IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: 07-2146-CM-DJW**
	)	
US BANCORP, et al.	)	
	)	
Defendants.	)	

REPORT OF PARTIES' PLANNING CONFERENCE

1. Rule 26(f) Conference. Pursuant to Fed. R. Civ. P. 26(f), a discovery and case management conference was held by counsel via email and telephone. The conference participants were plaintiff, Samuel Lipari appearing *pro se* and Mark Olthoff and Jay Heidrick for defendants.

2. Preliminary Matters.

a. The following persons appeared at the scheduling conference:

Samuel K. Lipari, *pro se*: 816-365-1306
Mark Olthoff- Counsel for defendants: 816-395-0620
Jay Heidrick- Counsel for defendants: 816-691-3743

b. The parties provide the following information regarding themselves and their counsel:

Samuel K. Lipari,
297 NE Bayview,
Lee's Summit, MO 64064 (home and business)
(816) 365-1306 (home and business)
saml@medicalsupplychain.com
Plaintiff, *pro se*

Jay E. Heidrick, Esq.
Shughart Thomson & Kilroy, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, KS 66210
Business Phone: (913) 451-3355
Business Fax: (913) 451-3361
Cellular Phone: (913) 424-2411
Home Phone: (913) 780-4379

E-Mail: jheidrick@stklaw.com

Mark A. Olthoff, Esq.
Shughart Thomson & Kilroy, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105
Business Phone: (816) 421-3355
Business Fax: (816) 374-0509
Cellular Phone: (913) 530-5651
Home Phone: (913) 851-2661
E-Mail: molthoff@stklaw.com

U.S. Bancorp and U.S. Bank:

Sarah Stroebel, Esq.
US Bancorp
BC-MN-H210
800 Nicollette Mall
Minneapolis, MN 55402
Business Phone: (612) 303-7803
Business Phone: (612) 303-7819
Business Fax: (612) 303-7884
E-mail: sarah.stroebel@usbank.com

c. The parties submit the following summary of the case:

Plaintiff:

Plaintiff as the assignee of claims from his dissolved Missouri corporation, Medical Supply Chain, Inc. alleges the defendants U.S. Bank and US Bancorp created contracts and agreements with the plaintiff to provide escrow accounts for the plaintiff to capitalize his entry into the nationwide hospital supply market. The complaint alleges that when the defendants discovered the plaintiff would be competeing with US Bancorp Piper Jaffray's healthcare companies, the defendants caused the contracts and agreements to be breached with knowledge of the future profits the plaintiff would obtain from the contract and that the plaintiff would immediately lose $350,000.00 he had raised. The complaint alleges the defendants used the USA PATRIOT Act as a fraudulent excuse and committed other frauds. The complaint also alleges that the defendants caused the plaintiff's trade secrets and business plan to be delivered to his competitors.

Parties believe subject matter jurisdiction is conferred upon this court through diversity jurisdiction under 28 U.S.C. § 1332.

Medical Supply claims that it was injured because, in the absence of the escrow accounts and financing, it could not launch its business and enter into the market for hospital supplies to compete against Novation LLC. Based on these basic facts, plaintiff's Complaint asserts claims for breach of contract, misappropriation of trade secrets, fraudulent misrepresentation, breach of fiduciary duty and *prima facie* tort.

Defendant:

Plaintiff claims he is the sole assignee of this cause of action from his former corporation, Medical Supply Chain, Inc. Plaintiff alleges that he requested defendant U.S. Bank to open one or more escrow accounts to be used by Medical Supply and its potential students/customers, but the Bank declined to do so; that Medical Supply sought a loan from U.S. Bank and gave the Bank a copy of its business plan; and that the Bank declined the loan and misappropriated trade secrets from its business plan before returning it to Medical Supply.

Medical Supply claims that it was injured because, in the absence of the escrow accounts and financing, it could not launch its business and enter into the market for educating students in medical supply services in the health care industry. Based on these basic facts, plaintiff's Complaint asserts claims for breach of contract, misappropriation of trade secrets, fraudulent misrepresentation, breach of fiduciary duty and *prima facie* tort.

Defendants assert numerous defenses as set forth in their Answer, including the following: Plaintiff's pleading fails to state claims against defendants upon which relief can be granted, for the reasons more fully set forth in motion to dismiss which is pending; there were valid business reasons justifying defendants' decisions to decline to enter into escrow accounts with plaintiff and to decline plaintiff's request for financing, and defendants' decisions in that regard were reasonable and appropriate under the circumstances; there was no contract between plaintiff and defendants and, if there were, there was no breach of any such contract; plaintiff did not furnish to defendants any confidential or trade secret information, nor did defendants wrongfully use or disclose any information provided by plaintiff to defendants; none of the defendants breached any duty owed to plaintiff; plaintiff did not suffer any damages as a result of any wrongful conduct by any of the defendants; plaintiff lacks standing to assert its claims; plaintiff's claims are barred in whole or in part by *res judicata*. Defendants' affirmative defenses are more specifically identified in their Answer.

The Court maintains subject matter jurisdiction pursuant to the diversity jurisdiction provisions of 28 U.S.C. § 1332, *et seq*.

3. Plan for ADR

a. The parties' position on ADR.

Plaintiff shall submit to defendant a written, good faith settlement proposal by February 4, 2008. By February 18, 2008, defendant shall make a written, good faith response to such proposal, either accepting it or submitting a good faith counterproposal to settle the case. By March 3, 2008, the parties shall send confidential reports to the magistrate judge, stating the efforts to settle the case, current evaluations of the case, views concerning future settlement negotiations, prospects for settlement, a specific recommendation regarding mediation and/or any other ADR method, and an indication (preferably jointly) concerning who has been selected by the parties to serve as a mediator or other neutral in an ADR process.

b. To date, the parties have engaged in the following good faith efforts to resolve this matter:

Plaintiff:

Around November 8, 2002, Plaintiff offered to settle for provision of the first ten escrow accounts in time to prevent the loss of $350,000.00 and to pay the defendants $6000.00 for fees. Defendants rejected the offer through their attorney Patrick J. McLaughlin a partner and co-chair in the corporate trust services of Dorsey & Whitney LLP and Mark A. Olthoff, KS lic. #70339 of Shughart Thompson & Kilroy. The defendants' problem with the plaintiff proposed settlement was that even though no damages would have to be paid and the plaintiff would be paying US Bank the lucrative fees for the first ten accounts, the plaintiff would have entered the market violating the agreement between US Bancorp Piper Jaffray and Novation LLC's Neoforma, Inc. to exclude competitors in the supplier markets that weren't approved by Novation LLC, VHA and UHC.

