

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

MEDICAL SUPPLY CHAIN, INC.,)
(Party in interest Samuel K. Lipari))
<i>Plaintiff,</i>)
v.) Case No. 05-2299
NEOFORMA, INC. <i>et al</i>) Formerly W.D. MO.
) Case No. 05-0210

MOTION FOR RECONSIDERATION

Comes now, the plaintiff Medical Supply Chain, Samuel K. Lipari appearing pro se and respectfully requests the court reconsider its dismissal order, (Doc. 78). The order in clear error contradicts controlling US Supreme Court authority.

STATEMENT OF FACTS

1. The federally actionable conduct complained of in the current case occurred after the date federally actionable conduct was averred in *Medical Supply Chain, Inc. v. US Bancorp, NA, et al*, case number 02-2539-CM ("*Medical Supply I*")

2. The merger of the two remaining web based hospital supply distributor competitors of Medical Supply averred in the current complaint as an agreement made by the defendants to monopolize the hospital supply market did not take place until March of 2006, a year after the current complaint.

3. The defendants were not parties in *Medical Supply Chain, Inc. v. General Electric Company, et al.*, case number 03-2324-CM ("*Medical Supply II*").

MEMORANDUM OF LAW

A court will alter or amend judgment or reconsider its ruling when there is a need to correct clear error or prevent manifest injustice. *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995); *Priddy v. Massanari*, 2001 WL 1155268, at *2 (D. Kan. Sept. 28, 2001).

1. The prior case outcomes cannot determine the present action

The defendants Novation, LLC ("*Novation*"), VHA Inc. ("*VHA*"), University Healthsystem Consortium ("*UHC*"), Robert Baker, Curt Nonomaque, Neoforma and Robert J. Zollars were not defendants or plaintiffs in either of the preceding cases. The defendant Shughart Thomson & Kilroy, P.C. while in recognizable privity as counsel to defendants in *Medical Supply I*,¹ were not parties in *Medical Supply II* and the conduct averred in the present complaint did not take place

¹ *B-S Steel of Kansas, Inc. v. Texas Industries*, 327 F.Supp.2d 1252 (D. Kan., 2004) "But, privity does not require the plaintiff and defendant to be parties to an agreement. "Privity requires, at a minimum, a substantial identity between the issues in controversy and showing [that] the parties in the two actions are really and substantially in interest the same." Quoting *Lowell Staats Mining Co. v. Philadelphia Elect. Co.*, 878 F.2d 1271, 1275 (10th Cir.1989).

until after the filing of the plaintiff's averments in *Medical Supply I*.

The Supreme Court case of *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955), is controlling. In *Lawlor*, the plaintiffs brought an antitrust action in 1942 alleging that the defendants, National Screen and three producers, had conspired to establish a monopoly in the distribution of advertising posters to motion picture exhibitors through the use of exclusive licenses, and that the plaintiffs' business had been injured as a result. In 1943, prior to trial, that suit was settled and dismissed with prejudice. *Id.* at 324, 75 S.Ct. at 866. The settlement was based upon an agreement by National Screen to furnish plaintiffs with all standard accessories distributed by National Screen pursuant to its exclusive license agreements. In 1949, the plaintiffs brought another antitrust action, this time alleging that the prior settlement was merely a device used by the defendants to perpetuate their conspiracy and monopoly. Plaintiffs also alleged that five other producers had joined the conspiracy since the 1943 dismissal, that defendant National Screen had deliberately made slow and erratic deliveries of advertising materials in an effort to destroy plaintiffs' business, and that defendant had used

tie-in sales and other means of exploiting its monopoly power. *Id.* at 325, 75 S.Ct. at 867. The Supreme Court held that the latter suit was not barred by res judicata because the two suits were not based on the same cause of action. *Id.* at 327, 75 S.Ct. at 868. The Court noted:

"That both suits involved "essentially the same course of wrongful conduct" is not decisive. Such a course of conduct--for example, an abatable nuisance--may frequently give rise to more than a single cause of action.... 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."

Id. at 327-28, 75 S.Ct. at 868 (footnote omitted).

See also *Cellar Door Productions, Inc. of Michigan v. Kay*, 897 F.2d 1375 at 1376-77 (C.A.6 (Mich.), 1990).

