

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

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| MEDICAL SUPPLY CHAIN, INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 05-CV-0210-CV-ODS |
| |) | |
| NOVATION, LLC, et al., |) | |
| |) | |
| Defendants. |) | |

**REPLY SUGGESTIONS IN SUPPORT OF MOTION TO DISMISS PLAINTIFF’S
COMPLAINT FOR FAILURE TO STATE A CLAIM**

Defendants Novation, LLC (“Novation”), VHA Inc. (“VHA”) and University Healthsystem Consortium (“UHC”)(collectively “Defendants”) submit these Reply Suggestions in Support of their Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim.

I. INTRODUCTION

Defendants’ Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim (“Motion to Dismiss”) established that Plaintiff’s Complaint lacks the factual allegations necessary to plead a right to recovery under any of Plaintiff’s theories of liability. Plaintiff’s Suggestions in Response (“Plaintiff’s Response”), and the supporting Affidavit of Samuel Lipari, drop any pretense that this lawsuit has any basis in the law or fact. Instead, Plaintiff uses this lawsuit as a forum to vent outrageous, facially implausible, and, apparently delusional conspiracy theories.

Indeed, Plaintiff argues that this Court should not transfer venue to the U.S. District Court in Kansas, the Court which has previously rejected the claims Plaintiff asserts in this proceeding, because “the State of Kansas was so far removed from lawfulness and the

constitution” and because Plaintiff’s CEO Samuel Lipari believes he would be “putting witnesses in jeopardy if this action were conducted in Kansas . . . as a result of . . . the obvious willingness of the Kansas judicial branch to assist in the harassment and intimidation [of witnesses and victims].” Affidavit of Samuel Lipari (“Lipari Aff.”) at ¶¶ 15, 33. However, Plaintiff’s distaste for the state of Kansas and its judiciary is no reason to deny transfer of a case to the court in which a case Plaintiff admits “share[s] common issues of law and fact” with a case filed there.

The Lipari affidavit also either directly alleges or implies that Defendants and/or various unidentified co-conspirators in city and state governments and Kansas courts are responsible, directly or indirectly, for the following nefarious acts:

- retaliation against Plaintiff’s counsel Bret Landrith for bringing these claims and for representing an individual named James Bolden in unrelated litigation;
- the possible disappearance of one of Bolden’s prior attorneys;
- harassment of witnesses willing to testify on behalf of Mr. Bolden, including unspecified actions against a U.S. Postal worker that left him homeless;
- causing an ethics investigation into Plaintiff’s attorney Bret Landrith;
- “intensified presence of law enforcement officials” including “uniformed and plain clothes surveillance” of Plaintiff’s CEO Samuel Lipari;
- disruption of Lipari’s fathers trucking company and resulting financial difficulties;
- aggravation of the health problems of Lipari’s parents, which caused his stepmother’s death from a stroke;
- targeting of Lipari’s fiancée and her daughter, which led to the breakup of his relationship and the loss of Lipari’s home and his need to move into his father’s basement;
- the break-in and search of Lipari’s father’s home while the Liparis were not at home;
- Lipari’s internet research interruption and email delays;
- a bribe of Lipari involving an offer of \$300,000 if he will hire a Kansas attorney as lead counsel for Medical Supply;
- unspecified improper acts to influence the Kansas District Court;

- unspecified involvement in the deaths of U.S. Attorneys in Ft. Worth Texas, causing Mr. Lipari to fear for his own life.

In addition to this discussion of Landrith's and Lipari's alleged travails, Plaintiff's Response focuses on allegations that Defendants violated antitrust laws by artificially inflating medical supply prices and defrauding Medicare, Medicaid and Champus. Plaintiff's Complaint also alleges that the U.S. Bank Defendants and others acted improperly to deprive Plaintiff of necessary capital and real estate for its medical product supply venture. Plaintiff then tries to tie it all together by alleging that this alleged conduct represents a conspiracy to prevent Plaintiff from competing in the medical supply market.