In a 2003 Tenth Circuit Mediation conference during *Medical Supply Chain, Inc. v. US Bancorp, NA, et al* 112 Fed. Appx. 730 (10th Cir. 2004) where US Bank and US Bancorp through their attorneys Mark A. Olthoff, KS lic. #70339 and Andrew M. DeMarea KS lic. #16141 of Shughart Thompson & Kilroy offered merely to not seek attorney's fees from the plaintiff if plaintiff dismissed his claims.

Defendants:

The parties have previously exchanged settlement positions in prior litigation and defendants feel that, at this time, settlement appears virtually impossible.

c. The parties have not agreed on an alternative dispute resolution procedure.

Plaintiff:

Plaintiff is opposed to the introduction of an arbitrator and against trying the matter before anyone other than a US District Court Judge and jury. The reason for the plaintiff's opposition to ADR is the consistent nature of rulings of the trial court in preceding Medical Supply Chain litigation. Plaintiff believes the defense counsel repeatedly misstated the law in the face of controlling precedent and US Supreme Court decisions which resulted in clearly erroneous rulings. Plaintiff believes that the reversal decision *In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders* (U.S. Jud. Conf. 2007) stemming from the US Senate Judiciary Committee's concern over the experiences of the plaintiff in this court now provides meaningful review of failure to prosecute a complaint of judicial misconduct upon dismissal of the complaint by the chief judge under 28 U.S.C. § 352(b), or upon the denial of a petition for review of the complaint by the circuit judicial council under 28 U.S.C. § 352(c).

Plaintiff believes there would be no such protection in ADR from the mediator adopting legal authorities misrepresented by the defense counsel while ignoring the plaintiff's recitation to controlling case law.

Defendants:

The parties have not yet agreed on a method of alternative dispute resolution and, at this time, defendants do not view any real likelihood of settlement based on the extreme differences in their evaluations of the plaintiff's case.

4. **Plan for Pre-Discovery Disclosures.** The parties have exchanged the disclosures required by Fed. R. Civ. P. 26(a)(1).

Plaintiff:

Information required by Fed. R. Civ. P. 26(a)(1) due by March 1, 2008.

Defendants:

Plaintiff previously served its Rule 26 disclosures in April 2007, defendants in May, 2007. Defendants will produce any documents in their possession on or before January 15, 2008. Plaintiff has produced disclosures which are impossibly overbroad and non-compliant with Rule 26(a)(1). Plaintiff has identified seventy (70) witnesses including Judges Waxse and O'Hara as well as Patrick Fisher. Plaintiff has produced electronic copies of over 11,000 pages of documents which appear to relate primarily to other litigation. Plaintiff's damages statement does not reference the current defendants but rather states that: "The total damages sought from the GE Defendants is Four Hundred and Fifty Million Dollars $450,000,000." Defendants have made two good faith attempts to resolve this issue.

5. **Plan for Discovery.** The parties propose to the court the following discovery plan:

a. All discovery shall be commenced or served in time to be completed by:

Plaintiff: December1st, 2009. Reasons for this date include:

- litigation in multiple courts for 6 years
- conduct by defendants during that period to evade contract is discoverable
- some conduct committed by attorneys and privilege arguments are expected to take a long time to resolve
- plaintiff's experience with co-conspirator GE described in this complaint required two Mandamus actions, the litigation with US Bank has already required one interlocutory appeal and two other appeals
- continuing conduct of US Bank defendants will likely result in an interim injunction being sought by the plaintiff will based upon experience be denied and result in an interlocutory appeal if merited
- this court is likely to continue the case during the interim appeal even though the Tenth Circuit has stated Hon. Carlos Murguia loses jurisdiction during plaintiff's previous interlocutory appeal
- the defendants have a fundamental and unshakable belief that discovery rules and precedent are inapplicable to them and the plaintiff believe the outcomes and dismissals to date reflect this court's understanding the defendants are not subject to discovery and much further litigation is required before the plaintiff has exhausted his right to redress in the court.

Defendants: June 13, 2008. Defendants believe this date is *only* possible if limitations are established. *See* 5.c below and 4 above.

b. The parties intend to serve disclosures and discovery electronically, as permitted by this court's General Order No. 03-1, Exhibit 1, Rules 5.4.2 & 26.3.

Plaintiff asserts his right to receive all discoverable records originally created electronically or stored electronically by the defendants and their agents or employees in their original electronic format with accompanying metadata *Williams, et al v. Sprint*, Case No. 03-2200-JWL-DJW , 230 F.R.D. 640; 2005 U.S. Dist. LEXIS 21966; 62 Fed. R. Serv. 3d (Callaghan)1052; 96 Fair Empl. Prac. Cas. (BNA) 1775 (KS Dist. 2005).

c. One or more of the parties anticipate the following problem(s) in discovery, which should be discussed with the court and, if possible, resolved at the scheduling conference:

Plaintiff:

The defendant objects to the subjects the plaintiff seeks discovery on, making a generalized objection that the motive behind the breach, the fraud and misconduct of the defendants to deprive the plaintiff of his property rights in the contract are outside of the pleadings. The plaintiff believes that this conduct is within the express averments of the complaint. The plaintiff also believes the defendants are in error over the legal standard for disallowing discovery and have made no showing is support of the lack of relevance as required in the District of Kansas:

“The "Notes of Advisory Committee Rules" concerning the 1946 Amendment to 26(b) state:

The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at trial but also inquiry into matters themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978), the Supreme Court stated:

The key phrase in this definition — "relevant to the subject matter involved in the pending action" — has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. See *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388, 91 L.Ed. 451 (1947). **Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues**. Id., at 500-501, 67 S.Ct. [at] 388-389, 91 L.Ed. 451. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits. (footnote omitted).