The Seventh Circuit has also followed *Lawlor* insofar as it held that "[i]n the context of a continuing scheme to violate the antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff." *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir.), cert. denied, 459 U.S. 943, 103 S.Ct. 257, 74 L.Ed.2d 201 (1982).

The Fifth Circuit explored *Lawlor's* application in *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (5th Cir.1970).

"On appeal, the Fifth Circuit first examined the meaning of "cause of action" for res judicata purposes and found that the doctrine did not apply to a liberal reading of the third complaint. The court distinguished cases in which damages came from a prior act, such as breach of contract, or series of acts that have been completed except in their consequences and cases in which damages arose from actions subsequently occurring, either alone or in combination with the completed actions. On the facts before it, the court held that "significant actions ... occurring subsequent to 1961, either alone or in combination with acts [completed prior to 1961] except for their consequences" may be the basis for new damage claims since the harm currently alleged by plaintiff did not arise out of the particularized activities previously adjudicated. 421 F.2d at 1318. As for collateral estoppel, the court examined the issues raised in the earlier cases and held that the effect of the orders granting summary judgment was to wipe out all claims against the defendants arising out of the 1961 actions. Plaintiff was entitled, however, to establish antitrust violations and damages by proof covering post-1961 activities."

Harkins Amusement v. Harry Nace Co., 648 F.Supp. 1212 at 1215 (Ariz., 1986) The Harkins court ultimately found that consumer fraud claims brought against the defendants later conduct could not be precluded. *Id.* At 1216.

The facts of the Medical Supply case before us are similar to those of *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir.1967). Cream Top involved an action alleging a continuing scheme to violate antitrust laws subsequent to a prior dismissal with prejudice. In that case, the court relied upon *Lawlor* in reversing the District Court's order granting summary judgment on res

judicata grounds. The court noted, "[a]t least insofar as the complaint alleges violations since the dismissal of the [first] case, the judgment in that case cannot be given the effect of extinguishing a claim which arose subsequent to that judgment." Id. at 363 (citing *Lawlor*, 349 U.S. 322, 75 S.Ct. 865).

The Cellar Door court stated:

"In the case before us, Olympia and Brass Ring's course of conduct could give rise to more than one cause of action. Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in *Lawlor* and *Cream Top*, those causes of action that arose subsequent to the 1983 dismissal are not barred by res judicata. Accordingly, we must reverse the District Court's order granting summary judgment in favor of appellees."

Cellar Door Productions, Inc. of Michigan v. Kay, 897 F.2d 1375 at 1378 (C.A.6 (Mich.), 1990).

2. Claim preclusion

Claim preclusion clearly does not apply to the Novation defendants who were not parties to the previous action. The Novation defendants were not in privity or controlling the previous actions. The US Supreme Court in *Lawlor v. National Screen Service Corporation* resolved these issues:

a. Privity

The Novation defendants are not parties in privity for the purposes of collateral estoppel. "Restatement, Judgments, § 83, Comment a: 'those who control an action although not parties to it * * *; those whose interests are represented by a party to the action * * *; successors in interest. * * *' "Id. at fn 19 "It is sufficient here to point out that the five defendants do not fall within the orthodox categories of privies;" *Id.* at pg. 329

b. prior outcome of injunction no bar

Nor does the plaintiff's failure to prevail against the previous defendants estop the present 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 the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata."

Id. at pg. 329.

c. Necessary Parties

Nor does the plaintiff's failure to prevail against the previous defendants estop the present action:

"in any event there was no obligation to join them in the 1942 case since as joint tort-feasors they were not indispensable parties; and that their liability was not 'altogether dependent upon the culpability' of the defendants in the 1942 suit."

Id pg. 328.

d. Identity of claims

Under federal law, collateral estoppel may be invoked only if "the issue previously decided is identical with the one presented in the action in question." *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir.1995).

The current complaint states claims for subsequent conduct and conduct not yet ripe in the earlier litigation. "...if future damages are unascertainable, a cause of action for such damages does not accrue until they occur. *Zenith*, 401 U.S. at 339, 91 S.Ct. at 806." *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at FN4 (C.A.10 (Kan.), 1989). See also *Barnosky Oils Inc., v. Union Oil Co.*, 665 F.2d 74, 82 (6th Cir. 1981). US Bank was still attempting to perform the financing part of the contract after Medical Supply filed its injunctive relief. If "the initial refusal is not final, each time the victim seeks to deal with the violator and is rejected, a new cause of action accrues. See *Pace Indus.*, 813 F.2d at 237-39; *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714-15 (11th Cir.1984)." *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas*

Elec. Power Co-op., Inc., 872 F.2d 931 at 933-4 (C.A.10 (Kan.), 1989).

