

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

MEDICAL SUPPLY CHAIN, INC.,  
*Plaintiff-Appellant,*

v.

Case No. 03-3342

US BANCORP, NA; US BANK PRIVATE CLIENT GROUP; CORPORATE TRUST; INSTITUTIONAL TRUST AND CUSTODY; MUTUAL FUND SERVICES, LLC.; PIPER JAFFRAY; ANDREW CESERE; SUSAN PAINE; LARS ANDERSON; BRIAN KABBES; UNKNOWN HEALTHCARE SUPPLIER,

*Defendants-Appellees.*

**MOTION TO STAY ISSUANCE OF THE MANDATE**

Pursuant to Fed. R. App. P. 41(d), appellant Medical Supply Chain, Inc. and its counsel Bret D. Landrith respectfully move this Court for an order staying issuance of the mandate pending the filing of a petition for a writ of certiorari to the Supreme Court. In support of this motion, the undersigned counsel state as follows:

1. This Court issued its decision affirming the district court's judgment on November 8, 2004 declaring there is no private right of action under Public Law 107-56 "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, notwithstanding the act's express language providing for private rights of action meeting the requirements of *Alexander v Sandoval*, 532 U.S. 223, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001) and the appellant's claim based on § 355 providing for civil liability. Thus, this Court has invalidated an Act of Congress in this case.

2. The appellant filed a petition for rehearing en banc. On February 10<sup>th</sup>, 2005, this Court denied that petition. Accordingly, the mandate in this case should issue no sooner than May 29, 2005. *See* Fed. R. App. P. 41(b).

3. A petition for a writ of certiorari is due May 11, 2005. Currently, the Government is considering whether to join in seeking Supreme Court review, which it often does when a federal statute is invalidated.

4. A stay of the mandate is appropriate where a certiorari petition "would present a substantial question" and "there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). Whether there exists "a substantial question" and "good cause" for a stay turns on the applicant's "reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury." *Books v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir.), cert. denied, 121 S. Ct. 2209 (2001). If either one of these elements is established, the stay should be granted. *See id.* at 829 (granting stay "although the [applicant] presents a weak case for a grant of certiorari"); see also *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir.) (existence of "substantial" issues constitutes "good cause" that would make the court "obliged to grant" stay), cert. denied, 439 U.S. 958 (1978). Both elements are present here.

I. First, a petition for certiorari obviously would present a substantial question that the Supreme Court likely would agree to review. This Court has invalidated an Act of Congress and deprived the appellant of a right of redress.

a. The USA PATRIOT Act is controversial Resolutions opposing the USA PATRIOT Act have been passed in 371 communities in 43 states including four

state-wide resolutions. These communities represent approximately 56.2 million people who oppose sections of the USA PATRIOT Act. Review of this court's decision would be the first opportunity for the Supreme Court to address the act's restraint of financial freedoms. *Ratzlaf v. United States* (1994) and *United States v. Cabrales* (1998) suggest the Supreme Court has a continuing concern over increased scrutiny of financial conduct.

b. The appellant, acting as a private attorney general employed the statute to civilly enforce federal antitrust law under the Sherman Act as Congress intended where malicious reporting under the USA PATRIOT Act was being used a monopolization device.

c. The Government suffers irreparable injury when it is enjoined from applying federal statutes. *Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J.) (granting a stay) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); see *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984).

d. The public interest also will suffer in the absence of a stay. The public will lose the scarce resources of the appellant, which is actively seeking to enforce the Sherman Act against the appellees in a now ripe action for monetary damages based on their alleged group boycott, single firm refusal to deal and obstruction from entry into the market for hospital supplies. The US Senate has

recognized the anticompetitive practices that injure consumers in this market and are contributing to the projected bankrupting of Medicare in 2012.

II. Second, the appellant has a reasonable prospect of succeeding. It is unlikely that the Tenth Circuit appeal will be upheld as frivolous. In its order for sanctions, the appellate panel acknowledged the existence of private rights of action under the USA PATRIOT Act and finally the presence of a legally separate conspiring entity.

a. The appellant's injunctive relief from Sherman 2 prohibited monopolization does not depend on the existence of a private right of action because Congress granted no express immunity from antitrust law to conduct controlled by the act.

b. Upholding the trial court's dismissal conflicts with a trilogy of recent Supreme Court decisions reflecting the Court's renewed determination to ensure that district judges properly defer to the pleading party in deciding Rule 12(b)(6) motions to dismiss. 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).

c. The appellate panel's dismissal of claims against unknown defendants contradicts this court's own rule allowing dismissal "only when it appears that the true identity of the defendant cannot be learned through discovery or the court's intervention. See *Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993).

d. Finally, the appellate panel's sanction order "relying on a materially incorrect view of the relevant law" is contrary to the standard in *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) and therefore an abuse of discretion.

5. For the foregoing reasons, a stay of the mandate is warranted. If the Solicitor General determines not to file a petition for certiorari or amicus curiae brief, counsel will promptly notify the Court's clerk of that determination.

### **CONCLUSION**

For the foregoing reasons, the appellant respectfully requests an order staying issuance of the mandate.

Respectfully Submitted

S/Bret D. Landrith

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### **Certificate of Service**

I certify I have served copies of this pleading upon opposing counsel listed below via email on February 19th, 2005.

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