Id. at 351, 98 S.Ct. at 2389.

The Tenth Circuit has held that "the trial court [has] broad discretion as to the control of discovery, ... and rulings will not set aside short of an abuse of discretion." *Marsee v. U.S. Tobacco Co*., 866 F.2d 319, 326 (10th Cir.1989) (quoting *Shaklee Corp. v. Gunnell*, 748 F.2d 548, 550 (10th Cir.1984) (citations omitted)). "In particular, rulings on relevancy of material sought for discovery are within the trial court's discretion." Marsee, 866 F.2d at 326.

The party opposing the discovery has the burden of proving its lack of relevance. *Koch v. Koch Industries, Inc*., No. 85-1636-C, 1992 WL 223816, 1992 U.S.Dist. LEXIS 14094 (D.Kan. Aug. 24, 1992) (citing *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978)).” [Emphasis added]

Aramburu v. Boeing Co., 885 F.Supp. 1434 at 1437 (D. Kan., 1995)
The intent or motive of US Bank in breaching the contract as averred in the complaint at the direction US Bancorp is a necessary element under Missouri law and necessitates discovery:

"[I]n resolving the tensions between the opposed needs of disclosure of confidentiality we are reminded that the discovery rules are to be accorded broad and liberal treatment, particularly where proof of intent is required." *Hardy v. New York News, Inc*., 114 F.R.D. 633, 640 (S.D.N.Y.1987) (quoting *Gray v. Board of Higher Educ., City of New York*, 692 F.2d 901, 904 (2d Cir.1982) (citing *Herbert v. Lando*, 441 U.S. 153, 170-175, 99 S.Ct. 1635, 1645-48, 60 L.Ed.2d 115 (1979))."

Aramburu v. Boeing Co., 885 F.Supp. 1434 at 1438 (D. Kan., 1995)

The Kansas District court is stringent in requiring the showing in opposition to discovery relevance to be specific, not conclusory:

"More than a conclusory statement that the discovery is irrelevant must be offered, the opposing party must show specifically how the request is not reasonably calculated to lead to the discovery of admissible evidence. *Josephs v. Harris Corp*., 677 F.2d 985, 992 (3rd Cir.1982). Courts should lean towards resolving doubt over relevance in favor of discovery. *Corrigan v. Methodist Hosp*., 158 F.R.D. 54, 57 (E.D.Pa.1994)."

Teichgraeber v. Memorial Union Corp., 932 F.Supp. 1263 at 1266 (D. Kan., 1996).

The Magistrate has consistently enforced the requirement that opposition to discovery be specific when undue burden is asserted:

"As the party resisting the discovery, Defendants have the burden to show facts justifying their objections. See *Snowden v. Connaught Lab., Inc*., 137 F.R.D. 325, 332 (D.Kan. 1991). Those resisting discovery must demonstrate that the time or expense involved in responding to requested discovery is unduly burdensome. Moreover, the party resisting discovery has the obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure which would be required to produce the requested documents. This information is necessary to enable the Court to determine the burden imposed by the discovery.

Defendants have submitted no explanation, let alone an affidavit or other proof, demonstrating that responding to Request 35 would impose an undue burden. The Court will not speculate that the requested discovery causes undue burden; therefore, Defendants' objection with regard to undue burden will be overruled."

Doebele v. Sprint Corp., No. 00-2053-KHV (D. Kan. 6/5/2001) (D. Kan., 2001). Undue burden is a far more common basis used by courts to limit discovery than relevancy used by the defendants. Relevancy arguments are usually resolved in favor of the plaintiff requesting the information:

"United States v. American Telephone & Telegraph, 461 F.Supp. 1314, 1341 n. 81 (D.D.C.1978) ("The clear policy of the rules is toward full disclosure ... [I]t is rare that a particular item of requested information is not `relevant' under the broad definition given that word in Rule 26.") (quoting Judge Kaufman, Judicial Control Over Discovery, 28 F.R.D. 111, 119 (1961)); 8 Wright & Miller, Civil §§ 2008, 2009."

Avianca, Inc. v. Corriea, 705 F.Supp. 666 at 676 (D.D.C., 1989)

Discovery under Rule 26 is broad:

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978) (Rule 26(b)(1) "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."); *United States v. American Telephone & Telegraph*, 461 F.Supp. 1314, 1341 n. 81 (D.D.C.1978) ("The clear policy of the rules is toward full disclosure ... [I]t is rare that a particular item of requested information is not `relevant' under the broad definition given that word in Rule 26.") (quoting Judge Kaufman, Judicial Control Over Discovery, 28 F.R.D. 111, 119 (1961)); 8 Wright & Miller, Civil §§ 2008, 2009. The facts of this case as they have become apparent since the magistrate's order, including the joinder of Andres Cornelissen as a party defendant, and the evidence of conflicts of interest involving Corriea and his corporate affiliations, clearly demonstrate the relevancy of all of the documents sought.

"Seaboard objects to KPL's request for "all Seaboard's bond forms for construction performance bonds in use for the years 1983 through the present." Seaboard contends the forms are not relevant. KPL contends that since Seaboard raises the defense of lack of proper notice, an issue of contract interpretation is involved and thus the forms are relevant. Given the broad nature of relevancy for discovery purposes, the court finds that these forms are relevant for discovery. Thus, the court denies Seaboard's request for an order limiting discovery on this matter."