Lawlor v. National Screen also clarifies this issue:

"The conduct presently complained of **was all subsequent to the 1943 judgment**. In addition, there are **new antitrust violations alleged** here—deliberately slow deliveries and tie-in sales, among others—not present in the former action. 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**. In the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly; **five other producers had granted exclusive licenses to National Screen, with the result that the defendants' control over the market for standard accessories had increased to nearly 100%**. Under these circumstances, whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, **the 1943 judgment does not constitute a bar to the instant suit.**" [emphasis added]

Lawlor v. National Screen Service Corporation, 349 U.S. 322 at 328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955)

Collateral Estoppel Is Inapplicable To The Novation Defendants

The defense has no clothes. Clearly the three required elements for claim preclusion or collateral estoppel do not exist:

"The three requirements for application of claim preclusion are: (1) identity or privity of the parties; (2) identity of the cause of action; and (3) a final judgment on the merits. *Id.* Where these three requirements are met, claim preclusion applies to bar the maintenance of a subsequent suit."

Heard v. Board of Pub. Util. of Kansas City, Ks, 316 F.Supp.2d 980 at 982 (D. Kan., 2004).

3. Antitrust Conspiracy Sufficiently Pled

There is no heightened pleading standard for conspiracy or antitrust conspiracy. The claims adequately apprise the defendants of the gravamen of their conduct: Under the law, a conspiracy may consist of any mutual agreement or arrangement, knowingly made, between two or more competitors. *Law v. Nat'l Collegiate Athletic Ass'n* 185 F.R.D. 324, 336, n.19 (D. Kan. 1999). The plaintiff has met the burden of pleading a conspiracy by "identif[ying] the co-conspirators and describ[ing] the nature and effect of the alleged conspiracy." *Alco Standard Corp. v. Schmid Bros.*, 647 F.Supp. 4, 6 (S.D.N.Y.1986).

The hospital supply competitors VHA and UHC's joint ownership and agreement to exclusively use the electronic marketplace Neoforma is such a prohibited combination and conspiracy.

The hospital supply competitors VHA and UHC's formation of the defendant limited liability company Novation is identified in the complaint as a conspiracy to restrain trade specifically prohibited under *Dagher v. Saudi Refining Inc.*, No. 02-56509 (Fed. 9th Cir. 6/1/2004) (Fed. 9th Cir., 2004).

The plaintiffs other Sherman 1 claims are equally undismissable. See *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 478, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) ("The alleged conduct – higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent."); *United States v. VISA U.S.A., Inc.*, 344 F.3d 229, at 241-43 (2d Cir.2003) (rules for vendor participation causing reduction in output and consumer choice had anticompetitive effect); *Primetime 24 Joint Venture v. National Broadcasting Co.*, 219 F.3d 92, 103-04 (2d Cir.2000) (refusing to dismiss where complaint alleged agreement resulting in denial of a necessary input to a competitor).

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4. Plaintiff sufficiently alleged monopoly power or the elements of attempt to monopolize

The complaint alleges and Neoforma and the Novation defendant parties surprisingly subsequently proved the plaintiff's claims for Sherman 1 combination and conspiracy in restraint of trade antitrust violations through their conduct and official press releases. See Exbs. 3 and 4:

"The current 10-year exclusive outsourcing agreement was originally entered into in March 2000 and was most recently amended in August 2003 as a result of negotiations between the parties to the contract. Under the terms of that amendment, the quarterly maximum payment from Novation to Neoforma was established at \$15.25 million, or \$61.0 million per year, beginning in 2004."

Exb 3 Neoforma SEC disclosure press release pg. 1

"In addition, at the effective time of the Merger, VHA and UHC, which respectively owned 8,611,217 and 2,130,302 shares of Neoforma common stock prior to the Merger, representing approximately 41.5% and 10.3% of Neoforma outstanding common stock, respectively had 2,004,190 and 495,810 of their shares of Neoforma common stock converted into the right to receive \$10.00 per share in cash in the Merger. The remainder of the shares that they held were exchanged, immediately prior to the closing of the Merger, for membership interests in GHX representing approximately an 11.6% ownership interest in GHX for VHA and a 2.9% ownership interest in GHX for UHC, pursuant to exchange agreements."