What is missing from Plaintiff's Response, however, is: (1) any factual allegations in Plaintiff's Complaint that Novation, UHC or VHA even knew about Plaintiff's efforts to obtain financing and office space, much less conspired with anyone to block such efforts; (2) any explanation of why Plaintiff would have standing to sue for alleged injuries to Medicare, Medicaid and Champus; (3) any response at all to the majority of legal arguments set forth in Defendants' Motion to dismiss; and, (4) any explanation of why Plaintiff is prevented from competing in the medical supply market, especially when it alleges that it could provide medical supplies at a lower price than is provided by Defendants. To the small extent Plaintiff tries to address some of the arguments in Defendants' Motion, it gets the law wrong.

II. ARGUMENT AND AUTHORITIES

A. Plaintiff's Claims are Barred by Collateral Estoppel

Plaintiff's efforts to avoid the collateral estoppel bar to its claims, and thereby get a third bite at the apple, are without merit. First, Plaintiff argues that the claims for its recent damages are not precluded because the damages post-date the prior action. This argument is frivolous, because the damages are alleged to arise from the course of conduct alleged in the prior cases—

the same course of conduct found not to violate the antitrust laws. Under Plaintiff's theory, a party could assert a new antitrust claim each day, based on the alleged new damages, despite the fact that a court has found that the defendant's conduct allegedly causing the same damage on prior days was not actionable. This, of course, is not the law. In *Huck on Behalf of Sea Air Shuttle Corp. v. Dawson*, 106 F.3d 45 (3rd Cir. 1997), the plaintiff brought a claim for damages relating to recent denials of access to certain sea ramps, despite the fact that an earlier suit had determined that the defendant had a right to deny access:

First, Huck's argument ignores the fact that in the initial judgment the district court determined that VIPA had a right to deny Sea Air access to the sea ramps, thereby settling the question of whether Sea Air was being deprived of its constitutional rights. Second, the conduct of which Huck complains, i.e., the denial of access to the sea ramps, is precisely the same conduct challenged in the earlier suit. Finally, it is difficult to understand how Huck can conclude that VIPA, by acting upon authority of and in accordance with the final judgment of the district court, created a new cause of action that was not barred by res judicata. This is not a case where there has been a change of circumstances concerning material operative facts that would serve to make the application of res judicata improper, nor does Huck argue so.

Id at 49. See also *Yoon v. Fordham Univ. Faculty & Admn. Retirement Plan*, 263 F.3d 196 (2d. Cir. 2001) (holding that where the plaintiff had sought an order requiring the University to continue to pay his salary until he was dismissed from his tenured position, the dismissal of that action meant that a later action seeking unpaid salary payments that would have been due after the dismissal of the first lawsuit was barred by res judicata).

Second, Plaintiff argues that Defendants are precluded from relying on the collateral estoppel doctrine because there is no privity between Defendants and a party to the prior lawsuits. However, privity between the defendant and a prior litigant is not required to assert collateral estoppel against Plaintiff. See *Ashton Optical Imports, Inc. v. Incite Intern., Inc.*, 266 F. Supp. 2d 1027, 1031 n.2 (D. Neb. 2003) (noting that a "[a] stranger to a primary suit can

assert the theory of issue preclusion in a subsequent suit provided the issue is identical, it was raised and litigated in the prior action, it was material and relevant to the disposition of the prior action, and the determination was necessary and essential to the resulting judgment.”). To the extent that privity is at all relevant, the requirement applies to the party being estopped. *See Oldham v. Pritchett*, 599 F.2d 274, 279 (8th Cir. 1979). In this case, Medical Supply Chain was the plaintiff in all three cases.

Finally, Plaintiff misunderstands the basis for the Kansas District Court’s rejection of these claims. For example, Plaintiff tries to deflect that court’s characterization of Plaintiff’s allegations under the USA Patriot Act as “completely divorced from rational thought,” as merely displaying disapproval for the USA Patriot Act, rather than any rejection of Plaintiff’s claim that would have preclusive effect here. That contention is belied by the clear language of the court’s judgment which dismisses the USA Patriot Act’s claim. Thus, as set forth more fully in Defendants’ Motion and Supporting Suggestions, most of Plaintiff’s claim is barred by collateral estoppel.