Green Const. Co. v. Kansas Power and Light Co., 732 F.Supp. 1550 at 1554 (D. Kan., 1990)

Under Missouri law that governs the plaintiff's state law based claims, discovery of the relationship between the parties outside of the contract is relevant and required for the contract related tort claims:

"Under Missouri law, the trend appears to favor the theory that a tort action arising from a breach of contract may be brought only if the duty owed is superimposed by operation of law as an incident of the relationship between the parties rather than the contract. See, *Fingers v. Mount Tabor United Church of Christ*, 439 S.W.2d 241 (Mo.App. 1969); *State ex rel. Cummins Missouri Diesel*

Sales Corporation v. Eversole, 332 S.W.2d 53, 57-58 (Mo.App.1960). However, Missouri appears willing to allow a litigant to maintain an action for fraud and recover punitive as well as actual damages where the duty breached is exclusively incidental to the contract. See, *Throckmorton v. M.F.A. Central Cooperative*, 462 S.W.2d 138 (Mo.App.1970); *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 353 S.W.2d 102 (Mo. App.1961). There are other situations which may be compared with this position. Cf., *Stambaugh v. Wedlan*, 371 S. W.2d 361, 363 (Mo.App.1963); *Harzfeld's Inc. v. Otis Elevator Co.*, 114 F. Supp. 480 (W.D.Mo.1953)."

General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d at 1216 (C.A.8 (Mo.), 1973)

Communications of defendant corporation's control group and its agents to commit the alleged fraud or breach are not privileged:

"Communications made before the fact of or during the commission of a crime, fraud, or tort between an attorney and persons within the control group of the corporate client are not protected by the attorney-client privilege. To allow the attorney-client privilege to attach for such communications would permit an attorney to be a principal or an accessory to a crime, fraud, or tort without fear of discovery and would permit clients to commit crimes, frauds, and torts with the aid of legal advice beforehand. Consultation to carry out the wrongful conduct is a conspiracy. The attorney-client privilege was not meant to protect such communications intended to foster criminal, fraudulent, or tortious conduct. *Union Camp Corp. v. Lewis*, 385 F.2d 143 (4th Cir. 1967); *United States v. Bob*, 106 F.2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589, 60 S.Ct. 115, 84 L.Ed. 493; Annot., 2 A.L. R.3d 861 (1965).

Although there are no crimes charged in this case, frauds on the Patent Office and business torts in the form of antitrust violations are alleged. In order for the attorney-client privilege not to apply to communications made before or during the commission of a crime, fraud, or tort, there must be only a prima facie showing that the lawyer's advice was designed to serve his client in the furtherance of its wrongful conduct. *Union Camp Corp., supra*, at 144; *United States v. Bob, supra*, 106 F.2d at 40; *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 77 L.Ed. 993 (1933) (dictum)."

Duplan Corporation v. Deering Milliken, Inc., 397 F.Supp. at 1171 (D.S.C., 1974).

Missouri punitive damages law requires discovery on the defendants' motives in breaching the contract and subsequent conduct to deprive the plaintiff of enforcing his property rights under the contract. Also Missouri law requires discovery on the defendants motive in preventing the plaintiff from recovering for General Electric's breach of the following funding agreement the plaintiff obtained to cover for the breach of the defendants US Bank and US Bancorp:

"The behavior by DuPont is comparable to that found in other cases in which courts have held that the plaintiff made a submissible case for punitive damages. These cases involve evidence in which the defendant committed repeated bad acts from which the jury could find willful or outrageous conduct by the defendant. For instance, in *DeLong v. Hilltop Lincoln-Mercury, Inc*., the court found no error in submitting the issue of punitive damages where evidence demonstrated a "culpable mental state or reckless disregard for an act's consequences." 812 S.W.2d 834, 841 (Mo. App. 1991). The defendant in DeLong repeatedly made false representations to customers concerning previous ownership of automobiles, refused to provide information despite the ease of doing so, and refused to repurchase the automobiles upon plaintiff's discovery of true prior ownership. Id. *Similarly, in Northland Ins. Co. v. Chet's Tow Service, Inc.*, evidence was introduced that the defendant lied about its charges, changed the amount due, refused payment and attempted to double bill. 804 S.W.2d 54, 57 (Mo. App. 1991). The court found this evidence sufficient to demonstrate an evil motive and that the trial court had not made an error in submitting the issue of punitive damages to the jury. Id.In this case, there is sufficient evidence demonstrating that DuPont committed several different acts from which the jury could reasonably infer an evil motive. After Colt had notified Fabricor it would no longer supply Fabricor, DuPont attempted to convince BMS, Fabricor's other major supplier, not to supply Corian to Fabricor by making misrepresentations to BMS regarding the consequences BMS faced if it continued to supply Fabricor. Additionally, DuPont made it known that it did not want anyone to do business with Fabricor, made false representations on several different occasions over a period of several months concerning Fabricor's financial ability to perform for Marriott, and sought a way to prevent Fabricor from obtaining a supply of Corian from any distributor in the nation. This is sufficient evidence to submit the issue of punitive damages to the jury. DuPont's third point on appeal is denied."

Fabricor, Inc. v. E.I. Dupont Denemours & Co., 24 S.W.3d 82 (Mo. App.W.D., 2000).

The plaintiff requires discovery of communications used to Under Missouri law this purpose for interference with a contract or business expectancy is a necessary element:

"False statements tending to prejudice or injure a person in the person's business, by suggesting the person is unreliable, insolvent, or the like, are independently actionable and constitute an improper means." *Kerr Const. Paving Co., Inc. v. Khazin*, 961 S.W.2d 75, 80-81 (Mo. App. 1997). Regardless of DuPont's reason for interfering with Fabricor's business relationship with Marriott, when DuPont made false statements with regard to Fabricor's financial ability to perform, it employed improper means in interfering in the relationship. Therefore, it is irrelevant whether DuPont was acting to protect its own legitimate economic interest, because under the law of tortious interference, one is never justified in using improper means to interfere with another's business relations. Id. at 80.

In light of this evidence, this court finds that Fabricor presented substantial evidence on the elements of causation and lack of justification to make a submissible case on its claim of tortious interference. The evidence was sufficient for the jury to find that DuPont caused the breach of the relationship between Fabricor and Marriott. The evidence was also sufficient for the jury to find that DuPont tortiously interfered with Fabricor's business relationship with Marriott by improper means when DuPont made false representations to Marriott. Therefore, DuPont's first and second points are denied."