Exb 4 Neoforma SEC disclosure press release pg. 1

The complaint does describe the Novation defendant's market power in many places. The following three paragraphs from the complaint are an example:

¶56 states: "By 8/21/04 The NY Times reported that the Justice Department had opened a broad criminal investigation of the medical-supply industry revealing that Novation is being subjected to a criminal inquiry:

"Novation's primary business is to pool the purchasing volume of about 2,200 hospitals, as well as thousands of nursing homes, clinics and physicians' practices, and to use their collective power to negotiate contracts with suppliers at a discount. In many cases, the contracts offer special rebates to hospitals that meet certain purchasing targets. **Although Novation is not well known outside the industry, it wields formidable power because it can open, or impede, access to a vast institutional market for health products.**" [emphasis added]

¶433 states:

"The defendant Novation LLC is the largest Hospital Group Purchasing Organization selling over 30 billion dollars in hospital supplies a year and controlling the purchasing in 2000 hospitals nationwide."

¶434 states:

"The defendants possess market power having the power to exclude competitors from 2000 of the nation's hospitals, which Novation controls under long term purchasing contracts. The defendants possess market power in the ability to charge manufacturers and suppliers fees to have their products sold to Novation's members and additional fees to manufacturers and suppliers for allowing their products to be sold through the web where member hospitals are required to purchase products through Neoforma, Inc. The defendants possess market power in having exclusive access to Piper Jaffray's investor research coverage and annual healthcare conferences, elements essential to effectively obtain capitalization through an initial public offering. The defendants possess market power in having exclusive access to the commercial banking facilities of US Bancorp NA."

The complaint identifies the defendant Neoforma and the nondefendant coconspirator GHX, LLC as the only other electronic marketplaces for hospital supplies (¶40) besides Medical Supply Chain and that Neoforma will be merged with GHX, LLC to monopolize the web based market for hospital supplies.

The complaint adequately alleges a conspiracy to monopolize under Section 2. To establish such a claim, plaintiff must plead and prove (1) a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1556 (10th Cir. 1995).

5. Plaintiff adequately alleges harm to competition

The plaintiff's complaint documents harm to the market from the defendants' artificial inflation of hospital supply prices. A trilogy of recent Supreme Court decisions reflect that it is unnecessary at the pleading stage to state every element of a claim, See *Swierkiewicz v. Sorema N.A.*, 534 U.S.

506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998);
*Leatherman v. Tarrant County Narcotics Intelligence &
Coordination Unit*, 507 U.S. 163 (1993).

6. Plaintiff has standing

The plaintiff Medical Supply Chain, Inc., like the sole proprietorship Medical Supply Chain and Sam Lipari the founder and CEO of Medical Supply Chain, Inc. (a statutory trustee of the corporation under Missouri § 351.525 RSMo) and now the proprietor of Medical Supply Chain, a hospital supply business excluded from the market by the continuing acts of the defendants has standing.

Missouri's rule 52.13(e) states "When a corporation has been sued and served with a process or has appeared while in being, and is thereafter dissolved or its charter forfeited, the action shall not be affected thereby" Accordingly, under § 351.525, "[t]he statutory trustees succeed to the interest of the corporation by operation of law ". *Sab Harmon Indus. v. All State Bldg. Sys.*, 733 S.W.2d 476, 483 (Mo.App.1987).

It has been asserted that like the trial court in case *World of Sleep's* conclusion that *World of Sleep's* lost profits from potential sales to the licensee stores were too speculative because "there is no history at all of any profit or loss on these dealings during the years involved

in this case *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 at 1478 (C.A.10 (Colo.), 1985). This error contradicts established Tenth Circuit and US Supreme Court law:

“If proof of a profit and loss history were required, no plaintiff could ever recover for losses resulting from his inability to enter a market. However, such recoveries are clearly available under section 4 of the Clayton Act. See, e.g., *Zenith*, 395 U.S. at 129, 89 S.Ct. at 1579. (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969))”

World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 at 1478 (C.A.10).