B. Plaintiff’s Irrelevant Arguments Regarding Allegedly Inflated Medical Supply Costs Fail to Salvage Plaintiff’s Claims

Plaintiff argues that a press release discussing the potential renegotiation of an outsourcing agreement between Defendants and Neoforma, and noting Defendants’ belief that Neoforma’s outsourcing fee should be lower, constitutes a concession by Defendants of liability for a price fixing claim. *See* Plaintiff’s Response, at p. 5. As a threshold matter, a discussion of recent press releases does nothing to bolster the legal sufficiency of Plaintiff’s complaint, which does not even mention the issues discussed in the release. More fundamentally, Plaintiff’s argument is simply absurd. A dispute between the fee charged by Neoforma to Defendants has nothing to do with Plaintiff’s allegations that Defendants artificially inflate the prices of medical

supplies to hospitals and other consumers of such products.

In any event, even if Plaintiff sufficiently alleged a conspiracy to inflate medical supply product prices, Plaintiff is simply not injured by such conduct and, under settled controlling precedent, has no standing to sue. *See* Defendant's Suggestions in Support of Motion to Dismiss, at p. 4. Plaintiff has wholly failed to respond to this argument and instead seeks to recover for damages allegedly caused to Medicare, Medicaid and Champus.

C. Plaintiff's Arguments Against Transfer are Frivolous and Rely on Overruled Precedent

As noted in the Introduction, Plaintiff's primary argument against transfer of this cause to the Kansas district court is the alleged lawlessness of that state and misconduct of its judiciary. While Plaintiff may be disappointed in the lack of success of its claims in Kansas, this argument is clearly without any merit. The argument that the U.S. District Court in Kansas lacks the resources to handle this case is also without basis, as it is based on the Court's refusal to respond to a letter to that court by Plaintiff's counsel complaining that Plaintiff felt that the dismissal was "a mistake of law and fact" which resulted from an unwillingness "to devote the time to research a relatively rare form but very serious form of antitrust violation." *See* Exhibit 4 to Plaintiff's Response. Obviously, the refusal to respond to Plaintiff's unfounded criticism is not an indication of a lack of judicial resources on the part of the U.S. District Court in Kansas. Finally, Plaintiff's argument that the rules regarding contribution among joint tortfeasors differs in the Eighth Circuit, and thereby transfer would prejudice defendant, is not only incoherent, but also relies on overruled law. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (abrogating *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979)).

D. Plaintiff's Use of Conclusory Allegations of Conspiracy and Joint and Several Liability Do Not Salvage the Complaint

Finally, Plaintiff implicitly concedes that there are no factual allegations regarding Defendants' involvement in the alleged conduct against Medical Supply Chain, but argues that such allegations are unnecessary given that there is joint liability among participants in an antitrust conspiracy. Thus, Plaintiff argues, "no basis for dismissal of any claim asserted by the defendant [sic] VHA, UHC and Novation can be dispositive unless it addressed the failure of a claim to meet pleading requirement [sic] against all defendant parties." *See* Response, at p. 9. This gambit, however, overlooks the fact that joint and several liability presupposes the liability of each defendant in the first place. Merely asserting a claim against other defendants is not sufficient to hold another VHA, UHC and Novation liable if, like here, Plaintiff has wholly failed to allege that VHA, UHC and Novation participated in an actionable antitrust conspiracy with the other defendants. In other words, mere incantation of the terms "conspiracy" and "joint and several liability" cannot repair the multiple, fatal, legal defects with Plaintiffs' claims against Defendants.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Defendants pray that this Court dismiss Plaintiff's claims against them and for all other relief to which they are entitled.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2005, I electronically filed 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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/s/ John K. Power
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