Fabricor, Inc. v. E.I. Dupont Denemours & Co., 24 S.W.3d 82 (Mo. App.W.D., 2000).

The plaintiff's complaint also alleges that defendants breached the contract for the purposes of restraining trade in the hospital supply market where the defendants through their US Bancorp Piper Jaffray business units had relationships and investments with Neoforma, Inc. and Novation LLC and were part of an agreement to restrain trade in the United States market for hospital supplies. Restraint of trade is a recognized element meeting the motive requirement for interference with a contract or business expectancy:

"DuPont next argues that it was justified in interfering with Fabricor's relationship with Marriott because DuPont was attempting to protect its business relationship with Marriott. DuPont is correct that if a defendant has a legitimate interest, economic or otherwise, in a contract or expectancy sought to be protected, then to demonstrate an absence of justification, the plaintiff must show that the defendant employed improper means in seeking to further only its own interests. *Community Title*, 796 S.W.2d at 372; *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. 1996). For purposes of tortious interference with a business expectancy, "improper means are those that are independently wrongful such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or the common law." Id. at 81."

Fabricor, Inc. v. E.I. Dupont Denemours & Co., 24 S.W.3d 82 (Mo. App.W.D., 2000).

If the plaintiff is denied the full and fair opportunity to litigate his claims, he will have to bring additional actions in Missouri state court against the defendants and their agents which are citizens of Missouri. This needlessly consumes the resources of Missouri State court and by the controlling law of this jurisdiction, the outcome obtained in this matter would be set aside:

"Thus the basic issue on appeal is whether the denial of discovery to the defendants was prejudicial and did not enable them to have a fair trial. It is the difference between the relevancy determinations made by the trial court for a limitation of discovery and that applied during the course of trial. Matters or subjects at the time of discovery were ruled not to be then relevant but became relevant at trial and were included in plaintiff's case in chief. This may have been inevitable considering the nature of the several causes of action.

There was an erroneous denial of discovery as the matter ultimately developed. Such a denial is ordinarily prejudicial. *Weahkee v. Norton*, 621 F.2d 1080 (10th Cir.). It is not possible to determine here whether the outcome would have been different had discovery been permitted. There were many statements on diverse subjects testified to at trial as described above which were excluded by the narrow scope of the order limiting discovery. These were significant subjects and concerned many statements attributed to defendants. The diversity and scope of the trial testimony as compared to the subjects as to which discovery was permitted makes it impossible to determine whether the result would have been different had discovery been permitted. We are not faced with but a limited variation or with but one or two subjects but instead a large part of the proof.

It is apparent that the trial court had broad discretion as to the control of discovery, *Smith v. Ford Motor Co*., 626 F.2d 784 (10th Cir.), *Voegeli v. Lewis*, 568 F.2d 89 (8th Cir.), and rulings will not be set aside short of an abuse of discretion. *Burns v. Thiokol Chemical Corp*., 483 F.2d 300 (5th Cir.). **We must hold that there was a denial of discovery sought by the defendants that precluded a fair trial and the judgment must be set aside**." [Emphasis added]

Shaklee Corp. v. Gunnell, 748 F.2d 548 (C.A.10 (Utah), 1984).

The plaintiff is at a loss why the defendants are objecting to the extensive witnesses and documents the plaintiff will use to show it could have earned its reasonable damages expectations if the defendants had not prevented the plaintiff from entering the market for hospital supplies. It is clealry required to be turned over to the defndants and it will be used at trial.

Similarly the defendants are arguing the plaintiff cannot include disclosures related to General Electric's breach of the contract the plaintiff sought to cover for US Bank's breach with. Especially since the complaint alleges US bank and US Bancorp participated in obstructing the plaintiff from obtaining redress for his claims against GE. It is clealry required to be turned over to the defndants because it will be used at trial as proof of the defendants' motive.

Defendants:

If plaintiff's Rule 26(a)(1) "disclosure" is a reflection of its discovery intentions, then defendants foresee substantial discovery problems with regard to both oral and documentary discovery, including the scope of discovery, compliance with the limitations provided under the Federal Rules of Civil Procedure. Unless there is a rational basis and relevancy established, plaintiff's discovery will be overly burdensome and a protective order required.

d. Disclosure of discovery of electronically stored information (ESI) should be handled as follows:

Plaintiff:

Plaintiff prefers email or a link to an FTP client for transfer of larger files.

Plaintiff observes the defense counsel has not communicated to its defendants who during "September - early October 2002" were in possession of plaintiffs' bank accounts, email communications with US Bancorp Piper Jaffray and their advisory reports on electronic market places in hospital supplies being able to save 20% of hospital supplies nationwide. All of which were created and stored electronically and over which the Hon. Magistrate Waxse heard a telephone conference regarding a previous parties' planning committee teleconference and had previously received the plaintiff's notification of the need for these elctronic documents.

Also defense counsel has ommitted the US Bancorp intranet and web pages announcing US Bancorp Piper Jaffray's involvment in healthcare start up venture capital funds. Foot note 10 of the plaintiff's amended complaint in the original action gave defense counsel notice of additional ESI documents:US BANCORP NA web site homepage news article regarding falling values of venture funds including those of US BANCORP NA, dated Oct. 15,2002.

ESI also exisits for the following:

The case resulting in a $250,000.00 fine by the National Association of Securities Dealers for threatening to deny Antigenetics, Inc. a critical service of analyst coverage if it did not select US BANCORP PIPER JAFFRAY as a lead underwriter for a second issuing of Stock.

February 2000, US BANCORP PIPER JAFFRAY Senior Analyst Daren Marhula's study estimating $83 billion dollars spent annually could be eliminated if supplies were purchased through the internet and that $23 billion of the total spent on medical supplies is pure process and procurement costs, and about half of this cost could be eliminated by ordering supplies over the Internet.