7. Plaintiff pled he required elements for an antitrust claim based on interlocking directors

The defendants omit that Rule 8 of the federal rules of civil procedure governs. No special pleading requirements attach in antitrust cases, beyond those specifically set out by Congress; antitrust plaintiffs thus enjoy the same general standard for stating a claim as other litigants. See *Radovich v. National Football League*, 352 U.S. 445, 453-54, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); *Nagler v. Admiral Corporation*, 248 F.2d 319, 323-24 (2d Cir.1957).

The burden to state a claim for interlocking directors is exceedingly low:

"Defendant also maintains that plaintiff has failed to state a claim under § 8 of the Clayton Act, 15 U.S.C. § 19. Section 8 prohibits interlocking directorates of competing corporations if elimination of competition between them by agreement would violate any of the antitrust laws. Defendant intends to seek majority representation on plaintiff's board of directors after the acquisition of seventy five percent of the plaintiff's stock (SEC FORM S-7 at 16). *United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614 (S.D.N.Y.1953), the district court granted summary judgment against the defendant, ordering the resignation of a director from the board of one or both of two competitor corporations upon which he sat, because of a potential anticompetitive agreement.¹⁰ In light of *Sears*, we hold that plaintiff has adequately stated a claim under § 8 of the Clayton Act."

American Medicorp, Inc. v. Humana, Inc., 445 F.Supp. 573 at 587 (E.D. Pa., 1977). At footnote 10, the *American Medicorp* court goes on to explain the purpose for easily triggering interlocking directorate liability:

"[w]hat Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. The legislation was essentially preventative.

* * * * *

While it may be acknowledged that the clause is not crystal clear, to infuse it with the meaning contended for by the defendants would defeat the Congressional purpose "to arrest the creation of trusts, conspiracies and monopolies in their incipiency and before consummation." This conclusion is compelled because of the futility of trying to decide whether a given hypothetical merger would violate the pertinent sections of the antitrust laws. *Sears*, supra, at 616-617. (Footnotes omitted)."

The complaint states the defendants had interlocking directors to facilitate their monopoly and that antitrust law violations occurred:

¶235 states:

"The May 25, 2000 announcement also revealed the interlocking directors used by the Defendants to restrain trade in hospital supplies. In connection with the new agreements, two of the seven seats on the Neoforma.com Board of Directors will be filled by VHA designees after closing of the transaction."

¶ 368 states:

"(US Bancorp has interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC.; the Defendant Novation and Premier. US Bancorp helped the Defendant Novation acquire control of the Defendant Neoforma and partner it with GHX LLC. creating a monopoly of over 80% of healthcare e-commerce)."

¶ 424 states:

"Medical Supply Chain, Inc. has been excluded from the hospital supply market with agreements between UHA and VHA's Novation in combination with their electronic marketplace Neoforma, Inc. US Bancorp NA, and The Piper Jaffray Companies exchanged directors with Novation and participated in exclusive agreements with Novation and Neoforma to keep hospitals using technology products from companies US Bancorp NA and Piper Jaffray had an interest in. The purpose of these agreements was to injure the hospital supply consumers with artificially inflated prices."

¶ 500 states:

"The Defendants use of interlocking directors in joint ventures and LLC's formed by competing suppliers, manufacturers and distributors and use of interlocking directors on the boards of healthcare technology and supply chain management companies violate Section 8 of the Clayton Act, 15 U.S.C. § 19."

¶ 502 states:

"Defendants through the use of interlocking directors collectively have at all times material to this complaint maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies in the several States of the United States; and have used, attempted to use, or combined and conspired to use, their monopoly power and interlocking directors to affect competition in the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies sale of the same in the several States of the United States in violation of 15 U.S.C. § 19."

8. Plaintiff attempts to assert a RICO claim, but fails to allege a racketeering act, a pattern of racketeering, or a RICO injury;

The plaintiff has adequately alleged the existence of a RICO enterprise and that the Novation defendants is part of the association in fact that comprises the enterprise.

a. Enterprise

Allegations of the existence of a RICO enterprise must meet only the "notice pleading" requirements of Fed.R.Civ. Pro. 8. Trustees of Plumbers and Pipefitters 886 F.Supp. 1134, 1144-45 (S.D.N.Y.1995)' *Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F.Supp. 1134, 1144-45 (S.D.N.Y.1995); *Azurite Corp. v. Amster & Co.*, 730 F.Supp. 571 (S.D.N.Y.1990).

