to7 at 60-61 (2d Cir.2003).

The appellees attempt to argue the earlier actions claims for breach of contract which were dismissed without prejudice should prevent the current complaint from stating federal claims for damages resulting from any breach. This is an attempt to invoke the Doctrine of Judicial Estoppel . However breach is a legal conclusion not a fact and was alleged in claims not yet tried. “The stance ...cannot give rise to judicial estoppel: in it, the Partnership is taking a legal position, not a factual one.” *Kaiser v. Bowlen*, 455 F.3d 1197 at 1204 (10th Cir.,

2006). The appellees do not assert the three elements required for judicial estoppel to apply and they are inapplicable to Medical Supply. *Johnson v. Lindon City Corp.*, 405 F.3d 1065 at 1069 (10th Cir., 2005).

Missouri recognizes a party's right to plead in the alternative and to state inconsistent claims or defenses under Rule 55.10. Controlling law in the Western District of Missouri federal court where the complaint was filed also permitted Medical Supply to raise its federal claims resulting from breach: "... there is ample authority that one of two inconsistent pleas cannot be used as evidence in the trial of the other. *Giannone v. United States Steel Corporation, supra*, 238 F.2d at 544, n. 4; McCormick on Evidence, § 242, pp. 509-520 (1954); Note, 17 Tex. Law Rev. 191 (1939)." *Garman v. Griffin*, 666 F.2d 1156 at 1159 (C.A.8 (Mo.), 1981).

## **II. Appellee Response to Appellant's issue; "Whether The Trial Court Erred In Finding Medical Supply And Lipari Failed To State Antitrust Claims."**

At pages 37-41, the Appellees' misrepresent that the complaint fails to state antitrust claims because: "Medical Supply Has Not Alleged the Existence of a Relevant Market" when in fact Medical Supply alleges three. See Aplt Br. Pg. 22.

The Appellees misstate established antitrust law when they assert "Defendants Cannot Monopolize or Attempt to Monopolize a Market in Which They do not Compete." The complaint clearly states the defendants conspired to monopolize the relevant markets in which some of the defendant co-conspirators and Medical Supply compete:

“Nothing in our case law suggests that a conspiracy must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy. Cf. *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir.2001) (“[W]e conclude that there can be sufficient evidence of a combination or conspiracy when one conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive.”)”

*Spanish Broadcasting System v. Clear Channel*, 376 F.3d 1065 at fn 10 (11th Cir., 2004). This circuit has similarly recognized co-conspirators don’t have to compete in the same market: “The fact that Davmor's co-conspirators competed in markets different from Davmor's market does not preclude finding a conspiracy to monopolize Davmor's market.” *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 at 1377 (C.A.10 (Colo.), 1980).

The Federal Circuit applying Tenth Circuit antitrust law in *Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, 375 F.3d 1341 (rev’d on other grounds)(Fed. Cir., 2004) observed this circuit recognizes relevant market and injury are questions of fact:

“Market definition and antitrust injury, on the other hand, are intensely factual determinations. See e.g., *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (“The proper market definition in this case can be determined only after a factual inquiry into the ‘commercial realities’ faced by consumers.”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)”

*Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, 375 F.3d at 1349. The complaint alleges the appellees control 100% of the national market. In ¶¶ 419-422 pgs. 118-119 Medical Supply’s complaint describes the defendants’ plans to

merge the direct competitors Neoforma with GHX LLC to monopolize *all* of the product market for hospital supplies delivered through electronic supply chain systems in the nation. Alleging 100% forestalls the need for further inquiry into sufficiency of the averment of market power. See *Lepage's Inc. v. 3M*, 2003 C03 234 at ¶ 41 (USCA3, 2003).

### **III. Appellee Response to Appellant's issue; "Whether The Trial Court Erred In Finding Medical Supply And Lipari Failed To State 18 U.S.C. § 1962 (RICO) Claims."**

Medical Supply and Lipari's opening brief at pgs. 26-31 identified each of the elements required to state valid RICO and RICO conspiracy claims and their locations in the complaint. The alleged conduct is subsequent to the Hobbs Act Racketeering threats and extortion described in *Medical Supply I* in 2002. "*Reisner v. Stoller*, 51 F.Supp.2d 430, 451 (S.D.N.Y.1999) (RICO claims which accrued after first action filed, based on injuries sustained after first action filed not barred in subsequent action by doctrine of res judicata); *Crowe v. Leeke*, 550 F.2d 184, 187 (res judicata has very little applicability to continuing series of acts, for generally each act gives rise to new cause of action)" *Waddell & Reed Financial, Inc. v. Torchmark Corp.*, 292 F.Supp.2d 1270 at 1281(Kan., 2003).

Appellees misstate Rule 8 as an alternative basis to uphold the dismissal alleging the "prolix and rambling nature of the Complaint." However the plaintiff's claims meet the concise requirements of Rule 8 averments:

"Rule 8 does not require a "short and plain complaint," but rather a "short and plain statement of the claim." FED. R.CIV.P. 8(a)(2) (emphasis

added)... Moreover, it is "each averment of a pleading" that Rule 8(e)(1) states "shall be simple, concise, and direct" — not each pleading itself."

*Ciralsky v. C.I.A.*, 355 F.3d 661 at 670 (D.C. Cir., 2004).

Surprisingly the appellee's view inclusion of US Senate hearing testimony that the upstream relevant market for investment inputs in healthcare technology companies has been dominated by Novation and its co-conspirators as grounds for dismissal. See Appl Br. pg. 53. The appellees view other facts including President George Bush's proposed national policy to pay for rising healthcare costs and Missouri's pressing state interest in the injury to Missouri citizens from forced cutbacks in healthcare from rising healthcare costs as a basis for dismissal and sanction. *Id.*

Medical Supply is under a burden to plead harm to consumers in the national market for healthcare from the appellees artificial inflation of hospital supplies. Just like Medical Supply was required to show the appellees actions caused injury in Missouri for venue and jurisdiction purposes.

**IV. Appellee Response to Appellant's issue; "Whether The Trial Court Erred In Finding Medical Supply And Lipari Failed To State Claims Under The USA PATRIOT Act, specifically 31 U.S.C. § 5318(g)(3) And 18 U.S.C. § 1030."**

Medical Supply and Lipari are unable to discern a non frivolous argument by the appellees against civil liability under 18 U.S.C. § 1030 (g) which creates a private right of action for Medical Supply to address the conduct of the Defendants in gaining access to the FINCEN network for the purpose of filing a suspicious activity report to prevent Medical Supply from providing hospital

supplies and reducing healthcare costs when *a priori* FINCEN is a web interface of computers in a network where Suspicious Activity Reports are filed:

“The USA PATRIOT Act of 2001, §314(a) requires the Secretary of the Treasury to create a secure network for the transmission of information to enforce the relevant regulations. FinCEN’s regulations under Section 314(a) enable federal law enforcement agencies, through FinCEN, to reach out to more than 45,000 points of contact at more than 27,000 financial institutions to locate accounts and transactions of persons that may be involved in terrorist financing and/or money laundering. This cooperative partnership between the financial community and law enforcement allows disparate bits of information to be identified, centralized, and rapidly evaluated. This web interface allows the person(s) designated in §314(a)(3)(A) to register and transmit information to FinCEN.”

[http://en.wikipedia.org/wiki/Financial\\_Crimes\\_Enforcement\\_Network](http://en.wikipedia.org/wiki/Financial_Crimes_Enforcement_Network)

There is no immunity under 18 U.S.C. §1030 (g):

“(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages.”

The relevant 18 U.S.C. §1030 violation Medical Supply charged the defendants with is :

“§ 1030. Fraud and related activity in connection with computers  
(a) Whoever—  
(5)  
(A)  
(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;  
(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or  
(iii) intentionally accesses a protected computer without authorization, and as

a result of such conduct, causes damage; and

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(iv) a threat to public health or safety;”

The appellees arguments against liability for a malicious suspicious activity report under 31 U.S.C. § 5318(g)(3) contradicts published case law. The defendants are liable for filing a Suspicious Activity Report for the sole purpose of injuring Medical Supply Chain outside of the safe harbor protection of 31 U.S.C. § 5318(g)(3). See *Lopez v. First Union National Bank*, 129 F.3d 1186 (11th Cir.1997) and “We do not agree, however, that Congress intended the Act's safe harbor to give banks such blanket immunity that even malicious, willful criminal and civil violations of law are protected. Importantly, the Act requires there to be a "possible" violation of law — "possible" being the operative word — before a financial institution can claim protection of the statute.” *Bank of Eureka Springs v. Evans*, 109 S.W.3d 672 at 680(Ark., 2003) The plaintiffs’ complaint alleges “malice or lack of good faith motivated the actions” required for liability notwithstanding 31 U.S.C. § 5318(g)(3) under *Joseph v. Bancorpsouth Bank*, 414 F.Supp.2d 609 at 612 (S.D. Miss., 2005).

Other parts of the USA PATRIOT Act specifically include standards limiting the applicable safe harbor, such as in Section 355 “which provides that with respect to an employment reference, an institution shall not be shielded from liability if a disclosure is made with "malicious intent." Moreover, in section 314(a), Congress included specific standards with respect to information shared among financial institutions, regulators and law enforcement, and described the

information subject to such disclosures as ‘reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities...the final portion of section 314(b) does except from the safe harbor violations of the section generally. See Heather Smith, Data Sharing-Assessing Patriot Act’s Safe Harbor.

**V. Appellee Response to Appellant’s issue; “Whether The Trial Court Erred In Denying Medical Supply And Lipari A Chance To Amend The Petition For Relief.”**

Appellees’ response does not dispute Medical Supply and or Lipari were denied the opportunity to amend the complaint which was in its original form.

**VI. Appellee Response to Appellant’s issue; “Whether The Award Of Sanctions For Bringing The New Action Violated Rule 11 When The Plaintiff Had A Clearly Established Right To Bring A Separate Proceeding To Scrutinize The Conduct Of The Parties In *Medical Supply I.*”**

Appellees’ response does not contest any of the legal arguments or conclusions set forth in the Medical Supply and Lipari’s brief regarding the right to bring a new proceeding to scrutinize the conduct of the parties in the previous action under *Leber-Krebs, Inc. v. Capitol Records*, 779 F.2d 895 at 901 (C.A.2 (N.Y.), 1985).

Medical Supply rests on its arguments supporting its claims and the errors of the trial court in granting the dismissal and therefore disputes the trial court’s other reasons to justify sanctions.

**VII. Appellee Response to Appellant’s issue; “Whether The Trial Court Erred In Denying Samuel Lipari The Right To Represent His Interests Pro Se As Assignee Of The Dissolved Missouri Corporation Medical Supply Chain,**

**Inc. By Granting The Defendants’ Motion To Strike Lipari’s Timely Motion For Reconsideration.”**

On April 4, 2007 the appellees US Bank NA and US Bancorp were unsuccessful in obtaining a dismissal of *Samuel Lipari v. US Bancorp, NA, et al*, United States District Court, Western District of Missouri Case No. 06-1012-CV-W-FJG based on their argument the “plaintiff (Samuel Lipari acting pro se) does not have standing to maintain this action” as the assignee of the dissolved Medical Supply Chain, Inc.’s rights. The action was transferred to Kansas District Court and now bears the case number 07-CV-02146-CM-DJW.

**VIII. Appellee Response to Appellant’s issue; “Whether The Notice Of Appeal From The Trial Court’s Order Granting The Defendants’ Motion To Strike Samuel Lipari’s Motion For Reconsideration Was Timely.”**

Apellees’ response does not contest any of the legal arguments or conclusions set forth in the Medical Supply and Lipari’s brief that the trial court’s August 7th, 2006 order was not a judgment on Lipari’s Motion to reconsider but instead an order striking the reconsideration motion; the August 7<sup>th</sup>, 2006 order also denied Medical Supply’s counsel’s motion to withdraw and struck plaintiff’s Motion Under FED. R.CIV.P. Rule 15 for Leave to Rewrite and Amend Complaint to Cure Any Defects Requiring Dismissal Remaining After Outcome of Reconsideration Motion (Doc. 92); plaintiff’s Motion to Strike Documents and plaintiff’s Motion to Rewind Action and Return Proceeding to the Western District of Missouri in the Interest of Justice Under 28 U.S.C. § 1631.

As a ruling on motions other than Lipari's Motion to Reconsideration, specifically Medical Supply's counsel's timely and proper Motion to Withdraw, the exception to Fed. R. Civ. P. 58(a)(1)(D) does not apply. No separate judgment was filed by the trial court. See Fed. R. App. P. 4(a). The time to appeal begins when a judgment is formally entered as a separate document under Fed. R. Civ. P. 58(a). *Thompson v. Gibson*, 289 F.3d 1218, 1221 (10th Cir. 2002). Here, no formal judgment was entered; therefore, "the time for filing a notice of appeal has yet to run." *Id.* Consequently, this court has jurisdiction over this appeal.

Respectfully Submitted,

/s/ Dennis Hawver

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Ira Dennis Hawver 8337  
6993 Highway 92  
Ozawkie, Kansas 66070  
Telephone (785) 876 2233  
Fax (785) 876 3038  
hawverlaw@earthlink.com  
Attorney for Medical Supply Chain  
And Samuel K. Lipari

## **CERTIFICATE OF COMPLIANCE**

### **Section 1. Word count**

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 2726 words.

Complete one of the following:

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I counted five characters per word, counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Dennis Hawver

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Ira Dennis Hawver 8337

### **CERTIFICATION OF DIGITAL SUBMISSION**

I hereby certify the following:

Compliance with emergency General Order of October 20, 2004 (e) that copies were provided on a compact disc supplied along with written materials and by electronic mail.

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(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program Kaspersky Anti-Virus 6.0 and, according to the program, are free of viruses.

/s/ Dennis Hawver

\_\_\_\_\_  
Ira Dennis Hawver 8337

### **CERTIFICATE OF SERVICE**

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of The Appellant's Opening Brief was submitted to the Clerk in Digital Form and was provided to counsel for all other parties hereto by e-mail on April 26, 2007.

John K. Power  
John.Power@Husch.com  
Stephen N. Roberts  
SRoberts@Nossaman.com  
Janice Vaughn Mock  
JVaughnMock@Nossaman.com  
Kathleen Bone Spangler, Esq.  
kspangler@velaw.com  
HUSCH & EPPENBERGER, LLC  
1200 Main Street, Suite 1700  
Kansas City, MO 64105  
Telephone: (816) 421-4800  
Facsimile: (816) 421-0596  
Attorneys for Appellees Novation, LLC,  
Volunteer Hospital Association, Curt  
Nonomaque, University Healthsystem  
Consortium, Robert J. Baker

Mark A. Olthoff  
molthoff@stklaw.com  
Kathleen A. Hardee  
khardee@stklaw.com  
Andrew M. DeMarea  
ademarea@stklaw.com  
William Quirk  
wquirk@stklaw.com  
SHUGHART THOMSON & KILROY, PC  
1700 Twelve Wyandotte Plaza  
120 W. 12th Street  
Kansas City, Missouri 64105-1929  
(816) 421-3355  
(816) 374-0509 (Fax)  
Attorneys for Appellees US Bancorp,  
U.S. Bank National Association and  
Piper Jaffray Companies, Shughart Thomson & Kilroy, P.C.

/s/ Dennis Hawver

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Ira Dennis Hawver 8337