Furthermore the time period proposed by the defendant is not the full period of defendant conduct addressed by the complaint October 2002 till being filed in 2007. The plaintiff's counsel Dennis Hawver was served paper versions of the defendants' agents billing statements that were created electronically and are presently stored electronically, even by the defense counsel who made the representation that there is no ESI.

Defendant:

Defendant is unaware of any ESI in its possession, custody or control that in any way relates to the matters alleged in the Complaint, which specifically relates to the time frame of late September - early October 2002.

e. The parties have not agreed at this time to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows:

Plaintiff:

Plaintiff proposes that privilege documents be handled as specified in the following Kansas court cases (Missouri adopted the Kansas State court case *Cypress Media*'s standard:

"The party asserting a privilege or the work-product doctrine as a bar to discovery has a two-fold burden. First, the party must present the privilege objection "in a timely and proper manner." Id. Second, the party must show the privilege is applicable. *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 656 (10th Cir.1984). In short, "[t]he applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document." *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir.1984), cert. dismissed, 469 U.S. 1199, 105 S.Ct. 983, 83 L.Ed.2d 984 (1985).

The Federal Rules of Civil Procedure spell out the requirements for a timely and proper privilege objection. Rule 34(b) requires the producing party on a request for production of documents to serve a written response within 30 days after service of the request or within a longer or shorter period set by the court or agreed to by the parties. In its response, the producing party must state whether it assents or objects to the request and the reasons for any stated objection. As amended in 1993, Rule 26(b)(5) specifies what a producing party must provide when the objection is based on privilege or the workproduct doctrine:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Rule 26(b)(5) plainly contemplates that the required notice and information is due upon a party withholding the claimed privileged material. Consequently, reading Rules 26(b)(5) and 34(b) together, the producing party must provide the Rule 26(b)(5) notice and information at the time it was otherwise required to produce the documents under Rule 34.

When a producing party fails to make a timely and proper objection, a court may find that the party has waived any objections to a document request under Rule 34. Marx, 929 F.2d at 12; *Scaturro v. Warren and Sweat Mfg. Co., Inc*., 160 F.R.D. 44, 46 (M.D.Pa.1995); *McEwen v. Digitran Systems, Inc*., 155 F.R.D. 678, 681 n. 2 (D.Utah 1994); 4A James W. Moore et al., Moore's Federal Practice ¶ 34.05[2] (1995). Even when the untimely objection is based on privilege, the court likewise may find a waiver. See *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir.1981); *United States v. 58.16 Acres of Land, Clinton County, Ill*., 66 F.R.D. 570, 572 (E.D.Ill.1975); see 8 Charles A. Wright, et al., Federal Practice and Procedure § 2016.1 at 230-31 (1994) ("Some courts state that such a log must be delivered within the time limits for filing a discovery response and that failure to list a document works a waiver." (footnote omitted)). The Advisory Committee Notes to the 1993 Amendments

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of Rule 26 reveal that waiver was a contemplated remedy for non-compliance with Rule 26(b)(5):

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection."

First Sav. Bank, F.S.B. v. First Bank System, Inc., 902 F.Supp. 1356 (D. Kan., 1995).

The plaintiff suggests that information sought to be withheld be treated as in *Cypress Media v. City of Overland Park*, 997 P.2d 681 (Kan., 2000) with a privilege log showing a line by line assertion and justification of privilege and the opportunity to challenge through *in camera* hearings.

Defendants:

Defendants propose the use of a "claw back" agreement.

f. Discovery is needed on the following specific subjects**:**

Plaintiff: Plaintiff believes discovery is required on the following specific subjects:

1. Communications Related To The Transactions Between The Defendants and Plaintiff

All email, letters, affidavits, memorandums, reports, inquiries sent to the plaintiff by the defendants, their agents and representatives to the plaintiff, his former company, former counsel or witnesses.

All email, letters, affidavits, memorandums, reports, inquiries, account statements, loan documents web site inquiries created or circulated by the defendants, their employees and agents including those of US Bancorp Piper Jaffray related to the plaintiff, his former company or former counsel or witnesses and the names and addresses of the persons creating or receiving the above described documents.

All manuals, policy materials, operating procedures related to escrow account services and business loans.

2. Communications To Conceal Defendants' Liability to Plaintiff

All communications by Andrew Cecere, US Bancorp Chief Financial Officer, Richard K. Davis US Bancorp CEO, Jerry A. Grundhofer former CEO of U.S. Bancorp, Andrew S. Duff, formerly a vice chairman of U.S. Bancorp and formerly president and chief executive officer of the U.S. Bancorp Piper Jaffray unit, and Mark Reed General Counsel with external entities or their principals and agents including Edward D. Jones & Co., Royal Bank of Canada, Berkshire Hathaway Inc., Novation LLC, Bob Zollars, Neoforma, Inc., Volunteer Hospital Association, University Healthcare Consortium, and St. Luke Health System, related to Medical Supply Chain, Inc., the plaintiff, his witnesses, former counsel, or claims.

All communications between US Bancorp. Inc. and its securities public accounting and audit firms including Ernst & Young LLP regarding liability from litigation during the period from June 2002 to March 2008 and related to US Bancorp's compliance under Sarbanes-Oxley Act, Section 404 in the effectiveness of controls in place to report liability from litigation.

Disclosures made to federal and state investigators regarding US Bancorp and its Piper Jaffray subsidiary's roles in manipulating the capitalization of technology start up companies in *Securities and Exchange Commission v. U.S. Bancorp Piper Jaffray Inc.,* 03 CV 2942 (WHP) (S.D.N.Y.)

Records contained on the Corporate Analysis and Planning ("CAP") drive of the U.S. Bank document management system or in any other database related to Chris Walden, Becky Hainje, Becky Hainje of US Bank in Independence, Missouri, Susan Paine, Lars Anderson, Brian Kabbes.

The case resulting in a $250,000.00 fine by the National Association of Securities Dealers for threatening to deny Antigenetics, Inc. a critical service of analyst coverage if it did not select US BANCORP PIPER JAFFRAY as a lead underwriter for a second issuing of Stock.