The enterprise was alleged to have committed predicate acts in violation of 18 U.S.C. § 1962(c) and they were alleged with the required specificity and identified which defendants committed which acts.

"To sufficiently state a RICO claim, [p]laintiffs must plead (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.'" *Cyber Media Group, Inc. v. Island Mortgage Network, Inc.*, 183 F.Supp.2d 559, 578 (E.D.N.Y. 2002) (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985))."

Calabrese v. Csc Holdings, Inc., 283 F.Supp.2d 797 at 807 (E.D.N.Y., 2003). See also *Krear v. Malek*, 961 F.Supp. 1065 (E.D. Mich., 1997):

"Regardless, plaintiffs have sufficiently alleged an "enterprise" in that they have alleged an association-in-fact between Lease Equities, NBF, NBF Cable, Turner and Malek. See *Frank v. D'Ambrosi*, 4 F.3d 1378, 1386 (6th Cir.1993). In *Frank*, the Sixth Circuit stated that: "To satisfy the enterprise requirement, an association-in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the pattern of racketeering activity in which it engages." *Id.* (citing *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981)).

Plaintiffs have properly alleged that the racketeering activity, i.e., the sale of notes through Lease Equities to perpetuate the alleged Ponzi scheme, is distinct from the association-in-fact which associated for legitimate business purposes, to wit: Lease Equities entered into legitimate leases with third parties; NBF Cable entered into legitimate cable television contracts; and Lease Equities was a secured creditor of NBF Cable.

Third, plaintiffs have sufficiently alleged, under § 1962(d), that defendants conspired to violate §§ 1962(b) and (c). To state a claim under § 1962(d), a plaintiff must plead that the defendant agreed to join

the conspiracy, agreed to commit predicate acts, and knew that those acts were part of a pattern of racketeering activity. See *Glessner v. Kenny*, 952 F.2d 702, 714 (3rd Cir. 1991). While plaintiffs have not used the word "agreement" per se, they have stated that defendants Malek, Turner and Lease Equities "have conspired to violate RICO," and have well-pleaded a set of facts from which a conspiracy can be inferred in the FARCS. See *Baumer v. Pacht*, 8 F.3d 1341, 1346 (9th Cir.1993); *Manning v. Stigger*, 919 F.Supp. 249, 254 (E.D.Ky.1996)."

Krear v. Malek, 961 F.Supp. 1065 at 1070-1071 (E.D. Mich., 1997).

b. RICO Conspiracy

The complaint alleges the Novation defendants are part of a RICO conspiracy. Plaintiffs have alleged that the defendant First Franklin engaged in a conspiracy to commit the acts mentioned above in violation of 18 U.S.C. § 1962(d). 18 U.S.C. § 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

c. No Overt Act Required

The Supreme Court's 1997 decision *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352, is controlling. The Supreme Court held that plaintiffs need only allege that defendants "knew of and agreed to facilitate the scheme." *Id.* at 478.

There is no requirement of some overt act or specific act in the [RICO] statute before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an `act to effect the object of the conspiracy.'

§ 371:

"A [RICO] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor ... One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a [RICO] conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, and so punishable in itself."

Salinas, 118 S.Ct. at 476-77.

The Novation defendants do not refute the conduct of the other defendants. Having established a RICO conspiracy, the Novation defendants must make a factual showing to escape. "Once a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming." *United States v. Diaz*, 176 F.3d 52, 97 (2d Cir.1999) (quoting *United States v. Amato*, 15 F.3d 230, 235 (2d Cir.1994)). Plaintiff's § 1962(d) allegations suffice to satisfy *Salinas*.

"[o]nce a RICO enterprise is established, a defendant may be found liable even if he does not have specific knowledge of every member and component of the

enterprise." *Mason Tenders District Council Pension Fund v. Messera*, 1996 WL 351250 at *6 (S.D.N.Y.1996) ("Whether or not this conduct is viewed as being at the core of the enterprise ..."). Furthermore, "[t]he RICO statute has been repeatedly construed to cover both insiders as well as those peripherally connected to a RICO enterprise, particularly where the "outsiders" are alleged to have engaged in kick-backs in order to influence the enterprise's decision." *Id. Azrielli v. Cohen Law Offices*, 21 F.3d 512, 514-15, 521 (2d Cir.1994) (**Judge Kearse held that the district court should not have dismissed the § 1962(c) claim against defendant who served as "the middle person in [a] flip sale" of a building "by allowing his name to be used on the bogus contract and showing up at the closing."**)

In re Sumitomo Copper Litigation, 104 F.Supp.2d 314 (S.D.N.Y., 2000).

To be convicted of conspiracy to violate RICO under § 1962(d), the conspirator need not himself have committed or agreed to commit the two or more predicate acts, as long as each agreed to act in furtherance of the scheme. *Salinas v. United States*, 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). Under this statute, there is no requirement of some overt act in furtherance of the conspiracy. *Id.*

9. Plaintiff's USA Patriot Act claim is a legally valid private cause of action under that Act as a matter of law.

There are numerous expressly stated private causes of action under USA PATRIOT Act Public Law 107-56 ``Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001'' contains private rights of action even

expressly stated in the acts subheadings; SEC. 223. CIVIL LIABILITY FOR CERTAIN UNAUTHORIZED DISCLOSURES and the plaintiff's averred malicious reporting to which there is a private right in SEC. 355 which states:

“(3) MALICIOUS INTENT.—Notwithstanding any other provision of this subsection, voluntary disclosure made by an insured depository institution, and any director, officer, employee, or agent of such institution under this subsection concerning potentially unlawful activity that is made with malicious intent, **shall not be shielded from liability** from the person identified in the disclosure.” [emphasis added].

Additional private rights of action are communicated in sections that immunize “good faith” disclosure of information from third parties. The qualifying of immunity to third parties’ causes of action for civil liability are expressions of Congressional intent for private rights of action; i.e. § 215 of USA Patriot amends FISA § 501(e) (as amended): “A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production.”

10. US District Courts Recognize USA PATRIOT Act Private Rights of Action

It is unclear how the Novation defendants state such a clearly erroneous assertion as the non existence of private rights of action under the USA PATRIOT Act when it is contradicted by case law:

"Section 315 of the Patriot Act amends and expands 18 U.S.C. § 1956(c) (7), a RICO provision that establishes money-laundering as a predicate act. Pub.L. No. 107-56, § 315; or 18 U.S.C. § 1961(1)."

European Community v. Japan Tobacco, Inc., 186

F.Supp.2d 231 at pg. 238 (E.D.N.Y., 2002).

"...as part of the USA-PATRIOT Act, the Congress again amended § 2520 to add that an aggrieved party could recover from an intercepting "person or entity, other than the United States." Pub.L. No. 107-56, § 223, 115 Stat. 293, 384"

Williams v. City of Tulsa, Ok, 393 F.Supp.2d 1124

(N.D. Okla., 2005)

"Finally, section 2520(a) was again amended in 2001 by the USA Patriot Act, which added the phrase "other than the United States" following "person or entity." See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Thus, as currently enacted, section 2520(a) states that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C.A. § 2520(a) (West Supp. 2003) (emphasis added)."

Huber v. North Carolina State University, No. COA03-

145 (N.C. App. 4/20/2004) (N.C. App., 2004).

11. Plaintiff's case has been brought in good faith.

The complaint alleges the Novation defendants knew of and participated in the efforts to deny the plaintiff legal representation. The Novation defendants overtly

participated in a pleading to prevent Sam Lipari from being substituted. In evaluating a dismissal the allegations in the complaint are taken as true. The question of dismissal does not concern the conduct of the plaintiff to avoid unjustly being deprived of redress through representation.

12. Plaintiff Has an Unresolved/Unripe Antitrust Merger Claim

The court's present ruling if unchanged would lead to another year's delay when the plaintiff files his antitrust claim for injury from the merger of Neoforma, Inc. and GHX, LLC. The defendants would no doubt claim res judicata and claim preclusion and seek to have the plaintiff sanctioned without once identifying the transaction date and whether it was subsequent to the present complaint.

Conclusion

The plaintiff respectfully requests the court reconsider its opinion and issue a revised opinion in conformance with controlling applicable law. If the court follows controlling case law and the express language of federal statutes, there is no basis for sanctioning the plaintiff or his former counsel.

Respectfully Submitted,

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Certificate of Service

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