

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

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|------------------------------------|-----------------------------|
| 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> |) |

SUGGESTION IN OPPOSITION TO US BANCORP NA'S MOTION FOR SANCTIONS

Comes now the plaintiff Medical Supply Chain, Inc. and makes the following suggestion in opposition to US Bancorp NA's motion for sanctions. Medical Supply asserts US Bancorp NA's motion for sanctions is unfounded, contradicting the controlling law and the facts of this action. Moreover, the defendant's motion for sanctions violates Rule 11 and Title 28 U.S.C. § 1927. Medical Supply respectfully requests the defendants' motion for sanctions be denied.

STATEMENT OF FACTS

1. Medical Supply filed a complaint captioned *Medical Supply Chain, Inc. v. Novation, et al.*, Case No. 05-0210-CV-W-ODS stating new claims and new causes of action against 8 additional defendants, 7 of whom share no recognized privity with the defendants of *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM.

2. All transactions on which *Medical Supply Chain, Inc. v. Novation, et al.*, is based were expressly dismissed without prejudice by Hon. Judge Carlos Murguia of the District of Kansas in *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM, occurred subsequent to the filing of Medical Supply's Amended complaint or were part of a RICO racketeering pattern undiscovered until after *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM was dismissed on June 16, 2003.

3. Medical Supply's complaint identifies the sources of the material facts it alleges, some of which were identified in footnotes in the earlier action's complaint and some of which were developed by US Senate hearings on the defendants' anticompetitive conduct in the hospital supply market, newspaper reports on US Department of Justice subpoenas, an investigative reporting series in the New York Times and the defendants' own press releases.

4. No discovery or evidentiary hearings were conducted in the prior action.

ARGUMENTS AND AUTHORITIES

Mark A. Olthoff #38572 Jonathan H. Gregor #50443 Logan W. Overman #55002 and Andrew M. DeMarea KS #16141 of the defendant Shughart Thomson & Kilroy, P.C. have filed a frivolous motion for sanctions unreasonably and vexatiously multiplying proceedings. The motion for sanctions is wholly violative of Rule 11 and Title 28 U.S.C. § 1927. Mark A. Olthoff, Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea have filed this frivolous sanction motion despite their own professional failure to identify any transactions and privities between parties in the present legal action that are precluded by *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM and despite being served notice of the applicable controlling legal authority by the plaintiff and its counsel in their suggestion opposing dismissal. **See Exb. 1, 2** The United States Supreme Court in *Lawlor v. Nat'l Screen Services*, 349 U.S. 322 (1955), recognized the appropriateness of an action for monetary damages after the dismissal of an action for injunctive relief against prospective antitrust violations, precisely the facts related to the present action and which Mark A. Olthoff, Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea now in bad faith assert Medical Supply and its counsel should be sanctioned for.

Medical Supply's new case meets each of the qualifications the Eighth Circuit has recognized defeat res judicata 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. In *Lawlor*, five new defendants were added, medical Supply has added eight, seven of whom were without recognizable privity¹ with any of the prior defendants. See also *Wilford Banks v. International Union Electronic*,

¹ "The doctrine of res judicata applies to and is binding, not only on actual parties to the litigation, but also those in privity with them." *Carr v. Rose*, 701 A.2d 1065, 1075 (D.C. 1997) (citations omitted). "A privity is

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).

Of course *Lawlor* is the law of all American jurisdictions: *Bindit Corp. v. In-Flight Advertising Inc.* at 1464 (2001) stated “cf., *Lawlor v. National Screen Serv. Corp.*, 349 US 322, 328 [“While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case”]”. *St. Pierre and Que-Van Transport v. Dyer*, 208 F.3d 394 at 400 (2nd Cir., 1999) states: “Further, while a previous judgment may preclude litigation of claims that arose “prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.” *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955).”

Medical Supply had the option of filing this new action for conduct occurring after the amended complaint was filed in the District of Kansas. If a defendant engages in actionable conduct after a lawsuit is commenced, the plaintiff may seek leave to file a supplemental pleading to assert a claim based on the subsequent conduct. See Fed.R.Civ.P. 15(c). But he is not required to do so, and his election not to do so is not penalized by application of res judicata to bar a later suit on that subsequent conduct:

“The scope of litigation is framed by the complaint at the time it is filed. The rule that a judgment is conclusive as to every matter that might have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated.... Plaintiffs may bring events occurring after the filing of the complaint into the scope of the litigation by filing a supplemental complaint with leave of the court, ... but there is no requirement that plaintiffs do so.”

Los Angeles Branch NAACP v. Los Angeles Unified School District, 750 F.2d 731, 739 (9th Cir.1984) (internal quotation marks omitted) (emphasis added), cert. denied, 474 U.S. 919, 106 S.Ct. 247, 88 L.Ed.2d 256 (1985); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir.1992) (decision whether

one so identified in interest with a party to the former litigation that he or she represents precisely the same legal right in respect to the subject matter of the case." *Smith*, supra, 562 A.2d at 615 (citation omitted). Traditional categories of privies include "those who control an action although not parties to it . . .; those whose interests are represented by a party to the action . . .; [and] successors in interest." *Id.* (quoting *Lawlor v. National Screen Serv.*, 349 U.S. 322, 329 n.19 (1955) (footnote omitted)).”

Patton v. Klein, 746 A.2d 866 at para 26 (DC, 1999)

or not to attempt to assert claims that arose subsequent to the filing of the action "is optional for the plaintiff; the existence of the doctrine of res judicata does not make the filing of supplements mandatory"). See *S.E.C. v. First Jersey Securities, Inc.*, 101 F.3d 1450 at 1464 (C.A.2 (N.Y.), 1996).

The Tenth Circuit has also adopted the transactional approach of the Restatement (Second) of Judgments to determine what constitutes a "cause of action" for res judicata purposes. *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335 (10th Cir.1988). The Tenth Circuit citing *Lawlor* has overruled the Kansas District Court for failing to recognize new claims in a later action:

“See *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328, 75 S.Ct. 865, 868, 99 L.Ed. 1122 (1955) (holding that while a judgment may preclude recovery on claims arising prior to its entry, "it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case"); *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948) ("Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding..."); Restatement (Second) of Judgments § 24 cmt. f. (1982) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may ... be made the basis of a second action not precluded by the first.")”

Phelps v. Hamilton, 122 F.3d 1309 at 1321(C.A.10 (Kan.), 1997).

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea make a frivolous “same facts” argument that does not meet the requirements of transaction analysis and cannot based on the facts alleged in Medical Supply’s cases:

“[W]e cannot agree with the district court that the legal claims in the two suits arise from the same "operative nucleus of fact." *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir.1984); RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt.f (1980) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first."); see also *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327-28, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) (prior dismissal of antitrust complaint did not bar new antitrust complaint based on conduct occurring after the first judgment); *Wu v. Thomas*, 863 F.2d 1543, 1548-49 (11th Cir.1989) (prior discrimination action did not bar current action for retaliation).

Southeast Florida Cable, Inc. v. Martin County, Fla., 173 F.3d 1332 at 1336-1337 (C.A.11 (Fla.), 1999).

The prior judgment wholly ignored the nondefendant conspirators who are now defendants. All issues and facts related to inter enterprise conspiracy were never subject findings of law or fact in Kansas District Court.

The law of res judicata and collateral estoppel following *Lawlor* has long been established as contrary to Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea’s bad

faith misrepresentation to this court that Medical Supply's current action is precluded by a previous prospective injunctive relief action. In *Finnerman v. McCormick*, 499 F.2d 212 (C.A.10 (Colo.), 1974) the Tenth Circuit recognizing *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 on collateral estoppel observed where the doctrine is inapplicable in even issue preclusion against Medical Supply's new action :

“Professor Moore in his work on federal practice recognizes this exception to the collateral estoppel doctrine. See 1B Moore's Federal Practice P0.443(2).

Our court has also held that collateral estoppel does not apply where the issue emerges differently in two different contexts. *Embry v. Equitable Life Assurance Society*, 451 F.2d 472 (10th Cir. 1971), cert. denied, 405 U.S. 1041, 92 S.Ct. 1316, 31 L.Ed.2d 582 (1972). To the same effect is *Young & Company v. Shea*, 397 F.2d 185, 188 (5th Cir. 1968), cert. denied, 395 U.S. 920, 89 S.Ct. 1771, 23 L.Ed.2d 237 “(1969).

Finnerman v. McCormick, 499 F.2d 212 at 214(C.A.10 (Colo.), 1974). While Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea might recycle quotes from the court in *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM related to the USA PATRIOT Act wholly contradicting the plain text of the federal statute, such quotes cannot determine issues related to the USA PATRIOT Act in the present case. *Finnerman v. McCormick*, 499 F.2d 212 at 214.

The trial court and the Tenth Circuit did not make findings of fact or law relevant to many of the antitrust claims, the issues of whether combination in addition to conspiracy fulfills Sherman 1 and whether a malicious USA PATRIOT Act suspicious activity report could be Sherman 2 prohibited conduct and other that might be relevant to the current action. “However, a dismissal with prejudice unaccompanied by findings has no preclusive effect on any issue. See *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *InterDigital Technology Corp. v. OKI America*, 866 F. Supp. 212 (E.D. Pa. 1994)(issue preclusion inapplicable to issue dismissed in earlier litigation without factual findings or conclusions of law). Nor does a dismissal of an action with prejudice unaccompanied by findings preclude subsequent litigation involving a different cause of action. *Connaghan v. Maxus Exploration Co.*, 5 F.3d 1363 (10th Cir. 1993).” *Reid v. Pyle* (Colo. Ct. App., 2002).

Issue preclusion, of narrower scope than res judicata, requires that the identical issue was decided on the merits between the same parties. 1B James W. Moore et al., Moore's Federal Practice pp 0.401, 0.405, 0.441 (2d ed.1992). “*Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1324, 5 USPQ2d 1255, 1258 (Fed.Cir.1987) (“a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been

determined in the first action") (quoting *Cromwell v. County of Sac*, 94 U.S. (4 Otto) 351, 356, 24 L.Ed. 195 (1876)).” *Kearns v. General Motors Corp.*, 94 F.3d 1553 at 1556 (C.A.Fed. (Va.), 1996).

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea are desperate for *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM to save their clients from new antitrust causes of action when under *Lawlor* and the established law of the Eighth and Tenth Circuits it cannot. And of course, where Honorable Judge Carlos Murguia expressly dismissed without prejudice claims based on contract and intellectual property, the earlier case also cannot have preclusive effect. And while extra legal conduct of Mark A. Olthoff, Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea’s law firm have deprived Medical Supply of a US Supreme Court appeal where its counsel under professional ethics attack by the defendants was ineligible to represent the company under US Supreme Court rules. Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea’s law firm and clients cannot escape antitrust liability to the other defendant conspirators for *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM and the present action.

While the above describes law and facts Mark A. Olthoff, Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea are responsible for knowing and therefore showing they have intentionally violated Rule 11 and Title 28 U.S.C. § 1927 in filing the present motion for sanctions, there are additional reasons outside the defendant counsels’ expected knowledge that provide Medical Supply the right to bring new claims: “[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).

Medical Supply’s current case alleges Shughart Thomson & Kilroy, P.C. on behalf of the other defendants and acting through Shughart Thomson & Kilroy, P.C.’s recent Overland Park office managing partner Magistrate James O’Hara and Shughart Thomson & Kilroy, P.C. Andrew M. DeMarea (also of the firm’s Overland Park office) controlled racketeering conduct directed at Medical Supply’s counsel for the purpose of depriving Medical Supply of legal representation. While Shughart Thomson & Kilroy, P.C. as counsel for US Bancorp, NA, US Bank, Piper Jaffray and their officers was in the only privity relationships recognizable in the earlier action, this conduct took place after the filing of Medical Supply’s Amended

complaint in *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM and largely after that action was dismissed on June 16, 2003. In fact, the RICO pattern was not even discovered until this year, see *Medical Supply v. Novation et al* complaint.

Neither the plaintiff Medical Supply or its counsel opposes the rate per hour charged by the defendant counsel used to determine the legal fees for the Tenth Circuit's sanction of Medical Supply's counsel for appealing the trial court's abuse of discretion in dismissing *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM for failure to state a claim and the trial court's clearly erroneous determination the USA PATRIOT Act does not provide private rights of action when clearly Congress expressly provided several in the text of the act and implied additional causes of action. The Tenth Circuit also sanctioned Medical Supply's counsel for appealing the trial court's abuse of discretion in ruling contrary to established Tenth Circuit controlling authority regarding unknown defendants and antitrust coconspirators identified but not named as defendants. Medical Supply and its counsel submitted a pleading in the fee determination stating \$360.00 an hour is a reasonable rate for antitrust work in this market. (not including fee enhancement for the adversity imposed on Medical Supply's counsel). Medical Supply's counsel is seeking US Supreme Court review of the appropriateness of sanctions for an appeal that takes the same position later followed by the Arkansas Supreme Court on the liability of a bank for a malicious USA PATRIOT Act suspicious activity report. **See Exb. 3**

The fact that the Tenth Circuit sanctioned Medical Supply's counsel does not create preclusion regarding any issue in the present case. Medical Supply and its counsel were denied review of the *sua sponte* sanctions, despite seeking an *en banc* rehearing. Medical Supply was unable do to the actions of the defendants described in the complaint to petition for certiorari. Collateral estoppel does not apply where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." Restatement (Second) of Judgments § 28(1); *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 393-94 (5th Cir. 1998); *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1122 (9th Cir. 1997); *Johnson v. Watkins*, 101 F.3d 792, 795-96 (2d Cir. 1996); *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993); *Edwards v. Boeing Vertol Co.*, 750 F.2d 13, 15 (3rd Cir. 1984); *Gelpi v. Tugwell*, 123 F.2d 377, 378 (1st Cir. 1941); *Standefer v. United States*, 447 U.S. 10, 23 (1980) ("Under contemporary principles of collateral estoppel, [the fact that a party could not appeal the prior judgment]

strongly militates against giving an acquittal preclusive effect." (citing Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 3, 1976 (denying preclusive effect to an unreviewable judgment))).”

CONCLUSION

The defendant’s motion for sanctions against Medical Supply and its counsel is wholly contrary to the facts of the present case and the applicable law regarding claim and issue preclusion. Mark A. Olthoff, Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea were served notice by the plaintiff of their responsibility to identify transactions or privities that could preclude Medical Supply’s current claims or issues. Mark A. Olthoff, Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea failed to do so on behalf of their clients in frivolously seeking the dismissal of Medical Supply’s current complaint and now in bad faith seek sanctions against Medical Supply and its counsel. The plaintiff respectfully requests this court deny the defendants’ motion.

Respectfully Submitted

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Certificate of Service

I certify that on June 17th, 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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