February 2000, US BANCORP PIPER JAFFRAY Senior Analyst Daren Marhula's study estimating $83 billion dollars spent annually could be eliminated if supplies were purchased through the internet and that $23 billion of the total spent on medical supplies is pure process and procurement costs, and about half of this cost could be eliminated by ordering supplies over the Internet.

Communications to the Johnson County District Attorney and the Kansas Attorney General concerning the plaintiff and his company, his claims, counsel and witnesses.

3. Communications To Deprive Plaintiff of Recovery For Breach of Contract

All communications to FINCEN, the Securities and Exchange Commission and the Office of the Comptroller of the Currency concerning the plaintiff, his claims, his company, witnesses or former counsel (Discoverability of Suspicious Activity Report not yet determined in this jurisdiction but was disclosed and used in the District of Kansas in *USA v. Wittig et al*, 03-cr-40142-JAR);

All phone calls, voice messages, logs, emails, and letters of ex parte communications by the defendants and their agents to employees of the Kansas State Judicial branch and to employees of the U.S. District Court for the Western District of Missouri, U.S. Court of Appeals for the Eight Circuit, the Kansas District Court and the Tenth Circuit Court of appeals and the contents of any communication oral or otherwise to any of the above by attorneys on behalf of the defendants concerning the plaintiff, his dissolved company, witnesses or former counsel, including communications by

a. Susan C. Hascall, formerly of Shughart Thompson and Kilroy, P.C. with law clerks and other employees of the U.S. Court of Appeals for the Tenth Circuit from 12/02/2003 to 10/13/2005;

b. Steven D. Ruse, KS lic. #11461, of Shughart Thomson & Kilroy, P.C. to Hon. Judge Carlos Murguia from October to December of 2002;

c. Andrew M. DeMarea, KS lic. #16141 of Shughart Thompson & Kilroy to Hon. Magistrate James P. O'Hara from November 2004 to January 2005; to John J. Ambrosio, KS. Lic #07489 of Ambrosio & Ambrosio, Chtd.;

d. Mark A. Olthoff, KS lic. #70339 to US District Court Magistrate James P. O'Hara from October 2004 to March, 2005; employees and agents of the Kansas Disciplinary Administrator's office and the Johnson County Kansas Discipline Committee including Rex A. Sharp KBA#12350 of Gunderson, Sharp & Walke, L.L.P in October, November and December 2007.

4. Communications To Deprive Plaintiff of the Ability To Cover For The Breach

Actions taken by US Bancorp, US Bank employees and their agents to defeat the plaintiff's ability to cover for the breached contracts with the defendants. Plaintiff asserts that the defendants and their agents work to defeat contracts between the plaintiff and third parties like General Electric out of a motive to restrain trade as alleged in the complaint is relevant and discoverable under *Fabricor, Inc. v. E.I. Dupont Denemours & Co.*, 24 S.W.3d 82 (Mo. App.W.D., 2000).

Documents related to the defendants' representation by and communication with the law firms Dorsey & Whitney LLP, Husch & Eppenberger, LLC and Blackwell Sanders LLP, Arnold & Porter, Seyfarth Shaw LLP and Lathrop & Gage LC including correspondence, attachments, agreements, emails and phone communications and logs for all minutes of meetings with officers, employees, representatives, and agents for and any related entities, representatives or agents concerning Medical Supply Chain, Inc., Samuel Lipari, Bret Landrith, Dennis Hawver or any witness identified in the complaint.

5. Defendants' Insurance, Indemnity, Surety, and Subrogation Agreements

The guarantees made to US Bancorp and US Bank NA in February 2003 by The Piper Jaffray Company to compensate the defendants for liability from the plaintiff and from US Bancorp Piper Jaffray's conduct in the capitalization of healthcare technology companies and any modification made after February 2003.

All insurance claims, errors and omissions set offs, write downs or transfers of stock applied for or received from underwriting sureties or investment banking houses over the 2003 forced divestiture of US Bancorp Piper Jaffray from US Bancorp due to the breach of agreements between US Bank and the plaintiff.

All guarantees and notes of indebtedness created by US Bancorp Piper Jaffray/The Piper Jaffray Company or its principals to compensate US Bancorp for the misconduct against the plaintiff that caused the breach of agreements between US Bank and the plaintiff, including the subordinated debt interest in the new Piper Jaffray Company of $215 million.

The guarantees of Shughart Thompson & Kilroy and or US Bancorp made to or received from Bruce Blefeld and Kathleen Bone Spangler to insure Novation LLC or US Bancorp against liability from the misconduct against the plaintiff that caused the breach of agreements between US Bank and the plaintiff to provide escrow accounts capitalizing Medical Supply Chain, Inc.'s entry into the hospital supply market controlled by Novation LLC.

The negligence insurance policies of Shughart Thompson & Kilroy, P.C. that would reimburse US Bancorp, Inc. and Jerry A. Grundhofer for any judgments obtained by the plaintiff or by US Bancorp over negligence over the management of attorneys in defending against the plaintiff's claims.

Defendants:

Defendants dispute the relevance or necessity of the plaintiff's proposed discovery topics. The scope of the discovery sought is overly broad and well outside the allegations of his Complaint. For their part, defendants anticipate the subjects of discovery will be all of plaintiff's allegations, damages, experts, defendants' affirmative defenses, and any necessary third-party discovery.

g. Plaintiff seeks a maximum of 100 interrogatories and defendants seek a maximum of 25 interrogatories, including all discrete subparts, by each party to another party.

h. Plaintiff seeks a maximum of 20 depositions by each party and defendants seek a maximum of 10 depositions by each party.

i. Length of depositions:

Plaintiff: 10 hours each, max 5 hours per day unless mutual consent to exceed 5 hours in one day.

Defendants: No more than seven (7) hours of actual transcribed time unless otherwise mutually agreed.

j. Disclosures required by Fed. R. Civ. P. 26(c)(2):

Plaintiff:

Disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, shall be served by plaintiff by September 1, 2009, and by defendants by March 1, 2010. Disclosures and reports by any rebuttal experts shall be served by April 20, 2010.

Defendants:

Disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, shall be served by plaintiff by March 1, 2008, and by defendants by April 15, 2008. Disclosures and reports by any rebuttal experts shall be served by May 1, 2008.

k. The parties agree that physical or mental examinations pursuant Fed. R. Civ. P. 35 are not appropriate in this case.

l. Supplementations of disclosures under Fed. R. Civ. P. 26(e) shall be served at such times and under such circumstances as required by that rule. In addition, such supplemental disclosures shall be served 40 days before the deadline for completion of all discovery.

m. Preliminary witness and exhibit disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A) and (C):

Plaintiff:

Plaintiff shall provide its lists on or before _______________. Defendants shall provide their lists on or before __________________.

Defendants:

The parties shall provide their Preliminary Witness and Exhibit lists on or before May 5, 2008.

n. The parties agree that there is a need for discovery in this case to be governed by a protective order. The parties shall submit a jointly proposed protective order by February 15, 2008. Such jointly proposed protective orders must include, in the first paragraph, a concise but sufficiently specific recitation of the particular facts in this case that would provide the court with an adequate basis upon which to make the required finding of good cause pursuant to Fed. R. Civ. P. 26(c). If the parties disagree concerning the need for, and/or the scope or form of a protective order, the party or parties seeking such an order shall file an appropriate motion and supporting memorandum by a date to be determined at the future scheduling conference (if needed).

6. Deadlines for Amendments and Potentially Dispositive Motions.

Plaintiff:

a. Plaintiff believes the joinder of additional parties and the amendment of his complaint is likely but requires information normally produced in Rule 26 initial disclosures but understands US Bank and US Bancorp have already objected to the scope of normal Rule 26 discovery. Plaintiff proposes the date be four weeks after documents are received from the defense counsel after resolution of discovery disputes.

Punitive damages amendment is determined at a later date, defendants have provided no material discovery to date, additional parties and conduct revealed in discovery would not be res judicata because plaintiff was denied full opportunity to litigate, plaintiff would be forced to see an injunction, if injunction was denied plaintiff would pursue an interlocutory appeal which under the Tenth Circuit's last interlocutory order between the parties would have the effect of depriving this court of jurisdiction and ending the relevance of the current case management calendar.

Defendants:

a. Any motion for leave to join additional parties or to otherwise amend the pleadings shall be filed by February 1, 2008.

b. Provided that such defenses have been timely preserved, any motions to dismiss for lack of personal jurisdiction, venue, propriety of the parties, or failure to state a claim upon which relief may be granted shall be filed by February 11, 2008.

c. All other potentially dispositive motions shall be filed by:

Plaintiff: March 1, 2010.

Defendants: July 28, 2008

d. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kuhns Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar law, shall be filed no later than:

Plaintiff: January 20, 2010

Defendants: July 28, 2008

7. Other Items.

a. Any party asserting comparative fault shall identify all persons or entities whose fault is to be compared by:

Plaintiff:

Plaintiff will permit defendants to add defendants' co-conspirators who can be enjoined to shoulder a portion of the defendants' liability by March 1, 2010.

Defendants: Defendants do not believe the principles of comparative fault will apply to this action.

b. The defendants do not request a status conference prior to the final pretrial conference. The plaintiff does request a status conference in 2010, prior to the final pretrial conference.

c. The parties request that the court hold the final pretrial conference at an available date convenient to the Court.

d. Defendants believe the case should be ready for trial by February, 2009 and believe trial will last approximately one week. Plaintiff believes the case should be ready for trial after March, 2010 and believes the trial should last approximately four weeks. At the present time, defendants believe trial should last one week.

e. The parties are not prepared to consent to trial by a magistrate judge at this time.

Plaintiff:

Plaintiff does not consent for the reasons detailed in 3(c) above regarding ADR and because on May 7th, 2007, Mark A. Olthoff KS lic. #70339, Andrew M. DeMarea KS lic. #16141 and Jay E. Heidrick KS lic #20770 falsely misrepresented the law to Magistrate David J. Waxse that the plaintiff's complaint was barred by *res judicata* despite the express dismissal without prejudice identified in the complaint ¶ 32 , that Magistrate Waxse had jurisdiction to stay discovery despite the exclusive federal jurisdiction of the Tenth Circuit identified in ¶ 34 of the complaint and that the plaintiff lacked standing as an assignee to the rights of the dissolved corporation. Mark A. Olthoff KS lic. #70339 and Andrew M. DeMarea KS lic. #16141 had been previously served the clear controlling authority contradicting their misleading assertions in the Western District of Missouri, yet made the misrepresentations again in this court after the case was transferred as part of an intentional scheme to interfere with the machinery of justice. Magistrate David J. Waxse was deceived by the misrepresentation and in an order dated May 24th, 2007 suspended Discovery as an appropriate measure for a case likely to be dismissed.

The plaintiff was injured by Mark A. Olthoff KS lic. #70339, Andrew M. DeMarea KS lic. #16141 and Jay E. Heidrick KS lic #20770 misrepresentations in having his redress continually postponed and thereby being prevented from entering the hospital supply market. This was fraud on the court. *Weese v. Schukman*, 98 F.3d at 553 (C.A.10 (Kan.), 1996). The plaintiff believes the presiding US District Judge is subject to a challenge to the outcome upon review and where in the Tenth Circuit, appeals from clear error in hospital supply cases are themselves sanctioned, the US Judicial Conference has now provided an additional safeguard in favor of justice.

(Plaintiff did not authorise defendants' deletion of the above. This conduct is relevant to both the plaintiff's contract claims and later determination of the need to seek punitive damages. It is also why discovery is broader than defendants acknowledge.)

f. Other matters: none.

Date: January 7, 2008

s/ Samuel Lipari
SAMUEL K. LIPARI,
297 NE Bayview,
Lee's Summit, MO 64064
(816) 365-1306
saml@medicalsupplychain.com
Plaintiff, *pro se*

s/ Jay E. Heidrick
MARK A. OLTHOFF KS #70339
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)

JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS