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

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

ANSWER AND AFFIRMATIVE DEFENSES OF
INDIVIDUAL DEFENDANT ANDREW S. DUFF

Individual defendant Andrew S. Duff, by and through his attorneys and for his answer and affirmative defenses in this case, states and alleges as follows:

Defendant has answered and responded to the Complaint to the best of his ability with respect to those allegations that are reasonably capable of an answer consisting of a simple admit, deny or denied because defendant is without sufficient knowledge or information to form a belief whether to admit or deny the allegations in the paragraph. However, rather than a short and plain statement of the case as required by Fed. R. Civ. P. 8(a)(2) and 8(e)(1), this Complaint is confusing, argumentative and prolix. To that extent and because of it, defendant has denied certain especially lengthy, complex and confusing paragraphs *in toto*. In addition, all of the claims of plaintiff are deficient by reason of the strict pleading required by Fed. R. Civ. P. 9(b) or the causes of action fail to state claims upon which relief may be granted as a matter of law and fact under Fed. R. Civ. P. 12(b)(6).

1. Defendant admits only that plaintiff's Complaint seeks the relief outlined in paragraph 1 of the Complaint and denies all other statements, conclusions and assertions in paragraph 1.

2. In answer to paragraphs 1-6 of the plaintiff's Complaint, although denying the merits of plaintiff's claims and causes of action, defendant admits only that the Complaint raises issues and asserts claims under federal statutes thus providing subject matter jurisdiction in the federal courts, but defendant denies all other conclusions of law and averments in paragraphs 1-6 of plaintiff's Complaint.

3. Defendant denies the conclusions of law and averments in paragraphs 7-9 of plaintiff's Complaint.

FACTS

4. In answer to paragraphs 10-17, defendant lacks sufficient knowledge or information to permit him to form a belief whether to admit or deny the allegations in paragraphs 10-17 of the plaintiff's Complaint and, therefore, denies the same.

5. Defendant admits the allegations in paragraph 18 of plaintiff's Complaint.

6. In answer to paragraph 19 of plaintiff's Complaint, defendant lacks sufficient knowledge and information to permit him to form a belief whether to admit or deny the allegations in paragraph 19 of the Complaint and, therefore, denies the same.

7. Defendant admits the allegations in paragraph 20 of plaintiff's Complaint.

8. In answer to paragraph 21 of plaintiff's Complaint, defendant lacks sufficient knowledge and information to permit him to form a belief whether to admit or deny the allegations in paragraph 21 of the Complaint and, therefore, denies the same.

9. Defendant admits that Piper Jaffray Companies, NYSE symbol PJC, is a company located at 800 Nicollet Mall in Minneapolis, Minnesota but denies the remaining allegations in paragraph 22 of the Complaint.

10. Defendant admits the allegations in paragraph 23 of the Complaint.

11. In answer to paragraph 24 of the Complaint, defendant lacks sufficient knowledge and information to permit him to form a belief whether to admit or deny the allegations in paragraph 24 of the Complaint and, therefore, denies the same.

12. In answer to paragraphs 25-32, defendant lacks sufficient knowledge or information to permit him to form a belief whether to admit or deny the allegations in paragraphs 25-32 of the Complaint and, therefore, denies the same.

13. In answer to paragraphs 33-41 of the plaintiff's Complaint, defendant lacks sufficient knowledge or information to permit him to form a belief whether to admit or deny the allegations in paragraphs 33-41 of the Complaint and, therefore, denies the same.

14. In answer to paragraphs 42 and 43 of the plaintiff's Complaint, defendant lacks sufficient knowledge or information to permit him to form a belief whether to admit or deny the allegations in paragraphs 42 and 43 of the Complaint and, therefore, denies the same.

15. With respect to paragraphs 44-46 of plaintiff's Complaint, defendant admits that Piper Jaffray provided research to institutional investors and published coverage of health care technology companies, but lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny all remaining legal conclusions and averments in paragraphs 44-46 of plaintiff's Complaint and, therefore, denies the same.

16. In answer to paragraphs 47-50 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 47-50 of plaintiff's Complaint and, therefore, denies the same.

17. In answer to paragraph 51, defendant admits that the National Association of Securities Dealers and Piper Jaffray entered into a settlement agreement, the terms of which speak

for themselves, but denies all other legal conclusions and averments in paragraph 51 of plaintiff's Complaint.

18. In answer to paragraph 52 of plaintiff's Complaint, defendant admits that research was published concerning a company called ThermaSense, but denies all remaining conclusions and allegations in paragraph 52 of the Complaint.

19. In answer to paragraphs 53-58 of plaintiff's Complaint, defendant state they lacks sufficient information or knowledge in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 53-58 of plaintiff's Complaint and, therefore, denies the same.

20. Defendant denies the allegations in paragraphs 59-68 of plaintiff's Complaint.

21. In answer to paragraphs 69-75 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 69-75 of plaintiff's Complaint and, therefore, denies the same.

22. Defendant denies the allegations in paragraphs 76-84 of plaintiff's Complaint.

23. In answer to paragraphs 85-89 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 85-89 of plaintiff's Complaint and, therefore, denies the same.

24. Defendant denies the allegations in paragraphs 90-94 of plaintiff's Complaint.

25. In answer to paragraphs 95-100 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 95-100 of plaintiff's Complaint and, therefore, denies the same.

26. In answer to paragraphs 101-108 of plaintiff's Complaint, defendant admits that plaintiff previously filed a lawsuit styled *Medical Supply Chain, Inc. v. US Bancorp, et al.*, Case No. 02-2539, in the United States District Court for the District of Kansas, that the Complaint sought

a temporary restraining order and other relief, that the temporary restraining order was denied, that interlocutory appeal of the denial of injunctive relief was denied, that the prior action was dismissed by the District Court and dismissal affirmed on appeal by the Tenth Circuit Court of Appeals, that Medical Supply's counsel was ordered to pay sanctions for a frivolous appeal and that the Tenth Circuit refused to hear the case on rehearing. In all other respects, defendant denies the remaining allegations in paragraphs 101-108 of plaintiff's Complaint.

27. In answer to paragraphs 109-151 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 109-151 of plaintiff's Complaint and, therefore, denies the same.

28. Defendant denies the allegations in paragraph 152 of plaintiff's Complaint.

29. In answer to paragraphs 153-159 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 153-159 of plaintiff's Complaint and, therefore, denies the same.

30. Defendant denies the allegations in paragraphs 160 and 161 of plaintiff's Complaint.

31. In answer to paragraphs 162-193 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 162-193 of plaintiff's Complaint and, therefore, denies the same.

32. In answer to paragraph 194 of plaintiff's Complaint, to the extent the term "defendant" includes this answering defendant, the allegations are denied; to the extent the term "defendant" includes other parties, then this defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraph 194 of plaintiff's Complaint and, therefore, denies the same.

33. In answer to paragraphs 195-210 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 195-210 of plaintiff's Complaint and, therefore, denies the same.

34. Defendant denies the allegations in paragraphs 211-214 of plaintiff's Complaint.

35. In answer to paragraphs 215-234 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 215-234 and, therefore, denies the same.

36. In answer to paragraph 235 of plaintiff's Complaint, to the extent the term "defendant" refers to these answering defendant, the allegations are denied. To the extent the term "defendant" includes other parties, then this answering defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraph 235 of the Complaint and, therefore, denies the same.

37. In answer to paragraphs 236-323 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in plaintiff's Complaint and, therefore, denies the same.

38. In answer to paragraphs 324-329 of plaintiff's Complaint, defendant admits that plaintiff sought preliminary injunctive relief which was denied, that plaintiff filed a notice of interlocutory appeal which was denied, that the Kansas District Court dismissed plaintiff's prior action, that plaintiff's "motion for new trial" was denied and that the Tenth Circuit Court of Appeals dismissed the interlocutory appeal as moot, but defendant denies all other legal conclusions and averments in paragraphs 324-329 of plaintiff's Complaint.

39. In answer to paragraphs 330-336 of plaintiff's Complaint, defendant admits that Piper Jaffray began operating as an independent public company on and after January 1, 2004 and that

US Bancorp announced prior to January 1, 2004 that Piper Jaffray would begin independent operations, but defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the remaining allegations in paragraphs 330-336 of plaintiff's Complaint and, therefore, denies the same.

40. In answer to paragraphs 337-369 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 337-369 of plaintiff's Complaint and, therefore, denies the same.

41. In answer to paragraphs 370-374 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 370-374 of plaintiff's Complaint and, therefore, denies the same.

42. In answer to paragraphs 375-403 of plaintiff's Complaint, defendant lacks sufficient or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 375-403 of plaintiff's Complaint and, therefore, denies the same.

43. In answer to paragraph 404 of plaintiff's Complaint, to the extent the Complaint refers to alleged actions or omissions on the part of US Bancorp, U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cesare, Piper Jaffray Companies and/or Andrew S. Duff, the allegations are denied; defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the remaining allegations in paragraph 404 of plaintiff's Complaint and, therefore, denies the same.

44. Defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraph 405 of plaintiff's Complaint and, therefore, denies the same.

45. In answer to paragraph 406 of plaintiff's Complaint, to the extent defendant US Bancorp, U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cesare, Piper Jaffray Companies and/or Andrew S. Duff are alleged to have acted or omitted to act, the allegations are denied. In all other respects, the answering defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the remaining allegations in paragraph 406 of plaintiff's Complaint and, therefore, denies the same.

46. In answer to paragraphs 407-422 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations and, therefore, denies the same.

47. Defendant denies the allegations in paragraphs 423-425 of plaintiff's Complaint.

48. In answer to paragraph 426 of plaintiff's Complaint, defendant admits that plaintiff's prior claims against US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and others were dismissed, but defendant denies all other and remaining allegations and claims in paragraph 426 of plaintiff's Complaint.

49. In answer to paragraphs 427-429 of plaintiff's Complaint, defendant lacks sufficient knowledge or information in order to permit him to form a belief whether to admit or deny the allegations in paragraphs 427-429 of plaintiff's Complaint and, therefore, denies the same.

50. Defendant denies the allegation in paragraph 430 of plaintiff's Complaint.

CLAIMS FOR RELIEF

51. Defendant denies the allegations in paragraphs 431-434 of plaintiff's Complaint.

COUNT I
DAMAGES FOR COMBINATION AND CONSPIRACY AND RESTRAINT OF TRADE OR COMMERCE

52. In answer to paragraph 435 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-434 of plaintiff's Complaint as if fully stated herein.

53. Defendant denies the allegations in paragraphs 436-469 of plaintiff's Complaint.

COUNT II
INJUNCTIVE RELIEF FOR COMBINATION AND CONSPIRACY AND RESTRAINT OF TRADE OR COMMERCE

54. In answer to paragraph 470 of plaintiff's Complaint, defendant incorporates his responses to plaintiff's allegations in paragraphs 1-469 of plaintiff's Complaint as if fully stated herein.

55. Defendant denies the allegations in paragraphs 471-473 of plaintiff's Complaint.

COUNT III
DAMAGES FOR MONOPOLIZATION

56. In answer to paragraph 474 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-473 of plaintiff's Complaint as if fully stated herein.

57. Defendant denies the allegations in paragraphs 475-495 of plaintiff's Complaint.

COUNT IV
INJUNCTIVE RELIEF FOR MONOPOLIZATION

58. In answer to paragraph 496 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-495 of plaintiff's Complaint as if fully stated herein.

59. Defendant denies the allegations in paragraphs 497-498 of plaintiff's Complaint.

COUNT V
DAMAGES FOR INTERLOCKING DIRECTORS

60. In answer to paragraph 499 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-498 of plaintiff's Complaint as if fully stated herein.

61. Defendant denies the allegations in paragraphs 500-504 of plaintiff's Complaint.

COUNT VI
DAMAGES FOR COMBINATION AND CONSPIRACY AND RESTRAINT OF TRADE OR COMMERCE

62. In answer to paragraph 505 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-504 of plaintiff's Complaint as if fully stated herein.

63. Defendant denies the allegations in paragraphs 506-515 of plaintiff's Complaint.

COUNT VII
INJUNCTIVE RELIEF FOR COMBINATION AND CONSPIRACY AND RESTRAINT OF TRADE OR COMMERCE

64. In answer to paragraph 516 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-515 of plaintiff's Complaint as if fully stated herein.

65. Defendant denies the allegations in paragraphs 517-520 of plaintiff's Complaint.

COUNT VIII
DAMAGES FOR MONOPOLIZATION

66. In answer to paragraph 521 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-520 of plaintiff's Complaint as if fully stated herein.

67. Defendant denies the allegations in paragraphs 522-525 of plaintiff's Complaint.

COUNT IX
INJUNCTIVE RELIEF FOR MONOPOLIZATION

68. In answer to paragraph 526 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-525 of plaintiff's Complaint as if fully stated herein.

69. Defendant denies the allegations in paragraphs 527-528 of plaintiff's Complaint.

COUNT X
DAMAGES FOR TORTIOUS INTERFERENCE WITH CONTRACT OR BUSINESS EXPECTANCY

70. In answer to paragraph 529 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-528 of plaintiff's Complaint as if fully stated herein.

71. Defendant denies the allegations in paragraphs 530-537 of plaintiff's Complaint.

COUNT XI
DAMAGES FOR BREACH OF CONTRACT

72. In answer to paragraph 538 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-537 of plaintiff's Complaint as if fully stated herein.

73. Defendant denies the allegations in paragraphs 539-543 of plaintiff's Complaint.

COUNT XII
DAMAGES FOR BREACH OF FIDUCIARY DUTY

74. In answer to paragraph 544 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-543 of plaintiff's Complaint as if fully stated herein.

75. Defendant denies the allegations in paragraphs 545-553 of plaintiff's Complaint.

COUNT XIII
DAMAGES FOR FRAUD AND DECEIT

76. In answer to paragraph 554 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-553 of plaintiff's Complaint as if fully stated herein.

77. Defendant denies the allegations in paragraphs 555-562 of plaintiff's Complaint.

COUNT XIV
DAMAGES FOR *PRIMA FACIE* TORT

78. In answer to paragraph 563 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-562 of plaintiff's Complaint as if fully stated herein.

79. Defendant denies the allegations in paragraphs 564-571 of plaintiff's Complaint.

COUNT XV
DAMAGES FOR RACKETEERING INFLUENCED CORRUPT ORGANIZATIONS (RICO) CONDUCT

80. In answer to paragraph 572 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-571 of plaintiff's Complaint as if fully stated herein.

81. Defendant denies the allegations in paragraphs 573-592 of plaintiff's Complaint.

COUNT XVI
DAMAGES FOR MALICIOUS FILING OF A SUSPICIOUS ACTIVITY REPORT (SAR) UNDER THE USA PATRIOT ACT

82. In answer to paragraph 593 of plaintiff's Complaint, defendant incorporates his responses to paragraphs 1-592 of plaintiff's Complaint as if fully stated herein.

83. Defendant denies the allegations in paragraphs 594-612 of plaintiff's Complaint.

TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

84. Defendant denies the allegations in paragraph 613 of plaintiff's Complaint.

85. Defendant denies all other allegations, claims and causes of action asserted in plaintiff's Complaint not otherwise admitted herein.

86. Defendant denies the plaintiff's allegations in its prayer for relief.

87. Defendant denies the allegations in plaintiff's conclusion.

WHEREFORE, having fully answered plaintiff's Complaint, defendant Andrew S. Duff prays for judgment in his favor and against plaintiff, for his costs and attorneys' fees incurred herein and for such other and further relief as the Court deems just and proper.

AFFIRMATIVE DEFENSES

1. Plaintiff's claims are barred for the reason that this Court lacks personal jurisdiction over this defendant.

2. Plaintiff's claims are barred by reason of insufficiency of service of process.

3. Plaintiff's claims are barred by reason of the failure to state a claim upon which relief may be granted.

4. Plaintiff's claims are barred by reason of prior orders and judgments of the Kansas District Court which have been affirmed by the Tenth Circuit Court of Appeals and, thus, constitute *res judicata* and/or collateral estoppel.

5. Plaintiff's claims are barred by the applicable statutes of limitation.

6. Plaintiff's claims are barred in whole or in part by reason of lack of standing.

7. Plaintiff's claims are barred by reason of the failure or lacks of consideration.

8. This Court is not the appropriate venue for the claims in light of the prior action that remains pending in the District of Kansas.

9. It is denied there was any contract between plaintiff and any defendant in relation to the allegations in the Complaint. In the alternative, however, any such alleged contract would be unenforceable to the extent it is barred by the statute of frauds.

10. It is denied there was any contract between plaintiff and any defendant in relation to the allegations in the Complaint. In the alternative, however, plaintiff's recovery for any alleged breach of contract would be barred or reduced by virtue of the failure of a condition precedent, lacks or failure of consideration, and/or indefinite terms of the alleged agreement.

11. Defendant assert their right to recover attorneys' fees from plaintiff pursuant to applicable Court Rules, federal statutes and Orders, including but not limited to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927.

12. Plaintiff's claims for fraud are deficient and barred by reason of the failure to comply with Fed. R. Civ. P. 9(b).

13. The individual defendant were at all times acting properly and on behalf of their employers, who were known to plaintiff, and were therefore acting as agents of fully disclosed principals against whom relief cannot be sought individually.

14. Plaintiff has failed to establish a right to any injunctive relief, and the relief requested by plaintiff is not in accordance with the requirements for injunctive relief.

15. The valid business decision not to provide the alleged escrow account(s) to plaintiff was reasonable and is thereby protected from plaintiff's claims.

16. Plaintiff's claims under the antitrust laws are barred in whole or in part by the *Copperweld* doctrine.

17. Plaintiff's claims are barred in whole or in part by reason of the absence of intention to restrain trade, to create or conduct a monopoly, or injury to competition.

18. Plaintiff's claims are barred in whole or in part by reason of the absence of antitrust injury.

19. Plaintiff's claims are barred because of the absence of allegation concerning relevant markets in which all defendant and plaintiff engage or sought to engage.

20. Plaintiff's claims are barred in whole or in part by reason of the lacks of damages. Alternatively, plaintiff's claims for damages are speculative and conjectural.

21. Plaintiff's claims are barred for the reason defendant' actions were factually and legally justified and/or privileged.

22. Plaintiff's claims are barred in whole or in part by plaintiff's failure to mitigate damages.

23. Plaintiff's claims are barred by the equitable doctrines of waiver, estoppel and/or ratification.

24. Plaintiff's claims or any intended claims for punitive damages are barred or otherwise constrained by the United States and/or Kansas and/or Missouri constitutions, statutes and case law.

25. Plaintiff's claims for punitive damages must require strict proof and clear and convincing evidence which is absent from this case.

26. Defendant reserve the right to assert additional defenses as may be revealed in discovery or as justice may require.

JURY DEMAND

Defendant demands a jury trial.

Respectfully submitted,

/s/ Mark A. Olthoff

MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929

ANDREW M. DeMAREA KS #16141
Corporate Woods
Suite 1100, Building #32
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANT
ANDREW S. DUFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 4th day of April, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendant

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

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

DEFENDANTS CURT NONOMAQUE AND ROBERT BAKER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE JUDGE OF THIS COURT:

Pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), Defendants Curt Nonomaque ("Nonomaque") and Robert Baker ("Baker") (collectively "Defendants") submit this Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim.

1. Plaintiff has sued Nonomaque and Baker, among numerous other individual defendants, corporations and other entities, under the federal and Missouri antitrust law, the RICO statute, the USA Patriot Act, and Missouri common law theories. Plaintiff seeks several billions of dollars in damage allegedly arising from the obstruction of Plaintiff's efforts to obtain financing, office space in a particular building in Missouri, and escrow services.

2. All of Plaintiff's claims against Nonomaque and Baker must be dismissed because this Court lacks personal jurisdiction over Nonomaque and Baker.

3. Nonomaque is a Texas resident who has never resided in Missouri. *See* Affidavit of Curt Nonomaque ("Nonomaque Aff.") at ¶ 3 (Attached as Exhibit 1). Baker is an Illinois

resident who likewise has never resided in Missouri. *See* Affidavit of Robert Baker ("Baker Aff.") at ¶ 3 (Attached as Exhibit 2). Neither Baker nor Nonomaque has ever owned real or personal property located in Missouri. Nonomaque Aff. at ¶ 3; Baker Aff. at ¶ 3. Neither Baker nor Nonomaque has solicited a contract with a resident of Missouri. Nonomaque Aff. at ¶ 6; Baker Aff. at ¶ 6. Furthermore, neither individual has ever maintained a mailing address or phone number in Missouri, *see* Nonomaque Aff. at ¶ 4; Baker Aff. at ¶ 4, and neither has any personal employees or agents in Missouri. Nonomaque Aff. at ¶ 5; Baker Aff. at ¶ 5.

4. There is no basis for the exercise of specific jurisdiction over either Nonomaque or Baker. Indeed, Plaintiff's Complaint does not allege that Nonomaque or Baker performed any tortious act, transacted any business, nor engaged in any conduct in Missouri. Thus, the claims at issue in this case do not relate to any contacts of Defendants with the forum. Thus, the Missouri long arm statute, MO. REV. STAT. § 506.500, does not confer upon this Court *in personam* jurisdiction over Nonomaque or Baker.

5. Moreover, this Court cannot exercise general jurisdiction over these Defendants. Neither Defendant has the minimum contacts with Missouri necessary for general jurisdiction. Neither Defendant has had anything approaching continuous and systematic contacts with Missouri so that they could anticipate being haled into Court in this forum.

6. Neither Defendant resides, is found, has an agent, or transacts his affairs in Missouri for purposes of the RICO service of process statute, *see* 18 USCA § 1965, or the analogous provision under the antitrust laws, *see* 15 U.S.C. § 15.

7. Finally, the exercise of personal jurisdiction over Baker and Nonomaque would offend traditional notions of fair play and substantial justice.

8. Subject to their Motion to Dismiss for Lack of Personal Jurisdiction, Defendants join in the Motion to Dismiss for Failure to State a Claim filed by Defendants Novation, LLC, VHA Inc., and University Healthsystem Consortium.

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

REQUEST FOR ORAL ARGUMENT

Defendants Curt Nonomaque and Robert Baker hereby requests oral argument on their Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power

John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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::

Bret D. Landrith landrithlaw@cox.net
Attorney for Plaintiff

/s/ John K. Power
John K. Power

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

MEDICAL SUPPLY CHAIN, INC.	§	
	§	
VS.	§	Case No. 05-0210-CV-W-ODS
	§	
NOVATION, LLC et al.	§	

AFFIDAVIT OF CURT NONOMAQUE

STATE OF TEXAS	§
	§
COUNTY OF DALLAS	§

Before me, the undersigned notary public, on this day personally appeared Curt Nonomaque a person whose identity is known to me who, being sworn upon his oath to tell the truth, stated and deposed as follows:

1. My name is Curt Nonomaque. I am of sound mind and am competent in all ways to testify to the matters stated in this affidavit. I am over the age of twenty-one, and I have personal knowledge that the statements in this affidavit are true and correct.

2. I am the President and CEO of VHA Inc., which is headquartered in Irving, Texas.

3. I reside in Southlake, Texas. I have never resided in Missouri, nor have I owned real or personal property located there.

4. I have never maintained a mailing address or telephone number in Missouri.

5. I do not have any agents or employees in Missouri.

6. I have never solicited a contract with a resident of Missouri.

FURTHER AFFIANT SAYETH NOT.

Curt Nonomaque

CURT NONOMAQUE

SWORN TO and SUBSCRIBED before me, the undersigned authority, by Curt Nonomaque on March 31, 2005.

Notary Public in and for the State of Texas

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

MEDICAL SUPPLY CHAIN, INC.	§	
	§	
VS.	§	Case No. 05-0210-CV-W-ODS
	§	
NOVATION, LLC et al.	§	

AFFIDAVIT OF ROBERT J. BAKER

STATE OF ILLINOIS	§	
	§	
COUNTY OF DUPAGE	§	

Before me, the undersigned notary public, on this day personally appeared Robert J. Baker a person whose identity is known to me who, being sworn upon his oath to tell the truth, stated and deposed as follows:

1. My name is Robert J. Baker. I am of sound mind and am competent in all ways to testify to the matters stated in this affidavit. I am over the age of twenty-one, and I have personal knowledge that the statements in this affidavit are true and correct.

2. I am the President and CEO of University HealthSystem Consortium, which is headquartered in Oak Brook, Illinois.

3. I reside in Naperville, Illinois. I have never resided in Missouri, nor have I owned real or personal property located there.

4. I have never maintained a mailing address or telephone number in Missouri.

5. I do not have any agents or employees in Missouri.

6. I have never solicited a contract with a resident of Missouri.

FURTHER AFFIANT SAYETH NOT.

Robert J. Baker
ROBERT J. BAKER

SWORN TO and SUBSCRIBED before me, the undersigned authority, by Robert J. Baker on March 31, 2005.

OFFICIAL SEAL
LORI M. RICHARDS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 2-23-2006

Lori M. Richards
Notary Public in and for the State of Illinois

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

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

SUGGESTIONS IN SUPPORT OF CURT NONOMAQUE AND ROBERT BAKER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE JUDGE OF THIS COURT:

Pursuant to Federal Rules of Civil Procedure 12b(2) and 12(b)(6), Defendants Curt Nonomaque ("Nonomaque") and Robert Baker ("Baker") (collectively "Defendants") submit these Suggestions in Support of their Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim.

INTRODUCTION

Notwithstanding Nonomaque and Baker's lack of contacts with Missouri, Plaintiff named Nonomaque and Baker as defendants in this action. Plaintiff's Complaint does not allege that Nonomaque or Baker personally performed any tortious act, transacted any business, or engaged in *any* conduct in Missouri. Defendants respectfully request that the Court dismiss them from this action on the ground that they are not subject to personal jurisdiction in the Missouri. Subject to their Motion to Dismiss for Lack of Personal Jurisdiction, Defendants join in the Motion to Dismiss for Failure to State a Claim filed by Defendants Novation, LLC, VHA Inc., and University Healthsystem Consortium.

BACKGROUND FACTS

Nonomaque is a Texas resident who has never resided in Missouri. *See* Affidavit of Curt Nonomaque ("Nonomaque Aff.") at ¶ 3 (attached to Motion to Dismiss as Exhibit 1)[1] Baker is an Illinois resident who likewise has never resided in Missouri. *See* Affidavit of Robert Baker ("Baker Aff.") at ¶ 3 (attached to Motion to Dismiss as Exhibit 2). Neither Baker nor Nonomaque has ever owned real or personal property located in Missouri. Nonomaque Aff. at ¶ 3; Baker Aff. at ¶ 3. Neither Baker nor Nonomaque has solicited a contract in Missouri. Nonomaque Aff. at ¶ 6; Baker Aff. at ¶ 6. Furthermore, neither individual has ever maintained a mailing address or phone number in Missouri, *see* Nonomaque Aff. at ¶ 4; Baker Aff. at ¶ 4. Finally, neither Baker nor Nonomaque has any personal employees or agents in Missouri. Nonomaque Aff. at ¶ 5; Baker Aff. at ¶ 5.

ARGUMENT AND AUTHORITIES

I. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS

"A party seeking to invoke the jurisdiction of a federal court bears the burden to establish that jurisdiction exists." *Enterprise Rent-A-Car Co. v. U-Haul Int'l., Inc.*, 327 F. Supp. 2d 1032, 1036 (E. D. Mo. 2004). As set forth below, Plaintiff cannot meet its burden of proof because neither general nor specific jurisdiction exist over Defendants in this case. Accordingly, the claims against Defendants must be dismissed.

The United States Court of Appeals for the Eighth Circuit employs a two-step test for personal jurisdiction. The first step is to examine whether the defendant is amenable to service of process under the state's long arm statute. *Romak USA, Inc. v. Rich*, 384 F.3d 979, 984 (8th

[1] When considering whether personal jurisdiction exists under Missouri's Long Arm Statute, it is permissible to consider matters outside the pleadings, such as affidavits or declarations from the movant. *Enterprise Rent-A-Car Co. v. U-Haul Int'l., Inc.*, 327 F.Supp.2d 1032, 1036 (E. D. Mo. 2004).

Cir. 2004). The second step is to examine whether the Due Process Clause permits personal jurisdiction. *Id.*

A. Defendants are Not Amenable to Process Under the Missouri Long Arm Statute

The Missouri Long Arm Statute does not reach Defendants and therefore does not confer *in personam* jurisdiction over them in this Court. Missouri's Long Arm Statute provides in pertinent part:

> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this state;
>
> (2) The making of any contract within this state;
>
> (3) The commission of a tortious act within this state;
>
> (4) The ownership, use, or possession of any real estate situated in this state;
>
> (5) The contracting to insure any person, property or risk located within this state at the time of contracting;
>
> (6) Engaging in an act of sexual intercourse within this state with the mother of a child on or near the probable period of conception of that child. . . .

MO. REV. STAT. § 506.500. Because Defendants have not conducted any of these acts within the state of Missouri, and because Plaintiff's claims are not based on any allegation that either Defendant personally engaged in any business or tortious conduct in Missouri, the Missouri Long Arm Statute does not authorize service of process on Defendants.

B. The Exercise of *In Personam* Jurisdiction Over Defendants Would Violate Federal Due Process

This Court should dismiss the claims against Defendants because it would offend federal due process for this Court to exercise jurisdiction over Defendants. Beginning with the seminal case of *International Shoe v. Washington*, 326 U.S. 310 (1945), the Supreme Court has consistently held that a court may not constitutionally exercise personal jurisdiction over a nonresident defendant unless it is shown that the defendant has "certain minimum contacts with the forum state such that maintenance of the suit there does not offend the 'traditional notions of fair play and substantial justice'." *International Shoe,* 326 U.S. at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Consequently, a court must undertake a two-prong analysis in considering jurisdiction over a nonresident defendant, like Defendants. First, the court must determine whether the defendant has *purposefully* established minimum contacts with the forum state. If the court concludes that such purposeful minimum contacts exist, then the court must next decide if the contacts are such that "the assertion of personal jurisdiction would comport with 'fair play and substantial justice'." *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985). In this case, neither prong of the test is satisfied. Consequently, it would offend the due process clauses for this Court to exercise personal jurisdiction over Defendants.

1. Defendants Lack Sufficient Minimum Contacts with Missouri

The minimum contacts prong of *International Shoe*, which is the very "touchstone" of the constitutional analysis in this area, depends heavily upon the "foreseeability" of a defendant being sued in a forum state. *Burger King,* 471 U.S. at 474; *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In *World-wide*, the United States Supreme Court stated that "the foreseeability that is critical to due process analysis . . . is that the defendant's contacts in connection with the forum State are such that he should reasonably anticipate being haled into

court there." *World-wide*, 444 U.S. at 297. Whether it is foreseeable that a defendant can be sued in a particular court can be established only by proof that the defendant has "purposefully directed" its activities toward the forum state. *Asahi Metal Industry Company v. Superior Court*, 480 U.S. 102, 112 (1987); *see also Burger King,* 471 U.S. at 473. In this sense, the due process clause ensures a "degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to whether or not the conduct will or will not render them liable to suit*." World-wide Volkswagen,* 444 U.S. at 297.

In considering minimum contacts, two categories of personal jurisdiction have been recognized by the courts: general jurisdiction and specific jurisdiction. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). A state may exercise "general jurisdiction" over a foreign defendant if there are "continuous and systematic" general contacts between the state and the foreign defendant. *See, e.g., Felch v. Transportes Lar-Mex SA DE CV,* 92 F.3d 320, 324 (5th Cir. 1996). "Specific jurisdiction," in contrast, subjects the nonresident defendant to suit in the forum state only on claims that "arise out of or relate to" the defendant's contacts with the forum state. *See, e.g., Id.*; *Gardemal v. Westin Hotel Co.,* 186 F.3d 588, 595 (5th Cir. 1999); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

Defendants do not have the minimum, "continuous and systematic" contacts with Missouri which are necessary to confer general jurisdiction upon this Court under the constitutional analysis of *International Shoe*. Defendants never resided, owned property, maintained a mailing address or phone number, had personal employees or agents, or solicited contracts for personal business in Missouri. *See generally* Nonomaque Aff.; Baker Aff. Thus, Defendants simply have never engaged in ongoing day-to-day business or other activities in Missouri and do not have the contacts necessary to establish general jurisdiction.

Moreover, this Court cannot exercise specific jurisdiction over Defendants. There are simply no allegations that Defendants, in their personal capacity, committed any acts at all in the State of Missouri, or that they availed themselves the privilege of conducting activities within the state. As a consequence, there is no connection between Plaintiff's claims and activities of the Defendants in the forum state.

2. Exercising Personal Jurisdiction Over Defendants Would Offend Traditional Notions of Fair Play and Substantial Justice

Even if Plaintiff could establish minimum contacts, which it cannot, it would also be unfair and unjust to require Defendants to defend against Plaintiff's claims in this forum. After determining whether a nonresident defendant has sufficient minimum contacts with the forum state (the "first prong" of *International Shoe*), a court finding the presence of such contacts must next examine certain other factors to determine whether those contacts are sufficient so that the assertion of personal jurisdiction would comport with "traditional notions of fair play and substantial justice." *Burger King,* 471 U.S. at 476; *Wilson v. Belin,* 20 F.3d 644, 647 (5th Cir. 1994). It is the "quality and nature of the defendant's activity," *Hanson v. Denckla,* 357 U.S. 235, 253 (1958), in relation to the allegations that determines whether jurisdiction comports with "fair play and substantial justice." *International Shoe,* 326 U.S. at 320.

In reaching the decision on fair play and substantial justice, the court must consider the following factors: (1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiffs' interest in obtaining relief; and (4) the interests of other states in securing the most efficient resolutions of controversies. *See Asahi*, 480 U.S. at 103 (1987).

An application of these factors to the present case demonstrates that it would be unfair and unjust to require Defendants to litigate in this forum. Nonomaque lives and works in Texas and Baker lives and works in Illinois. On the other hand, Plaintiff's interest in obtaining relief in

this forum should be given no weight. As is explained in the Motions to Dismiss filed by other Defendants in this case, Plaintiff filed this lawsuit as a third "bite at the apple" on claims already found to be without merit. No state has an interest in encouraging such forum shopping and this multiplicity of suits.

II. THE PRESENCE OF RICO AND ANTITRUST CLAIMS DOES NOT PERMIT THE COURT TO EXERCISE PERSONAL JURISDICTION OVER DEFENDANTS

Neither Nonomaque or Baker resides in, is found, has an agent, or transacts his affairs in Missouri. Consequently, neither the RICO "Venue and Process" provision, 18 U.S.C.A. § 1965(a) or the similar provision of the Clayton Act, 15 U.S.C.A. § 15, supports jurisdiction in this case.

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

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power

John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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::

Bret D. Landrith landrithlaw@cox.net
Attorney for Plaintiff

/s/ John K. Power
John K. Power

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

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

DEFENDANT SHUGHART THOMSON & KILROY, P.C.'S MOTION
TO TRANSFER, DISMISS AND/OR STRIKE AND SUGGESTIONS IN SUPPORT

Defendant Shughart Thomson & Kilroy, P.C., incorrectly named as "Shughart Thomson & Kilroy Watkins Boulware, P.C.," joins with defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff and together they respectfully seek an Order from this Court transferring this case to the District of Kansas, dismissing the plaintiff's Complaint in its entirety, and to strike certain frivolous and vindictive allegations.

In support of this motion, defendant Shughart Thomson & Kilroy, P.C. relies upon the following suggestions in support, as well as the Suggestions in Support filed by defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff.

Suggestions in Support

1. Plaintiff has previously litigated the factual claims which form the basis of its Complaint herein. That suit was dismissed by the United States District Court for the District of Kansas. The dismissal was affirmed by the Tenth Circuit Court of Appeals, with a finding that such appeal was frivolous. As such, *res judicata* and/or collateral estoppel applies to those claims which were previously litigated, as well as those claims which could have been raised in the earlier suit.

Although Shughart Thomson & Kilroy was not a party to the original suit, it was in privity with persons or entities who were parties to the earlier suit, and is therefore entitled to the protection of *res judicata*. *Lane v. Peterson*, 889 F.2d 737, 741 (8th Cir. 1990).

2. The dismissal of plaintiff's federal claims pursuant to collateral estoppel or *res judicata* eliminate federal question jurisdiction in this suit, leaving this Court without subject matter jurisdiction. Although plaintiff has also pleaded diversity jurisdiction, it has pleaded that both itself and defendant Shughart Thomson & Kilroy are Missouri residents. (Compl. ¶¶ 10, 24.)

3. The original suit is still pending in the United States District Court for the District of Kansas. Any of plaintiff's claims and causes of action which are not dismissed should be transferred to the District of Kansas for further handling, to prevent plaintiff's splitting a cause of action.

4. The assertion of claims against Shughart Thomson & Kilroy, and its current and former attorneys, is frivolous, immaterial and irrelevant to this litigation, and included solely for the purpose of harassment and to interfere in Shughart Thomson & Kilroy's relationship with its clients in this litigation. The allegations against a sitting Magistrate are particularly improper and vindictive. This defendant moves, pursuant to Rule 12(f), F.R.C.P., that such allegations against all Shughart Thomson & Kilroy attorneys, current and former, be stricken.

5. Plaintiff has failed to properly serve the defendant Shughart Thomson & Kilroy in this case. F.R.C.P. 12(b)(4), (5).

6. Plaintiff has failed to properly name the defendant Shughart Thomson & Kilroy.

7. So as to avoid redundancy, as further support for its motion, defendant Shughart Thomson & Kilroy respectfully incorporates herein the Motion and Suggestions in Support field by defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff.

WHEREFORE, defendant Shughart Thomson & Kilroy respectfully requests that plaintiff's Complaint be transferred and joined with the original case filed by plaintiff and still pending in the United States District Court for the District of Kansas, or dismissed in its entirety, that this defendant be awarded its costs and expenses incurred herein, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Kathleen A. Hardee
ROBERT A. HENDERSON MO #28566
KATHLEEN A. HARDEE MO #36071
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ATTORNEYS FOR DEFENDANT SHUGHART THOMSON & KILROY, P.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned Court, with notice of case activity to be generated and sent electronically by the Clerk of said Court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 4th day of April, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Kathleen A. Hardee
Attorney for Defendant Shughart Thomson & Kilroy, P.C.

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

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

NOVATION, LLC, VHA INC., AND
UNIVERSITY HEALTHSYSTEM CONSORTIUM'S
MOTION TO TRANSFER VENUE OR ALTERNATIVELY MOTION TO DISMISS
COMPLAINT FOR FAILURE TO STATE A CLAIM

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants Novation, LLC ("Novation"), VHA Inc. ("VHA"), and University Healthsystem Consortium ("UHC") (collectively, "Defendants") respectfully request that the Court transfer this case to the District Court of Kansas pursuant to 28 U.S.C. § 1404(a), or alternatively dismiss Plaintiff's Complaint with prejudice pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

1. Plaintiff's Complaint seeks several billions of dollars in damages arising from Plaintiff's inability to lease desired office space, to obtain financing, and to establish escrow accounts allegedly necessary to enter into the market to provide hospital supplies in e-commerce. Plaintiff asserts that these harms flowed from a vast conspiracy involving, *inter alia*, various entities and individuals in the nationwide hospital supply market, venture capital firms, a bank, a law firm, the owner of an office building, and a magistrate of the U.S. District Court for Kansas.

PRIOR ACTIONS

2. This is not the first time Plaintiff has raised these claims. Indeed, this lawsuit is substantially similar to claims asserted in two prior suits, both of which were dismissed on the pleadings. Plaintiff originally filed a lawsuit against many of these same defendants in the United States District Court for the District of Kansas in 2002, styled *Medical Supply Chain, Inc. v. US Bancorp, NA, et al*., Civil Action No. 02-2539-CM (Judge Carlos Murguia) (the "US Bancorp Case"). In that case, Plaintiff asserted virtually identical claims arising out of the same transactions and same set of operative facts as are alleged here even though Plaintiff was warned by the District Court in its order dismissing the complaint in that case "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *See* Memorandum and Order, at p. 11 (attached as Exhibit 1). Indeed, the district judge noted, with regard to Plaintiff's USA Patriot Act violations (which are also made here) that "plaintiff's allegation [is] so completely divorced from rational thought that the court will refrain from further comment . . . ." *See* Exhibit 1 at pp. 14-15. The Tenth Circuit affirmed the District Court's dismissal. Because the Tenth Circuit concluded that Plaintiff's appeal was not supported by the law or the facts, it ordered Plaintiff and its counsel to show cause why it should not be sanctioned for filing a frivolous appeal. *Medical Supply Chain, Inc. v. US Bancorp, NA*, 2004 WL 2504653, *1 (10th Cir. 2004).

4. In June of 2003, Plaintiff filed suit in the District Court of Kansas against many of the GE-related parties alleged to be unnamed co-conspirators in this action. That case was styled *Medical Supply Chain, Inc. v. General Electric Company, et al.*, Civil Action No. 03-2324-CM (Judge Carlos Murguia) (the "GE case"). That case also involved many of the same factual and legal allegations as alleged here. In the District Court's order dismissing that suit, the Court

noted that the federal antitrust claims failed "at the most fundamental level." *See* Memorandum and Order, at p. 5 (attached as Exhibit 2).

TRANSFER OF VENUE

5. Defendants join in the motion to transfer venue of this proceeding to the U.S. District Court in Kansas pursuant to 28 U.S.C. § 1404(a) filed by Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare, and Andrew S. Duff. Because the Kansas District Court has already twice-dealt with this Plaintiff and these allegations, it is the most efficient use of judicial resources for that court to consider this case. Further, transfer to Kansas ensures that Plaintiff cannot forum shop his deficient Complaint to this Court in an effort to avoid incurring additional sanctions imposed by the Kansas court for filing frivolous and harassing lawsuits.

GROUNDS FOR DISMISSAL

6. Undeterred by the Tenth Circuit's and the Kansas District Court's admonitions regarding Plaintiff's attorney's Rule 11 responsibilities, that same attorney has now filed this Complaint which is substantially similar to his defective actions in the US Bancorp and GE cases. The Complaint is incoherent, *e.g.* Complaint at p. 114 (seeking an injunction during the "pungency [sic] of this action" and damages for Plaintiff's stakeholders including the town of Blue Springs, Missouri and "the injury of the 2000 hospitals loosing [sic] money due to high supply costs"), and irrational, *e.g.* Complaint at ¶ 89 (blaming the deaths of "at least 41,206 Americans" on the increasing health care costs due to the Defendants' actions in foreclosing Plaintiff's entry into the market).

7. What is clear upon a reading of the Complaint, however, is that it states no legally viable claim. In fact, the new Complaint repairs none of the fundamental legal defects and

pleading insufficiencies of the prior cases, and adds some new ones. Moreover, many claims are now foreclosed by collateral estoppel grounds. As is explained further in the accompanying Suggestions in Support of Novation, LLC, VHA, Inc., and University Healthsystem Consortium's Motion To Dismiss Complaint For Failure To State A Claim, Plaintiff's claims should be dismissed by this Court with prejudice on the following grounds:

- Plaintiff's federal and state antitrust claims should be dismissed because: (1) Plaintiff is collaterally estopped from asserting such claims; (2) Plaintiff wholly fails to allege concerted action; (3) Plaintiff fails to sufficiently allege monopoly power or the elements of attempt to monopolize; (4) Plaintiff fails to adequately allege harm to competition, rather than merely harm to Plaintiff, a single competitor; (5) Plaintiff lacks standing to assert the claims; and, (6) Plaintiff fails to plead any of the required elements for a claim for interlocking directors.

- Plaintiff fails to plead the existence of a misleading statement or omission made by Defendants to Plaintiff; therefore, Plaintiff's fraud claim should be dismissed.

- Plaintiff fails to plead that Defendants knew about or intentionally interfered with the contracts with which Plaintiff claims Defendants tortiously interfered.

- Plaintiff's allegations actually contradict the basis for recovery under the theory of prima facie tort.

- Plaintiff's RICO claim fails due to the lack of a viable claim of a racketeering act or pattern and an injury that can be remedied under RICO.

- Plaintiff's USA Patriot Act claim against Defendants must be dismissed because: (1) there is no private right of action under the USA Patriot Act; (2) that claim is barred by principles of collateral estoppel; and, (3) Plaintiff has failed to plead facts sufficient to show that Defendants had any involvement with or knowledge of a filing under that statute.

INSUFFICIENCY OF SERVICE OF PROCESS

8. Plaintiff filed Return of Service forms with this Court purporting to establish valid service of process on Defendants. However, service of process was ineffective to obtain jurisdiction over Defendants because: (1) service by mail is insufficient under the Federal Rules of Civil Procedure and the Missouri Rules of Civil Procedure unless the defendant returns the acknowledgement form (that Plaintiff failed to include in the served papers); and, (2) the mailing was not directed at the appropriate officer or agent of Defendants. Nevertheless, counsel for Defendants contacted Plaintiff's counsel, noted the deficiency in service, and offered to execute waiver of service forms as is contemplated by Federal Rule of Civil Procedure 4. Plaintiff's counsel rejected that offer, stating instead that this is a "bloody battle" for which no agreements can be considered. Rather than delay consideration of the patent insufficiency of this Complaint by resting on a challenge to service of process, Defendants are now filing their Rule 12(b)(6) motion according to the deadline that would have applied if service had been proper.

PRAYER

WHEREFORE, for all of these reasons, Defendants request that the Court transfer this case to the U.S. District Court in Kansas, or alternatively enter an Order dismissing with

prejudice Plaintiff's Complaint and granting Defendants all other relief to which they are entitled.

REQUEST FOR ORAL ARGUMENT

Defendants Novation, LLC, VHA Inc., and University Healthsystem Consortium hereby requests oral argument on its Motion to Transfer Venue or Alternatively Motion to Dismiss Complaint for Failure to State a Claim.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power
John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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::

Bret D. Landrith landrithlaw@cox.net
Attorney for Plaintiff

/s/ John K. Power
John K. Power

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 02-2539-CM**
	)	
US BANCORP, NA, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Pending before the court is defendants' Motion to Strike Plaintiff's Answer to Defendants' Reply (Doc. 30). Also before the court are defendants' Motions to Dismiss (Docs. 21, 23, and 25), plaintiff's Response to defendants' Motions to Dismiss (Doc. 27), and defendants' Reply in Support of all Motions to Dismiss (Doc. 28). As set forth below, defendants' Motions to Dismiss are granted. Defendants' Motion to Strike is dismissed as moot.

I. Background[1]

1. The Parties

Plaintiff is a Missouri corporation which has developed a health care supply strategist certification program. According to plaintiff, defendant US Bancorp NA (hereinafter "US Bancorp") is a bank holding corporation headquartered in Minnesota and is the parent company of the employees and subsidiaries named as co-defendants. Defendant US Bancorp operates banks in several states under the name US Bank.

[1]The court exercises jurisdiction under 28 U.S.C. §§ 1331 and 1337.

Defendant Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC (hereinafter "defendant LLC"), is a subsidiary of defendant US Bancorp, also headquartered in Minneapolis. Defendant LLC is the division of defendant US Bancorp that is responsible for escrow accounts for health care systems. Defendant US Bancorp Piper Jaffray, Inc. is the investment banking subsidiary of defendant US Bancorp, and is headquartered in Minneapolis. It has underwriting and investment relationships with healthcare suppliers. Defendant Unknown Healthcare Entity is "believed to be a supplier or purchasing organization who has communicated with US Bancorp, its employees or its subsidiaries about plaintiff for the purpose of obstructing or delaying plaintiff's entry into commerce." Jerry A. Grundhofer is President and CEO of defendant US Bancorp. Defendant Andrew Cesere is Vice Chairman of the US Bancorp trust division. Defendant Susan Paine is the supervisor for US Bank's St. Louis, Missouri corporate trust office. Defendant Lars Anderson is the customer acquisition manager for US Bank's St. Louis, Missouri corporate trust office. Defendant Brian Kabbes is Vice President of Corporate Trusts for US Bank.

B. Plaintiff's Claims

Plaintiff contends defendants engaged in conduct violating (1) the Sherman Antitrust Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act. Plaintiff also alleges defendants (4) "fail[ed] to properly train [their] employees on the USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under the USA PATRIOT Act"; and (6) violated "criminal laws to influence policy under section 802 of the USA PATRIOT Act." The complaint further charges defendants with (7) misappropriation of trade secrets, under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good faith and fair dealing. Plaintiff seeks over $943

million in damages and declaratory relief.[2] Defendants request dismissal of the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff has failed to state a claim for which relief can be granted.

On March 12, 2002, plaintiff's President and CEO, Sam Lipari, began a process of selecting a national bank to provide services including nationwide checking, escrow services, credit facilities, and other banking services. Mr. Lipari opened a corporate account with US Bank on or about April 15, 2002. On October 1, 2002, plaintiff contacted a US Bank employee at the Noland Road, Independence, Missouri branch of US Bank. Plaintiff requested the bank to provide escrow services. Defendants ultimately denied plaintiff's request, and plaintiff claims it was damaged as a result.

II. Legal Standard for Motions to Dismiss

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

---

[2]On January 9, 2003, the Tenth Circuit affirmed this court's order denying plaintiff's requests for preliminary injunction.

III. Analysis

A. Sherman Act (Count I)

In Count I of the Amended Complaint, plaintiff alleges defendants have violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

1. Section 1

A plaintiff must plead three elements to state a claim under § 1 of the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. 15 U.S.C. § 1; *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992); 1 Irving Scher, et al., *Antitrust Adviser* (4th ed. 2001) § 1.04.

With regard to § 1, plaintiff states defendants are a "vertically integrated" entity that exercises monopoly power over "the specific market" of companies seeking to supply new products, services, and technology in the field of health care, because new entrants into the market "are dependent" upon defendants' approval and endorsement. Plaintiff alleges that defendants violated Section 1 by stating that defendants "are believed to be the largest holder of health care supplier equity issues"; that defendants US Bancorp , US Bank, and defendant LLC, as well as US Bancorp Piper are "alter egos" of each other which have, *inter alia*, "completely dominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics"; that defendants use "anticompetitive sole source contracts between their client health care suppliers and health care GPOs [sic] the defendants have developed" in order to inflate the value of equity shares that defendants market; that defendants "operate a conspiracy among their subsidiaries and parent companies" for the purpose of restraining commerce; that defendants rejected plaintiff's application for escrow accounts in order to prevent plaintiff's entry into the

market; and that defendants have acted in furtherance of the conspiracy through a refusal to deal, denial of services, and boycotting or withholding of critical facilities in order to exclude plaintiff from the market.

a. Contract, Combination, or Conspiracy

Plaintiff alleges that defendants have conspired to prevent plaintiff's entry into the market through refusal to deal, denial of services, and boycotting or withholding critical facilities. Defendants contend plaintiff has failed to allege the existence of an agreement among defendants, and that plaintiff cannot show that two or more independent actors were present. Accepting the allegations contained in the complaint as true, the court finds plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1.

First, the court finds that plaintiff has not demonstrated that a plurality of actors existed among defendants. In the complaint, plaintiff states that all individuals named as defendants are officers or employees of defendant US Bancorp, and that all business entities named as defendants are subsidiaries of defendant US Bancorp. Officers, directors, and employees of the **same** company cannot conspire with each other to violate § 1, because they cannot comprise the plurality of actors necessary for a conspiracy. As the Supreme Court held in *Copperweld Corp. v. Independence Tube Corp.*:

> [A]n internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

467 U.S. 752, 769 (1984). Likewise, a parent corporation is incapable of conspiring with its wholly owned subsidiaries:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Id. at 771; *see also In re Indep. Serv. Orgs. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1149 (D. Kan. 2000) (following *Copperweld* in finding that coordination among divisions of a corporation does not violate Sherman Act).

Second, the court finds that even if the allegations of conspiracy alleged in plaintiff's complaint encompassed a plurality of actors, plaintiff has failed to state a claim for relief. Here, plaintiff has not pled the existence of a pricing agreement, or agreement of any kind, among the defendants in restraint of trade. "Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief." *TV Communications Network, Inc.*, 964 F.2d at 1024 (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir. 1980)). A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. *Id.*; *see also Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) (holding that to survive a motion to dismiss, a complaint stating violations of the Sherman Act "must allege facts sufficient, if they are proved, to allow the court to conclude that claimant has a legal right to relief"). Conclusory allegations that the defendant violated those laws are insufficient.

Id. (citing *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965)). The court grants defendants' motion to dismiss plaintiff's claim under § 1 of the Sherman Act.

2. Section 2

Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90, (1956); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987).

Plaintiff states defendants "have violated Section 2," and that they "have acquired, maintained and extended their monopoly power through improper means, including attempting to extort healthcare technology companies into using US Bancorp as the underwriter of capitalization against securities regulations and in denying [plaintiff] the escrow accounts it required to capitalize its entry into commerce through extortion under the color of official right - the USA PATRIOT Act." Further, plaintiff alleges defendants' "vertical integration is part of a calculated scheme to gain control over the $1.3 trillion health care supplier and distribution segment of the health care industry and to restrain or suppress competition," and that defendants "engage in predatory tactics and dirty tricks including . . . extortion [and] 'laddering' schemes to fraudulently inflate equity values of competitors they own interests in." Plaintiff claims defendants "invest in and promote engage in [sic] anticompetitive predatory sole source contract agreements." In addition, according to plaintiff, defendants have

gained "the power to control prices of health care supplies . . . that are higher than those negotiated directly by hospitals."

With regard to the effects of defendants' alleged actions, plaintiff states, without elaboration, that "new technologies have been prevented from entering the health care market," resulting "in the unavailability of superior products and services that would have been able to save lives and alleviate suffering." Further, plaintiff contends "[t]he public is being severely injured by defendants' actions" and that plaintiff "has been severely injured and is in danger of further injury."

The court construes plaintiff's complaint as attempting to state a claim of combination or conspiracy to monopolize. It is unclear whether plaintiff claims that actual or attempted monopolization occurred. Applying all three theories of recovery, the court finds that plaintiff has failed to state a claim under § 2.

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In the Tenth Circuit, "monopoly power is defined as the ability both to control prices and exclude competition." *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1567 (10th Cir. 1991). Further, "determination of the existence of monopoly power requires proof of relevant product and geographic markets." *Id.*

Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, plaintiff has not pled the existence of a relevant product market or geographic market. Plaintiff has not stated that defendants' alleged market power stems from defendants' willful acquisition or maintenance of that

power rather than from defendants' development "of a superior product, business acumen, or historic accident." The court finds plaintiff has failed to state a claim of monopoly under § 2.

To state a claim for attempted monopolization under § 2, the plaintiff must plead: "(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999) (citing *TV Communications, Inc.*, 964 F.2d at 1025). "Factors to be considered in determining dangerous probability include the defendant's market share, 'the number and strength of other competitors, market trends, and entry barriers.'" *Id.* (citing *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991). Plaintiff has neither adequately pled the existence of a relevant market nor alleged that defendants have a "dangerous probability" of success in monopolization. The court finds plaintiff has not stated a claim for attempted monopolization under § 2.

With regard to combination or conspiracy to monopolize, "[a] plaintiff must show conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy." *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan.*, 891 F.2d 1473, 1484 (10th Cir. 1989) (*citing Perington Wholesale*, 631 F.2d at 1377; *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988)). As with § 1, the court finds that plaintiff cannot state a claim for conspiracy because plaintiff has not alleged a plurality of actors and has made only very conclusory allegations of conspiracy. Thus, the court finds plaintiff has not stated a claim for combination or conspiracy to monopolize. Count I of the complaint is dismissed.

B. Clayton Act (Count II)

Plaintiff contends that defendants' refusal to provide escrow account services was a denial of a critical facility in violation of the Robinson-Patman Act, located at 15 U.S.C. § 13 of the Clayton Act. The Robinson-Patman Act, in part, makes it "unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers **of a commodity** bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." § 13(e) (emphasis added).

The court finds plaintiff cannot state a claim under the Robinson-Patman Act, because the act prohibits only the sale of commodities. As numerous courts have held, the Act does not concern the sale of services, including financial services as provided by defendants in this case. *E.g.*, *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739, 745 (6th Cir. 1993); *Norte Car Corp. v. FirstBank Corp.*, 25 F. Supp. 2d 9, 18 (D.P.R. 1998). Count II is dismissed.

C. Hobbs Act (Count III)

Plaintiff states defendants violated the Hobbs Act's provision against racketeering, 18 U.S.C. § 1951(b)(2), "by preventing plaintiff's entry into commerce under color of official right." The court is persuaded by the findings of other courts which have determined that no private right of action exists to enforce the Hobbs Act. *See Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 408-09 (8th Cir. 1999) (citing cases and holding that "neither the statutory language of 18 U.S.C. § 1951 nor its legislative history reflect an intent by Congress to create a private right of action").

Even if such an action were authorized, there is no showing that defendants - private parties - acted with the requisite "official color of right."

> In general, proceeding against private citizens on an official right theory is inappropriate under the Act, irrespective of the actual control that citizen purports to maintain over governmental activity. Private persons have been convicted of extortion under color of official right, but these cases have been limited to ones in which a person masqueraded as a public official, was in the process of becoming a public official, or aided and abetted a public official's receipt of money to which he was not entitled.

35 C.J.S. *Extortion* § 12. The complaint contains no contention that defendants presented themselves as public officials or acted in any manner connected with a public official. Plaintiff cannot state a claim under the Hobbs Act. Count III is dismissed.

D. USA PATRIOT Act Claims (Counts IV-VI)

Prior to analyzing plaintiff's legal arguments, the court reminds plaintiff's counsel that, by signing the complaint and any other paper submitted to the court, he has certified, to the best of his belief and after a reasonable inquiry, that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11 (b)(2). Plaintiff's counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts.

Plaintiff seeks to bring claims that defendants failed to properly train their employees on the USA PATRIOT Act (hereinafter "Patriot Act") or provide a compliance officer related to the Act, violating section 352 of the Act, codified at 31 U.S.C. § 5318 (Count IV); "misused their authority" and engaged in excessive use of force as "enforcement officers" under the Act (Count V); and "violated criminal laws to influence public policy" under the Act (Count VI). The Act states, in relevant part,

> **(h) Anti-money laundering programs.–**
> **(1) In general.**–In order to guard against money laundering through financial institutions, each financial institution shall establish anti-money laundering programs, including, at a

minimum--
(A) the development of internal policies, procedures, and controls;
(B) the designation of a compliance officer;
(C) an ongoing employee training program; and
(D) an independent audit function to test programs.

31 U.S.C. § 5318 (h).

First, with regard to Count IV, the court finds plaintiff lacks standing. The court is obligated to raise the issue of standing *sua sponte* to ensure that an Article III case or controversy exists. *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 (10th Cir. 2002). "To establish Article III standing, the plaintiff must show injury in fact, a causal relationship between the injury and the defendants' challenged acts, and a likelihood that a favorable decision will redress the injury." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In ruling on a motion to dismiss for lack of standing, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (citing *Warth v. Seldin*, 422 U.S. 490, 501, (1975)).

Here, the court finds plaintiff lacks standing because it has failed to allege a redressable injury. Even if defendants failed to train their employees in order to guard against money laundering and also failed to designate a compliance officer as required by the Act, plaintiff has not pled that it was injured due to such omissions. Moreover, there is no basis to conclude that any order from the court directing defendants to comply with the Act could redress plaintiff's grievance that defendants denied plaintiff escrow services.

Second, the court finds that, even if Count IV were justiciable, no private right of action exists to enforce the Patriot Act. As a result, Counts IV, V, and VI fail to state a claim for which relief can be granted. Plaintiff

has not identified a provision of the Patriot Act expressly authorizing enforcement by private citizens. In its response to the motion to dismiss, plaintiff states that the failure to train and excessive use of force claims are actionable under 42 U.S.C. § 1983.

Section 1983 provides a cause of action against any person who, **under color of state law**, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." § 1983 (emphasis added). The complaint has failed to allege that defendants acted under color of state law, an essential element of a § 1983 suit. *E.g.*, *Sooner Prods. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983). Although plaintiff later states in its response that defendants acted "as an agent for the Department of the Treasury"[3] and that § 1983 liability may extend to private individuals if they engage in joint action with state officials, these allegations do not appear in the complaint and are, nevertheless, so conclusory that they cannot state a claim. *See, e.g.*, *Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir. 1994); *Sooner Prods. Co.*, 708 F.2d at 512. ("When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action."). In *Blessing v. Freestone*, the Supreme Court explained the factors courts must consider in determining whether a statute gives rise to a right enforceable under § 1983:

> In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have

---

[3]Plaintiff's argument implicates action under color of federal rather than state law, thus giving rise to an action under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), rather than § 1983.

> intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. 329, 340 (1997) (citations omitted). Plaintiff has not alleged the existence of any of these necessary elements.

Further, plaintiff has not attempted to state a claim that an implied private right of action exists under the Act. "A plaintiff asserting an implied right of action under a federal statute bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute. In other words, he must overcome the familiar presumption that Congress did not intend to create a private right of action." *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 521 (5th Cir. 2002); *see also Cort v. Ash*, 422 U.S. 66, 78 (1975) (setting forth the four-factor test for whether a statute creates an implied private right of action as (1) whether plaintiff is a member of the class for whose benefit the statute was passed; (2) whether there is evidence of legislative intent, either explicit or implicit, to create or deny a private remedy; (3) whether it is consistent with the legislative scheme to imply a private remedy; (4) whether the cause of action [is] one traditionally relegated to state law so that implying a federal right of action would be inappropriate). The complaint alleges none of these elements.

Finally, with regard to Count VI in particular, in which plaintiff actually contends defendants "are preventing [plaintiff]'s entry into commerce in violation of Section 802 of the USA Patriot Act which creates a federal crime of 'domestic terrorism' that broadly extends to 'acts dangerous to human life that are a violation of the criminal laws," the court finds plaintiff's allegation so completely divorced from rational thought that the

court will refrain from further comment until such time as federal criminal proceedings are commenced, if indeed they ever are.

Counts IV, V, and VI are dismissed.

E. State Law Claims (Counts VII-XIII)

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only supplemented state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). If the parties have already expended "'a great deal of time and energy on the state law claims,' it is appropriate for the district court to retain supplemented state claims after dismissing all federal questions." *Vllalpando v. Denver Health & Hosp. Auth.*, 2003 WL 1870993, at *5 (10th Cir. 2003) (citing *Botefuhr*, 309 F.3d at 1273). Here, the court finds no compelling reason to retain jurisdiction over the state law claims, and dismisses them without prejudice.

IV. Order

IT IS THEREFORE ORDERED THAT defendants' Motions to Dismiss (Docs. 21, 23, and 25) are granted.

IT IS FURTHER ORDERED THAT defendants' Motion to Strike Plaintiff's Answer to Defendants' Reply (Doc. 30) is dismissed as moot.

IT IS FURTHER ORDERED THAT this case is hereby dismissed.

Dated this 16th day of June 2003, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 03-2324-CM**
GENERAL ELECTRIC COMPANY, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff Medical Supply Chain (MSC) brings this action against defendants General Electric Company (GE), General Electric Capital Business Asset Funding Corporation (GE Capital), General Electric Transportation Systems Global Business Signaling (GETS), and Jeffrey R. Immelt, Chief Executive Officer of GE. Plaintiff alleges that GE, GE Capital, GETS, and Immelt violated federal antitrust laws and Missouri common law by refusing to sublease a building or provide financing to plaintiff. This matter is before the court on defendants' Motion to Dismiss Amended Complaint (Doc. 8), plaintiff's Request for Extension of Time Under Local Rule 6.1 (Doc. 10), and defendants' Motion for Rule 11 Sanctions (Doc. 13).

I. Plaintiff's Request for Extension of Time Under Local Rule 6.1

On August 21, 2003, defendants filed their Motion to Dismiss Amended Complaint (Doc. 8). On September 9, 2003, plaintiff requested an extension of time in which to answer defendants' motion. The

court hereby grants plaintiff's request for an extension of time. Accordingly, the court will consider plaintiff's response brief, which was filed on October 1, 2003.

II. Motion to Dismiss Amended Complaint

A. Standards

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff, *Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir. 1998). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984).

B. Background Facts

1. The Parties

As alleged, plaintiff spent ten years developing technology and has spent the last three years completing the research and development for commercialization of an Internet-based service to manage strategic data and provide direct support to buyers and sellers that make up the healthcare supply chain. This service is designed to permit plaintiff to provide "hospital supplies through e-commerce."

Plaintiff alleges that defendant GE distributes equipment, parts, and credit services to hospitals. Plaintiff does not allege that GE provides any service (Internet-based or otherwise) relating to the healthcare supply chain or that it competes in the business of selling "hospital supplies through e-commerce." GE is a shareholder of Global Healthcare Exchange (GHX), which plaintiff alleges is an "electronic marketplace promising online distribution at lower prices to hospitals" that competes in the market to provide hospital supplies through e-commerce. GE's share of the ownership of GHX is not alleged, and GHX is not a named defendant in this action.

Defendant Immelt is currently the Chief Executive Officer of GE. Previously, as President of GE Medical Systems, defendant Immelt oversaw GE's capitalization of GHX in 2000. Plaintiff alleges that defendant Immelt allied GHX with the other Internet marketplace, Neoforma, Inc. (also not a party to this action), to control 80% of the existing hospital supply e-commerce market.

Defendant GE Capital is a GE subsidiary performing GE's commercial lending operations. GE Capital is not alleged to provide hospital supply chain services or compete in providing hospital supplies through e-commerce.

Defendant GETS, a GE subsidiary, is a global supplier of ground transportation products. GETS assumed a lease on a building at 1600 N.E. Coronado Drive, Blue Springs, Missouri (the "Blue Springs Building") when it bought Harmon Industries, Inc., a railroad signal company. Like GE and GE Capital, GETS is not alleged to provide hospital supply chain services or compete in hospital supplies through e-commerce.

2. The Dispute

On or about June 1, 2002, Samuel Lipari, Chief Executive Officer of plaintiff MSC, contacted a leasing agent regarding the Blue Springs Building. Lipari was interested in sub-leasing a portion of the building wherein plaintiff could conduct its hospital e-commerce business. The leasing agent indicated to Lapari that the building already was leased and that the existing lessee only would sub-lease the entire building. GETS was the existing lessee at the time.

Lipari contacted the building owner, who agreed to sell plaintiff the building for the remaining balance of GETS's seven-year lease ($5.4 million). The building owner provided Lipari with a letter of intent to sell the building to plaintiff.

As alleged, plaintiff was unable to obtain financing from a national bank to purchase the building. On or about May 15, 2003, plaintiff wrote a letter to George Fricke, a property manager at GE, offering to release GE from its remaining lease obligations on the building provided that GE pay plaintiff at closing for the remainder of the 2003 lease ($350,000). Pursuant to the terms of the offer, GE Capital would provide plaintiff a twenty-year mortgage ($6.4 million), with a moratorium on the first full year of mortgage payments. In closing the letter, plaintiff sought the name of a contact person at GE Capital.

On May 15, 2003, Fricke left a voice mail message stating that "we will accept that transaction," and on the same day he followed up with an e-mail stating that "GE will accept your proposal to terminate the existing lease." Several days later, GETS representatives provided Lipari a walk-through of the property. Lipari also provided GE Capital representative Doug McKay with a loan package, which included plaintiff's financial information.

Ultimately, GE Capital chose not to finance plaintiff's purchase of the building and, as alleged by plaintiff, repudiated the parties' contract. As a consequence, plaintiff filed this suit for damages under the federal antitrust laws and state common law.

C. Discussion

1. Federal Antitrust Claims

Counts 1 through 4 of plaintiff's Amended Complaint are based on Section 1 of the Sherman Act, 15 U.S.C. § 1. In order to withstand a motion to dismiss a Section 1 claim, a plaintiff must allege an agreement between two separate entities. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). Counts 5 through 9 allege violations of Section 2 of the Sherman Act, 15 U.S.C. § 2. A plaintiff is required to establish a relevant market to prevail on a monopolization or attempted monopolization claim under Section 2 of the Sherman Act. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002).

Defendants set forth a variety of arguments why this case should be dismissed. However, the court need not address each and every argument because, at the most fundamental level, plaintiff's antitrust claims fail.

"[A]ntitrust law is concerned with abuses of power by private actors in the marketplace. Therefore, before we can reach the larger question of whether [a defendant] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market." *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991). "Markets are defined in terms of two separate dimensions: products and geography." *Id.* Plaintiff refers to a relevant market of "hospital supplies delivered through e-commerce in North America." (Am. Compl. ¶ 37.).

Plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America." The fact that defendant GE owns an interest in GHX, the percentage of which plaintiff does not allege, does not make defendant GE (let alone the other defendants) a competitor in the market in which GHX allegedly competes. For example, in *Spanish Broadcasting System, Inc. v. Clear Channel Communications, Inc.*, 242 F. Supp. 2d 1350 (S.D. Fla. 2003), the defendant did not compete in the alleged relevant market, but did own 26% of a firm that did compete. The court dismissed the plaintiff's antitrust claims, holding that this ownership interest did not convert the defendant into a competitor in the relevant market. *Id.* at 1363. *Accord Invamed, Inc. v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 219 (S.D.N.Y. 1998) ("that the [defendants] possess market power through their alleged ownership interests in [a market participant], standing alone, does not satisfy the pleading requirements of a monopolization or attempted monopolization claim.").

Because plaintiff does not allege that any of the named defendants compete in the market of "hospital supplies delivered through e-commerce in North America," the court turns to whether plaintiff has alleged an agreement with a market participant who does compete in that market.

In the Amended Complaint, plaintiff alludes to an agreement between defendants and "other healthcare suppliers" and agreements with "other suppliers and electronic marketplaces." (Am. Compl. ¶¶ 33, 36.) As such, even if the Amended Complaint adequately alleged an agreement between any defendant and GHX, or any defendant and Neoforma, Inc., it would be a vertical agreement, because no defendant is alleged to compete with either of these companies. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been

denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

With that in mind, a vertical agreement in which firms agree that they will deal only with each other (or not deal with each others' competitors) is considered an "exclusive dealing arrangement." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 473 n.2 (3rd Cir. 1992). Exclusive dealing arrangements, like other non-price vertical restraints, are analyzed under the rule of reason. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44-45 (1984).

Among other things, this means a plaintiff seeking to challenge an exclusive dealing arrangement must demonstrate the defendant possesses market power, as this is a prerequisite to being able to restrain trade unreasonably. *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 663 F. Supp. 1360, 1478 (D. Kan. 1987). In other words, the exclusive dealing arrangement is unlawful only if the defendants have market power, which is defined as "the power to control prices or the power to exclude competition." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 n.3 (10th Cir. 1986).

As previously stated, plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America." Rather, plaintiff's antitrust claims are based upon defendants' denial of corporate financing and its refusal to transfer real property to plaintiff. As such, the market that the court must consider in determining whether defendants engaged in anti-competitive conduct is the commercial real estate market and the related market of potential financiers.

Defendants are by no means the only holders of commercial real estate in Blue Springs, Missouri, and in no way control the commercial real-estate financing market. Even more importantly, plaintiff does not

allege such facts. It appears from the Amended Complaint that plaintiff sought and was denied financing from other financial institutions. However, plaintiff cannot sustain an antitrust claim against defendants – the final party to deny financing – absent an allegation that defendants possessed market power such that defendants' denial of financing left plaintiff with no alternative and kept plaintiff from entering the e-commerce hospital supply market. Plaintiff's inability to obtain financing could be due to a variety of factors and does not, in itself, give rise to an antitrust claim against a potential investor who may have decided to either avoid risk or to expend its resources elsewhere. Defendant GE Capital's refusal to extend credit on terms that plaintiff itself alleges to be "unusual," which included a below-market interest rate, an unusually lengthy term, and forbearance on interest payments for one year, does not constitute anti-competitive conduct.

There simply exists no allegation that defendants had the ability, through their denial of financing or the lease of office space, to lessen or destroy competition in the market of hospital supplies through e-commerce. *Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1st Cir. 1996) ("To determine whether a party has or could acquire monopoly power in a market, 'courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.'") (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)). Accordingly, even assuming as true the facts alleged in the Amended Complaint, the court concludes that defendants' conduct was not unlawful under the federal antitrust laws.

3. Robinson-Patman Act Claim

Count 10 of the Amended Complaint alleges that defendants have violated Section 2(e) of the Robinson-Patman Act. Section 2(e) makes it unlawful for a seller to:

> Discriminate in favor of one purchaser against another purchaser or purchasers of a *commodity bought for resale* . . . by . . . furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such *commodity* so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e) (emphasis added).

As a threshold matter, the Robinson-Patman Act only bars price discrimination in the sale of commodities. *See, e.g., FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 355-57 (1968). Plaintiff asserts that defendants have discriminated in the supply of a real estate lease or financing, but neither is a "commodity" within the ambit of Section 2(e). *See Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1328 (6th Cir. 1983) ("[D]iscriminatory practices in the extension of credit . . . are beyond the scope of either § 2(d) or § 2(e)); *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970) (lease is not a commodity); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 652 (C.D. Cal. 1978) ("It suffices to say that real estate and intangibles are not commodities within the meaning of the Act."). As such, the court dismisses plaintiff claim under the Robinson-Patman Act

4. State Law Claims

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). If the parties have already expended "'a great deal of time and energy on the state law claims,' it is appropriate for the district court to retain supplemented state claims after dismissing all federal questions." *Villalpando v. Denver Health & Hosp. Auth.*, 2003 WL

1870993, at *5 (10th Cir. 2003) (citing *Botefuhr*, 309 F.3d at 1273). This court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice.

III. Motion for Rule 11 Sanctions

Defendants move for sanctions under Federal Rule of Civil Procedure 11, based on their contentions that plaintiff filed its Amended Complaint for purposes of harassment and that plaintiff's claims were frivolous and based on neither law nor fact.

The court recognizes that in a related case entitled *Medical Supply Chain, Inc. v. US Bancorp, NA*, this court reminded plaintiff's counsel, Bret Landrith, of his obligations under Fed. R. Civ. P. 11 and cautioned him "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." No. Civ. A. 02-2539-CM, 2003 WL 21479192, at *6 (D. Kan. June 16, 2003). Notwithstanding, the court is unwilling at this juncture to conclude that plaintiff's Amended Complaint was so meritless or otherwise frivolous that sanctions are warranted. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, (1978) (district court must resist the "understandable temptation" of concluding that the action was unreasonable or without foundation simply because the plaintiff did not ultimately prevail). Moreover, the court dismissed plaintiff's state law claims, thereby leaving open the question of whether or not those claims have a basis in law or fact. The court denies defendants' motion for sanctions.

IT IS THEREFORE ORDERED that plaintiff's Request for Extension of Time Under Local Rule 6.1 (Doc. 10) is granted; defendants' Motion to Dismiss Amended Complaint (Doc. 8) is granted, and defendants' Motion for Rule 11 Sanctions (Doc. 13) is denied. This case is hereby dismissed.

Dated this 29 day of January 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

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

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

SUGGESTIONS IN SUPPORT OF NOVATION, LLC, VHA INC. AND UNIVERSITY HEALTHCARE CONSORTIUM'S MOTION TO TRANSFER VENUE OR ALTERNATIVELY MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM

Of Counsel:

Robert C. Walters
VINSON & ELKINS LLP
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201-2975
214-220-7704 (Phone)
214-999-7704 (Fax)

Bruce A. Blefeld
Kathleen Bone Spangler
VINSON & ELKINS LLP
2300 First City Tower
1001 Fannin Street
Houston, TX 77002-6760
713-758-3610 (Phone)
713-615-5147 (Fax)

John K. Power
HUSCH & EPPENBERGER, LLC
1200 Main Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR NOVATION LLC, VHA INC., AND UNIVERSITY HEALTHSYSTEM CONSORTIUM

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. PLAINTIFF'S FEDERAL AND STATE ANTITRUST CLAIMS SHOULD BE DISMISSED 2

A. Plaintiff's Sherman Act Section 1 Claim Should Be Dismissed 2

B. Plaintiff's Sherman Act Section II Claim Should Be Dismissed 4

C. Plaintiff's Interlocking Directorates Claim Should Be Dismissed 7

II. PLAINTIFF FAILS TO ALLEGE THE REQUIREMENTS FOR A LEGALLY VIABLE FRAUD CLAIM 7

III. PLAINTIFF FAILS TO ALLEGE THE REQUIREMENTS FOR A LEGALLY VIABLE CLAIM OF TORTIOUS INTERFERENCE 8

IV. PLAINTIFF'S COMPLAINT CONTRADICTS THE BASIS FOR A RECOVERY FOR PRIMA FACIE TORT; THAT CLAIM THEREFORE SHOULD BE DISMISSED 9

V. PLAINTIFF HAS FAILED TO STATE A COGNIZABLE CLAIM UNDER THE RICO STATUTE 9

A. Plaintiff's Allegations Regarding the Racketeering Activity are Frivolous 10

B. Plaintiff Has Not Adequately Pleaded the Pattern Element of a RICO Violation 12

C. Plaintiff Has Not Plead an Injury that Can be Redressed by the RICO Statute 13

VI. PLAINTIFF'S USA PATRIOT ACT CLAIMS FAIL AS A MATTER OF LAW 14

PRAYER 14

TABLE OF AUTHORITIES

Cases

Acetylene Gas Co. v. Oliver,
939 S.W.2d 404 (Mo. App. E.D. 1996) 8

Adidas Am., Inc. v. NCAA,
64 F. Supp. 2d 1097 (D. Kan. 1999) 5, 6

Agency Holding Corp. v. Malley-Duff & Assocs.,
483 U.S. 143 (1987) 12

Atlantic Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 4

Bradley v. Ray,
904 S.W.2d 302 (Mo. Ct. App. 1995) 9

Cammer v. U.S.,
350 U.S. 399 (1956) 10, 11

Defino v. Civic Center Corp.,
718 S.W.2d 505 (Mo. Ct. App. 1986) 4

Estate Constr. Co. v. Miller & Smith Holding Co.,
14 F.3d 213 (4th Cir. 1994) 3

Fisher, Etc. v. Forrest T. Jones & Co.,
586 S.W.2d 310 (Mo. 1979) 4

Full Draw Productions v. Easton Sports, Inc.,
182 F.3d 745 (10th Cir. 1999) 6

H. J., Inc. v. Northwestern Bell Co.,
492 U.S. 229 (1989) 12, 13

H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.,
879 F.2d 1005 (2d Cir. 1989) 6

Imagineering, Inc. v. Kiewit Pacific Co.,
976 F.2d 1303 (9th Cir. 1992) 13

In re Lifecore Biomedical, Inc. Sec. Litig.,
159 F.R.D. 513 (D. Minn.1993) 8

In re Piper Aircraft Distribution System Antitrust Litigation,
551 F.2d 213 (8th Cir. 1977) 4

Lantec, Inc. v. Novell, Inc.,
306 F.3d 1003 (10th Cir. 2002) 5

Lohse v. St. Louis Children's Hospital, Inc.,
646 S.W.2d 130 (Mo. Ct. App. 1987) 9

Maio v. Aetna, Inc.,
221 F.3d 472 (3rd Cir. 2000) 13

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 4

Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.,
5 F.Supp.2d 694 (D. Minn. 1998),
aff'd, 208 F.3d 655 (8th Cir. 2000) 2, 3

Oscar v. University Students Co-operative Ass'n,
965 F.2d 783 (9th Cir.1992) 13

Premium Financing Specialists, Inc. v. Hullin,
90 S.W.3d 110 (Mo. App. W.D. 2002) 8

Queen City Pizza, Inc. v. Domino's Pizza, Inc.,
124 F.3d 430 (3d Cir. 1997) 6

Rice v. Hodapp,
919 S.W.2d 240 (Mo. 1996) 9

Sedima, S.P.R.L. v. Imrex Co., Inc.,
473 U.S. 479 (1985) 9

Sheperd v. American Honda Motor Co.,
822 F. Supp. 625 (N.D. Cal. 1993) 13

TV Communications Network, Inc. v. Turner Network Television, Inc.,
964 F.2d 1022 (10th Cir. 1992) 3, 5

U.S. v. McClain,
934 F.2d 822 (7th Cir. 1991) 12

U.S. v. Tomblin,
46 F.3d 1369 (5th Cir. 1995) 12

United States v. E.I. du Pont de Nemours & Co.,
351 U.S. 377 (1956) 5

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.,
382 U.S. 172 (1965) 5

Wilt v. Kansas City Area Transp. Authority,
629 S.W.2d 669 (Mo. App. W.D. 1982) 9

Wisdom v. First Midwest Bank, of Poplar Bluff,
167 F.3d 402 (8th Cir. 1999) 9

Statutes

15 U.S.C.A. § 19 7

17 U.S.C. § 102 12

18 U.S.C. § 1030 14

18 U.S.C. § 1503 10

18 U.S.C. § 1513 11

18 U.S.C. § 1951 11

28 U.S.C. § 1404 1

31 U.S.C. § 5318 14

MO. REV. STAT. § 416.141 4

Other Authorities

35 C.J.S. Extortion § 12 (2002) 12

Rules

Fed. R. Civ. P. 11 ..... 3, 4

INTRODUCTION

Although Plaintiff's spurious and outlandishly expansive Complaint defies easy summary, the gist of Plaintiff's claims is that various health care supply related entities, venture capital, real estate and banking firms, a law firm, and a federal magistrate have conspired to prevent Plaintiff's entry into the health care supply market by obstructing Plaintiff's efforts to obtain financing, office space in a particular building in Missouri, and escrow services. Plaintiff seeks $3 billion in damages and asserts claims under the federal and state antitrust statutes, the USA Patriot Act, RICO, and various common law theories.

Plaintiff's Complaint, full of irrelevant and unsupported allegations, lacks the factual allegations necessary to plead a right to recovery under any of Plaintiff's theories of liability. Plaintiff's state and federal law claims fail to state a claim upon which relief may be granted and are barred, in large part, by the doctrine of collateral estoppel. In fact, under the facts set forth in the Complaint, no cognizable claim is stated against Novation, LLC ("Novation"), VHA Inc. ("VHA"), and University Healthsystem Consortium ("UHC") (collectively, "Defendants"). Thus, the Complaint should be dismissed with prejudice and without an opportunity for re-pleading because of the patent frivolousness of Plaintiff's claims, and because Plaintiff's two substantially similar complaints have already been dismissed by a Kansas District Court and the Tenth Circuit.[1]

Plaintiff originally filed a similar lawsuit against many of these same defendants in the United States District Court for the District of Kansas in 2002. *See Medical Supply Chain, Inc. v. US Bancorp, NA, et* al., Civil Action No. 02-2539-CM (Judge Carlos Murguira) (the "US Bancorp Lawsuit") (Ex. 1 to Defendants' Motion to Transfer Venue or Motion to Dismiss).

[1] Because of these two prior, similar lawsuits, Defendants join in the motion of the US Bank defendants to transfer venue to the District Court of Kansas in accordance with 28 U.S.C. § 1404(a).

Subsequently, in June 2003, Plaintiff filed suit in the District Court of Kansas against many of the GE-related parties alleged to be unnamed co-conspirators in this action. *See Medical Supply Chain, Inc. v. General Electric Company, et al*., Civil Action No. 03-2324-CM (Judge Carlos Murguira) (Ex. 2 to Defendants' Motion to Transfer Venue or Motion to Dismiss). In *US Bancorp*, not only did the Tenth Circuit affirm the dismissal of Plaintiff's Complaint on the pleadings, it remanded the case to the district court to impose sanctions against Plaintiff and its counsel for the prosecution of a frivolous appeal. *See* Compl. ¶¶ 104-05 ("[T]he Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal.") Likewise, *GE* was dismissed on the pleadings, in part because Plaintiff's antitrust claims—repeated here—failed "at the most fundamental level." *See* Ex. 2. Further, *US Bancorp* resulted in adverse findings on several issues relevant to this case; as a consequence, collateral estoppel bars many of Plaintiff's claims here.

ARGUMENT

I. PLAINTIFF'S FEDERAL AND STATE ANTITRUST CLAIMS SHOULD BE DISMISSED

Plaintiff alleges claims for damages and injunctive relief under Sections 1 and 2 of the Sherman Act, Section 8 of the Clayton Act, and the analogous sections of the Missouri antitrust statutes. None of these claims are legally viable and Plaintiff is barred from asserting most of them under the doctrine of collateral estoppel.

A. Plaintiff's Sherman Act Section 1 Claim Should Be Dismissed

"To establish a claim under § 1 of the Sherman Act, a plaintiff must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *See Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp*., 5

F.Supp.2d 694, 703 (D. Minn. 1998), *aff'd*, 208 F.3d 655 (8th Cir. 2000). The "contract, combination, or conspiracy" element "requires that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* Although Plaintiff repeatedly states that Defendants acted in concert, it does not allege any facts concerning a common scheme relating to any action against Plaintiff or other unlawful objective. There are no facts relating to any contact or communication between Novation, VHA, and UHC on the one hand and the defendants and other parties alleged to have deprived Plaintiff of its financing, real estate, and escrow services. The Complaint alleges no facts suggesting that Novation, VHA, or UHC had any knowledge of the events relating to Plaintiff.

Moreover, the Complaint fails to allege facts sufficient to plead an agreement or concerted action relating to group boycott, allocation of customers, price restraints, or tying agreements. Further, even if an agreement among defendants had been pled, Plaintiff's Complaint contains no factual allegations suggesting that Defendants' agreement unreasonably restrained competition—as opposed to allegedly injuring one competitor (Medical Supply)—in the relevant market. Instead, Plaintiff merely asserts—without factual elaboration—that "the defendants have foreclosed competition in the market for hospital services." Compl. ¶ 206.

"[A] plaintiff must do more than cite relevant antitrust language to state a claim for relief." *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992). A complaint must "provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) (citation and internal quotation omitted). The Complaint completely fails this requirement. Plaintiff does not – and cannot consistent with Fed. R. Civ. P. 11 – allege that the Defendants

agreed with anyone to harm Plaintiff. Plaintiff never elaborates on the alleged conspiracy other than to simply assert that such an agreement exists. Because of Plaintiff's failure to allege any of the required particulars, "[d]ismissal of [this] 'bare bones' allegation of antitrust conspiracy without any supporting facts is appropriate." *Id.*

Moreover, Plaintiff lacks standing to recover damages for Defendants' alleged cartel that fixes prices of medical supplies sold to hospitals at above-market prices. Compl. ¶ 424 ("The purpose of these agreements [among defendants] was to injure the hospital supply consumers with artificially inflated prices.") Even if such price fixing occurred—which it did not—Plaintiff, as a competitor of the alleged cartel (Compl. ¶ 439), would benefit by any agreement to charge high prices, because it could either undercut the price to win business or profit from the cartel's pricing "umbrella." The case law is unequivocal that Plaintiff lacks standing to complain of Defendants' alleged price-fixing. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990) (holding that a firm has not suffered antitrust injury where competitors have agreed to fix prices); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (same).

Thus, Counts I and II of the Complaint must be dismissed.[2]

B. Plaintiff's Sherman Act Section II Claim Should Be Dismissed

As a threshold matter, Plaintiff's Section II claim is barred by the doctrine of collateral estoppel. Collateral estoppel bars relitigation of an issue if the same issues were actually litigated in a prior action and determined by, and essential to, a valid and final judgment in that action. *See, e.g.*, *In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 219

[2] Plaintiff's state antitrust claims should also be dismissed. The Missouri Antitrust Act closely parallels the Sherman Act. *Defino v. Civic Center Corp.*, 718 S.W.2d 505, 510 (Mo. Ct. App. 1986). Missouri state antitrust claims are "construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." MO. REV. STAT. § 416.141; *Fisher, Etc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. 1979) (*en banc*). Thus, Plaintiff's analogous claims under the Missouri antitrust laws (Counts VI and VII) must also be dismissed for the same reasons that Plaintiff's federal antitrust claims fail.

(8th Cir. 1977). Here, the district court in *U.S. Bancorp* already held that Plaintiff's allegations regarding the relevant product and geographic market were legally deficient. *See* Exhibit 1, at p. 8. Plaintiff's Complaint should therefore be dismissed because proper allegation of a relevant market is a prerequisite of a Sherman Act Section 2 claim. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002); s*ee generally Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [a defendant's] ability to lessen or destroy competition.").

Even apart from the issue of collateral estoppel, Plaintiff's pleadings with regard to relevant market are insufficient. A relevant market consists of all products or services that are reasonably interchangeable. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). In this case, Plaintiff variously alleges that the relevant market is "the nationwide hospital supply market" or the "nationwide e-commerce hospital supply market." A market definition, however, must be plausible to survive a motion to dismiss. *See TV Communications*, 964 F.2d at 1028 (affirming dismissal because the plaintiff "did not allege a relevant product market which [the defendant] was capable of monopolizing, attempting to, or conspiring to monopolize in violation of section 2 of the Sherman Act."); *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (to survive a motion to dismiss, the plaintiff "must allege a relevant market that includes all [products or services] that are reasonably interchangeable"). Plaintiff's pleading of a relevant market is defective for at least two reasons.

First, the market cannot be limited to "hospital supplies through e-commerce" simply because that is the only way that Plaintiff plans to sell hospital supplies. "[A]n antitrust plaintiff may not define a market so as to cover only the practice complained of, this would be circular or at least result-oriented reasoning." *Adidas Am.*, 64 F. Supp. 2d at 1102. Rather, the market

alleged in a complaint must be justified through application of the relevant legal principles for market definition. As Judge Van Bebber noted:

> 'Where [an antitrust] plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.'

Adidas Am., 64 F. Supp. 2d at 1102 (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir. 1997) and collecting cases).

Second, a plaintiff claiming monopolization must allege that the defendant possesses "monopoly power in the relevant market," and a plaintiff claiming attempted monopolization must allege that the defendant has a "dangerous probability of success in monopolizing the relevant market." *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999). Specifically, "[i]n order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a *particular defendant*." *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (emphasis added) (rejecting attempt to show dangerous probability of success by aggregating shares of two defendants). Plaintiff does not allege that Novation, VHA, or UHC has market power or the dangerous probability of acquiring market power. Rather, Plaintiff alleges only that when the market share of Novation and one of its competitors Premier is aggregated, those entities enjoy a 70% share. Compl. ¶ 120. However, only the shares of the individual Defendants can be used to establish a violation of Section 2. Because the market share of Novation and Premier cannot be aggregated for purposes of establishing a Section II claim, Counts III, IV, VIII, and IX must be dismissed for failure to state a claim.

C. Plaintiff's Interlocking Directorates Claim Should Be Dismissed

Plaintiff claims damages for interlocking directorates in purported violation of 15 U.S.C.A. § 19. That provision of the Clayton Act prohibits a person from serving as a director and officer of two corporations (other than certain banking entities and trust companies) that are engaged in commerce and "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws" but only if each of the corporations meet certain capital, surplus, and profit benchmarks set forth in the statute. *See* 15 U.S.C.A. § 19(a)(1). There are also certain exceptions to the prohibition against such dual service based on the amount of competitive sales of the companies. *Id.* at (2).

However, the Court need not parse the criteria for a violation and the exceptions in order to dismiss this patently deficient claim. Plaintiff fails to plead who the interlocking directors are, on which companies' boards they serve, and the requisite facts to show that the companies are competitors under this section of the Clayton Act. Plaintiff's allegations in Count V of its Complaint, which do nothing more than cite the statute and announce its violation in conclusory terms, do not even attempt to set forth the required factual elements of a claim under this provision. Count V should be dismissed.

II. PLAINTIFF FAILS TO ALLEGE THE REQUIREMENTS FOR A LEGALLY VIABLE FRAUD CLAIM

Plaintiff asserts a claim for fraud and deceit against Defendants. The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and

(6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002).

The Court need not go further than the first requirement in order to dismiss this claim against Defendants. Nowhere in the Complaint is there an allegation that Defendants made any statement, false or otherwise, to Plaintiff. Plaintiff thus completely fails to satisfy basic pleading requirements, let alone the more stringent pleading requirements for fraud claims under Rule 9(b). *See In re Lifecore Biomedical, Inc. Sec. Litig*., 159 F.R.D. 513, 516 (D. Minn.1993) ("To pass muster under Rule 9(b), the complaint must allege the time, place, speaker and sometimes even the content of the alleged misrepresentation.") Thus, Plaintiff's fraud claim fails at the threshold.

III. PLAINTIFF FAILS TO ALLEGE THE REQUIREMENTS FOR A LEGALLY VIABLE CLAIM OF TORTIOUS INTERFERENCE

Plaintiff claims that Defendants tortiously interfered with "trust accounts with U.S. Bank" and some unknown putative sale or lease arrangement with "General Electric Transportation Co." Compl. ¶ 530. Tortious interference with a contract or business expectancy requires plaintiff to plead the following elements: "(1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) an intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and (5) damages." *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. E.D. 1996).

Even assuming there were a valid contract or business expectancy involved, Plaintiff wholly fails to allege that Defendants knew about it or intentionally interfered with such contract or business expectancy. Indeed, the Complaint is devoid of any facts to justify an inference of knowledge or intention. Instead, Plaintiff impermissibly relies on its conclusory and improperly

pled allegations that Defendants acted in conspiracy with each other with regard to all the conduct in the Complaint in order to try tie Defendants to banking and real estate transactions between Plaintiff and other parties that Novation, VHA, and UHC had nothing to do with.

IV. PLAINTIFF'S COMPLAINT CONTRADICTS THE BASIS FOR A RECOVERY FOR PRIMA FACIE TORT; THAT CLAIM THEREFORE SHOULD BE DISMISSED

Plaintiff wholly fails to adequately plead the elements of a *prima facie* tort. The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant's act. *Rice v. Hodapp*, 919 S.W.2d 240, 245-46 (Mo. 1996) (en banc); *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1987); *Wilt v. Kansas City Area Transp. Authority*, 629 S.W.2d 669, 672 (Mo. App. W.D. 1982). Failure to plead that the defendant committed an intentional lawful act is fatal to a claim for *prima facie* tort. *Bradley v. Ray*, 904 S.W.2d 302, 315 (Mo. Ct. App. 1995).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is both intentional and lawful. In fact, plaintiff specifically alleges the "acts and activities of defendants are still *unlawful and fraudulent*." Compl. ¶ 564 (emphasis added).

V. PLAINTIFF HAS FAILED TO STATE A COGNIZABLE CLAIM UNDER THE RICO STATUTE

In order to recover under the Racketeering Influenced Corrupt Organizations Act (RICO), the plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 406 (8th Cir. 1999) (citing *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479, 496 (1985)). Plaintiff has failed to

establish the predicate acts of racketeering and the pattern elements of the statutory requirements and, consequently, does not come close to asserting a viable RICO claim. Furthermore, Plaintiff fails to adequately allege an injury to business or property as a result of the alleged RICO violation. This Court should dismiss Count XV of the Complaint.

A. Plaintiff's Allegations Regarding the Racketeering Activity are Frivolous

First, Plaintiff attempts to establish a pattern of racketeering by alleging predicate acts under statutes that have nothing to do with the conduct alleged in the Complaint. Plaintiff claims it was injured by a violation of 18 U.S.C. § 1503, which prohibits threats against and intimidation of "any grand or petit juror, or officer in or of any court of the United States, in the discharge of his duty" or the injury to such juror or judicial officer. Compl. ¶ 584. Plaintiff claims that Defendants violated this statute by "implicitly ratif[ying]" Shughart Thompson & Kilroy's filing of a "facially void ethics complaint" against Plaintiff's counsel Bret Landrith. Compl. ¶¶ 582, 585. (There are no specific allegations suggesting that Novation, VHA, or UHC had anything to do with the ethics complaint.) Not only does an ethics complaint not equate to the threats, force or intimidation made criminal by this statute, Plaintiff more fundamentally errs by ignoring the limitation of the scope of the statute to jurors and officers of the court of the United States. Mr. Landrith is a private attorney. In construing a similarly worded statute, the U.S. Supreme Court has defined the term officer of the Court to exclude private attorneys, noting that "an attorney was not an 'officer' within the ordinary meaning of that term" in the manner in which marshals, bailiffs, court clerks or judges are. *Cammer v. U.S.*, 350 U.S. 399, 405 (1956). "Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to

lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term." *Id.*

Similarly, Plaintiff cites 18 U.S.C. § 1513, which proscribes retaliation against a witness, victim, or informant for providing any law enforcement officer truthful information about a federal offense or the attendance of a witness or party to an official proceeding. Compl. ¶ 586. Again, Plaintiff alleges this statute was violated by the ethics complaint lodged against Mr. Landrith. However, there are no factual allegations that Mr. Landrith or Plaintiff was a witness, victim, or informant who provided a law enforcement officer information relating to a commission of a federal offense or attended an official proceeding related thereto. This statute, therefore, does not apply.

Plaintiff's Hobbs Act claim (18 U.S.C. § 1951) is similarly frivolous. Plaintiff claims that U.S. Bancorp's threat of filing a USA Patriot Act suspicious activity report ("SAR") against Plaintiff in connection with Plaintiff's attempt to procure banking services from US Bank is prohibited by the Hobbs Act which applies to a person who "obstructs, delays, or affects commerce . . . by robbery or extortion or . . . commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation" of the statute. This claim is obviously defective. First, Plaintiff fails to allege that Novation, VHA, or UHC had any involvement in threatening to file a SAR against Plaintiff. Second, filing a SAR is obviously not violent. As the Hobbs Act defines extortion, it must either involve "force, violence or fear or under color of official right." 18 U.S.C. § 1951(b). Third, there is no allegation that Defendants acted under "color of official right." Defendants are private parties. "Private persons have been convicted of extortion under color of official right, but these cases have been limited to ones in which a person masqueraded as a public official, was in the process

of becoming a public official, or aided and abetted a public official's receipt of money to which he was not entitled." 35 C.J.S. Extortion § 12 (2002) (citing *U.S. v. Tomblin*, 46 F.3d 1369 (5th Cir. 1995); *U.S. v. McClain*, 934 F.2d 822, 829-830 (7th Cir. 1991)). There are no such allegations in this case.

Finally, Plaintiff claims that certain alleged thefts of "business plans, algorithms, confidential proprietary business models, customer and associate lists" from Plaintiff in 2002 and from an entity called Medical Supply Management in 1995 and 1996 constituted a criminal infringement of copyright. Compl. ¶¶ 587-88. There are numerous defects in Plaintiff's pleading with regard to this predicate act. First, the alleged infringement in 1995 and 1996 is outside the limitations period for RICO. *See Agency Holding Corp. v. Malley-Duff & Assocs*., 483 U.S. 143, 156 (1987) (holding that civil RICO actions are governed by a four-year statute of limitations). Second, the alleged criminal infringements in 1995 and 1996 were not even alleged to have been suffered by Plaintiff, but rather by a separate entity not party to this proceeding. Finally, and perhaps most fundamentally, Plaintiffs have not alleged facts regarding the subject of the alleged thefts that would show that they are the type of literary, musical, dramatic, choreographic, pictorial, motion picture, sound, or architectural works that are the subject of copyright law, *see generally* 17 U.S.C. § 102, or that Novation, VHA, or UHC had any connection to the alleged theft of this information.

B. Plaintiff Has Not Adequately Pleaded the Pattern Element of a RICO Violation

Plaintiff has also failed to allege the pattern required for a RICO claim. The Supreme Court has held that "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicate acts are related and that they amount to or pose a threat of continued criminal activity." *H. J., Inc. v. Northwestern Bell Co*., 492 U.S. 229, 239 (1989). "It is this factor of continuity plus relationship which combines to produce a pattern." *Id*. (citation

omitted). Relatedness may be established if the acts have the "same or similar purposes, results, participants, victims, or methods of commission." Id. at 240. Continuity, in turn, requires either "a closed period of repeated conduct" or "past conduct that by its nature projects into the future with a threat of repetition." *Id.* Thus, a plaintiff in a RICO action must allege either an "open-ended" pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a "closed-ended" pattern of racketeering activity (i.e., past criminal conduct "extending over a substantial period of time"). Even if the Court were to accept Plaintiff's allegations of racketeering conduct, they are insufficient to establish either an open-ended or closed-ended pattern. Not only are the individual predicate acts pled by Plaintiff not related, but there is no allegation connecting Novation, VHA, or UHC to each of the alleged predicate acts.

C. Plaintiff Has Not Plead an Injury that Can be Redressed by the RICO Statute

Finally, Plaintiff does not adequately allege an injury redressable under RICO. Courts have construed the requirement that a plaintiff establish an injury to business or property to require a showing of a concrete, financial loss. *See e.g.*, *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992) (rejecting a RICO claim where "the facts alleged do not establish proof of 'concrete financial loss,' let alone show that money was paid out as a result of [defendant's] alleged racketeering activity."); *Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3rd Cir. 2000) ("[T]he injury to business or property element of section 1964(c) can be satisfied by allegations and proof of actual monetary loss, *i.e.*, an out-of-pocket loss."); *Sheperd v. American Honda Motor Co.,* 822 F. Supp. 625, 629 (N.D. Cal. 1993) (noting that "the requirement of a concrete financial loss proximately caused by the wrongful conduct of RICO defendants is not easily met" and dismissing car dealers' allegations of reduced profits resulting from manufacturer's wrongful refusal to supply them with popular vehicle models); *Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (en banc) (injuries to

property are not actionable under RICO unless they result in "tangible financial loss" to plaintiff). Plaintiff's fanciful allegations about billions of dollars in alleged lost profits fall far short of satisfying the pleading requirement of "concrete financial loss." Plaintiff's RICO claim should be dismissed.

VI. PLAINTIFF'S USA PATRIOT ACT CLAIMS FAIL AS A MATTER OF LAW

The Tenth Circuit and the District Court in *US Bancorp* have previously dismissed Plaintiff's Patriot Act claim because there is no private right of action under that statute. *See* Exhibit 1, at p. 12. The law has not changed since then.[3]

Moreover, the District Court in *US Bancorp* concluded that, even if a private right of action existed under the statute, Plaintiff had suffered no injury under that statute. *See* Exhibit 1, at p. 12. Thus, collateral estoppel bars the reassertion of a claim that Plaintiff has suffered an injury cognizable under the Patriot Act. In any event, Plaintiff alleges absolutely no facts relating to any involvement on the part of Novation, UHC, or VHA in any filing or report under the Patriot Act.[4] For all of these reasons, Count XVI must be dismissed.

PRAYER

WHEREFORE, for all of these reasons, Defendants request that the Court transfer this case to the District Court of Kansas or alternatively dismiss Plaintiff's Complaint with prejudice and grant Defendants all other relief to which they are entitled.

[3] Not only does the USA Patriot Act fail to provide for a private right of action for its violation, it actually provides a person who makes a report under the statute immunity from liability under other law. *See* 31 U.S.C. § 5318. This provides yet another reason demonstrating the facial invalidity of Plaintiff's claim.

[4] Plaintiff also seems to assert that an entirely separate statute, 18 U.S.C. § 1030, which provides damages for unauthorized access into protected computer systems (i.e. "computer hacking"), bolsters Plaintiff's Patriot Act claim. Compl. ¶¶ 597-99. That contention is frivolous; this case does not involve computer hacking and a private right of action under the computer hacking law has nothing to do with the Patriot Act.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power
John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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::

Bret D. Landrith landrithlaw@cox.net
Attorney for Plaintiff

/s/ John K. Power
John K. Power

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

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

NOVATION, LLC, VHA INC., AND
UNIVERSITY HEALTHSYSTEM CONSORTIUM'S
CERTIFICATE OF INTEREST

Pursuant to Local Rule 3.1, Novation, LLC, VHA Inc., and University Healthsystem Consortium make the following disclosures:

1. Novation, LLC is wholly owned by University Healthsystem Consortium and VHA Inc.

2. Both University Healthsystem Consortium and VHA Inc. own stock in Neoforma, Inc. which is a public company.

3. Neither Novation, LLC, University Healthsystem Consortium or VHA Inc. is a public company.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power

John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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::

Bret D. Landrith landrithlaw@cox.net
Attorney for Plaintiff

/s/ John K. Power
John K. Power

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

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

ORDER SETTING DEADLINE FOR FILING OF JOINT PROPOSED SCHEDULING ORDER AND FOR RULE 26(f) CONFERENCE

Appended to this order is the "Tenets of Professional Courtesy" adopted by the Kansas City Metropolitan Bar Association. COUNSEL SHOULD BE AWARE THAT THE COURT EXPECTS ADHERENCE TO THE TENETS BY ATTORNEYS APPEARING IN THIS DIVISION. FURTHER, THE COURT BELIEVES IT TO BE IN THE INTEREST OF ALL CONCERNED FOR PARTIES TO BE AWARE OF THE COURT'S EXPECTATION. TO THAT END, COUNSEL SHALL FORWARD A COPY OF THE TENETS TO ALL CLIENTS INVOLVED IN THIS ACTION.

A joint proposed scheduling order/discovery plan ("Proposed Plan") shall be filed on or before June 27, 2005. The Proposed Plan shall comply with Local Rules 16.1(d), 16.1(f), 26.1(c) and 26.1(d). The Proposed Plan shall also state whether the case will be tried to the Court or to a jury and the anticipated length of the trial. See Local Rule 16.1(f)(5). In accordance with Local Rule 16.1(d), plaintiff's counsel shall take the lead in preparing the Proposed Plan.

The Rule 26(f) conference shall take place on or before June 13, 2005. Counsel are reminded that FRCP 26(a)(1) disclosures must be completed within ten (10) days after the Rule 26(f) conference. During the Rule 26(f) conference, the parties shall discuss the nature and bases of their claims and defenses and shall discuss the possibilities for a prompt

settlement of the case. Discovery may not commence before the conference is held except under the conditions set forth in FRCP 26(d).

If the parties have not already done so, within fifteen (15) days of this Order each non-governmental corporate party must file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates that have issued shares to the public. See Local Rule 3.1.

If this case has been removed from state court, and if a jury trial has not already been specifically requested on the face of the Complaint or in a separate filing, pursuant to FRCP Rule 81(c) the parties shall have twenty (20) days from the date of this Order to file a jury demand. Failure to file a jury demand shall constitute a waiver of the right to a trial by jury. See Bruns v. Amana, 131 F.3d 761 (8th Cir. 1997).

The requirement that courtesy copies of all filings be delivered to chambers, see November 6, 1997, En Banc Order Regarding Electronic Filing Procedures, ¶ 5(a), is hereby modified. The only documents that need to be delivered to Chambers are dispositive motions and any other document greater than ten (10) pages in length.

When discovery commences in this case:

1. The number and form of interrogatories and the number of depositions are governed by FRCP 30(a)(2)(A) and 33(a).

2. The time permitted for depositions is governed by FRCP 30(d)(2).

3. The procedure for resolving discovery disputes is governed by Local Rule 37.1.

4. The form of answers to certain discovery requests and the disclosures required by FRCP 26 are provided in Local Rule 26.2.

5. The filing of motions does not postpone discovery. See Local Rule 26.1(b).

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: April 5, 2005

TENETS OF PROFESSIONAL COURTESY

I
A LAWYER SHOULD NEVER KNOWINGLY DECEIVE ANOTHER LAWYER.

II
A LAWYER SHOULD HONOR PROMISES OR COMMITMENTS MADE TO ANOTHER LAWYER.

III
A LAWYER SHOULD MAKE ALL REASONABLE EFFORTS TO SCHEDULE MATTERS WITH OPPOSING COUNSEL BY AGREEMENT.

IV
A LAWYER SHOULD MAINTAIN A CORDIAL AND RESPECTFUL RELATIONSHIP WITH OPPOSING COUNSEL.

V
A LAWYER SHOULD SEEK SANCTIONS AGAINST OPPOSING COUNSEL ONLY WHERE REQUIRED FOR THE PROTECTION OF THE CLIENT AND NOT FOR MERE TACTICAL ADVANTAGE.

VI
A LAWYER SHOULD NOT MAKE UNFOUNDED ACCUSATIONS OF UNETHICAL CONDUCT ABOUT OPPOSING COUNSEL.

VII
A LAWYER SHOULD NEVER INTENTIONALLY EMBARRASS ANOTHER LAWYER AND SHOULD AVOID PERSONAL CRITICISM OF ANOTHER LAWYER.

VIII
A LAWYER SHOULD ALWAYS BE PUNCTUAL.

IX
A LAWYER SHOULD SEEK INFORMAL AGREEMENT ON PROCEDURAL AND PRELIMINARY MATTERS.

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

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

DEFENDANT U.S. BANK NATIONAL ASSOCIATION'S
CORPORATE DISCLOSURE STATEMENT

Defendant U.S. Bank National Association, through its attorneys of record, pursuant to Western District of Missouri Local Rule 3.1, hereby discloses as follows:

1. U.S. Bank National Association is a national banking association and a wholly-owned subsidiary of USB Holdings, Inc.

2. U.S. Bancorp, the parent of USB Holdings, Inc., is a publicly traded corporation. No other company affiliated with U.S. Bank National Association is a publicly traded corporation.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361

ATTORNEYS FOR DEFENDANT U.S. BANK NATIONAL ASSOCIATION.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 6th day of April, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendants

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

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

DEFENDANT US BANCORP'S CORPORATE DISCLOSURE STATEMENT

Defendant US Bancorp, through its attorneys of record, pursuant to Western District of Missouri Local Rule 3.1, hereby discloses as follows:

1. US Bancorp is a publicly traded corporation.

2. No other company affiliated with US Bancorp is a publicly traded corporation.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361

ATTORNEYS FOR DEFENDANT U.S. BANCORP.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 6th day of April, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendants

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

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

DEFENDANT SHUGHART THOMSON & KILROY, P.C.'S
CORPORATE DISCLOSURE STATEMENT

Defendant Shughart Thomson & Kilroy, P.C., through its attorneys of record, pursuant to Western District of Missouri Local Rule 3.1, hereby discloses that it has no parent company, no subsidiary company and no affiliates which have issued shares to the public

Respectfully submitted,

/s/ Kathleen A. Hardee
ROBERT A. HENDERSON #28566
KATHLEEN A. HARDEE #36071
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR SHUGHART THOMSON & KILROY, P.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court, this 6th day of April, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Kathleen A. Hardee
Attorney for Defendant

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

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

DEFENDANT PIPER JAFFRAY COMPANIES
CORPORATE DISCLOSURE STATEMENT

Defendant Piper Jaffray Companies, through its attorneys of record, pursuant to Western District of Missouri Local Rule 3.1, hereby discloses as follows:

1. Piper Jaffray Companies is a publicly traded corporation.

2. No other company affiliated with Piper Jaffray Companies is a publicly traded corporation.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361

ATTORNEYS FOR DEFENDANT PIPER JAFFRAY COMPANIES.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 8th day of April, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendants

1690196.1

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

Medical Supply CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Suggestion in Opposition to Dismissal Of Robert J. Zollars
On Personal Jurisdiction Grounds

Comes now, Medical Supply and makes the following suggestion in response to Robert J. Zollars motion (doc.s 13, 13-1 and 14) to dismiss him as a defendant. Plaintiff's complaint describes the conduct of Robert J. Zollars as the chief executive of Neoforma, Inc., a business that has substantial and continuing business transactions in the State of Missouri.

1. At over 83 places in the complaint, the plaintiff names Robert J. Zollars and describes Zollars' knowledge of the conspiracies and combinations to restrain trade in hospital supplies and his actions to further the conspiracies and combinations in restraint of trade with the other defendants and identified non-defendant coconspirators that do business and have operations in the State of Missouri.

2. The descriptions of Zollar's conduct include "who what where and when" details about his specific actions with varying combinations of defendants and other coconspirators.

3. Paragraph 376 on page 74 of the plaintiff's complaint quotes Zollar's own statements as the CEO of the publicly traded Neoforma, Inc. describing the competitive landscape of the market for hospital supplies and the relationships, agreements and long term exclusive contracts restraining trade that he has secured for his company, concurring with the allegations made by Medical Supply Chain:

"TWST: Could you give us a sense of the competitive landscape?

> Mr. Zollars: About a year or so ago, there were probably 100 companies competing for this opportunity, and today you have less than a handful. As you look at the metrics that we're enjoying right now, as of October 18, Neoforma has over 700 trading partners; that includes 563 hospitals under contract, 333 live using the technology, and 130 suppliers. To give you an idea of scale, that means in our third quarter, we processed over 500,000 order documents that included 1.5 million line items. So, clearly, by any measure, we're out in front of the rest of the pack, which is exciting for us.
> TWST: What were the steps you took to achieve this dominant position?
> Mr. Zollars: I think the most important thing is we have great partners. First of all, we're partnered with Novation. Novation is the number one group purchasing organization in the country, or GPO. It covers roughly one-third of the market. It's members buy approximately $36 billion a year in medical supplies and equipment, and just over a year ago we signed an agreement with Novation to be it's exclusive e-commerce partner for 10 years. We're now one year into that agreement and have generated some great results together, as I just mentioned. The other great partner we have is GHX, the Global Health Exchange, an industry supplier consortium. It was founded by General Electric, Johnson & Johnson, Baxter, Abbott and Medtronic, and up until August, had been competing with us in the market. We struck a strategic alliance agreement with GHX in August that is really exciting for us. It's the first time healthcare buyers and suppliers have really gotten on the same side of the table to work at taking healthcare costs out. The alliance gives us access to the great supplier relationships that GHX has and they, of course, get the great buyer relationships that we have with our hospitals."
>
> The Wall Street Transcript Interview 12/20/2001

4. The complaint describes the notice given to Mr. Zollars and his company Neoforma, Inc. about the failure to obtain injunctive relief from the cartel's actions to prevent Medical Supply from entering the market and the intent of Medical Supply to bring claims for damages. The complaint alleges Zollars responded to this knowledge by participating in the defendants' conspiracy to interfere in the administration of justice, including depriving Medical Supply of counsel. ¶¶ 399-418.

5. The complaint describes the impending threat of the monopolization of hospital supplies from the sale of Neoforma, Inc. to GHX, LLC in ¶¶ 419-422. As CEO, Zollars will determine and control whether this event occurs.

6. The complaint describes Zollars as an antitrust person with a significant personal interest separate from Neoforma, Inc by virtue of having been an officer in Cardinal, a subsidiary of Novation, LLC and then an officer in the defendant Neoforma, Inc. See ¶ 176.

7. The complaint describes Zollars actions in furtherance of the common enterprise's combinations and conspiracies to restrain trade by injuring Medical Supply, a Missouri company that included conscious actions with US Bancorp, US Bank, Piper Jaffray and General Electric that have offices in Missouri and regularly conduct business in the state.

8. The complaint describes the effect on the State of Missouri from the tortious actions of the defendants contributing to higher Medicaid expenditures and the likely cuts of healthcare insurance to citizens of Missouri in ¶85 as a foreseeable result of the defendant's conduct to target Medicare, Medicaid and private health insurers with artificially inflated hospital supply costs.

ARGUMENTS AND AUTHORITIES

The long arm statute of Missouri utilized to serve process on Mr. Zollars, RSMo section 506.510 extends jurisdiction over Mr. Zollars where the plaintiff's compliant establishes prima facie showing of sufficient contacts based on transactions for hospital supplies, tortious conduct including antitrust violations and contracts for escrow accounts and real estate RSMo section 506.500.1, .1, .2 and .3.

The complaint avers facts of a conspiracy meeting the requirement of federal jurisdiction over co-conspirators The original leading case on "conspiracy theory" of jurisdiction was *Leasco Data Processing Equipment Corp. v. Maxwell*, 319 F.Supp. 1256 (S.D.N.Y.1970), a securities fraud action under the Securities Exchange Act of 1934. The *Leasco* approach has been adopted in several jurisdictions where the question has arisen. See, e. g., *McLaughlin v. Copeland*, 435 F.Supp. 513 (D.Md.1977); *Chromium Industries v. Mirror Polishing and Plating Co.*, 448 F.Supp. 544 (N.D.Ill.1978).

Other courts have rejected the coconspirator theory as an impermissible means of enlarging the "transacting business" test of § 12 of the Clayton Act. See *West Virginia v. Morton International, Inc.*, 264 F.Supp. 689 (D.Minn.1967); *I. S. Joseph Co., Inc. v. Mannesmann Pipe and Steel Corp.*, 408 F.Supp. 1023 (D.Minn.1976). However, Medical Supply also makes claims against Robert J. Zollars under RICO.

The complaint alleges a common enterprise and a conspiracy that committed RICO predicate acts and Mr. Zollars role in causing those acts to be committed as part of a continuing purpose of overcharging government and private insurance providers. To be liable under § 1962(d),

> "[A] 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."

Salinas v. United States, 522 U.S. 52, ___, 118 S.Ct. 469, 477, 139 L.Ed.2d 352 (1997). Mr. Zollars suggestion in support of dismissing this court's jurisdiction over him mistakenly faults the complaint for not averring that Mr. Zollars committed RICO predicate acts with his own hands. A conspirator need not agree to commit or facilitate each and every part of the substantive offense; if the partners agree to pursue

the same criminal objective and divide up the work, each is responsible for the acts of the other. See *id*. Indeed, "[a] person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense." *Id*.

A conspirator remains party to the conspiracy unless and until he admits his participation to the authorities or communicates his abandonment in a manner reasonably calculated to reach co-conspirators. See *United States v. Thomas*, 114 F.3d 228, 267 (D.C.Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 635, 139 L.Ed.2d 614 (1997). The plaintiff's complaint alleges that Mr. Zollars did not renounce the conspiracy upon receiving notice of Medical Supply's claims in December but instead relied on the common enterprise's commission of more predicate acts against Medical Supply in the hope this action could be obstructed. Once proof of a conspiracy is established, defendant has the burden of proving that he affirmatively withdrew from the conspiracy. *Id*. at 269.

For the reasons set forth above, Zollars agreement with US Bancorp and Piper Jaffray to subordinate the interest of Neoforma's shareholders in favor of securing favorable contracts for healthcare technology companies with Novation's hospitals and his operation of Neoforma as a price maintenance information exchange between competitors to secure profit for Novation, UHC and VHA instead of Neoforma's shareholders were both essential for the existence of the common enterprise to overcharge government and private insurers. Zollars' willingness to participate in the common enterprise, even though it was committing RICO predicate acts in the theft of intellectual property and obstruction of justice makes him liable under § 1962(d).

In addition, the direct actions to deny Medical Supply its contracted for escrow accounts and Medical Supply's sale of a lease to GE Transportation, both known to be required to capitalize Medical Supply's entry into Mr. Zollars market, were proximately caused by this conspiracy. It is hornbook law that

> "[O]nce the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action ... so long as the purpose of the tortious action was to advance the overall object of the conspiracy."

Halberstam v. Welch, 705 F.2d 472, 481 (D.C.Cir.1983). Zollars' agreement to act in the interests of the common enterprise instead of Neoforma's shareholders was essential to the cartel's maintenance of artificially inflated hospital supply prices by excluding web based discounted hospital supply transactions

from the cartel's member hospitals. Mr. Zollars operation of Neoforma as the technology platform the cartel used to police its anticompetitive exclusionary contracts was an essential link in the causal chain leading to Medical Supply's injuries.

The plaintiff's complaint alleges the elements required by the Conspiracy Theory of Jurisdiction as simplified by the District of Maryland:

> "[A] simplified articulation of the conspiracy theory of jurisdiction. Under that doctrine, when
> (1)two or more individuals conspire to do something
> (2)that they could reasonably expect to lead to consequences in a particular forum, if
> (3)one co-conspirator commits overt acts in furtherance of the conspiracy, and
> (4)those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state, then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contacts with the forum.
> *Cawley v. Bloch*, 544 F. Supp. 133, 134-35 (D. Md. 1982) (citations and footnotes omitted), quoted in *Chenault v. Walker*, No. 02A01_9812_CV_00340, slip op. at 14-15 (Tenn. Ct. App. Feb. 9, 2000)."

States with long arm statutes similar to Missouri's have recognized that co-conspirators are correctly before their courts when the object of a conspiracy was to injure a citizen of their state or injuries to citizens in their state were the reasonably foreseeable outcome of the conspirators conduct:

> "[w]hen the purpose of a conspiracy is to commit an intentional tort against a Georgian, all of the coconspirators are purposefully directing their activities toward Georgia and should reasonably anticipate being haled into court here. . . . In this case, . . . the alleged conspiracy targeted a Georgia resident specifically. Thus, the nonresident conspirators purposefully directed their activities toward Georgia, and could reasonably expect to be haled into court here. Accordingly, the imputation to them of the instate acts of their coconspirator to satisfy the requirements of the Georgia Long Arm Statute is not precluded by due process concerns."

Rudo v. Stubbs, 472 S.E.2d 515, 517 (Ga. Ct. App. 1996) (citation and footnote omitted). The 8th Circuit recognizes that Missouri's long arm statute would similarly apply to Zollars' common enterprise or combination and conspiracy's averred targeting of Medical Supply in Missouri:

> "[A] prima facie case of specific personal jurisdiction can only be established if Prudential Savings "has purposefully directed [its] activities at [Missouri] residents," and the claim of this suit either "arises out of" or "relates to" these activities. Burger King, 471 U.S. at 472 (citation omitted); State ex rel. Newport v. Wiesman, 627 S.W.2d 874, 876 (Mo. 1982) (en banc) (extending the Missouri long-arm statute to the extent permissible under the Due Process Clause)."

Lakin v. Prudential Securities, Inc., No. 02-2477 at pg.5 (8th Cir. 11/4/2003) (8th Cir., 2003). Of course, the complaint adequately establishes general federal jurisdiction under 28 U.S.C. § 1391 for violations of federal law committed against Medical Supply in Missouri.

Missouri has simplified these principles even further for contract and transaction based long arm jurisdiction. In *Schilling*, the Illinois defendant Human Support Services had had the bus with a malfunctioning wheelchair lift repaired several times by a co-defendant in St. Louis, Missouri. The court found that these repairs were sufficient to constitute transaction of business under the long-arm statute, even though it was unclear whether the Missouri repairs were connected to the injury. See *Schilling v. Human Support Services*, 978 S.W.2d 368, 370 at 371 (Mo. App. 1998).

The court in *Roberts v. Morse Chevrolet, Inc.* did not lose sight of general jurisdiction over defendants operating in Missouri recognizing that the "…Appellant alleged that Morse has numerous contractual arrangements with a Missouri entity" and stating:

> "General jurisdiction can arise where a foreign corporation is present and conducts substantial business in Missouri. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165 (Mo. banc 1999)(corporation adjudged to be conducting substantial and continuous business in Missouri was allowed to be sued here for a slip-and-fall case that arose in Colorado)."

Roberts v. Morse Chevrolet, Inc., 44 S.W.3d 402 (Mo.banc, 2001).

Robert J. Zollars is responsible for having in place internal controls under The Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745, § 302 (a)(4) and (5) to prevent losses to Neoforma Inc. shareholders from the violation of antitrust laws by the company and its officers. When Zollars executed long term exclusive agreements between Neoforma, Inc. and competing hospital supply distributors like the defendant Novation, LLC and the nondefendant GHX, LLC, knowing their controlling market share, he subjected himself to federal antitrust law. When Zollars participated in repeated efforts to injure a Missouri company, he put himself under the general jurisdiction of Missouri courts.

Mr. Zollars may be inconvenienced defending here but his inconvenience does not out weigh the interest of the State of Missouri in enforcing its legislated policy and the 8th Circuit has stated the interest in vindication of federal statutes will nearly always outweigh the inconvenience of the forum:

> "A few appellate courts have adopted the view that the constitutionality of the application of statutes granting nationwide jurisdiction to federal courts depends on whether the proposed forum puts a defendant at a "severe disadvantage," Republic of Panama v. BCCI Holdings, S.A., 119 F.3d 935, 948 (11th Cir.1997), in defending the action and, if so, whether something called the "federal interest," id., in litigating the matter in that forum outweighs attendant inconveniences to a defendant. With respect, we detect nothing in the case law already discussed that suggests that due process, or any other constitutional concern, requires such an approach to deciding the jurisdictional question that this case presents. We note, too, that the vindication of federal law principles in a federal court would seemingly always be sufficient to carry the day in favor of the exercise of federal jurisdiction, even if we felt obliged to engage in a balancing enterprise, which, in fact, we do not."

Federal Fountain, Inc., In re, 165 F.3d 600 at 602 (C.A.8 (Mo.), 1999).

Alternatively, the court may employ the second Sherman Act long arm statute § 5 Sherman Act, (15 U.S.C. § 5) which expressly states individuals may be brought before this forum even though they reside in other districts:

§ 5 Sherman Act, 15 U.S.C. § 5, Bringing in additional parties

> Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

This court could consequently assert jurisdiction over Mr. Zollars if his presence would facilitate the adjudication of this matter.

CONCLUSION

Whereas for the above stated reasons, the plaintiff respectfully requests the court deny Robert J. Zollars motion to dismiss on the basis of a lack of jurisdiction, recognizing that this court does indeed have general jurisdiction of Mr. Zollars. Or, in the alternative, the plaintiff respectfully requests that the court bring in Mr. Zollars as an additional party under 15 U.S.C. § 5.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
#KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 11th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

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

Medical Supply CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Suggestion In Opposition To Curt Nonomaque And Robert Baker's Motion To Dismiss Plaintiff's Complaint For Lack Of Personal Jurisdiction And For Failure To State A Claim

Comes now, Medical Supply and makes the following suggestion in response to defendant Curt Nonomaque And Robert Baker's Motions (doc.s 23, 23-1, 23-2, and 24).

1. Medical Supply's complaint contains averments of the defendants Nonomaque and Baker's repeated actions targeting Medical Supply in Missouri to injure and prevent Medical Supply from entering the national market for hospital supplies.

2. Curt Nonomaque's conduct as a conspirator in the combinations and conspiracies to interdict Medical Supply's market entry capitalization, exclude Medical Supply from the national hospital supply market and to restrain trade in the market for hospital supplies as part of a common enterprise having the goal of fraudulently overcharging Medicare, Medicaid and Champus government programs and private insurers is described at over 80 places in the plaintiff's complaint.

3. Robert Baker's conduct as a conspirator in the combinations and conspiracies to interdict Medical Supply's market entry capitalization, exclude Medical Supply from the national hospital supply market and to restrain trade in the market for hospital supplies as part of a common enterprise having the goal of fraudulently overcharging Medicare, Medicaid and Champus government programs and private insurers is described at over 60 places in the plaintiff's complaint.

4. The complaint describes the effect of Curt Nonomaque And Robert Baker's conduct on the State of Missouri from the tortious actions of the defendants contributing to higher Medicaid expenditures and the likely cuts of healthcare insurance to citizens of Missouri in ¶85 as a foreseeable result of the defendant's conduct to target Medicare, Medicaid and private health insurers with artificially inflated hospital supply costs.

ARGUMENTS AND AUTHORITIES

The long arm statute of Missouri utilized to serve process on Curt Nonomaque And Robert Baker, RSMo section 506.510 extends jurisdiction over Mr. Zollars where the plaintiff's compliant establishes a prima facie showing of sufficient contacts based on transactions for hospital supplies, tortious conduct including antitrust violations and contracts for escrow accounts and real estate RSMo section 506.500.1, .1, .2 and .3.

Determining the propriety of an exercise of personal jurisdiction over a foreign defendant is a two-step process. *Hanline v. Sinclair Global Brokerage Corp.*, 652 F.Supp. 1457, 1458 (W.D.Mo.1987). The court must determine whether the exercise comports with the requirements of the long-arm statute of the state in which it sits. See *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653 (8th Cir.1982), *Radaszewski by Radaszewski v. Contrux, Inc.,* 891 F.2d 672 at 673 (C.A.8 (Mo.), 1989). The court also must ensure that sufficient minimum contacts exist between the defendant and the forum state for the exercise of jurisdiction not to offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

The defendants' motion to dismiss avoids the effect of the allegation of conspiracy both on whether Medical Supply has sufficiently pled claims against Nonomaque and Baker (claims that allege multiple instances of tortious conduct by the conspiracy in Missouri against Medical Supply) and the effect of their alleged co-conspirator's substantial and continuing business contacts with Missouri.

The plaintiff has utilized Missouri's long arm statutes to establish specific jurisdiction over Nonomaque and Baker that does not offend their constitutional rights to Due Process:

> The Missouri long-arm statute permits personal jurisdiction over a foreign defendant who has committed a tortious act within the state. See Mo.Ann.Stat. § 506.500.1(3) (Vernon Supp.1988). This statute has withstood constitutional challenge. *State ex rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889, 892-93 (Mo.1970) (en banc).

Radaszewski by Radaszewski v. Contrux, Inc., 891 F.2d 672 at 673 (C.A.8 (Mo.), 1989).

Nonomaque and Baker's denials of substantial contacts with the forum state are immaterial to allegations of jurisdiction based on tortious acts:

> Missouri case law construes the phrase "commission of a tortious act within the state" to include extraterritorial acts that produce actionable consequences in Missouri. *Fulton v. Chicago R.I. & P. R.R. Co.*, 481 F.2d 326, 331 (8th Cir.), cert. denied sub nom. *Soo Line R.R. Co. v. Fulton*, 414 U.S. 1040, 94 S.Ct. 540, 38 L.Ed.2d 330 (1973) (citing Missouri case law). A single tortious act may be sufficient to justify a Missouri court's exercise of personal jurisdiction over a nonresident defendant. *State ex rel. Caine v. Richardson*, 600 S.W.2d 82, 84 (Mo.Ct.App.1980).

Institutional Food Marketing Associates, Ltd. v. Golden State Strawberries, Inc., 747 F.2d 448 at 453 (C.A.8 (Mo.), 1984.)

The defendants use *Enterprise Rent-a-Car Company v. U-Haul Intern., Inc.* for its business contacts analysis. While an important case in defining forum jurisdiction over operators of web sites, the case is not a useful tool for determining the defendants' business contacts with Missouri where Medical Supply's complaint alleges common enterprise, conspiracy and combination with codefendants having continuing and sustained business contacts in Missouri. US Bank alone has many offices doing thousands of transactions a day in Missouri in addition to the specific transactions where the complaint alleges US Bank refused to deal with Medical Supply, filed a malicious USA PATRIOT Act report against Medical Supply and through Shughart Thomson and Kilroy, formed a plan to obstruct justice through the intimidation and harassment of Medical Supply's counsel. *Enterprise* lacks utility in resolving the allegations in the complaint that the defendants targeted Medical Supply in Missouri and committed tortious actions against Medical Supply in Missouri but does affirm long arm jurisdiction over these purposeful directed tortious acts:

> "A party may anticipate being haled into court in a particular jurisdiction if it "purposefully directed" its activities at residents of the forum, and the litigation results from alleged injuries that "arise out of or relate to" those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)."

Enterprise Rent-a-Car Company v. U-Haul Intern., Inc., 327 F.Supp.2d 1032 at 1037 (E.D. Mo., 2004).

The complaint alleges Nonomaque and Baker participated in a conspiracy to monopolize the market for hospital supplies. Medical Supply has stated a prima facie case that Nonomaque and Baker acquired and maintained their monopoly through numerous unlawful acts and that their success is not a

result of their performance in the distribution of hospital supplies. The defendants' conclusion that elements of the many claims pled against Nonomaque and Baker are insufficiently stated because they don't allege every action as the individual conduct of Nonomaque or Baker is an incorrect understanding of the effect of allegations of conspiracy:

> "There is no statement of the individual appellees' market power in the complaint. However, it appears that Baxley DeLamar actually pleaded a conspiracy to monopolize, rather than a number of individual attempts to monopolize. It pleaded the necessary elements of conspiracy in violation of Sec. 2 of the Sherman Act--conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy. *International Distribution Centers, Inc. v. Walsh Trucking Co.,* 812 F.2d 786, 795 (2d Cir.), cert. denied, --- U.S. ----, 107 S.Ct. 3188, 96 L.Ed.2d 676 (1987). Since Baxley-DeLamar did plead a cause of action, it is not necessary to dismiss Count II merely because it is titled incorrectly. See *Terre du Lac Association, Inc. v. Terre du Lac, Inc*., 772 F.2d 467, 474 (8th Cir.1985), cert. denied, 475 U.S. 1082, 106 S.Ct. 1460, 89 L.Ed.2d 718 (1986)."

Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 843 F.2d 1154 at 1157 (C.A.8 (Ark.), 1988).

Medical Supply has made claims against Nonomaque and Baker under state and federal Antitrust and RICO theories of action. Medical Supply's complaint alleges that Nonomaque and Baker committed these violations against Medical Supply in combinations and conspiracies with other defendants as a common enterprise with the goal of defrauding Medicare, Medicaid, Champus and private insurers with artificially inflated hospital supply prices. Medical supply has sufficently stated claims against Nonomaque and Baker:

> "The appellee trade associations are alleged to have participated in the conspiracy by recommending the restrictive rules complained of. Baxley-DeLamar has alleged (albeit minimally) "facts constituting the conspiracy, its object and accomplishment." *Larry R. George Sales Co. v. Cool Attic Corp*., 587 F.2d 266, 273 (5th Cir.1979). Therefore, Baxley-DeLamar satisfied the minimal pleading requirements of Rule 8. *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1386-88 (10th Cir.1980)."

Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 843 F.2d 1154 at 1156 (C.A.8 (Ark.), 1988).

The RICO allegations of conspiracy against Nonomaque and Baker further frustrate the defendants' theory that sufficient averments of predicate racketeering acts against Nonomaque and Baker as individuals to state a claim have not been made. Three circuits have ruled that any plaintiff injured by an overt act may bring a RICO conspiracy claim, whether or not the overt act also is a racketeering act. See *Khurana v. Innovative Health Care Systems, Inc*., 130 F.3d 143, 152 (5th Cir. 1997), cert. granted and

vacated as moot, 119 S. Ct. 442 (1998*); Schiffels v. Kemper Financial Services*, 978 F.2d 344, 348 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-1169 (3d Cir. 1989).

Medical Supply's claims that the defendants controlled and caused tortious conduct targeted against Medical Supply in Missouri provide this court with jurisdiction under 28 U.S.C. § 1391:

> "[T]he general venue statute, 28 U.S.C. § 1391(b), which provides for venue in the district where the claim arose, supplements the Clayton Act and can provide for venue in situations where the provisions of the Clayton Act alone would not. The Missouri defendants agree, Supplemental Brief of Missouri Appellees at 10, as they must, because we have long recognized that special venue statutes in general, and section 12 of the Clayton Act in particular, are supplemented by the venue provisions applicable to all civil cases. *Board of County Comm'rs. v. Wilshire Oil Co.*, 523 F.2d 125, 130 (10th Cir.1975); 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3818 at 175 (2d ed. 1986) ("[I]t is now clear beyond any doubt that the general venue statutes apply to antitrust cases."); *Pure Oil Co. v. Suarez*, 384 U.S. 202, 204-05, 86 S.Ct. 1394, 1395-96, 16 L.Ed.2d 474 (1966) (special venue statutes are supplemented by more liberal general venue statute, absent specific contrary indication)."

Monument Builders of Greater Kansas City, Inc. v. American Cemetery Assn. of Kansas, 891 F.2d 1473 (C.A.10 (Kan.), 1989). Medical Supply's complaint provides for jurisdiction over the defendants under either Section 12 or of 28 U.S.C. § 1391:

> "The question in *Go-Video* was whether the special venue provision in Section 12 is the only source of venue for a federal antitrust suit, or whether the general venue provisions of 28 U.S.C. § 1391 are also available. We refused to read Section 12 as "an integrated whole," *Go-Video*, 885 F.2d at 1408, holding that the special venue provision of Section 12 is supplemented by the general venue provisions of § 1391 for federal antitrust plaintiffs. Id. at 1413. *Accord In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 296-97 (3d Cir. 2004); *Delong Equip. Co. v. Wash. Mills Abrasive Co.*, 840 F.2d 843, 855 n. 16 (11th Cir. 1988). *Contra GTE New Media Serv. Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1350-51 (D.C. Cir. 2000); *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), rev'd on other grounds, 369 U.S. 463 (1962). Under *Go-Video*, venue is proper in a federal antitrust suit if the venue requirements of either Section 12 or 28 U.S.C. § 1391 are satisfied."

Action Embroidery Corporation v. Atlantic Embroidery, Inc., No. 02-56770 at 5 (Fed. 9th Cir. 5/27/2004) (Fed. 9th Cir., 2004). While Medical Supply's state law claims allege tortious conduct, breach of contract and fiduciary duty committed by the defendants in the state of Missouri with co-conspirators having significant and continuing contacts with the state, jurisdiction also exists over the state claims based on the doctrine of pendant personal jurisdiction:

> "Many of our sister circuits have adopted the doctrine of "pendent personal jurisdiction." Under this doctrine, a court may assert pendent personal jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction. See, *e.g., United States v. Botefuhr*, 309 F.3d 1263, 1272-75 (10th Cir. 2002); Robinson 223 F.3d 445, 449-50 (7th Cir. 2000)' *Eng'g Co., Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 449-50 (7th Cir. 2000); ESAB Group, 126 F.3d at 628-29; *IUE AFL-CIO Pension Fund v.*

Herrmann, 9 F.3d 1049, 1056-57 (2d Cir. 1993); *Oetiker v. Werke*, 556 F.2d 1, 5 (D.C. Cir. 1977); *Robinson v. Penn Cent. Co*., 484 F.2d 553, 555-56 (3d Cir. 1973). Pendent personal jurisdiction is typically found where one or more federal claims for which there is nationwide personal jurisdiction are combined in the same suit with one or more state or federal claims for which there is not nationwide personal jurisdiction."

Action Embroidery Corporation v. Atlantic Embroidery, Inc., No. 02-56770 at 10-11 (Fed. 9th Cir. 5/27/2004) (Fed. 9th Cir., 2004).

Alternatively, the plaintiff's federal antitrust allegations provide a basis for exerting jurisdiction over Nonomaque and Baker for causing antitrust injury to Medical Supply in Missouri. The court may employ the second Sherman Act long arm statute § 5 Sherman Act, (15 U.S.C. § 5) which expressly states individuals may be brought before this forum even though they reside in other districts:

§ 5 Sherman Act, 15 U.S.C. § 5, Bringing in additional parties

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

This court could consequently assert jurisdiction over Curt Nonomaque And Robert Baker if their presence would facilitate the adjudication of this matter.

CONCLUSION

Whereas for the above stated reasons, the plaintiff respectfully requests the court deny Curt Nonomaque And Robert Baker's motion to dismiss on the basis of a lack of jurisdiction, recognizing that this court does indeed have specific and general jurisdiction over Curt Nonomaque And Robert Baker. That does not violate their right to Due Process. Or, in the alternative, the plaintiff respectfully requests that the court bring in Curt Nonomaque And Robert Baker as an additional parties under 15 U.S.C. § 5.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April11th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

S/Bret D. Landrith
Bret D. Landrith

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W- ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Motion for US Marshal Service Of Process

Comes now the plaintiff Medical Supply and makes the present motion for US Marshall Service of Process on defendants disputing service of process.

1. The plaintiff has been severely taxed by the conduct of the defendants.

2. The defendants' conduct is alleged to be in violation of federal antitrust and racketeering statutes and to be targeted at Medical Supply Chain, Inc. in its home state of Missouri.

3. The Missouri long arm statute § 506.500 addresses jurisdiction over conduct committed in the Missouri.

4. The RICO and Sherman Act provides for court service of process by US Marshall.

§ 5 Sherman Act, 15 U.S.C. § 5, Bringing in additional parties

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

The Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §1965. Venue and process

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

Whereas for the above reasons the plaintiff respectfully requests the court order US Marshal service on named defendants opposing service.

Respectfully Submitted
S/Bret D. Landrith
Bret D. Landrith
#KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 19th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

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

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

ORDER DENYING PLAINTIFF'S MOTION FOR
UNITED STATES MARSHAL SERVICE OF PROCESS

Pending is Plaintiff's Motion for U.S. Marshal Service of Process (Doc. # 40). Plaintiff requests that the Court order the United States Marshals serve Defendants in this matter pursuant to the Racketeer Influenced and Corrupt Organizations (R.I.C.O.) Act and the Sherman Act. According to R.I.C.O., process may be served by the marshal "[i]n any action under section 1964." 18 U.S.C. § 1965(b) (2002). Only the Attorney General may institute proceedings under section 1964. 18 U.S.C. § 1964(b). Plaintiff is a corporation.

According to the Sherman Act, process may be served by the marshal "[w]henever it shall appear to the court before which any proceeding under section 4 of this title may be pending." 15 U.S.C. § 5. Under section four of the Sherman Act, it states that the "United States attorneys. . . [shall] institute proceedings in equity to prevent and restrain such violations [of sections 1 to 7]." 15 U.S.C. § 4. Plaintiff is not the United States Attorney.

Because these statutes do not permit service by the United States Marshals in Plaintiff's case, the motion is denied.

IT IS SO ORDERED.

Date: April 20, 2005

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Suggestion in Opposition to
Novation, LLC, VHA Inc., And University Healthsystem Consortium's Motion To Transfer Venue Or Alternatively Motion To Dismiss Complaint For Failure To State A Claim

Comes now the plaintiff Medical Supply and respectfully requests the court deny the defendants motion (Doc. 26, 27) for the following reasons:

Statement of Facts

Medical Supply brought claims that VHA, UHC and Novation have conspired and combined to monopolize the market for hospital supplies and the related markets of hospital supplies through e-commerce and healthcare technology company finance with the other named defendants in a RICO conspiracy to prevent competition and thereby overcharge Medicare and Medicaid.

On April 18, 2005 at 7:11 pm ET, the defendant Neoforma, Inc. a publicly traded company announced SEC mandated disclosures in a judicially noticeable press release under Rule 201(b) of the Federal Rules of Evidence that the defendant hospital supply distributors VHA, UHC and Novation are in a long term agreement with Neoforma, an electronic marketplace distributor competitor of Medical Supply Chain, Inc. and that VHA and UHC have determined Neoforma's services are materially higher than they would be in a competitive market:

> "VHA and UHC also have indicated that, based in part on the findings of their consultant, they believe **a market competitive price of the services provided by Neoforma should be**

> **significantly less than the current fee**. They also have indicated that they intend to renegotiate the outsourcing agreement to which Neoforma, VHA, UHC and Novation are all parties…" [emphasis added]

Neoforma, Inc. press release, Exb 1. Medical Supply has alleged the defendants' actions to keep Medical Supply from distributing hospital supplies and the defendants' long term anticompetitive contracts have created artificially inflated hospital supply prices as part of their RICO common enterprise to submit False Claims to the US Government. While disclosing VHA, UHC and Novation's communications as required under SEC regulations, Neoforma disputes its services are not competitive.

Medical Supply opposes dismissal, having standing under the Sherman and RICO acts and having sufficiently pled its federal and state claims. Medical Supply also opposes transfer of venue which would defeat the interests of justice.

∫∫VHA, UHC and Novation's Argument Medical Supply's Claims and Issues Are Precluded

The defendants plead claim and issue preclusion but use the word "transaction" only once and in a denial on page 14 that they participated in the GE real estate transaction, in effect denying being in privity with the defendants Medical Supply brought its second action against. *Williams v. Marlar*, 267 F.3d 749 (8th Cir., 2001). Privity is also a word absent from their preclusion arguments but a required element of res judicata.

Medical Supply can now bring an action for damages based on what it tried to prevent. "As this court explained in *Baker Group, L.C.*, claim preclusion cannot apply to a claim that arises after the first suit is filed, as is the case here. Accordingly, we reverse and remand to the district court." *Lundquist v. Rice Memorial Hospital*, 238 F.3d 975 at 978 (8th Cir., 2000)

Despite never being allowed discovery, after two years, Medical Supply has obtained a lot of information unavailable to it when the emergency relief in the form of a temporary restraining order and preliminary injunctive relief were being sought in Kansas District Court. Medical Supply now raises timely new claims against the defendants based on transactions not covered by the previous action or reasonably discoverable.

The VHA, UHC and Novation defendants seek to preclude issues from being resolved in this case that were never ruled on in the prior trial or appellate court decisions. "A prerequisite to the use of issue preclusion is that the issue actually be litigated." *Jack Faucett Associates, Inc. v. American Tel. and Tel.*

Co., 744 F.2d 118 at 132 (C.A.D.C., 1984). There is no issue preclusion related to the theft of intellectual property, contract or interference with contract which were expressly dismissed without prejudice. Most saliently, Judge Murguia recognized the earliness of the litigation by repeatedly and expressly stating Medical Supply did not allege price fixing, the present complaint against different defendants is primarially a retail price maintenance, price fixing case under federal and state antitrust law.

The trial court and the court of appeals, despite repeated requests, refused to determine if the threat of a USA PATRIOT Act suspicious activity report was a Sherman §2 violation and of course could not have determined if VHA, UHC, and Novation's coconspirators and common enterprise member US Bank's filing of a suspicious activity report to help Piper Jaffray and Novation monopolize hospital supplies and defraud government insurance programs is a Sherman §2 violation because it had not yet happened and the Kansas District court refused to consider allegations related to US Bank, US Bancorp and Piper Jaffray being in a combination or conspiracy with Novation, UHC and VHA as stated numerous times in the Kansas complaint.

The defendants might mistake the meaning of the Kansas trial judge's comments regarding the USA PATRIOT Act, even though they quote the order in their suggestion: "Indeed, the district judge noted, with regard to Plaintiff's USA Patriot Act violations (which are also made here) that "plaintiff's allegation [is] so completely divorced from rational thought that the court will refrain from further comment . . . ." See Exhibit 1 at pp. 14-15." Suggestion at page 2. While the fact allegations tracked the statute's prohibited conduct exactly, the sole requirement for pleading sufficiency the trial judge seems to be expressing his disdain for the USA PATRIOT Act, and Medical Supply certainly supports the desire to criticize the act. There is no preclusive effect to these comments as an interpretation of the act that might preclude the national interest in Congress's enforcement as expressly stated. The plaintiff or the defendants would have to challenge the constitutionality of the statute.

Transfer of Venue is Inappropriate

Section 1404(a) of Title 28 provides that: "for the convenience of parties and witnesses, in the interest of justice, a district may transfer any civil action to any other district where it might have been brought." An authority on the standards for each element is *American Standard, Inc. v. Bendix Corp.* which states the burden to show particularized inconveniences for attorneys representing the defendants whose

local counsel are in this district or the defendants witnesses, identifying them by name, the subject of their testimony and how they will be inconvenienced, when both venues are in sight of each other. Finally the movant must show the variety of ways the transfer could be in the interest of justice. See *American Standard, Inc. v. Bendix Corp.*, 487 F.Supp. 254 at 261-263 (W.D. Mo., 1980).

The Chief Justice of the Tenth Circuit Court of Appeals, Deanell R. Tacha in a confidential order dated March 23, 2005 determined the conduct this lawsuit describes in relationship to improper influence alleged in the Kansas District court is in the nature of bias, even over the case the defendants allege to preclude this action where the magistrate was not assigned. See Exb. 2 Affidavit of Sam Lipari, pg. 2. The conduct this lawsuit describes extended to the Tenth Circuit see attached letter to Clerk Fisher. See Exb 3. Most disturbingly, there is a pattern and practice of intimidating witnesses and their counsel in Kansas District court cases described in depth in Sam Lipari's affidavit that endangers the parties. Obviously, a transfer to the District of Kansas cannot be in the interest of justice.

The judicial economy argument while an immeasurably less important factor in light of the documented misconduct is also in error. Medical Supply, awaiting an order on a reconsideration of the dismissal of the Bancorp case and while in the General Electric case became concerned that the Kansas District court did not have sufficient resources to adjudicate the two antitrust cases. A letter was written to the Chief Administrative Judge of the District of Kansas explaining the basis for Medical Supply's concerns:

> "I have written this letter in the hopes that these concerns will cause an inquiry into what resources the court would need to adequately administer justice in an antitrust case and should those resources not be available, it would give the parties in these two cases the opportunity to consider other forums."

Letter to Chief Judge John W. Lungstrum, November 7, 2003. Alas, the Kansas District court did not even have the resources to answer the letter. However it was added to the GE case record by court order and it is Exb. 4 to this document.

Medical Supply has never the less sought to address the judicial economy concern by making a motion (now contested) to consolidate the earlier Kansas case with the present action in Missouri District Court. There is a substantial basis for this because as the GE appeal brief gave notice to the conspirators, the United States ex rel action against the current defendants for Medicare, Medicaid and Champus fraud is in Kansas City, Missouri.

> "[T]he FCA "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co*., 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir.1995)."

Costner v. URS Consultants, Inc., 153 F.3d 667 at 677 (C.A.8 (Ark.), 1998). Both of these complex litigations share common issues of law and fact. The remaining Kansas case is on limited remand and the fact issue the Kansas District court has been tasked to determine is uncontested. The issue at law over whether Appellate sanctions should be imposed is contested but outside the limited remand jurisdiction of the Kansas court.

Finally, Medical Supply's substantive rights would be changed. The Western District of Missouri was chosen for the Eighth Circuit rule that contribution may be enforced among joint tortfeasors in an antitrust action. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc*., 594 F.2d 1179 at 1186 (C.A.8 (Minn.), 1979). Medical Supply also seeks to enjoin indemnification between defendants. *Id* Both are required to deter the defendants who continued to injure Medical Supply even after receiving notice of the gravamen of the antitrust violations.

The defendants seek to have the court contradict 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). See Fairman, Christopher M., The Myth Of Notice Pleading Arizona Law Review pgs. 1018-19, Vol. 45:987 (2003).

To prove a § 1 violation, a plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade. See *Tops Mkts*., 142 F.3d at 95; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc*., 996 F.2d 537, 542 (2d Cir. 1993).

It appears VHA, UHC and Novation have conceded the defendants are liable under Sherman § 1 for Medical Supply's *per se* price fixing claim. The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred." *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133, 1144 (9th Cir. 2003) (citations omitted). The distributor competitors UHC and VHA's creation of an

LLC (Novation) to set prices *ex ante* is itself unlawful *per se* under the Sherman Act. *Dagher v. Saudi Refining Inc*., No. 02-56509 (Fed. 9th Cir. 6/1/2004) (Fed. 9th Cir., 2004).

The April 18th, 2005 Neoforma press release clearly describes an agreement between competing legally distinct distributors that unreasonably restrains trade in the form of uncompetitively high charges for its electronic marketplace service. However, below the facial § 1 elements of the press release are Medical Supply's allegations that VHA and UHC have placed member hospital money into Neoforma at artificially inflated initial public offering stock prices and that these hospitals that could have been Medical Supply's customers.

Just the long term agreements used jointly by Novation mandating Neoforma and GHX membership and that punish hospitals for even looking at other sources including Medical Supply state a Sherman § 1 claim: "[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action." *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc*., No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004).

Medical Supply alleged that VHA, UHC and Novation participated in a broad scheme to overcharge Medicare, the devices used by the conspirators included long term contracts with hospitals to exclude competitors including and most especially Medical Supply which as a web based distributor could not be allowed to survive and lower prices. The complaint documents in detail how upstream inputs required by Medical Supply to enter the market including the escrow accounts and the profit from the GE Transportation lease were withheld by VHA, UHC and Novation's coconspirators in furtherance of the scheme.

> "Under the liberal pleading standards of the Federal Rules, the allegations and the reasonable inferences to which they give rise sufficiently outline the illegal agreement, the "conscious commitment to a common scheme designed to achieve an unlawful objective," that the law requires to state this type of claim. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir.1980), cert. denied, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). An unlawful agreement to fix prices is sufficiently clear from the pleading to state a claim for both horizontal and vertical price-fixing."

In re Mercedes-Benz Anti-Trust Litigation, 157 F.Supp.2d 355 at 362 (N.J., 2001). The defendants also seek to impose the who what when and where requirement on interlocking directorates. No heightened standard applies.

Medical Supply alleges it was prevented from entering the market by US Bank and later GE who were directed by the coconspirator defendants to break written contacts and deprive Medical Supply of inputs it required to enter as a competitor. Recovery is 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).

In *Covad Communications*, the mere breaking of the agreement between the plaintiff and the monopolist alone become adequate to state a claim. **"[A]llegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws**." [emphasis added] *Covad Communications Co. v. Bellsouth Corp.*, at ¶63 2002 C11 260 (USCA11, 2002), reversed on other grounds. The US Supreme Court recently stated this point of law:

> "The leading case imposing § 2 liability for refusal to deal with competitors is *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U. S. 585, in which the Court concluded that ***the defendant's termination of a voluntary agreement with the plaintiff*** suggested a willingness to forsake short-term profits to achieve an anticompetitive end." [emphasis added]

Verizon Communications Inc. v. Law Offices of Trinko, 540 U.S. ___ (U.S. 1/13/2004) (2004).

The defendants in asserting the complaint only confusingly describes one relevant market are not aiding the court's informed resolution of this matter. The complaint expressly states three relevant nationwide markets, each of which VHA, UHC and Novation are alleged to restrain trade in. The market for hospital supplies, the market for hospital supplies in e-commerce where the enhanced efficiency of the web based and artificial intelligence enhanced procurement services Neoforma, Inc., GHX LLC and Medical Supply Chain, Inc. is not substitutable or interchangable by Novation's fax machine and early electronic data interface or EDI individual order taking between human clerks. Interchangeability may be measured by, and is substantially synonymous with, cross-elasticity. *Brown Shoe Co. v. United States*, 370 U. S. 294, 325 (1962). Finally, the complaint adequately alleges VHA, UHC and Novation participated with US Bancorp and Piper Jaffray in restraining the market for capitalization of healthcare technology companies, the third expressly stated relevant market. Long term contracts used to lock out competitors from a relative markets are described in *Telecor Communications, Inc. v. Southwestern Bell Telephone*, 2002 C10 1017 (USCA10, 2002).

The appropriate analysis of the sufficiency of Sherman 2 relative market averments cannot stop at the expressly stated markets, however. It is well settled that defining the relevant market is an issue of fact, *Westman Comm'n Co. v. Hobart Int'l, Inc*., 796 F.2d 1216, 1220 (10th Cir. 1986). *Westman* itself inspires an inquiry into the difference between forms of product distribution which this court requires evidence and a finder of fact to resolve.

The complaint details that two competing hospital supply distributors, VHA and UHC tied their member hospitals held by long term contracts into a market of 2300 hospitals controlled by their agreement in restraint of trade called Novation LLC. This adequately alleges a relative market of 2300 hospitals that VHA, UHC and Novation have agreed to give the Neoforma, GHX, LLC joint venture or strategic alliance 100% of.

The averments in Medical Supply's complaint also clearly state that in combination and conspiracy, VHA, UHC and Novation participated with US Bancorp and Piper Jaffray in restraining trade in the upstream market of capitalizing healthcare technology companies including Medical Supply to deny critical inputs required to enter the market for hospital supplies controlled through Novation.

The defendants are inaccurate in denying the complaint does not allege fraudulent misrepresentations. Price Fixing through Novation's misrepresentation of economic inflation and that it was getting discounts through group purchasing power to exclude hospitals from dealing with competitors including Medical Supply places Medical Supply within the proximate victim element of Missouri fraud. *In re Mercedes-Benz Anti-Trust Litigation,* 157 F.Supp.2d 355 (N.J., 2001) collects cases on price fixing's inherent fraudulent misrepresentation. The complaint alleges fraud on the Kansas District court through misrepresentations by Shughart Thomson and Kilroy and its agents meeting the standard for fraud on the court and RICO fraud set out in *Raymark Industries, Inc. v. Stemple,* 714 F.Supp. 460 (Kan., 1988).

No more averments needed to be made in the complaint to give the defendants notice of the gravamen of the charges against them and that the allegations included that the conduct was committed in a common conspiracy (complaint clearly alleges a specific claim of civil conspiracy to commit fraud and that it further alleges that Zahm and Guy participated in the conspiracy.)*Deere & Co. v. Zahm*, 837 F.Supp. 346 at fn1 (Kan., 1993). A conspiracy may exist between two or more individual persons or individual corporations or by a mixture of people and corporations. Essentially, civil conspiracy exists on the actions

of people to bring about an illegal result. *Intern. U., United Auto., Etc. v. Cardwell Mfg. Co*., 416 F.Supp. 1267 at 1290 (Kan., 1976).

Joint and Several Liablity among participants in antitrust conspiracy (as it would also be in antitrust combination) is a vital instrument for establishing deterrence. See *Paper Systems Inc. v. Nippon Paper Industries Co*., Ltd. 281 F.3d 629 at 633 (C.A.7(Wis.) 2002), referencing Lewis A. Kornhauser & Richard L. Revesz, Sharing Damages among Multiple Tortfeasors, 98 Yale L.J. 831 (1989). No basis for dismissal of any claim asserted by the defendant VHA, UHC and Novation can be dispositive unless it addressed the failure of a claim to meet pleading requirement against all defendant parties.

The complaint adequately alleges violation of § 1962(c), the elements contained in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd, post, [473 U.S.] p. 606 [105 S.Ct. 3291, 87 L.Ed.2d 437]…the statute requires no more than this." *Bowman v. Western Auto Supply Co.,* 985 F.2d 383 at 385 (C.A.8 (Mo.), 1993). VHA, UHC and Novation merely argue that the complaint does not describe their individual conduct violating § 1962(c). This is however an invalid argument. The complaint alleges VHA, UHC formed Novation to defraud Medicare and that VHA, UHC acquired control of Neoforma and that Novation used Neoforma to police the fraudulent pricing of the enterprise. To direct a business's normal activities is to participate in the conduct of an enterprise within the meaning of RICO.

See *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (RICO extends to those who participate in the operation or management of an enterprise, including outsiders associated with the enterprise who participate in the direction of its activities through a pattern of racketeering activity); *Handeen v. Lemaire*, 112 F.3d 1339, 1349 n.12 (8th Cir. 1997) (same). "The fact that some defendants were not involved in each aspect of the overall enterprise did not require severing them or the charges against them." *U.S. v. Cardall*, 885 F.2d 656 at 668 (C.A.10 (Utah), 1989)

The plaintiff's complaint describes many contracts and transactions conducted and controlled by VHA, UHC and Novation. "Even a commercial contract can serve as the basis of a RICO enterprise. See *River City Mkts., Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1462 (9th Cir.1992) ("Virtually every business contract can be called an `association in fact.'"); *Loma Linda Univ. Med. Ctr., Inc. v. Farmers Group, Inc*., No. Civ-S-94-0681 WBS/JFM, 1995 WL 363441, at *2 (E.D.Cal. May 15, 1995) (noting that

"contractual relationships can establish a RICO enterprise").” *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 29 F.Supp.2d 1253 at 1259 (Kan., 1998).

Medical Supply’s complaint ascribes different predicate conduct to each individual: “The plaintiff set forth separately the acts complained of by each defendant.*" Wiesner v. Willkie Farr & Gallagher*, 785 F.Supp. 408, 411 (S.D.N.Y.1992) (citing *Zerman v. Ball*, 735 F.2d 15, 22 (2d Cir. 1984)).See also *Gottstein v. National Ass'n for Self Employed*, 53 F.Supp.2d 1212 at 1223 (Kan., 1999).

Since irrefutably at least one RICO predicate is adequately pled, Medical Supply has adequately alleged RICO conspiracy: “A RICO conspiracy allegation requires at least the pleading of the existence of one or more overt acts by the defendant in furtherance of the conspiracy and the assent of each defendant to the conspiracy. *Seville Industrial Machinery v. Southmost Machinery*, 742 F.2d 786 (3d Cir. 1984); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir.1981), cert. denied 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982).Where persons associate "in fact" for criminal purposes, each person may be held liable under RICO for his, her, or its participation in conducting the affairs of the association in fact through a pattern of racketeering activity.” *Raymark Industries, Inc. v. Stemple*, 714 F.Supp. 460 at 474 (Kan., 1988).

VHA, UHC and Novation were alleged to be at the center of the enterprise having the common goal of defrauding Medicare, Medicaid Champus and private insurers:

> “VNA Plus alleges that Apria was involved in the day-to-day operations of the VNA Plus/Apria enterprise by its direct control over the billing services and practices of the enterprise. At a minimum, VNA Plus has alleged that Apria had "some part in directing" the affairs of the Apria/VNA Plus enterprise. Reves, 507 U.S. at 179, 113 S.Ct. 1163. For the above reasons, we find that VNA Plus has adequately alleged that Apria participated in the RICO enterprise.
>
> *VNA Plus, Inc. v. Apria Healthcare Group, Inc*., 29 F.Supp.2d 1253 at 1259 (Kan., 1998).

The plaintiff was not a party to the communications between VHA, UHC, NOVATION, their subsidiary Neoforma, Inc. and the other defendants including US Bancorp and Piper Jaffray. Without discovery, it is inappropriate to dismiss the plaintiffs’ claims on a heightened pleading requirement basis for facts they cannot yet know.“[A]lthough the plaintiffs have been allowed to amend their complaint, they have not had the benefit of discovery. We think it only fair to give them that benefit before requiring them to plead facts that remain within the defendants' private knowledge.”*Abels v. Farmers Commodities Corp*., 259 F.3d 910 at 921 (8th Cir., 2001).

In *Independent Drug Wholesalers Group, Inc. v. Denton*, 833 F.Supp. 1507 at 1517-1518 (Kan., 1993), the court dealt with the dismissal sought by a defendant that was not a principal in the RICO conspiracy and asserted requisite intent had not been established. The court found the individual defendant's intent was irrelevant when the complaint and facts alleged against the enterprise as a whole were sufficient.

> "Defendants insist that RICO plaintiffs must plead damages with particularity. Both Supreme Court precedent and the Federal Rules of Civil Procedure foreclose the adoption of Defendants' position. See *id*.;Fed. R. Civ. P. 8 (pleading requires short and plain statements meant to give notice to defendants); see also Michael Goldsmith, Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO, 30 Harv. J. on Legis. 1, 18-22 (1993) (criticizing several attempts at RICO reform through judicial revisionism including improper heightened pleading requirements). Defendants confuse the requirement to plead with particularity RICO acts predicated upon fraud pursuant to Rule 9(b) with Rule 8's more general notice pleading typically required of all litigants. See, e.g., *Farlow v. Peat, Marwick, Mitchell & Co*., 956 F.2d 982, 989- 90 (10th Cir. 1992) (predicate acts of mail fraud require heightened pleading pursuant to Rule 9(b)); *Cayman Exploration Corp. v. United Gas Pipe Line Co*., 873 F.2d 1357, 1362 (10th Cir. 1989) (Rule 9(b) requires particularity in pleading the predicate RICO acts of mail and wire fraud)."

Robbins v. Wilkie, 2002 C10 944 at ¶24 (USCA10, 2002). VHA, UHC and Novation are confused about the relevance of the conduct described to interfere in the administration of justice and to defraud the Kansas District court and to which the complaint avers that VHA, UHC and Novation ratified in an attempt to intimidate Medical Supply into not bringing the present claims:

> "In the context of this case, it is momentous that a plaintiff "need only establish a tacit understanding between the parties, and this may be shown wholly through the circumstantial evidence of [each defendant's] actions." *Darden*, 70 F.3d at 1518 (8th Cir.1995)(quotation omitted). On the force of these authorities, we believe that Handeen's Complaint, broadly construed, provides an ample foundation to sustain a finding that the Firm "objectively manifested an agreement to participate directly, or indirectly, in the affairs of [the] enterprise through the commission of two or more predicate crimes." *Bennet*t, 44 F.3d at 1372 (quotation omitted)."

Handeen v. Lemaire, 112 F.3d 1339 at 1354-55 (C.A.8 (Minn.), 1997).

Medical Supply disputes the theft of intellectual property is not a concrete RICO injury. In Formax Inc. v. Hosert, 841 F.2d 388, 389 (Fed. Cir. 1988), the court held that a civil RICO count was properly pleaded against a former employee "alleged to have stolen some drawings claimed to be trade secrets" from both the former employer and from one of the former employer's vendors. The fraud on the court is also concrete "[A] cause of action, of course, is a form of `property,' and when it arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as `business injury.'" *Malley-Duff & Assocs, Inc.. v. Crown Life Ins. Co*., 792 F.2d 341, 354 (3d Cir. 1986)." Likewise, fraud, as alleged in this case, that causes one to relinquish a cause of action arising out of his business is an

injury to "business or property." *Deck v. Engineered Laminates*, No. 02-3100 at page 1 (10th Cir. 11/17/2003) (10th Cir., 2003). Also the complaint seeks the injury Medical Supply was proximately caused losing sales to 2000 hospitals under the targeted direct competitor exception to concreteness under *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.,* 18 F.3d 260 (C.A.4 (Md.), 1994)(cert. denied)*Ideal Steel Supply Corp. v. Anza*, No. 03-7381 (Fed. 2nd Cir. 7/2/2004) (Fed. 2nd Cir., 2004)

Medical Supply and its counsel have been vilified for asserting that the USA PATRIOT Act qualifies immunity for suspicious activity reports and that through Public Law 107–56 Congress changed the Annunzio-Wylie Money Laundering Act by expressly provided for civil liability for malicious suspicious activity reports against bank employees that would include US Bank, US Bancorp and Piper Jaffray's use of the threat of a suspicious activity report to take property from Medical Supply and furthering a monopoly in hospital supplies where Novation is in open and publicized anticompetitive agreements with US Bancorp and Piper Jaffray. For just contradicting the clear error over the express wording of the USA PATRIOT Act, the Tenth Circuit deprived Medical Supply of its rights and *sua sponte* sanctioned its counsel with its most severe penalty and refused to permit review.

The Supreme Court of the State of Arkansas is out of the jurisdictional reach of the Tenth Circuit and one year after Medical Supply came to its informed and researched conclusion, the heroic and honorable justices ruled that a bank could not use the acts immunity to escape liability for filing a malicious suspicious activity report to cause the baseless criminal prosecutions of a landowner it sought to deprive of property. See *Bank Of Eureka Springs And John Cross v. Floyd Carroll Evans*, 109 S.W.3d 672 Syl. 10 (Ark. 2003). No doubt the Stanton Hazlett Kansas Disciplinary Office gang is saddling up to travel the highways and disbar these brave justices from the practice of law in Kansas under the pretext of incompetence.

Medical Supply's present complaint adequately described the FINCEN database the defendants are using to threaten public health and it is actionable.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611

1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 19th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

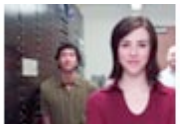
John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

Investor Relations

Check out our latest financial news for activities devoted to delivering supply chain solutions for our customers.

GET INFO

SOLUTIONS DEMO

About Neoforma
Customers
Investor Relations
Corporate Governance
Stock Information
SEC Filings
Financial Fundamentals
Investor Information
Financial News Room
Presentations
Annual Reports
Web Casts
Investor FAQ
Email Alerts
Request Information
Careers

Neoforma Provides Update Regarding Evaluation of Strategic Alternatives

Release Archives

2005 Archive
2004 Archive
2003 Archive
2002 Archive
2001 Archive
2000 Archive
1999 Archive
1998 Archive

San Jose, CA - April 18, 2005 - Neoforma, Inc. (Nasdaq: NEOF) is confirming that VHA Inc. and the University HealthSystem Consortium (UHC) have announced, through Schedule 13D filings, their current intent to support Neoforma's evaluation of strategic alternatives, including a possible sale or merger of the Company, and to sell their shares of Neoforma common stock in a transaction on terms that are acceptable to them. VHA and UHC are the two largest stockholders of Neoforma, owning 41.8% and 10.4%, respectively, of the Company's outstanding common stock. VHA and UHC own Novation, LLC, their supply company and Neoforma's largest customer.

In late 2004, Neoforma's board of directors appointed a special committee of independent directors to supervise the evaluation of strategic alternatives that Neoforma has undertaken, as previously disclosed in Neoforma's Form 10-K for the year ended December 31, 2004. As announced on January 11, 2005, Neoforma has retained Merrill Lynch & Co. as its financial advisor to assist the Company and the special committee in this evaluation.

Now that VHA and UHC have determined their current intent, Neoforma and its advisors intend to accelerate their investigation of strategic alternatives for enhancing stockholder value, including a potential sale or merger of the Company, and to enter into negotiations with prospective parties in connection with certain alternatives.

In the context of a sale or merger transaction, VHA and UHC also have indicated that, based in part on the findings of their consultant, they believe a market competitive price of the services provided by Neoforma should be significantly less than the current fee. They also have indicated that they intend to renegotiate the outsourcing agreement to which Neoforma, VHA, UHC and Novation are all parties, and that such a renegotiation is a condition of continuing the outsourcing agreement after any sale or merger transaction. Neoforma, however, based on the findings of its own consultant, believes its current fee is reasonable and market competitive.

Neoforma believes that it has been a valuable and trusted partner to VHA, UHC and Novation and to their membership over the last five years. By delivering customized and proven supply chain management solutions, Neoforma has helped hospitals reduce costs and increase efficiencies, allowing them to focus on other critical priorities.

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.

There can be no assurances that any particular alternative will be pursued or that any transaction will occur, or on what terms. In addition, there can be no assurances that a buyer acceptable to VHA and UHC will be willing to enter into a transaction on terms acceptable to Neoforma and VHA and UHC.

As previously disclosed, in the event of a change in control of Neoforma, Novation's consent is required to assign the outsourcing agreement, because Novation has the right to terminate the agreement upon such a change in control transaction. Separately, either party has the right to request that a formal benchmarking process be undertaken. The detailed terms of the benchmarking provisions of the agreement have been included in a Form 8-K to be filed by Neoforma. At this time, none of the parties to the agreement have requested the formal benchmarking process be undertaken.

About Neoforma

Neoforma is a leading supply chain management solutions provider for the healthcare industry. Through a unique combination of technology, information and services, Neoforma provides innovative solutions to over 1,500 hospitals and suppliers, supporting more than $10 billion in annualized transaction volume. By bringing together contract information and order data, Neoforma's integrated solution set delivers a comprehensive view of an organization's supply chain, driving significant cost savings and better decision-making for both hospitals and suppliers. For more information, point your browser to http://www.neoforma.com.

Contacts

This news release contains forward-looking information within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended. These forward-looking statements include statements related to Neoforma's consideration of strategic alternatives, the intent of VHA, UHC and Novation to renegotiate the Outsourcing Agreement with a buyer or merger partner of Neoforma, the likelihood of a merger or sale of Neoforma, and in a sale or merger of Neoforma the intent of VHA and UHC to sell their shares of Neoforma, the intent of Novation, VHA and UHC to support the sale or merger and the timing for the completion of the sale or merger. There are a number of risks that could cause actual results to differ materially from those anticipated by these forward-looking statements. These risks include the risk that no strategic alternative will ultimately be considered, that a buyer or merger partner of Neoforma will not agree to renegotiated Outsourcing Agreement terms with VHA, UHC and Novation, and that VHA and UHC may not agree to sell their shares to a merger partner or buyer of Neoforma or approve a merger or sale of Neoforma. Other risks are described in Neoforma's periodic reports filed with the SEC, including its Form 10-K for the year ended December 31, 2004. These statements are current as of the date of this release and Neoforma assumes no obligation to update the forward-looking information contained in this news release.

top

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

Medical Supply CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Affidavit of Sam Lipari on The Unsuitability of Transfer

1. My name is Samuel Lipari, I reside at 297 Bayview in Lee's Summit Missouri. I am the chief executive officer of Medical Supply Chain, Inc., a company I incorporated in May of 2000. I chose to bring this new action in Missouri District court because I have a responsibility to Medical Supply's stakeholders and to the shareholders of US Bancorp NA, The Piper Jaffray Companies and Neoforma, Inc. to adjudicate these claims in accordance with laws of the United States. I brought two earlier and related actions to Kansas District court based on the advice of my counsel. I witnessed first hand that no decision or outcome in either case including from the Tenth Circuit Court of Appeals had any relationship to the pleadings of my company or applicable law. I make this determination based on my considerable personal experience as a clerk and researcher for a Missouri legal firm and upon discussions with what I believe are the foremost healthcare antitrust authorities in our nation.

2. I know first hand the consequences to Medical Supply and the additional liabilities US Bancorp NA, The Piper Jaffray Companies and Neoforma, Inc. have incurred as a result of the Kansas District court outcomes and the Tenth Circuit delays. I believe several of these defendants will no longer be viable after a judgment at law is made on their conduct.

3. I received a confidential decision by Chief Judge Deanell R. Tacha dated March 23, 2005; a complaint with extensive documented evidence including official court transcripts and affidavits I made to the Tenth Circuit about the conduct of the Kansas District Court Magistrate James P. O'Hara and the attorneys of the law firm Shughart, Thomson & Kilroy described in the lawsuit before this court. Chief Justice Tacha determined that the conduct described presented an issue about the bias of the forum Medical Supply suffered. Included in the complaint was evidence that the bias reached the Office of the Clerk for the Tenth Circuit Court of Appeals and the person of Patrick Fischer, Chief Clerk.

4. Early in the Kansas District Court case against the US Bancorp defendants, I instructed my counsel to write a letter to the Chief Administrative Judge of the Kansas District Court inquiring as to weather the Kansas District court had the resources to adjudicate an antitrust matter based on a Sherman Act refusal to deal claim and if we should transfer the action to a different forum. The Kansas District Court never had the time, resources or manpower to answer my inquiry and it is my belief after observing first hand that the Kansas District Court does not have the resources required for me to prosecute my claims against these defendants.

5. Beyond the lack of sufficient resources, I was repeatedly struck by the bias and open hostility exhibited by the Kansas District Court and Tenth Circuit personnel against the claims of my company and how Kansas government attorneys were enlisted to retaliate against my counsel for bringing these actions. I believe this is the bias that Chief Judge Deanell R. Tacha described in her decision dated March 23, 2005. I became concerned and attended the trial phase of my counsel's representation of James Bolden, an African American small business man who had sought out my counsel when Kansas government attorneys had discouraged or intimidated four of his previous attorneys, the last of which still has not been found. I assisted in the trial preparation for this case believing it would be good practice for Medical Supply's jury trials.

6. I have now known James Bolden for some time and believe him to be an extraordinarily honest god-fearing man. I also know that his work vehicle was firebombed while it was parked next to his home and the Topeka Police Department refused to even take a police report and that he feared for his life while his case was being litigated in the Kansas District Court. The injuries and threats made against his witnesses who I also know and believe are honest made affidavits of the incidents, including the opposing city attorney, Sherri Price's threat to criminally prosecute the Topeka business owner Fred Sanders if he testified in federal court on behalf of James Bolden.

7. The City of Topeka and the Topeka office of the US Attorney threatened and intimidated other witnesses I have met because of their testimony in Mr. Landrith's cases. Affidavits of these incidents were filed in the various Kansas District Court cases and the response of the Kansas judicial branch was to increase its threats against Mr. Landrith, one of which was mailed the afternoon Mr. Landrith had called Mark Hunt a former US

Army officer and an African American to testify in a Topeka Federal courtroom. Mark Hunt was severely retaliated against for that testimony and Melvin Johnson, a retired US Postal worker client of Mr. Landrith was also retaliated against by city officials that night, leaving him homeless. The Topeka office of Eric Melgran the US Attorney caused Melvin Johnson's key witness, Rosemary Price to be retaliated against for her participation in a deposition held in the Topeka federal courthouse a week later.

8. The Kansas District court repeatedly rebuked Mr. Landrith for documenting the obstruction and deliberate interference of justice that seems to be commonplace in the Kansas legal culture. Magistrate James P. O'Hara issued a very harsh report against Mr. Landrith in the Bolden case that seems to be more about Medical Supply's case and what has happened to Shughart, Thomson and Kilroy. The Kansas Disciplinary Administrator Stanton Hazlett used the report to justify his investigation and prosecution of Mr. Landrith.

9. I advised Mr. Landrith to file in Kansas District Court to stop the state disciplinary administrator from prosecuting him for representing an African American and his American Indian witness. Affidavits in both cases revealed that Kansas state officials repeatedly obstructed justice and that the opposing counsel Sherri Price had threatened minority business men with criminal prosecution if they testified in Kansas District court against the City of Topeka. I knew that since none of this testimony was ever disputed the District of Kansas would certainly prevent the state from retaliating against Mr. Landrith for his protected speech on behalf of an African American and his American Indian witness. Surprisingly, however the District of Kansas judges recused themselves and the

Tenth Circuit assigned the Chief Judge Dee Benson of the District of Utah who made no findings of fact or law and dismissed the case with prejudice.

10. I attended the pre trial order conference of the Kansas Disciplinary Administrator before a three-attorney panel consisting of Sally H. Harris, Michael K. Schmitt and presided over by Randall D. Grisell. Stanton Hazlett admitted to the panel that the secret probable cause hearing had excluded official court records and evidence including a reply brief in the adoption appeal that matched court transcripts refuting each evidentiary point raised by the adoption attorney seeking to terminate Mr. Price's parental rights. Stanton Hazlett admitted he had secured the probable cause to prosecute Mr. Landrith by stating there was no evidence behind the appeal.

11. Randall D. Grisell and the panel ruled that Mr. Landrith would not be able to present any evidence or witnesses related to the discriminatory prosecution of himself while the felony threats to obstruct justice documented in the case and including opposing counsel were being ignored. Strangely, the panel also ordered the exclusion of any evidence or witnesses supporting the truth of the underlying litigations. Randall D. Grisell also ruled that the substantial family interest of Stanton Hazlett in the private adoption industry and that the chief complaining witness, Kansas state Judge G. Joeseph Pierron, Jr. held a position on the board of directors of a private $40 million dollar commercial adoption contractor with the State of Kansas, Kansas Children's Service League, Inc. did not require the dismissal and reinvestigation of the complaint. Judge G. Joeseph Pierron, Jr. had refused to disqualify himself when Mr. Price's appeal raised questions about widespread Kansas adoption law violations and the failure of the Kansas

Social and Rehabilitation Services to ensure compliance with laws designed to prevent interstate child trafficking.

12. A few days after Mr. Landrith asked to call Frank D. Williams as a witness to Stanton Hazlett's pattern and practice of not reading or familiarizing himself with the case before seeking to prosecute an individual, Kansas state officials in the judicial branch attempted to seize $50,000.00 in Southwestern Bell stock owned by Frank D. Williams on a ten year old judgment that had expired without being renewed or served on Mr. Williams. I believe this was an effort by state officials in the Kansas legal community to retaliate against witnesses and to threaten and harass witnesses with their misconduct. Since the Medical Supply complaint addresses misconduct related to influencing the Kansas District court, I believe that similar efforts will be made against Medical Supply's witnesses if the case is tried in a Kansas forum.

13. I witnessed the stress mount on Mr. Landrith leading up to the pretrial conference for the ethics prosecution. It was a dark holiday season as he had to spend an enormous amount of time preparing evidence for the ethics trial in January. I offered to clerk for Mr. Landrith during the trial and sat with him during its entirety at the counsel table.

14. On January 19th 2005 Stanton Hazlett sent another disciplinary complaint letter to Mr. Landrith. I saw that the ethics trial was not going well for Stanton Hazlett who seemed entirely unfamiliar with the evidence and exhibited shock and surprise when the testimony of Hazlett's own witnesses revealed that court records had been withheld from Mr. Landrith violating the due process and Sixth Amendment rights of his clients and that actions had been taken to deceive the court in the underlying cases.

15. Even though the bad faith basis for the prosecution had become overwhelmingly clear, Stanton Hazlett argued (looking to Andrew DeMarea's complaint for the inspiration that an appeal could be frivolous even though the ruling contradicts both statue and controlling case law and in the face of documented trial court misconduct) that Mr. Landrith should never have accepted the appeal of the indigent David Price when his appointed attorney had withdrawn before the conclusion of the trial court case and the trial court had refused to hear any of Mr. Price's pro se motions or allow him access to records required for post trial representation. This struck me as a living nightmare that the State of Kansas was so far removed from lawfulness and the constitution that I was thankful I don't live there.

16. At the conclusion of Mr. Landrith's ethics trial, Sally H. Harris, Michael K. Schmitt and Randall D. Grisell stated that they had found Mr. Landrith guilty of something but were not sure yet what it was. Stanton Hazlett then argued that the only possible punishment was disbarment.

17. Following the hearing I observed Magistrate O'Hara lagging behind in an effort to communicate with Stanton Hazlet and the three judge panel. Throughout this hearing there were several occasions were Stanton Hazlet and the three-judge panel had what appeared to be private off the record conversations.

18. Mr. Landrith asked me to accompany him to a meeting with John Ambrosio, a Topeka attorney Stanton Hazlett had directed to investigate the complaint made by Andrew DeMarea of Shughart Thomson and Kilroy who was representing counsel for the defendant US Bank in the Medical Supply case. Mr. Landrith had told me he had

answered the complaint and sent additional documents, but John Ambrosio had sent several letters threatening disbarment if Mr. Landrith did not attend a meeting.

19. Bret Landrith also arranged for Mr. Dennis Hawver to accompany us to the meeting since Mr. Hawver was investigating filing a legislative claim on behalf of Mr. Landrith for the enormous burden the repeated bad faith prosecutions by Stanton Hazlett in retaliation for Mr. Landrith's representing minority Kansans who were injured by state officials violating Kansas law. When we got there John Ambrosio's wife Kathleen Ambrosio who Janice King, a voluntary process server for Mr. Landrith told me had been assigned by the Kansas Judicial branch to assist a divorce attorney opposing her claims for child support in the Tenth Circuit stood around listening to our conversations. Then we were taken to John Ambrosio's office.

20. John Ambrosio was introduced to me and did not recognize my name even though he had insisted Mr. Landrith attend this meeting to be questioned about the Medical Supply case. I heard Mr. Landrith call his attention to the fact that he had been threatened several times by John Ambrosio if he did not make himself available for questioning about the case yet Ambrosio had clearly made no preparations and was unfamiliar with the complaint or the documents furnished by Stanton Hazlett. Furthermore Mr. Landrith complained that Stanton Hazlett had been prosecuting him for over two years, making it impossible to earn a living and that he had been told he would be disbarred on the earlier claims.

21. John Ambrosio insisted I leave and that I not witness the meeting but Mr. Hawver could stay. Mr. Landrith declined to be interviewed without my presence and I heard John Ambrosio threaten Mr. Landrith again with disbarment stating that if Mr. Landrith

didn't cooperate he would respond to Stanton Hazlett stating that everything Andrew DeMarea had alleged would be reported as true since Mr. Landrith was unwilling to refute it.

22. At that moment I knew the meeting had been arranged solely to harass Mr. Landrith for representing me. Despite being paid by the State of Kansas to do an ethics investigation, John Ambrosio had not even bothered to read Andrew DeMarea's complaint. Like Sherri Price, the City of Topeka attorney relaying Magistrate James O'Hara's order, Andrew DeMarea was smart enough to sign his name only to the cover page relaying without subjective comment a ruling designed to injure Mr. Landrith for his representation, neither alleged any wrongdoing against Mr. Landrith. I could see that despite John Ambrosio's visible intent to severely frighten Mr. Landrith if he did not meet without a witness, John Ambrosio had not bothered to review the case.

23. When the defendants realized they had to answer my action in Missouri, I experienced the intensified presence of law enforcement officials. Including uniformed and plain-clothes surveillance. I believe two plain clothes officers arranged to meet and question me. I was questioned extensively about GPO practices and how I was able to finance my litigation. I believe the justification for this investigation was the USA PATRIOT Act suspicious activity report filed against my company and me over two years ago.

24. I know the suspicious activity reports were filed because my father has my same name and the secret reports disrupted the financial operations of my father's trucking company at the time causing him significant loses in income and stress arising from the decreased income and the threats of foreclosure on the home he and my stepmother

shared. The stress aggravated their physical health and my stepmother died from a stroke later that year.

25. I believe the impetuous for the investigation however was the requests made by the defendants to government officials in Missouri starting once the Missouri action was filed. I went to the FBI office in Kansas City, Missouri with supporting documentation and the information described in the complaint about the defendants actions to retaliate against my attorney Mr. Landrith in their plan to impede the administration of justice.

26. No action was taken on my complaint and the law enforcement officials did not start surveillance of my home until the defendants requested it. I believe the surveillance was unproductive in that it did not serve the goals of the government officials who had attempted to accommodate the defendants. I believe this resulted in my fiancé who I lived with for four years and whose daughter we were arraigning for me to adopt as father was being targeted. When she was pressured repeatedly to find something unlawful I was doing, it led to our relationship being canceled and I lost my home.

27. I moved in with my father and live in his basement. I believe that this residence and my office in it has been searched while we were out, again under the justification of the USA PATRIOT Act suspicious activity report filed against my company and me over two year ago but for the purpose of finding something that could be used to stop my litigation.

28. I continue to experience Internet research interruption and email delays even though I believe the Missouri officials are satisfied as to Medical Supply's claims and the lawfulness of our litigation against the defendants. I am hopeful they will enforce the law and protect the witnesses of every party. The events that appeared to have occurred in

Texas, California and Kansas when persons have challenged the defendants' monopoly make this action's location in Missouri necessary for all the safety of all involved.

29. Unfortunately, I am experiencing the fallout from law enforcement officials on the Missouri side discovering that Medical Supply's claims were justified and that nothing unlawful is being done in my litigation against the defendants. Kansas state officials in the judicial branch, including Stanton Hazlett have contacted persons in the last two weeks to relay their intentions to me. This is on its face unlawful because Stanton Hazlett is required to keep that information confidential until the complaint is filed. One such person who had a conversation with Stanton Hazlett has made it clear that Mr. Landrith will be disbarred regardless of the law or evidence in the record. While this threat imperils Medical Supply's chance for justice in this litigation, the threat accompanied offers to "save" Medical Supply. This involves replacing Medical Supply's counsel with a Kansas attorney as lead counsel I feel Stanton Hazlett believes he and Magistrate O'Hara can control. I was offered the $300,000.00 US Bancorp deprived Medical Supply of to capitalize my company's entry to market if I would agree to this arrangement. While this is being suggested to me repeatedly to the point that it is becoming a pressure, the suggested attorneys have no antitrust experience or familiarity with the present actions.

30. I believe Stanton Hazlett and Magistrate O'Hara are acting in the interests of the defendant Shughart Thomson & Kilroy to use their control over the enforcement of Kansas Attorney Ethics rules to change counsel so that evidence of Shughart Thomson & Kilroy's actions in furtherance of the defendant's conspiracy will not be subjected to discovery, accomplishing the conspiracy's short term objective of concealing what was done to influence the Kansas District Court and the defendant conspiracy's long term

objective of eliminating liability for their conduct. Because the conspiracy so overtly seeks to control and prevent the presentation of evidence regarding the occurrences in Kansas District court and the motivations for what was done to Mr. Landrith while suppressing evidence of misconduct including felony obstruction of justice, witness intimidation and harassment related to Mr. Bolden and Mr. Price's entirely unrelated cases.

31. Chief Judge Deanell R. Tacha's confidential decision clearly casts the Sherman Antitrust Act and 18 U.S.C.§ 241 as "frivolous" laws. This also comports with the Tenth Circuit's formal opinions regarding Medical Supply's antitrust claims. Since my company cannot enter the market unless the conspirators exerting monopolistic control over the market are enjoined from further planned actions to exclude competition and discouraged from the belief that US antitrust law will not be enforced in the ecommerce delivery of hospital supplies, I must bring my company's claims to a jurisdiction that will follow US Antitrust law. I believe that excludes the Kansas District court and its appellate circuit.

32. At the time my counsel has twelve days to answer about 20 motions seeking the dismissal and transfer of this case, Stanton Hazlett is misleading the Tenth Circuit into dismissing the motion to enjoin further disbarment proceedings during the pendancy of Mr. Landrith's civil rights cases (he still has to represent Mr. James Bolden) based on Stanton Hazlett's misrepresentations that the appeal is moot because Mr. Landrith is not being disciplined, then, Stanton Hazlett filed a recommendation of disbarment against Mr. Landrith in the Kansas Supreme Court on April 14, 2005 without retracting his Tenth Circuit Motion to dismiss.

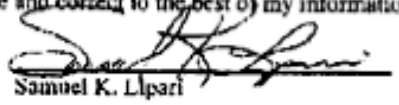
33. The defendants seek to transfer Medical Supply's case to Kansas. I have feared for my life during parts of this litigation especially after calling the Ft. Worth, TX office of the US Attorney to ask to speak to the attorney that issued the criminal subpoenas against my cases defendants and being told she was dead and then finding out that the FCA attorney had died shortly before her. It is my belief that I would be putting witnesses in jeopardy if this action were conducted in Kansas and that would principally be a result of the hostility the Kansas District court has for victims of witness intimidation and harassment and the obvious willingness of the Kansas judicial branch to assist in the harassment and intimidation. Certainly, it would be unlikely that law enforcement officials could bring anyone to justice in that environment.

34. I do believe the State of Missouri will uphold the laws against witness and victim harassment and secure the protection of all parties. In Missouri, law enforcement officials appear to have already looked into this litigation at the request of the defendants and I also have my up most confidence in them

VERIFICATION

STATE OF KANSAS)
) SS:
COUNTY OF MISSOURI)

I, Samuel K. Lipari being of lawful age and being first duly sworn upon my oath, state that I have read the above and foregoing affidavit and find the statements therein made to be true and correct to the best of my information, knowledge and belief.

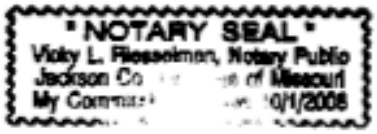


Samuel K. Lipari

Subscribed and sworn to before me this 18th day of April, 2005.

Notary

Commission expires 10/6/08



Bret D. Landrith
Attorney at Law
12820 SW Highway 4, Topeka KS 66610
1-785-256-6508 eposone@mobil1.net

July 1, 2004

RE: Medical Supply v. US Bancorp, NA *et al*; Medical Supply v. General Electric Company, *et al.*

Dear Mr. Fisher

This letter is being sent to provide you with written answers to your accusations this afternoon.

I do not own stock in Medical Supply Chain, Inc. or any other company.

When Medical Supply suffered the first attack in the form of the US Bancorp defendants purloining three hundred and fifty thousand dollars and intellectual property business trade secrets that Medical Supply relied upon to enter the hospital supply market after years invested in developing the proprietary technology of a superior electronic marketplace, we attempted to get injunctive relief to stop the defendants from their continuing obstruction and from further disseminating our trade secrets. We did not "file an antitrust suit every time we need money", as you assert.

We searched nationwide for a law firm capable of representing us in our antitrust action. Our failure to find one does not mean as you assert that we "do not have a case." More than 90% of our queries never resulted in information about our problem being exchanged. The fact that US Bancorp NA is one of our nation's largest bank holding companies conflicted out almost all of the firms we queried. The remaining commercial litigators were wholly prejudiced against any antitrust form of lawsuit, and declined representation without information about our action. However, the Harvard Law professor and antitrust authority we have cited, volunteered his services on the US Bancorp case and then even went further, expressing a desire to work with us on discovery.

I believe we met in district court the current state of disfavor private antitrust enforcement has fallen into. I accept no responsibility for this. I have not been a practitioner or judge. In fact, Medical Supply is my first client. Others can answer for the last twenty five years of antitrust litigation. At the time, I formed our expectations from the application of antitrust statutes in appellate case law. Because Tenth Circuit decisions were our controlling authority, I believed pleading a set of facts where a group boycott was enforced against my client by a competitor through a common supplier or in the alternative that the supplier acting as a competitor and refusing to deal against its own interests in an established business relationship and without even a business justification (let alone a pro-competitive one) entitled a plaintiff to put on evidence at trial.

The capable, experienced internal and external counsel for the US Bancorp and GE defendants were probably well within the expected standard of practice if they

advised their clients that they would not even have to refrain from injuring Medical Supply under the antitrust statutes. Mr. Glecklen, a formidable scholar on intellectual property based antitrust was very critical of the complaint I had drafted based on *Aspen Skiing*, believing it does not state a claim on which relief can be granted. Now that I have a broader perspective, I believe I can see why practioners who do not regularly represent antitrust defendants in the Tenth Circuit would not at the time, have recognized the significance of a single firm's refusal to deal under circumstances closely paralleling *Aspen Skiing*.

On January 13, 2004, the significance of the Tenth Circuit's decision in *Aspen Skiing* was again recognized when Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Ginsburg, and Justice Breyer delivered the opinion of the Court in *Verizon Communications Inc., Petitioner v. Law Offices Of Curtis V. Trinko, LLP*, Supreme Court Of The United States No. 02—682, stating "The leading case for §2 liability based on refusal to cooperate with a rival…is *Aspen Skiing*." Justice Scalia went on to endorse the *Aspen Skiing* premise, stating: "The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." Commentators have suggested that the court's omission of significant later §2 decisions is a deliberate preference for the higher standard (and the standard Medical Supply's claims meet) in *Aspen Skiing.* Medical Supply has not come to your court with baseless claims devoid of a meritorious supporting legal theory.

Furthermore, the issues related to Medical Supply's market exclusion have been a matter of national concern. When an industry expert (who has similarly volunteered to be an expert witness for Medical Supply) discussed the consequences of the actions taken to keep Medical Supply out of the hospital supply market by US Bancorp and General Electric before the US Senate Judiciary Committee's Subcommittee on Antitrust, he was warmly greeted by the committee's Republican and Democratic leadership who have been concerned about the failure of legislative attempts to discourage hospital supply price manipulation. Both the US Department of Justice and the Federal Trade Commission have since sought his guidance and information about efforts to suppress competition in the electronic marketplace for hospital supplies.

I do not believe Medical Supply lacks a case, in contrast I believe there was never a defense to Medical Supply's charges. When the human tragedy that is the foreseeable consequence of systemic violations of federal antitrust statutes to inflate hospital supply prices, decreasing access to healthcare and disrupting health insurance coverage struck my own family, I deeply questioned my progress and whether Medical Supply could have entered the market for hospital supplies by now with different counsel. Many have shared with me a belief which you appeared to articulate that it is not the law but who represents your cause that matters. Besides an oath to uphold the rule of law which prohibits me from subscribing to this view; even an elementary economics background would suspend belief that a new entrant to a market would be able to command greater resources in corrupt influence than existing national monopolists. I have a firm belief, unshaken by your accusations, that Medical Supply's claims against the US Bancorp and GE defendants will be fairly tried on their merits and under the weight of statute and case law authority with no regard to who represented each party.

Sincerely,

S/Bret D. Landrith
Attorney for Medical Supply Chain, Inc.

cc: Mark Olthoff,
John Power

November 7, 2003

Chief Judge John W. Lungstrum
500 State Ave., Suite 517
Kansas City, Kansas 66101
ksd_lungstrum_chambers@ksd.uscourts.gov

Dear Chief Judge John W. Lungstrum,

I am counsel for Medical Supply Chain, Inc., a party in two antitrust actions in the District of Kansas, at Kansas City Kansas . The first action was brought seeking an emergency preliminary injunction and other relief against US Bancorp Piper Jaffray and affiliate defendants. Very little time was available for the court to give consideration to any of our attempts to obtain relief or to understanding our causes of action. The denial of the preliminary relief resulted in an interlocutory appeal where very little of the case had been developed at trial court level. The court later, in its first written decision , dismissed the action for reasons that are a mistake of law and fact, failing even to take notice of an independent defendant conspirator and in error finding an absence of two or more conspirators. We have sought a retrial on this dismissal but no ruling has been forthcoming.

While Medical Supply has suffered irreparable injury it sought to avoid under statutes expressly granting protection from this injury, another partner, in a an extensively self publicized open combination with the first defendants repeated the same felonies against Medical Supply and threatened us if we persevered and took them to court.

We have had the utmost faith in the impartiality of the court to this point, but are concerned over whether The District of Kansas has the required resources to administer justice. A recent ruling, staying discovery in the second case and the continued absence of a ruling on the motion for retrial in the first. It appears that the court is unwilling to devote the time to research a relatively rare form but very serious form of antitrust violation "The Collaborative Refusal to Deal" and appears to lack the time and resources address the issues raised in our complaints and instead is constrained to the very simple and conclusory defenses that ignore Tenth circuit and US Supreme Court precedent, even where the facts related to the conduct are not in dispute.

During the period these cases have been delayed US Bancorp Piper Jaffray has settled with the SEC, NASD and The Office of The New York Attorney General setting the market prices of technology company capitalization and excluding market entrants in the two markets our complaint alleged, a result of this much publicized settlement is the disclosure of many documents that are evidence of this conduct.

A defendant in the second case, The General Electric Company has accepted a consent decree, as a parent company and the sole defendant in a US Justice Department complaint for monopolization of the sale of medical devices and related software, in the market our complaint charges them with antitrust conduct. See *U.S. v. General Electric Co.,* D.D.C., No. 1:03CV01923, 9/16/03.

The results of antitrust related conduct creating high prices in the healthcare market have been the subject of much public, legislative and media concern. The injuries to patients and hospitals described in our complaints have resulted in deaths and the closing of hospitals in our community and throughout the American market we allege. An affiant supporting our complaint was called to testify before the U.S. Senate Judiciary subcommittee on antitrust to explain how the control of electronic healthcare product marketplaces including Medical Supply Chain, Inc. is used to keep hospital supply prices artificially high.

I am concerned that The District of Kansas does not have the time to give consideration to an important controversy that affects so many people. I do not believe any of the parties are served by leaving so much of the resolution of issues in a complex case to wholesale review in the Tenth Circuit. I think this has contributed to the extraordinary time the interlocutory appeal in the first case has been submitted to hearing on the briefs. I have written this letter in the hopes that these concerns will cause an inquiry into what resources the court would need to adequately administer

justice in an antitrust case and should those resources not be available, it would give the parties in these two cases the opportunity to consider other forums.

Sincerely,

S/--------
Bret D. Landrith, Esq.
Kansas Supreme Court # 20380
Law Office
12820 SW Hwy. 4
Topeka, KS 66614
785-256-6508
eposone@mobil1.net

cc: Hon. Judge Carlos Murguia
Magistrate David J. Waxse
Magistrate James P. O'Hara
Jonathan L. Glecken, Arnold and Porter
Ryan Z. Watts, Arnold and Porter
John K. Power,
Steven D. Ruse, Shugart, Thompson and Kilroy
Andrew M. Demarea,
Mark A. Olthoff
Samuel Lipari

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Suggestion in Opposition to defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Shughart Thomson & Kilroy, P.C., Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff Motion To Transfer, Dismiss And/Or Strike

1. The plaintiff has addressed the request to transfer in this action to the Kansas District Court in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

2. The plaintiff has addressed the claim and issue preclusion arguments in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference with the addition of the mention that the defendants are seek to contradict *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) which appears in all respects to be a bay horse case:

> "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. And so it is here. 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.

This conclusion is unaffected by the circumstance that the 1942 complaint sought, in addition to treble damages, injunctive relief which, if granted, would have prevented the illegal acts now complained of. A combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought. And, as already noted, a prior judgment is res judicata only as to suits involving the same cause of 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."

Lawlor v. National Screen Service Corporation, 349 U.S. 322 at 327-329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955).

3. The plaintiff has addressed the arguments related to the sufficiency of its pleading of its federal actions in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

4. The notice pleading requirements of federal claims also extend to the plaintiff's state claims:

"Under the Federal Rules, it is not necessary to plead every fact with formalistic particularity. Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."). Rather, the question for us is whether BJC's complaint put Columbia on notice as to the substance of the claim. *Swierkiewcz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1057-58 (8th Cir. 2002). We conclude that it did. The allegations that BJC had a binding agreement with Columbia, that Columbia breached the agreement,

> and that BJC suffered injury as a result of the breach, are sufficient to satisfy the requirements of Rule 8(a)."

BJC Health System v. Columbia Casualty Company at page 5 (8th Cir., 2003).

5. The plaintiff has addressed the arguments related to the sufficiency of its pleading fraud in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

6. In response to the defendants' request to strike allegations related to Magistrate James P. O'Hara and the law firm of "Shughart, Thomson & Kilroy Watkins Boulware, P.C.," for being immaterial, impertinent and scandalous under Rule 12(f). There is no automatic immunity for attorneys from their tortious conduct. *Havens v. Hardesty*, 43 Colo.App. 162, 600 P.2d 116 (1979). The plaintiff calls the defendants' attention to *Handeen v. Lemaire*, 112 F.3d 1339 (C.A.8 (Minn.), 1997) in which the court of appeals found merit to RICO claims against a law firm. See also *Raymark Industries, Inc. v. Stemple*, 714 F.Supp. 460 (Kan., 1988).

7. The plaintiff also requires Shughart, Thomson & Kilroy Watkins Boulware, P.C.'s presence for injunctive relief to prevent indemnification of other defendants' antitrust liabilities in contradiction of public policy. See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 at 1186 (C.A.8 (Minn.), 1979).

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 19th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W- ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Suggestion In Opposition To Neoforma, Inc.'s Motion To Dismiss Complaint, Or Alternatively To Require Amendment, Pursuant To F.R.C.P. Rules 8 And 9

Comes now the plaintiff Medical Supply and makes the present suggestion opposing Neoforma Inc.'s motion to dismiss or amend the plaintiff's complaint (doc.s 15, 16).

1. The plaintiff has addressed Neoforma's Rule 8 and 9 arguments in its suggestion opposing VHA, UHC and Novation's motion for dismissal and incorporates its answer by reference.

2. The other defendants were able to answer or in the alternative seek dismissal. US Bancorp NA, The Piper Jaffray Companies and their corporate officers have a similar Sarbanes-Oxley Act standard to meet for their responses.

3. Plaintiff welcomes Neoforma's participation in drafting the pretrial order which will replace the present complaint.

Respectfully Submitted
S/Bret D. Landrith
Bret D. Landrith
#KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 19th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Certificate of Interest

Pursuant to Local Rule 3.1, the following is disclosed: Medical Supply Chain, Inc. is a privately held Missouri corporation.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 19th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

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

MEDICAL SUPPLY CHAIN, INC.,	)	Case No. 05-0210-CV-W-ODS
	)	
Plaintiff,	)	
	)	
NOVATION, LLC	)	
NEOFORMA, INC.	)	
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFFER	)	
ANDREW CESERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY	)	
WATKINS BOULWARE, P.C.	)	
	)	
Defendants.	)	
	)	

SUGGESTIONS IN REPLY TO PLAINTIFF'S SUGGESTION IN OPPOSITION TO DEFENDANT ROBERT J. ZOLLARS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

I. INTRODUCTORY STATEMENT

Neither due process nor Missouri's long-arm statute allows for jurisdiction over an individual who has no business or contracts with, and has not committed any tortious acts upon, any resident of the State of Missouri. Plaintiff ignores these basic principles of law,

however, and argues that this Court should exercise jurisdiction over Mr. Zollars for two primary reasons: (1) that Mr. Zollars was, at one time, an alleged "officer in Cardinal, a subsidiary of [co-defendant] Novation, LLC," and (2) Mr. Zollars is a member of an alleged conspiracy to (a) "overcharg[e] government and private insurance providers," and (b) to commit antitrust and RICO violations by operating a "price maintenance information exchange" between Neoforma and other defendants. (Opposition, at 3, 4.)

These arguments are meritless for several reasons. First, Plaintiff has failed to allege any facts establishing jurisdiction under Missouri's long-arm statute, or under any other theory of jurisdiction. Second, plaintiff has failed to allege facts establishing that Mr. Zollars committed any RICO or antitrust violations in his individual capacity. Third, this Circuit has not adopted the "conspiracy theory" of jurisdiction advanced by plaintiff, but even if it had, plaintiff has not alleged that Mr. Zollars was a member of any conspiracy in his personal capacity. Fourth and finally, plaintiff has failed to carry its burden of proving that the RICO or antitrust statutes compel jurisdiction over Mr. Zollars. Accordingly, the Court cannot exercise personal jurisdiction over Mr. Zollars and he should be dismissed from this case.

II. PLAINTIFF'S UNSUPPORTED ALLEGATIONS NOT ONLY FAIL TO ESTABLISH JURISDICTION UNDER MISSOURI'S LONG ARM STATUTE, BUT EXERCISING JURISDICTION OVER MR. ZOLLARS DOES NOT COMPORT WITH DUE PROCESS

Missouri's long-arm statute allows this Court to exercise jurisdiction over out-of-state defendants in six specific instances. Mo. Rev. Stat. § 506.500 (Lexis 2004). According to plaintiff, the Complaint establishes a "prima facie showing of sufficient contacts based on" three of these instances: "transactions for hospital supplies, tortious conduct including antitrust violations and contracts for escrow accounts and real estate" in Missouri. (Opposition, p. 3.) But there are several problems with this position. First, as set forth in Mr. Zollars' original moving papers and in his declaration, he has not engaged in any real estate or business transactions in Missouri. Second, all of plaintiff's allegations concerning these matters are directed at Mr. Zollars in his capacity as CEO of co-defendant Neoforma, and as such do not

support jurisdiction over Mr. Zollars individually. Third, none of the allegations are supported by any evidence, and therefore are insufficient as a matter of law. Finally, this Court cannot, as a matter of law, invoke jurisdiction over Mr. Zollars under the antitrust laws. For these reasons, the complaint against Mr. Zollars should be dismissed.

A. Mr. Zollars Has Not Engaged In Any Business or Real Estate Transactions In the State of Missouri

Plaintiff accuses Mr. Zollars of engaging in transactions for hospital supplies and in having (or committing tortious acts by having) contracts for escrow accounts and real estate in Missouri. (Opposition, p. 3.) By doing so, plaintiff appears to be invoking either § 506.500(1) or § 506.500(2), which allow jurisdiction over causes of action arising from the transaction of any business or the making of any contract within Missouri. Mo. Rev. Stat. § 506.500(1)-(2). However, plaintiff offers no evidence to support its position; and the only allegations it makes in this regard appear in paragraph 176 of the Complaint. (Opposition ¶ 6.) This is insufficient, especially in light of Mr. Zollars' declaration to the contrary.

"[F]acts adduced in opposition to jurisdictional allegations are considered more reliable than mere contentions offered in support of jurisdiction." *Leasco Data Processing Equip. Corp.,* 319 F.Supp. 1256, 1260 (S.D.N.Y. 1970), *rev'd. on other grounds,* 468 F.2d 1326. Here, the only evidence of jurisdiction is in Mr. Zollars' declaration. Mr. Zollars does not own, rent, lease, or utilize any property of any kind in the State of Missouri. (Declaration of Robert J. Zollars ("Zollars Dec.") ¶ 3.) He is not personally a party to any contract governed by Missouri law, executed in Missouri, or with any company or individual located in Missouri. (*Id.* ¶ 4.) And, he does not conduct any personal business in the State. (*Id.* ¶ 5.) Facts such as these refute plaintiff's contrary allegations and arguments. *Leaseco,* at 1260. Accordingly, there is no jurisdiction over Mr. Zollars under § 506.500(1)-(2).

B. Unsupported Allegations In The Complaint Cannot Be A Basis For Jurisdiction Over Mr. Zollars Because The Allegations Describe Things Mr. Zollars' Supposedly Did Only In His Capacity As CEO Of Neoforma

Mr. Zollars has been sued individually and has moved to dismiss all allegations levied against him in his personal capacity alone. Although it has the burden of proving that jurisdiction over Mr. Zollars is proper, *Enterprise Rent-A-Car Co. v. U-Haul Int'l., Inc.*, 327 F.Supp.2d 1032, 1036 (E. D. Mo. 2004), plaintiff's Opposition focuses almost exclusively on actions and statements that were made by Mr. Zollars, not individually, but solely in his capacity as CEO of Neoforma. For example, Mr. Zollars' allegedly made wrongful "statements as the CEO of the publicly traded Neoforma, Inc.," which were printed in The Wall Street Journal on December 20, 2001. (Opposition, p. 1 ¶ 3 [emphasis added]; *see also* Complaint ¶ 376.) Similarly, the complaint "describes the notice given to Mr. Zollars and his company Neoforma Inc. about the failure to obtain injunctive relief from the cartel's actions," and "the impending threat of the monopolization of hospital supplies from the sale of Neoforma, Inc. to GHX, LLC. As CEO [of Neoforma], Zollars will determine and control whether this event occurs." (Opposition, p. 2 ¶¶ 4, 5 [emphasis added], citing Complaint ¶¶ 399-422.) These allegations, which focus exclusively on Mr. Zollars' actions as a representative of a corporation, do not support the exercise of jurisdiction over Mr. Zollars as a matter of law. *Cantrell v. Extradition Corp. of America*, 789 F.Supp. 306, 309 (W.D. Mo. 1992) (recognizing the "fiduciary shield" doctrine); *see also Cawley v. Bloch,* 544 F.Supp. 133, 135 (D. Md. 1982) (holding that an individual defendant who acted in Maryland as a representative of his corporation" and not in his "individual capacity" could not be subject to personal jurisdiction under that State's long-arm statute).

C. Plaintiff Has Failed To Carry Its Burden Of Proof Because It Has Not Presented Any Evidence That Mr. Zollars Engaged In Any Wrongdoing

While allegations in a complaint "are viewed in the light most favorable to the plaintiffs, there must nonetheless be some evidence upon which a prima facie showing of jurisdiction may be found to exist." *Tax Lease Underwriters, Inc. v. Blackwall Green, Ltd.,* 613

F.Supp. 1082, 1084 (E.D. Mo. 1985) (emphasis added); *see also, Hanline v. Sinclair Global Brokerage Corp.,* 652 F.Supp. 1457, 1458 (W.D. Mo. 1987). Here, there is none. As plaintiff tacitly admits, the only allegations against Mr. Zollars in his individual capacity are those set forth in paragraph 176 of the Complaint. (Opposition, ¶ 6.) Contrary to plaintiff's suggestion, these allegations do not "describe[] Zollars as an antitrust person with a significant personal interest separate from Neoforma, Inc. by virtue of having been an officer in Cardinal." (*Id.*) Rather, these allegations simply state that Mr. Zollars was an untitled, un-ranked "Cardinal employee" who "left Cardinal and later joined Neoforma." (Complaint ¶ 176 (emphasis added); *see also* Mr. Zollars' Suggestions, p. 6.) There is no evidence (nor even an allegation) that Mr. Zollars engaged in any tortious conduct as a Cardinal employee. Accordingly, plaintiff's argument that Mr. Zollars has an "interest" in the alleged antitrust violations by virtue of the position he held at Cardinal cannot be the basis of jurisdiction as a matter of law. (Opposition, p. 2 ¶ 6; *Tax Lease,* at 1084; *Hanline,* at 1458.)

III. THERE IS NO JURISDICTION OVER MR. ZOLLARS UNDER THE ANTITRUST LAWS

As set forth in Mr. Zollars' opening papers, there is no basis for jurisdiction over Mr. Zollars under the antitrust laws. In opposition, however, plaintiff argues that jurisdiction is proper under the antitrust laws because (1) there is a nationwide service of process provision in 15 U.S.C. § 5; and (2) Mr. Zollars is subject to jurisdiction based on his alleged "responsib[ility] for having in place internal controls" at Neoforma designed to "prevent losses to Neoforma" and its "shareholders." (Opposition, p.6-7.) These arguments lack merit.

With respect to the nationwide service of process argument, 15 U.S.C. § 22 cannot be a basis for jurisdiction because that "nationwide" service of process statute applies to corporations only. (Defendant Zollars' Suggestions, pp. 8-9; *see also* 15 U.S.C. § 22; *Kingsepp vs. Wesleyan University*, 763 F. Supp. 22, 25 (S.D.N.Y. 1991).) Recognizing this, plaintiff now argues in opposition that this Court should invoke jurisdiction under 15 U.S.C. § 5 because it would "facilitate the adjudication of this matter." (Opposition, p. 7.) But as this Court

recognized in its April 20, 2005 Order Denying Plaintiff's Motion for U.S. Marshall Service of Process, plaintiff cannot invoke 15 U.S.C. § 5 because it is not the U.S. Attorney. Stated another way, 15 U.S.C. § 5 does not apply to private actions by corporations. (*See* 15 U.S.C. § 5; *Greer v. Stoller*, 77 F.1, 3 (W.D. Mo. 1896); *see also Albert H. Cayne Equipment Corp. v. Union Asbestos & Rubber Co.,* 220 F.Supp. 784 (S.D.N.Y. 1963).)

Plaintiff's next argument, that Mr. Zollars "subjected himself to federal antitrust law" because he allegedly violated his responsibility to Neoforma and its shareholders to maintain adequate "internal controls under The Sarbanes-Oxley Act," by "execut[ing] long term exclusive agreements between Neoforma" and Novation, LLC and GHX, LLC, is patently ludicrous. First, there are no allegations in the complaint – let alone evidence – of Mr. Zollars being responsible for "internal controls" under Sarbanes-Oxley. But even if such allegations existed, Mr. Zollars would have undertaken such responsibilities on behalf of Neoforma, and not in his personal capacity. Second, any contracts that Mr. Zollars might have executed on behalf of Neoforma are just that – contracts executed in his capacity as CEO of Neoforma, on behalf of Neoforma. They have nothing to do with Mr. Zollars' personal liability, and are irrelevant to a consideration of whether this Court can exercise personal jurisdiction over Mr. Zollars as an individual in this case. Finally, there are no allegations in the Complaint demonstrating that plaintiff has any standing to sue as a shareholder, or on behalf of Neoforma, for Mr. Zollars' alleged antitrust violations. This argument is frivolous, and should be given no weight.

IV. THE "CONSPIRACY THEORY" OF JURISDICTION IS INAPPLICABLE BECAUSE THE EIGHTH CIRCUIT HAS NOT ADOPTED IT, AND THERE IS NO NEXUS BETWEEN MR. ZOLLARS' ALLEGED CONDUCT AND THE ALLEGED CONSPIRACY

Plaintiff also argues that jurisdiction exists under Missouri's long-arm statute because Mr. Zollars engaged in tortious conduct in the State by being a member of a conspiracy to commit antitrust and RICO violations. (Opposition, pp. 3-5.) This is sometimes known as the "conspiracy theory" of jurisdiction. The conspiracy theory of jurisdiction "is based on two principles: (1) that the acts of one co-conspirator are attributable to all co-conspirators; and (2)

that the constitutional requirement of minimum contacts between non-resident defendants and the forum can be met if there is a substantial connection between the forum and a conspiracy entered into by such defendants." *Cawley,* 544 F.Supp. at 134; *West Virginia v. Morton International, Inc.*, 264 F.Supp. 689, 691-692 (D. Minn. 1967); *I.S. Joseph Co., Inc. v. Mannesmann Pipe & Steel Corp. et. al.,* 408 F.Supp. 1023, 1024 (D. Minn. 1976). Thus, "when several individuals (1) conspire to do something (2) that they could reasonably expect to have consequences in a particular forum, if one co-conspirator (3) who is subject to personal jurisdiction in the forum (4) commits overt acts in furtherance of the conspiracy, those acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction even if they have no other contacts with the forum." *Cawley,* at 134.

An exhaustive search of the case law reveals that the Eighth Circuit has not adopted or even ruled on this "co-conspirator theory" of jurisdiction. Importantly, however, several district courts within the Eighth Circuit have rejected this expansive theory. *See, e.g., I.S. Joseph Co.*, at 1024; *see also Morton,* at 691-692 (rejecting the co-conspirator theory to expand venue to out of state defendant). Even if the Court were to accept this theory of jurisdiction, it would still not be enough to draw Mr. Zollars into this lawsuit because there is no factual evidence in the Complaint to support allegations of Mr. Zollars' involvement in a conspiracy.[1] Indeed, the only allegations concerning Mr. Zollars in his personal capacity are found in paragraph 176 of the Complaint. These allegations concern Mr. Zollars former employment at Cardinal, a fact that has no "nexus" or relationship to the alleged conspiracy. *In re Bulk Popcorn Antitrust Litig.,* 1990 U.S. Dist. LEXIS 16333 at * 9-*10 (D. Minn. 1990) (holding that the

[1] Contrary to plaintiff's belief, the argument that plaintiff must allege evidence of Mr. Zollars' involvement in alleged wrongdoing does not mean that plaintiff must "aver[] that Mr. Zollars committed RICO predicate acts" or other conspiratorial acts "with his own hands." (Opposition, p. 3.) Rather, it means that, in order for the Court to have jurisdiction over Mr. Zollars, plaintiff must provide evidence in the Complaint demonstrating that Mr. Zollars in his personal capacity was a member of a conspiracy, or conspired to do something with another defendant who is subject to the Court's jurisdiction. *See, e.g., Hanline v. Sinclair Global Brokerage Corp.,* 652 F.Supp. 1457, 1458-1459 (W.D. Mo. 1987); *Cawley,* at 134. There is no such evidence here.

conspiracy theory cannot be a basis for jurisdiction over a non-resident defendant that lacks minimum contacts with the forum state unless there is a relationship or nexus between the alleged conspiracy and the specific factual assertion).[2] Without factual evidence connecting Mr. Zollars to the conspiracy, plaintiff cannot use the "conspiracy theory" of jurisdiction to salvage its inadequate jurisdictional allegations against Mr. Zollars. *Hanline v. Sinclair Global Brokerage Corp.,* 652 F.Supp. 1457, 1458-1459 (W.D. Mo. 1987).

V. PLAINTIFF HAS NOT MET ITS BURDEN OF PROVING JURISDICTION IS PROPER UNDER THE RICO STATUTES

As a last resort, plaintiff alleges that Mr. Zollars is subject to the court's jurisdiction as a "co-conspirator" in RICO actions. (Opposition, p. 3.) This allegation, too, is meritless. As set forth above, there are no facts in the Complaint to support the inference that Mr. Zollars conspired with any of the named defendants, and the Eighth Circuit has not adopted the "conspiracy theory" of jurisdiction. Similarly, plaintiff has failed to allege any evidence that Mr. Zollars, in his personal capacity, took part in any RICO-based conspiracy, and thus the claim fails as a matter of law. *Hanline,* at 1458-1459. However, in the event that the Court considers whether jurisdiction is proper under the RICO statutes, we address such argument here.

In 18 U.S.C. § 1965(b), "Congress provided for service of process upon RICO defendants residing outside the federal court's district when it is shown that 'the ends of justice' require it." *Butcher's Union Local No. 498 et al. v. SDC Investment, Inc. et al.,* 788 F.2d 535, 538 (9th Cir. 1986); *see also Rust v. City of Kansas City,* 1985 U.S. Dist. LEXIS 12328, *3 (W.D. Mo.) "Under the standard rules of statutory construction, the court should construe this provision in accordance with the ordinary meaning of the words used, and the "purpose or object" Congress sought to accomplish by the legislation." (*Butcher's,* at 538.). The purpose or object of the RICO statutes is to "eradicate organized crime in this country," and the "ends of justice" provision is intended to "bring all members of a nationwide RICO conspiracy before a

[2] Although this case has not been officially published, it was cited in plaintiff's Opposition and, as such, is addressed here.

court in a single trial." *Id.* "Consequently, the 'ends of justice' requirement in § 1965(b) is fulfilled when *venue* is properly laid in the forum district at least as to *one* defendant and there exists *no* other district in which venue would be appropriate as to all defendants." (Roddy, K., *Rico in Business and Commercial Litigation,* p. 6-18, § 6:06 (McGraw-Hill 1991), *citing Butcher's Union,* at 539.)

In this case, plaintiff has failed to carry its burden of proving that Mr. Zollars is subject to jurisdiction under 18 U.S.C. § 1965(b). In particular, plaintiff has made no effort at all to demonstrate that the "ends of justice" have been satisfied, pursuant to § 1965(b).[3] And, although venue might be properly laid here with respect to at least one defendant, there is another, more appropriate district in which all defendants might be subject to venue and jurisdiction: The Kansas District Court. That is where plaintiff filed its first lawsuit against many of the other defendants in this case, and that is where several of those defendants have urged this Court to transfer this case.

VI. CONCLUSION

Because it has failed to allege any facts supporting its baseless allegations, plaintiff has not carried its burden of proof on the issue of jurisdiction. Contrary to what plaintiff suggests, Mr. Zollars does not transact business in this State, nor is he a party to any contracts in this State. He is not a party to any alleged conspiracy, or to any alleged RICO or antitrust violations. Accordingly, the exercise of personal jurisdiction over Mr. Zollars would violate Missouri's long-arm statute and due process of law and the complaint against Mr. Zollars should be dismissed.

[3] In fact, plaintiff does not even mention § 1965(b). Instead, plaintiff points to 18 U.S.C. § 1962 – the substantive, criminal RICO law – and incorrectly conflates § 1962's substantive requirements with § 1965's jurisdictional requirements.

Respectfully Submitted

s/ John K. Power

John K. Power
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
816-421-4800
816-421-0596
john.power@husch.com

Stephen N. Roberts
Janice Vaughn Mock
Nossaman, Guthner, Knox & Elliott
50 California Street, 34th Floor
San Francisco, CA 94111
415-398-3600
415-398-2438
sroberts@nossaman.com
jvaughnmock@nossaman.com

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 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::

Andrew M. DeMarea	ademarea@stklaw.com
Jonathan H. Gregor	jgregor@stklaw.com
Kathleen Ann Hardee	khardee@stklaw.com
Bret D. Landrith	landrithlaw@cox.net
Mark A. Olthoff	molthoff@stklaw.com
Logan Wade Overman	logan.overman@stklaw.com

/s/ John K. Power
John K. Power

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

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

REPLY SUGGESTIONS IN SUPPORT OF CURT NONOMAQUE AND ROBERT BAKER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND FOR FAILURE TO STATE A CLAIM

Pursuant to Federal Rules of Civil Procedure 12b(2) and 12(b)(6), Defendants Curt Nonomaque ("Nonomaque") and Robert Baker ("Baker") (collectively "Defendants") submit these Reply Suggestions in Support of their Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim.

I. INTRODUCTION

Defendants' Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim ("Motion to Dismiss") established that Defendants lacked the minimum contacts necessary for this Court's exercise of personal jurisdiction over them. Plaintiff's Suggestions in Response ("Plaintiff's Response") provides no evidence of any contacts between Defendants and Missouri; indeed, Plaintiff implicitly concedes that there are no such contacts and instead asserts several frivolous legal arguments for the exercise of personal jurisdiction over Defendants.

In fact, as shown below, Plaintiff: (1) confuses venue with personal jurisdiction; (2) focuses on an alleged conspiracy about which it lacks standing to complain; (3) advances

arguments that have been rejected as a basis for service of process under the Missouri long-arm statute; (4) completely ignores the required elements of the theories for jurisdiction it invokes; (5) relies on cases that have been expressly overruled by the U.S. Supreme Court; and, (6) relies on a statute that applies only to actions brought by the government.

II. ARGUMENT AND AUTHORITIES

A. Plaintiff Erroneously Asserts that *In Personam* Jurisdiction Exists Where Venue is Proper

In its Response, Plaintiff confuses the concept of proper *venue* with the issue of whether the Court can exercise *in personam* jurisdiction over Defendants. Specifically, on page 5 of Plaintiff's Response, Plaintiff argues that personal jurisdiction over Defendants is proper under the general *venue* statute, 28 U.S.C. § 1391. Plaintiff's argument is wholly without merit, as it fails to recognize the distinction between personal jurisdiction, which asks whether the lawsuit is in a court that has "power to exercise control over the parties," and venue, which asks primarily whether the court is a "convenient forum." *See Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). *See also Action Embroidery Corp. v. Atlantic Embroidery, Inc*., 368 F.3d 1174, 1178-1179 (9th Cir. 2004) ("It has long been recognized that the question of a federal court's competence to exercise personal jurisdiction over a defendant is distinct from the question of whether venue is proper.").

B. Plaintiff Erroneously Relies on its Conclusory, and Irrelevant, Allegations of Conspiracy

In addition, Plaintiff alleges that personal jurisdiction is proper because Defendants allegedly participated in two conspiracies with effects and/or overt acts in Missouri. First, Plaintiff alleges that Defendants participated in a conspiracy to inflate medical supply prices to defraud Medicare, Medicaid and Champus government programs and that the harmful effects of

that alleged scheme were felt in Missouri. Second, Plaintiff points to its conclusory allegations that Defendants conspired with the other parties in the case to harm Medical Supply in Missouri. Neither of these alleged conspiracies bolsters Plaintiff's claim that personal jurisdiction can be exercised over Defendants.

1. Plaintiff Lacks Standing to Complain About a Conspiracy to Artificially Inflate Prices to Defraud Medicare and Other Government Programs

First, even if Plaintiff's wholly conclusory and fanciful allegations of an alleged conspiracy to inflate medical supply costs in order to defraud Medicare and other government programs were true—and they are not—they are completely beside the point. Plaintiff, as a private company who wants to compete in the market for medical supply products simply has no standing to complain about high medical supply costs. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990) (holding that a firm has not suffered antitrust injury where competitors have agreed to fix prices); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (same). Because Plaintiff is not the federal government or the government of any state, but rather a private corporation, it cannot seek redress for harm that those governmental entities suffered as a result of this alleged medical supply product conspiracy. *See Taubman Realty Group Ltd. Partnership v. Mineta*, 198 F. Supp. 2d 744, 755 (E.D. Va. 2002) ("Ordinarily, a plaintiff must claim a specific, personalized injury in order to invoke the jurisdiction of a federal court because courts do not sit to entertain generalized grievances that are shared by the public at large."), *aff'd*, 320 F.3d 475 (4th Cir. 2003). Indeed, high medical supply costs would benefit Plaintiff, not harm it, because Plaintiff's ability to compete on price would be enhanced if its competitors were inflating their prices. Plaintiff cannot base its argument that specific jurisdiction exists in this case by focusing on a claim for which it has no standing to sue. *See Williams v. FirstPlus Home Loan Trust 1996-2*, 209 F.R.D.

404, 412-413 (W.D. Tenn. 2002) (noting that where plaintiffs failed to allege that defendants had injured the plaintiffs, there was no basis for the exercise of specific jurisdiction).

2. Missouri is Not Alleged to be the Focal Point of the Alleged Conspiracy to Artificially Inflate Prices to Defraud Medicare and Other Government Programs

However, there is an independent reason for rejecting this basis for personal jurisdiction. Missouri was not the focal point of this alleged scheme and, therefore, personal jurisdiction by this Court would not be proper under this theory even if defrauding Medicare was properly a part of this lawsuit (which it is not) and even if Plaintiff alleged specific facts about Defendants' conduct in artificially inflating prices (which it has not).

When a plaintiff bases personal jurisdiction on the theory that tortious or wrongful activity committed out of the forum state had an effect inside the forum state, the plaintiff must establish that 1) the defendant committed an intentional tort; 2) the plaintiff felt the brunt of the harm in the forum state, such that the forum state was the focal point of the tortious activity; and 3) the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity. *Calder v. Jones*, 465 U.S. 783, 788-789 (1984). *See also Hicklin Engineering, Inc. v. Aidco, Inc*., 959 F.2d 738, 739 (8th Cir. 1992). Plaintiff has not alleged that Missouri is the focal point for the alleged scheme to artificially raise medical supply product prices or to defraud Medicare and similar government programs. Instead, Plaintiff alleges that it was a nationwide scheme. This is fatal to jurisdiction under the *Calder* effects test. *See ESAB Group, Inc. v. Centricutt, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997) (finding no personal jurisdiction over defendant because the defendant did not "manifest behavior intentionally targeted at and focused on South Carolina" but "[i]nstead, ... focused its activities more generally on customers located throughout the United States and Canada without focusing on and targeting South Carolina.").

3. Missouri Has Rejected the Imputation of Contacts with the Forum on the Basis of Conspiracy Allegations

In any event, Plaintiff cites no authority for the proposition that the Missouri long-arm statute justifies service on a non-resident merely because that non-resident is alleged to be a co-conspirator in a scheme with an impact on Missouri. In fact, Missouri courts have rejected the notion that personal jurisdiction can arise from a co-conspirator's contacts with the forum. *See State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377, 383-84 (Mo. banc 1979) (holding that allegations of a conspiracy does not confer upon the court personal jurisdiction over a defendant who did not meet the minimum contacts test); *City of St. Louis v. American Tobacco Co.*, No. 982-09752, 2003 WL 23277277, *7(Mo. Cir. Dec 16, 2003) (not designated for publication)(rejecting the notion that an alleged co-conspirator's activities in the forum state can be imputed to a non-resident as "inconsistent with the due process requirement that each individual defendant must, on its own, have sufficient minimum contacts with the forum state before personal jurisdiction can be imposed.").

4. Even if Conspiracy Jurisdiction Were a Viable Theory in this Case, Plaintiff Has Failed to Adequately Allege Defendants Participated in Any Conspiracy

Moreover, Plaintiff's conclusory allegations of a conspiracy would not pass muster even in jurisdictions that, unlike Missouri, have adopted the conspiracy theory of personal jurisdiction. "To satisfy this standard, the plaintiffs must: (1) make a prima facie factual showing of a conspiracy (*i.e.*, point to evidence showing the existence of the conspiracy and the defendant's knowing participation in that conspiracy); (2) allege specific facts warranting the inference that the defendant was a member of the conspiracy; and (3) show that the defendant's co-conspirator committed a tortious act pursuant to the conspiracy in the forum." *United Phosphorus, Ltd. v. Angus Chemical Co.*, 43 F.Supp.2d 904, 912 (N.D. Ill. 1999).

Plaintiff's bare assertions regarding either the Medicare fraud conspiracy or the

conspiracy allegedly directed at Plaintiff do not come close to meeting this test. Plaintiff's Complaint does not contain, and Plaintiff's Response does not cite, any allegation or evidence regarding Defendants' state of mind regarding any alleged conspiracy occurring in or directed toward Plaintiff or the state of Missouri. There is simply no allegation that Messrs. Baker or Nonomaque even communicated with anyone who committed any tortious or wrongful act in Missouri, or were even aware of such conduct. *See Lehigh Val. Industries, Inc. v. Birenbaum*, 527 F.2d 87, 93-94 (2nd Cir. 1975) (noting that "the bland assertion of conspiracy or agency is insufficient to establish jurisdiction" and holding that there is personal jurisdiction where there are no allegations of specific facts which would connect the defendant to the activity within the forum).

C. Plaintiff's Arguments that Jurisdiction Exists under RICO Rely on Overruled Precedent

Plaintiff then turns to its RICO allegations and argues that the RICO claim justifies this Court's exercise of personal jurisdiction over Defendants and that the Court can exercise pendent personal jurisdiction over the other claims. However, Plaintiff has failed to allege, much less prove, that Nonomaque or Baker engaged in, authorized, ratified, or even knew about, any acts of racketeering. Plaintiff tries to plug that gap by arguing that the absence of racketeering acts is no obstacle to its racketeering claim against Defendants. Specifically, Plaintiff argues that "three circuits have ruled that any plaintiff injured by an overt act may bring a RICO conspiracy claim, whether or not the overt act also is a racketeering act." *See* Plaintiff's Response, at p. 4 (citing *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997), *cert. granted and vacated as moot*, 119 S.Ct. 442 (1998); *Schiffels v. Kemper Financial Services*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989)).

However, what Plaintiff fails to tell this Court is that the U.S. Supreme Court, in *Beck v. Prupis*, 529 U.S. 494 (2000), overruled those three cases, by name, and held that an overt act that is not an act of racketeering does not give rise to a RICO conspiracy claim. *Id.* at 500, 505.

D. Plaintiff's Argument that the Sherman Act Justifies the Exercise of Personal Jurisdiction over Defendants Relies on a Statute that Applies only to Cases Brought by the Government

Plaintiff's final gambit is to argue that a subsection of the Sherman Act allows an individual to be summoned into court whether they reside in the district or not if the "ends of justice" require such an exercise of jurisdiction. *See* Plaintiff's Response, at p. 6 (relying on 15 U.S.C. § 5). However, as this Court has already informed Plaintiff in its April 20, 2005 Order denying Plaintiff's Motion for Service under this Statute, this statute applies only to actions brought by the government and is not relevant in this case. *See also Albert H. Cayne Equipment Corp. v. Union Asbestos & Rubber Co.*, 220 F. Supp. 784, 789 (S.D.N.Y. 1963) (noting that Section 5 of the Sherman Act is expressly limited to suits by the government).

III. CONCLUSION

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

Respectfully Submitted

s/ John K. Power
John K. Power
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
816-421-4800
816-421-0596
john.power@husch.com

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 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::

Andrew M. DeMarea	ademarea@stklaw.com
Jonathan H. Gregor	jgregor@stklaw.com
Kathleen Ann Hardee	khardee@stklaw.com
Bret D. Landrith	landrithlaw@cox.net
Mark A. Olthoff	molthoff@stklaw.com
Logan Wade Overman	logan.overman@stklaw.com

/s/ John K. Power
John K. Power

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

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

DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO TRANSFER, DISMISS AND/OR STRIKE

Defendants' motion to transfer, dismiss or strike should be granted. Plaintiff fails to meaningfully address defendants' core legal arguments. Instead, plaintiff conjures up fanciful conspiracy theories, supposed intimidation encouraged by the Kansas judiciary (in this case and in other cases completely unrelated to this litigation) and purported mysterious disappearances as grounds for denying defendants' motion. Plaintiff also relies upon inapplicable or overruled decisions and misapplies the case law cited in its opposition to defendants' motion. Accordingly, this case should be transferred to the District of Kansas for further disposition or dismissed altogether.

I. This Case Should be Transferred to The District of Kansas.

This case should be transferred to the Court that is most familiar with the facts, parties and counsel–the United States District Court for the District of Kansas. Plaintiff even admits that "[b]oth of these complex litigations share common issues of law and fact." Plaintiff's Sugg. in Opp. to Novation, *et al.*'s Motion to Transfer Venue and/or to Dismiss, at p. 5 (referring to the similar Kansas and Missouri federal actions). Plaintiff's argument in opposing transfer, based upon a supposed "pattern and practice of intimidating witnesses and their counsel in Kansas District [C]ourt

cases" (*id*.) as outlined in the affidavit of Sam Lipari, plaintiff's president, fails to demonstrate any sound reason why the case should not be sent to the Court that in effect has already handled it.

First, Mr. Lipari's caustic affidavit is not grounded in fact and should be disregarded. In it, he asserts:

- "Bias reached the Office of the Clerk for the Tenth Circuit Court of Appeals . . . ." (Lipari Affidavit, p. 2, ¶ 4);
- "Open hostility exhibited by the Kansas District Court and Tenth Circuit personnel against the claims of [Medical Supply Chain] and . . . Kansas government attorneys were enlisted to retaliate against [Bret Landrith] for bringing these claims . . . ." (*Id.* at p. 3, ¶ 5);
- "The City of Topeka and the Topeka office of the US Attorney threatened and intimidated other witnesses . . . because of their testimony in Mr. Landrith's cases . . . ." (*Id.* at ¶ 7);
- "When the defendants realized they had to answer [Medical Supply Chain's] action in Missouri, [Lipari] experienced intensified presence of law enforcement officials. Including uniformed and plain-clothes surveillance . . . ." (*Id.* at p. 9, ¶ 23);
- Defendants requested surveillance of Lipari's home and were "targeting" his fiancée and her daughter (*id.* at p. 10, ¶ 26);
- Felony obstruction of justice and conspiracy involving the Kansas Disciplinary Administrator's Office, Shughart Thomson & Kilroy and Federal Magistrate O'Hara (*id.* at pp. 11-12, ¶ 30); and
- Lipari's claim that "I have feared for my life during parts of this litigation especially after calling the Ft. Worth, TX office of the US Attorney to ask to speak to the attorney that issued the criminal subpoenas against my cases defendants and being told she was dead and then finding out that the FCA attorney had died shortly before her. . . " and that witnesses would be placed in "jeopardy" if the case were allowed to proceed in Kansas "as a result of the hostility the Kansas District court has for victims of witness intimidation and harassment and the obvious willingness of the Kansas judicial branch to assist in the harassment and intimidation." *Id.* at p. 13, ¶ 33.

Based upon these wild allegations in the affidavit, plaintiff argues, "[o]bviously, a transfer to the District Court of Kansas cannot be in the interest of justice." Sugg. in Opp., at p. 4. Contrary to its

unfounded assertions, however, because the Kansas District Court is thoroughly familiar with plaintiff's claims and allegations, transfer is warranted.

Second, plaintiff argues that the Kansas District Court does not have "sufficient resources" to handle this litigation. *Id.* at p. 4. As "evidence" supporting this contention, plaintiff relies upon a letter its counsel sent to Chief Judge John Lungstrum on November 7, 2003, that went unanswered. Again, contrary to the argument, the Kansas District Court docketed the case, held two hearings and reviewed multiple pleadings before dismissing the suit. Plaintiff's disappointment in the result and Mr. Landrith's unanswered correspondence are not competent evidence that the Kansas Federal Courts are too taxed to handle plaintiff's case a second time.

Finally, plaintiff relies upon *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), as a basis for denying transfer. Specifically, plaintiff cites the Eight Circuit's "rule that contribution may be enforced among joint tortfeasors in an antitrust action." Plaintiffs' Sugg. in Opp. to Novation, *et al.*'s Motion to Transfer Venue and/or to Dismiss, at p. 5. While it is not clear why this "rule" is important to plaintiff, *Professional Beauty Supply* has been overruled on the issue of contribution in antitrust cases. *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630 (1981) (holding federal antitrust laws do not allow a defendant a right to contribution from other participants in an unlawful antitrust conspiracy). With respect to the indemnification "rule," plaintiff argues that this case must remain in the Western District of Missouri because "Medical Supply . . . seeks to enjoin indemnification of defendants." Plaintiff's Sugg. in Opp. to Novation, *et al.*'s Motion to Transfer Venue and/or to Dismiss, at p. 5. However, the issue of indemnification is also one that does not affect plaintiff because it is an issue to be addressed solely among defendants, if it is an issue at all. Moreover, the rule regarding indemnification is one

of federal law, as discussed in *Texas Industries*, and is not one that differs from circuit to circuit. As such, this is not a valid basis upon which to deny transfer.

For the reasons set forth in their Motion and Suggestions in Support, the defendants' motion to transfer should be granted.

II. Plaintiff Does Not Allege any New or Different Conduct on the Part of These Defendants in This Lawsuit that was not Alleged in the Kansas Lawsuit.

Plaintiff does not specifically address the arguments these defendants made in their Suggestions in Support of the Motion to Transfer, Dismiss or Strike. It instead incorporates the oppositions to other defendants' motions. To that extent, these defendants also incorporate the other defendants' suggestions and reply suggestions as if fully set forth herein.

Plaintiff does argue, however, that the defendants "seek to contradict" *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955). That argument is meritless. In *Lawlor*, the Supreme Court held that a prior judgment "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 328. Unlike *Lawlor*, however, collateral estoppel and/or *res judicata* bar the claims asserted by the plaintiff here because *no* new claims, or conduct resulting in the assertion of new claims, are alleged to have arisen with respect to these defendants since the entry of the previous judgment. The earlier lawsuit was based upon the same conduct, transaction, set of operative facts and claims at issue here.[1] That plaintiff may have "repackaged" some of the alleged conduct into different theories or causes of action does not shield it from dismissal through application of *res judicata* and/or collateral estoppel.

[1] Plaintiff's allegation that it could not have known of its damages until January 21, 2005 when Magistrate O'Hara testified in plaintiff's counsel's disciplinary hearing (Compl. ¶ 613) is completely belied by the fact that the same damage claims were filed in the earlier lawsuit.

In dismissing the 2002 case, the District Court of Kansas held that plaintiff failed to state a claim for relief under each of the federal antitrust acts alleged and that there was no private right of action under the USA Patriot Act or Hobbs Act. The Tenth Circuit affirmed. Despite this, plaintiff now reasserts many of the same causes of action here which are based upon defendants' same alleged conduct. Further, the Missouri antitrust claim, "interlocking directorate" claim and RICO claim are all based upon defendants' same alleged conduct as asserted in the Kansas case and could have been brought in the Kansas District Court when this case was first filed. As such, all of plaintiff's claims, those which are simply reasserted and those which may have been re-pleaded into new claims and causes of action, should be dismissed.

III. Plaintiff's Claims and Allegations Against "Shughart, Thomson & Kilroy Watkins Boulware" and Federal Magistrate James P. O'Hara Should be Dismissed and/or Stricken.

Plaintiff's Complaint imaginatively references far-fetched conspiracies against plaintiff and plaintiff's attorney as the "grounds" for making allegations against Magistrate O'Hara and for its claims against "Shughart Thomson & Kilroy Watkins Boulware." Because these allegations and claims are not only illusory, but also immaterial, impertinent and scandalous, they should be dismissed and/or stricken.

Plaintiff argues in its suggestions in opposition that "[t]here is no automatic immunity for attorneys for their tortious conduct." Sugg. in Opp., at p. 3, ¶ 6. Plaintiff then cites inapposite case law that does not salvage its claims. In fact, the cases plaintiff cites actually support dismissal of all claims against Shughart Thomson & Kilroy, which is named as a defendant in this lawsuit simply because this firm competently represented defendants in plaintiff's first frivolous lawsuit in Kansas. An attorney representing a party who is alleged to have been involved in a RICO enterprise is an insufficient basis for RICO liability. In *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997), the Eighth Circuit held that "an attorney or other professional does not conduct [a RICO] enterprise's

affairs [and thus, incur liability] through run-of-the-mill provision of professional services." *Id.* at 1348 (citations omitted); *see also Raymark Industries v. Stemple*, 714 F. Supp. 460, 474 (D. Kan. 1988) (also cited by plaintiff and holding that "the court . . . has serious doubts as to any possible liability [for alleged RICO violations]on the part of the local counsel against whom no intentional wrongdoing has been alleged.") (citation omitted). Plaintiff has alleged nothing against Shughart Thomson & Kilroy beyond its actions in effectively defending these defendants in plaintiff's Kansas lawsuit. Such allegations simply do not rise to the level of "participation" (either knowing or unknowing) in a RICO enterprise.

Havens v. Hardesty, 600 P.2d 116 (Colo. App. 1979), also mentioned in plaintiff's suggestions in opposition, apparently is cited for the proposition that, under Colorado state law, an attorney may be held personally liable for his or her intentional torts. *Id.* at 164-65. However, Shughart Thomson & Kilroy's representation of these defendants in the Kansas lawsuit is an insufficient basis for an intentional tort claim under Missouri law. Plaintiff fails to identify any theory upon which the defendants' law firm owed plaintiff any duty of care let alone how it was breached or caused damages.

Because the allegations against "Shughart Thomson & Kilroy Watkins Boulware" and Magistrate O'Hara are bogus, they should be dismissed or stricken.

CONCLUSION

The defendants' motion has gone largely unchallenged. Even where there is some opposition, plaintiff offers nothing other than an affidavit containing unsupported and wild allegations of conspiracy, intrigue, witness intimidation, and unexplained disappearances. Plaintiff fails to offer competent, coherent argument or applicable legal authority sufficient to overcome Defendants' Motion to Transfer, Dismiss and/or to Strike. Defendant's motion should be granted.

Respectfully submitted,

/s/ Mark A. Olthoff

MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361
ATTORNEYS FOR DEFENDANTS US BANCORP, U.S. BANK NATIONAL ASSOCIATION, PIPER JAFFRAY COMPANIES, JERRY A. GRUNDHOFER, ANDREW CESARE AND ANDREW S. DUFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 4th day of May, 2005, to:

Bret D. Landrith, Esq.
2961 SW Central Park, #G33
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendants

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

MEDICAL SUPPLY CHAIN, INC.,	)	Case No. 05-0210-CV-W-ODS
	)	
Plaintiff,	)	
	)	
NOVATION, LLC	)	
NEOFORMA, INC.	)	
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFFER	)	
ANDREW CESERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY	)	
WATKINS BOULWARE, P.C.	)	
	)	
Defendants.	)	
	)	

SUGGESTIONS IN REPLY TO PLAINTIFF'S SUGGESTION IN OPPOSITION TO NEOFORMA, INC.'S MOTION TO DISMISS COMPLAINT, OR ALTERNATIVELY TO REQUIRE AMENDMENT, PURSUANT TO F.R.C.P. RULES 8 AND 9

I. INTRODUCTORY STATEMENT

Facing a motion to dismiss its complaint because it is largely unintelligible in the first place, plaintiff now completely fails to respond to Neoforma's motion on any substantive ground. Rather, plaintiff has submitted for this Court's consideration only seven lines through which it attempts to "incorporate by reference" at least three other oppositions it has filed in response to different motions on different matters with respect to different defendants. Plaintiff then goes on to compare Neoforma's refusal to answer the 115-page complaint with the actions

of other defendants, and "welcomes" Neoforma's assistance in "drafting a pretrial order," the latter meaning of which is altogether unclear.

This nonsensical and insufficient response to Neoforma's motion should be disregarded, Neoforma's motion should be granted, and the complaint against Neoforma should be dismissed.

II. PLAINTIFF HAS MISUSED RULE 10(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 10(c) of the Federal Rules of Civil Procedure allows a party to incorporate by reference statements made in another pleading previously filed in a case. Fed. R. Civ. P. 10(c). However, this rule of convenience contains restrictions on its use. The permitted incorporation cannot simply adopt vast and multifarious pages of other documents without providing the degree of clarity needed for the responding party to understand the nature and extent of the incorporation. *See Grenier v. Medical Engineering Corp.*, 243 F.3d 200, 205 (5th Cir. 2001); *Heintz & Co., Inc. v. Provident Tradesmens Bank & Trust Co.*, 29 F.R.D. 144, 145 (E.D. Pa 1961). At minimum, the incorporating reference must refer to the specific paragraphs of the other document(s) being relied upon. *Toberman v. Copas*, 800 F.Supp. 1239, 1243 (M.D. Pa 1992) (incorporation must "at a minimum" provide direct reference to paragraphs relied upon); *Federal Nat'l Mortgage Ass'n v. Cobb*, 738 F.Supp. 1220, 1226-27 (N.D. Ind. 1990) (statements to be incorporated must be specifically identified).

Here, plaintiff's amorphously vague reference to and attempted incorporation of "its suggestion opposing VHA, UHC and Novation's motion for dismissal" – three different defendants who have all asserted different bases for dismissal of plaintiff's complaint – cannot possibly meet the clear and specific standard recognized by the federal courts as the proper use of Rule 10. Nor is it a sufficient response to Neoforma's motion to dismiss pursuant to Rules 8 and 9 of the Federal Rules of Civil Procedure.

III. NO AUTHORITY BINDS NEOFORMA TO THE ACTIONS OF ITS CO-DEFENDANTS

In opposing Neoforma's motion to dismiss under Rule 8 and 9, plaintiff asserts that "other defendants were able to answer or in the alternative seek dismissal." (Opposition, ¶ 2). This, however, is insignificant. Plaintiff cites no authority for this proposition being binding on the Court, because none exits. Neoforma is not bound to answer a complaint served on it simply because other defendants have chosen to answer, and especially where, as here, those defendants have also moved for dismissal of the complaint.

Nor is the fact that other defendants' have chosen to respond with a Rule 12 motion persuasive on the point of whether a Rule 8 motion as to Neoforma is well taken or not. The issue for the Court is objectively whether this pleading meets with the requirements of Rule 8 or not, and as briefed in Neoforma's initial Suggestions in support of the motion, the complaint is not proper under Rule 8. While one can admire the attempt by other defendants to make sense of the complaint in propounding a response under Rule 12, a perusal of the Suggestions filed by those defendants in support of their Rule 12 motions illustrates a similar perception of the incomprehensiveness of plaintiff's pleading. If anything, those documents support the propriety of granting the Rule 8 motion.

IV. CONCLUSION

Because plaintiff has failed properly to respond to Neoforma's motion to dismiss, and for all the reasons set forth in Neoforma's initial moving papers, the motion should be granted and the complaint against Neoforma should be dismissed in its entirety.

Respectfully Submitted

s/ John K. Power
John K. Power
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
816-421-4800
816-421-0596
john.power@husch.com

Stephen N. Roberts
Janice Vaughn Mock
Nossaman, Guthner, Knox & Elliott
50 California Street, 34th Floor
San Francisco, CA 94111
415-398-3600
415-398-2438
sroberts@nossaman.com
jvaughnmock@nossaman.com

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::

Andrew M. DeMarea	ademarea@stklaw.com
Jonathan H. Gregor	jgregor@stklaw.com
Kathleen Ann Hardee	khardee@stklaw.com
Bret D. Landrith	landrithlaw@cox.net
Mark A. Olthoff	molthoff@stklaw.com
Logan Wade Overman	logan.overman@stklaw.com

/s/ John K. Power
John K. Power

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

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

s/ John K. Power
John K. Power
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
816-421-4800
816-421-0596
john.power@husch.com

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::

Andrew M. DeMarea	ademarea@stklaw.com
Jonathan H. Gregor	jgregor@stklaw.com
Kathleen Ann Hardee	khardee@stklaw.com
Bret D. Landrith	landrithlaw@cox.net
Mark A. Olthoff	molthoff@stklaw.com
Logan Wade Overman	logan.overman@stklaw.com

/s/ John K. Power
John K. Power

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W- ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Notice of Threat of Sanctions

Comes now the plaintiff Medical Supply and makes notice that the Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cecere and Andrew S. Duff have threatened to seek sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 against plaintiff Medical Supply Chain, Inc. ("Medical Supply Chain"), and its counsel Bret Landrith ("Landrith") if the present action is not withdrawn in 21 days.

Attached are Exb. 1 the letter from Mark Olthoff, Exb. 2 The Motion for Sanctions, Exb. 3 Suggestions in Support of Sanctions.

The plaintiff and its counsel believe the facts of the complaint are best tested by a jury on the basis of evidence and testimony. Medical Supply voluntarily dispenses with the 21 day notice requirement.

Respectfully Submitted
S/Bret D. Landrith
Bret D. Landrith
#KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on May 9, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

Law Offices
SHUGHART THOMSON & KILROY
A Professional Corporation

Mark A. Olthoff
molthoff@stklaw.com
Direct Dial (816) 395-0620
Fax (816) 374-0509

May 10, 2005

VIA ELECTRONIC MAIL and U.S. MAIL

Bret D. Landrith, Esq.
#G33
2961 S.W. Central Park
Topeka, KS 66611

Re: *Medical Supply Chain, Inc. v. Novation, LLC, et al.*

Dear Mr. Landrith:

Enclosed with this letter are Defendants' Motion and Suggestions in Support of Motion for Sanctions in the above-referenced matter pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. § 1927. Please be advised that, under Fed.R.Civ.P. 11(c)(1)(A), Medical Supply Chain has twenty-one (21) days after receipt of this motion to withdraw its claims against defendants. If Medical Supply Chain fails to do so within the time period set forth in Rule 11, defendants intend to and will file the motion and suggestions in support with the Court.

Very truly yours,

MARK A. OLTHOFF

MAO:slp
Enclosures

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

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

DEFENDANTS' MOTION FOR SANCTIONS

Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cecere and Andrew S. Duff (hereinafter collectively referred to as "defendants"), pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927, move this Court for its Order imposing sanctions against plaintiff Medical Supply Chain, Inc. ("Medical Supply Chain"), and its counsel Bret Landrith ("Landrith"). Defendants request that they be awarded their expenses and reasonable attorneys' fees incurred in defending this lawsuit as well as expenses and attorneys' fees incurred in preparing and presenting this motion and suggestions in support. In further support of this motion, defendants state:

1. Plaintiff filed its Complaint in this case on March 7, 2005.

2. In this lawsuit, plaintiff asserts many of the same underlying purported "facts," conduct and many of the same claims against these defendants (or those in privity with them) already dismissed by the Kansas District Court and affirmed by the Tenth Circuit Court of Appeals in *Medical Supply Chain, Inc. v. US Bancorp, et al.,* Case No. 02-2539-CM. Many of the same facts alleged in this case also were alleged in another suit dismissed as to Medical Supply Chain. *Medical Supply Chain, Inc. v. General Elec. Co., et al.*, Case No. 03-2324-CM. Defendants have thus filed motions to dismiss the current lawsuit on a number of separate grounds.

3. Plaintiff has filed additional frivolous and unsupported claims in this lawsuit, including claims against the law firm of "Shughart Thomson & Kilroy, P.C. Watkins Boulware," and has even implicated a current member of the Federal Bench as a participant in conduct it claims constitutes racketeering activity.

4. By filing this frivolous lawsuit, plaintiff and plaintiff's counsel have violated Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 and are liable to defendants for their expenses and reasonable attorneys' fees incurred in defending this lawsuit and preparing and presenting this motion.

5. Pursuant to Fed. R. Civ. P. 11(1)(A), defendants served this motion on plaintiff's counsel at least twenty-one (21) days before this Motion was filed with the Court. Counsel has refused to withdraw the objectionable pleading.

WHEREFORE, for these reasons and as more fully stated in the accompanying suggestions in support which are hereby incorporated, defendants pray this Court enter its Order sanctioning plaintiff and plaintiff's counsel under Rule 11 and/or § 1927, including striking the Complaint in this case, that defendants be awarded their expenses and reasonable attorneys' fees incurred in defending this lawsuit, preparing and presenting this motion and any other further monetary relief this Court deems just and reasonable.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
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 US BANCORP, U.S. NATIONAL ASSOCIATION, PIPER JAFFRAY COMPANIES, JERRY A. GRUNDHOFER, ANDREW CECERE AND ANDREW S. DUFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this _____ day of May, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendants

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

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

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION FOR SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL

The instant motion and these suggestions are not filed lightheartedly. The motion is not brought for tactical advantage but instead to protect these defendants and their counsel from further unwarranted attacks and unnecessary litigation. Plaintiff Medical Supply Chain, Inc. ("Medical Supply Chain"), and its counsel Bret Landrith ("Landrith") should be sanctioned by this Court under Fed. R. Civ. P. 11 and/or 28 U.S.C. § 1927 for their conduct. Rather than heed previous admonitions from the Kansas District Court and the Tenth Circuit Court of Appeals against filing certain claims as they have done in this case, plaintiff and its counsel have filed this lawsuit unnecessarily to continue to harass and annoy these defendants and their counsel through protracted, frivolous and costly litigation. Defendants, thus, request that they be awarded their expenses and reasonable attorneys' fees incurred in defending this lawsuit as well as expenses and attorneys' fees incurred in preparing and presenting the motion and these suggestions in support.

PROCEDURAL BACKGROUND

1. On October 22, 2002, plaintiff, through Landrith, filed a lawsuit against many of these same defendants in the United States District Court for the District of Kansas, styled *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM.

2. Plaintiff filed its thirteen-count Amended Complaint in the District of Kansas on November 12, 2002.

3. On March 27, 2003, defendants moved to dismiss plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted.

4. On June 16, 2003, the Court granted defendants' motion to dismiss. The Court's Memorandum and Order cautioned plaintiff against bringing frivolous claims like these, stating:

> Prior to analyzing plaintiff's legal arguments, the court reminds plaintiff's counsel that, by signing the complaint and any other paper submitted to the court, he has certified, to the best of his belief and after a reasonable inquiry, that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2). *Plaintiff's counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts.*

(Ex. A, June 16, 2003 Memorandum and Order, at p. 11 (emphasis added)).

5. After the Court denied plaintiff's "Motion for New Trial and Motion for Rule 52(b) Amendment of Judgment" on November 19, 2003, plaintiff appealed the dismissal to the Tenth Circuit Court of Appeals.

6. On November 8, 2004, the Tenth Circuit affirmed the Court's June 16, 2003 Order granting defendants' motions to dismiss. Quoting the cautionary language of the District Court's June 16, 2003 Memorandum and Order, the Court of Appeals held that Medical Supply Chain's appeal was "not supported by the law or the facts" and ordered plaintiff's counsel to show cause why he should not be sanctioned for pursuing a frivolous appeal. (Ex. B, Nov. 8, 2004 Order, at p. 3.)

7. In a December 30, 2004 Order, the Tenth Circuit assessed attorneys' fees and double costs against plaintiff's counsel as a sanction, pursuant to Fed. R. App. P. 38. The Tenth Circuit remanded the case to the District Court to determine the amount of attorneys' fees to be awarded as a sanction. (Ex. C.)

8. On January 27, 2005, defendants filed their Motion for Attorneys' Fees, requesting the Kansas District Court to enter an order determining that the amount of defendants' attorneys' fees incurred in opposing plaintiff's frivolous appeal is $23,956.00 and awarding that amount to defendants pursuant to the Court of Appeals' order. Defendants' Motion for Attorneys' Fees–which plaintiff's counsel does not oppose–is currently awaiting ruling by the Kansas District Court.

9. Plaintiff's counsel, Bret Landrith, filed this case on March 7, 2005, asserting the same underlying purported "facts" and conduct and realleged many of the same claims already dismissed by the Kansas District Court and affirmed by the Tenth Circuit Court of Appeals.[1]

STANDARD FOR IMPOSING SANCTIONS

A. Rule 11

Rule 11(b), which applies to pleadings, motions and other papers, provides in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations an other factual contentions have evidentiary support, or if specifically so identified, are likely to have

[1] Plaintiff realleged U.S.A. Patriot Act claims in Count XVI. In dismissing one of the several Patriot Act claims in the earlier litigation, Judge Murgia stated the allegations were "so divorced from rational thought" that further discussion was unnecessary. (Ex. A, pp. 14-15.) Defendants believe that the current U.S.A. Patriot Act claim (Count XVI) is likewise insufficient and plainly not supported by the statute or case law. Likewise, it is clear that the other federal claims are barred by *res judicata* and/or collateral estoppel such that the claims should never have been filed in this Court.

> evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

Rule 11 is "intended to be vigorously applied by district courts to curb widely acknowledged abuse resulting from the filing of frivolous pleadings and other papers." *Perkins v. General Motors Corp*., 129 F.R.D. 655, 658 (W.D.Mo. 1990) (*quoting Aduono v. World Hockey Ass'n*., 824 F.2d 617, 621 (8th Cir. 1987)). The Rule grants the Court discretion to sanction a party with "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2).

The party or its attorney need not act in subjective bad faith or with malice to trigger a violation of Rule 11. *Perkins*, 129 F.R.D. at 658. "Rather, an objective standard applies and the party or his attorney cannot argue 'that their subjective 'good faith' (i.e., ignorance of the law or legal procedures) somehow excuses their actions." *Id.* (*citing Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987)); *see also McCormick v. City of Lawrence, Kan.*, 218 F.R.D. 687, 690 (D.Kan. 2003) ("A person's actions must be objectively reasonable in order to avoid sanctions under Rule 11."); *White v. General Motors Corp*., 908 F.2d 675, 680 (10th Cir. 1990) ("A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances."). Moreover, "[a]n empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating." *In re Cascade Energy & Metals Corp*., 87 F.3d 1146, 1151 (10th Cir. 1996) (*quoting Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986)); *see also Monument Builders of Greater Kansas City, Inc. v. American cemetery Assn. of Kansas*, 891 F.2d 1473, 1484-85 (10th Cir. 1989) ("Rule 11 imposes an obligation on the signer of a pleading to conduct a reasonable inquiry into whether the pleading is legally frivolous or factually unsupported.").

Once the Court has found a Rule 11 violation, "imposition of sanctions is mandatory." *Perkins*, 129 F.R.D. at 658 (*citing Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988)). Moreover, upon finding a violation, the Court may sanction the lawyer, the client, or both. *White*, 908 F.2d at 679 (citation omitted).

Under Rule 11, plaintiff and its counsel were provided notice of this filing and an opportunity to withdraw the objectionable pleading. (Ex. D.) They have, however, refused.

B. 28 U.S.C. § 1927

Title 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Sanctions under § 1927 are discretionary, unlike those under Rule 11, and may be imposed by this Court if it finds that plaintiff's counsel acted either in subjective bad faith or that counsel's conduct was objectively vexatious. *Perkins*, 129 F.R.D. at 657 (citations omitted); *see also Tenkku v. Normandy Bank*, 348 F.3d 737, 743 (8th Cir. 2003) ("Section 1927 warrants sanctions when an attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'") (*quoting Perkins*). As the *Perkins* decision notes, sanctions under § 1927 have been held appropriate in a variety of circumstances. *Id.* (*citing Taylor v. Belger Cartage Service, Inc.*, 102 F.R.D. 172 (W.D.Mo. 1984) (union member's attorney unreasonably and vexatiously multiplied proceedings by filing and pursuing the case)); *Fisher v. CPC International, Inc.*, 591 F. Supp. 228 (W.D.Mo. 1984) (all amounts incurred by defendants recoverable as excess costs under § 1927 where action never should have been filed and counsel for plaintiff proceeded recklessly); *see also Tenkku*, 348 F.3d 743-44 (where the Eighth Circuit affirmed the district court's imposition of sanctions, but imposing them on plaintiff's counsel instead of plaintiff, after the trial

court noted that plaintiff's counsel's own motion for sanctions "while frivolous of its own accord, is the latest example of a pattern of unnecessary and hostile pleadings the court has been forced to review in this matter," all of which "created unnecessary and protracted delays in discovery."); *Lee v. First Lenders Ins. Services, Inc.*, 236 F.3d 443 (8th Cir. 2001).

Plaintiff's Counsel Has Violated Both Rule 11 and § 1927.

Plaintiff's counsel violated Rule 11 and § 1927 when he filed this lawsuit. Defendants should be awarded sanctions under Rule 11 and their attorneys' fees under § 1927 in this action because plaintiff's counsel has unreasonably and vexatiously multiplied proceedings by filing and pursuing this case after many of the same claims were previously dismissed by the Kansas District Court, with an express admonition to plaintiff's counsel that he was to take greater care to ensure that the claims he brings on his client's behalf are supported by the law and facts. *See* Ex. A, June 16, 2003 Memorandum and Order, at p. 11 (*citing* Rule 11(b)(2)). Succinctly, plaintiff's federal claims were dismissed outright as unsupported by the law or facts. *Id.* The Tenth Circuit affirmed, echoing the district court's cautionary language to plaintiff's counsel in its November 8, 2004 Order (at p. 3) and later imposing sanctions for filing a frivolous appeal. Ex. C, Tenth Circuit's December 30, 2004 Order.

Despite these clear admonitions and the imposition of sanctions, plaintiff has brought essentially the same lawsuit against these defendants in this Court. Plaintiff has also asserted additional claims which are equally devoid of factual or legal support as those previously brought in Kansas. This lawsuit represents just the latest example of a pattern of frivolous and legally and factually baseless pleadings filed by plaintiff's counsel. *See* Defendants' Motion to Dismiss, filed April 4, 2005, incorporated by reference herein (establishing that plaintiff's claims fail to state any claim upon which relief can be granted, are unsupported by the law or the facts, are barred as *res*

judicata or under the doctrine of collateral estoppel, and are completely frivolous in nature). Such conduct is exactly the type Rule 11 and § 1927 were designed to redress.

Plaintiff asserts the same underlying purported "facts" and conduct and many of the same claims previously dismissed by the Kansas District Court. Plaintiff reasserts previously dismissed claims under the Sherman Act, the USA Patriot Act, and again seeks injunctive relief. Plaintiff has also "repackaged" the same purported "facts" into new antitrust causes of action, including alleged violations of Missouri's antitrust statutes.

Finally, plaintiff has resorted to filing a RICO claim and even ratcheted up its conduct by asserting claims against the law firm of "Shughart, Thomson & Kilroy, Watkins, Boulware, P.C." ("Shughart Thomson & Kilroy") for having been engaged to defend parties in the prior action. Complaint, Count XV, pp. 107-111. Included among plaintiff's allegations against Shughart Thomson & Kilroy are that, by defending the Kansas lawsuit and purportedly creating and arranging for ethics complaints to be prosecuted by the Kansas Disciplinary Administrator, Shughart Thomson & Kilroy engaged in racketeering. *Id*. Even if these bizarre allegations were taken as true, they are insufficient to state a RICO claim. The claims are wholly spurious.

If that was not enough, plaintiff also implicates a member of the Federal Bench as a participant in the conduct it now claims constitutes racketeering activity. Specifically, plaintiff alleges that Federal magistrate James P. O'Hara, a former partner with Shughart Thomson & Kilroy, provided "false and misleading testimony" to the Kansas Disciplinary Administrator against plaintiff's counsel, Bret Landrith. *Id*. at p. 108, ¶ 579. Not surprisingly, plaintiff fails to identify how the testimony was "false and misleading."

In *KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 630 (8th Cir. 1999), the Eighth Circuit affirmed an award of attorneys' fees and costs under § 1927 on the ground that plaintiff's

counsel had unreasonably and vexatiously multiplied the proceedings in filing a subsequent action asserting identical claims which had already been rejected in an earlier suit. Like in *KPERS*, this Court should decide "enough is enough." Plaintiff and its counsel should be sanctioned, ordered to pay defendants' attorneys' fees and costs, and their Complaint should be stricken.

CONCLUSION

Plaintiff and its counsel have filed this lawsuit without having any factual or legal foundation. In fact, the Kansas District Court and the Tenth Circuit specifically advised plaintiff's counsel of this fact when dismissing plaintiff's lawsuit in Kansas and further admonishing him not to file future baseless claims. Undeterred, plaintiff and its counsel have now engaged in forum shopping to pursue these frivolous claims and bizarre allegations in this Court and to avoid further negative rulings in Kansas. Plaintiff's counsel makes baseless claims against these defendants, their counsel and further alleges a member of the Federal Bench has lied under oath in a disciplinary matter and has engaged in racketeering with private litigants or their counsel. Such vexatious multiplication of these proceedings, unreasonable and bad faith conduct constitutes intentional or reckless disregard of plaintiff's counsel's duties to this Court and has forced defendants to incur substantial expense in defending another of plaintiff's frivolous lawsuits. Plaintiff and its counsel should be sanctioned for this conduct under Rule 11 and § 1927 respectively. An award of attorneys' fees and costs is not only appropriate but necessary in this instance.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361
ATTORNEYS FOR DEFENDANTS US BANCORP, U.S. NATIONAL ASSOCIATION, PIPER JAFFRAY COMPANIES, JERRY A. GRUNDHOFER, ANDREW CECERE AND ANDREW S. DUFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this _____ day of May, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendants

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

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

NOTICE OF SECOND DEFENDANT THREAT OF SANCTIONS

Comes now the plaintiff Medical Supply Chain, Inc. and its counsel Bret D. Landrith, and gives notice to the court that a second threat of sanctions has been made against the plaintiff and its counsel by the defendants. This time, the defendants Novation, LLC, VHA Inc., University Healthsystem Consortium , Robert Baker and Curt Nonomaque are threatening Medical Supply and its counsel with sanctions if the complaint is not withdrawn or changed in 21 days. See Exb.s 1,2,3. Medical Supply Chain, Inc. and its counsel are giving this notice to alert the court they are waiving the 21 day notice requirement under Fed. R. Civ. P. 11(1)(A).

Medical Supply observes the defendants are attempting to rehash their baseless dismissals that failed to address transactions or privities between the parties warranting any claim or issue preclusion. The defendants were required under clear US Supreme Court and Eighth Circuit authority to identify transactions that occurred before the filing or amendment of the Medical Supply Kansas District court complaint and which of those transactions are now precluded. The May 13th, 2005 ruling by Judge Murguia stating the Kansas case was closed in 2003, before much of the current charged conduct. Judge Murguia's ruling is also fatal to the defendants' dismissal and sanction arguments. The Kansas court also expressly dismissed without prejudice all of the plaintiff's state law claims which included its intellectual property claims. Dismissal without prejudice means Medical Supply is entitled to bring them again. Doing so is not sanctionable. In fact, in his dismissal order for the General Electric case, Judge Murguia refused to grant John K. Power's (then representing the GE defendants) motion for sanctions precisely because the state law claims were not facially without merit and could be raised in another forum.

Medical Supply will present facts proving each element of each of its claims. John K. Power represents defendants that are in Medical Supply Chain, Inc.'s market and who have combined with and made agreements with Neoforma, Inc. The corporate disclosures to this court have already stipulated this. Medical Supply has been injured by John K. Power's clients' publicized exclusive agreements unreasonably restraining trade and repeatedly kept out of this market by the other acts described in this complaint. As things stand currently, even before Medical Supply introduces evidence, the only lawful resolution of this conflict can be a finding of Sherman 1 per se antitrust prohibited conduct necessitating treble damages of Medical Supply's business plan expectations.

Instead of writing sanction motions, Medical Supply is compiling thousands of pages of electronic documents supporting its claims for Rule 26 disclosure. The defendants' counsel might better spend their time meeting their clients and learning what happened in the hospital supply industry and why it such a pressing matter of public concern.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on May 18th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Joel K. Goldman, Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

S/Bret D. Landrith
Bret D. Landrith

Law Offices
SHUGHART THOMSON & KILROY
A Professional Corporation

Mark A. Olthoff
molthoff@stklaw.com
Direct Dial (816) 395-0620
Fax (816) 374-0509

May 10, 2005

VIA ELECTRONIC MAIL and U.S. MAIL

Bret D. Landrith, Esq.
#G33
2961 S.W. Central Park
Topeka, KS 66611

Re: *Medical Supply Chain, Inc. v. Novation, LLC, et al.*

Dear Mr. Landrith:

Enclosed with this letter are Defendants' Motion and Suggestions in Support of Motion for Sanctions in the above-referenced matter pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. § 1927. Please be advised that, under Fed.R.Civ.P. 11(c)(1)(A), Medical Supply Chain has twenty-one (21) days after receipt of this motion to withdraw its claims against defendants. If Medical Supply Chain fails to do so within the time period set forth in Rule 11, defendants intend to and will file the motion and suggestions in support with the Court.

Very truly yours,

MARK A. OLTHOFF

MAO:slp
Enclosures

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

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

NOVATION, LLC, VHA INC. , UNIVERSITY HEALTHSYSTEM CONSORTIUM ROBERT BAKER AND CURT NONOMAQUE'S
MOTION FOR SANCTIONS

Defendants Novation, LLC ("Novation"), VHA Inc. ("VHA"), University Healthsystem Consortium ("UHC"), Robert Baker ("Baker") and Curt Nonomaque ("Nonomaque") (collectively, "Defendants") respectfully request that the Court impose sanctions on Plaintiff's counsel pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. 1927.

1. Defendants request that they be awarded their expenses and reasonable attorneys' fees incurred in defending this lawsuit as well as expenses and attorneys' fees incurred in preparing and presenting this motion and suggestions in support.

2. Plaintiff filed its Complaint in this case on March 7, 2005 and has since filed an opposition papers to the Motions to Dismiss filed by Defendants.

3. This is not the first time these claims have been asserted by Plaintiff. Indeed, many of the same underlying purported "facts," conduct and many of the same claims have been already dismissed by the Kansas District Court and affirmed by the Tenth Circuit Court of Appeals in *Medical Supply Chain, Inc. v. US Bancorp, et al.,* Case No. 02-2539-CM. Many of

the same facts alleged in this case also were alleged in another suit dismissed as to Medical Supply Chain. *Medical Supply Chain, Inc. v. General Elec. Co., et al.*, Case No. 03-2324-CM.

4. This lawsuit suffers from the same fundamental legal defects as the prior suits, and adds additional frivolous and unsupported claims in this lawsuit.

5. By filing this frivolous lawsuit, plaintiff and plaintiff's counsel have violated Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 and are liable to defendants for their expenses and reasonable attorneys' fees incurred in defending this lawsuit and preparing and presenting this motion.

6. Pursuant to Fed. R. Civ. P. 11(1)(A), Defendants served this motion on plaintiff's counsel at least twenty-one (21) days before this Motion was filed with the Court. Counsel has refused to withdraw the objectionable pleading.

WHEREFORE, for all of these reasons and for the reasons stated in the accompanying supporting suggestions, Defendants pray this Court enter its Order sanctioning plaintiff and plaintiff's counsel under Rule 11 and/or § 1927, including striking the Complaint in this case and awarding Defendants their expenses and reasonable attorneys' fees incurred in defending this lawsuit, preparing and presenting this motion and any other further relief to which they are entitled.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power
John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 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::

Andrew M. DeMarea	ademarea@stklaw.com
Jonathan H. Gregor	jgregor@stklaw.com
Kathleen Ann Hardee	khardee@stklaw.com
Bret D. Landrith	landrithlaw@cox.net
Mark A. Olthoff	molthoff@stklaw.com
Logan Wade Overman	logan.overman@stklaw.com

/s/ John K. Power
John K. Power

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

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

SUGGESTIONS IN SUPPORT OF
NOVATION, LLC, VHA INC. , UNIVERSITY HEALTHSYSTEM CONSORTIUM
ROBERT BAKER AND CURT NONOMAQUE'S
MOTION FOR SANCTIONS

Defendants Novation, LLC ("Novation"), VHA Inc. ("VHA") and University Healthsystem Consortium ("UHC") Robert Baker, and Curt Nonomaque (collectively "Defendants") submit these Suggestions in Support of their Motion for Sanctions.

I. INTRODUCTION

Plaintiff's Complaint seeks several billions of dollars in damages arising from Plaintiff's inability to lease desired office space, to obtain financing, and to establish escrow accounts allegedly necessary to enter into the market to provide hospital supplies in e-commerce. Plaintiff asserts that these harms flowed from a vast conspiracy involving, *inter alia*, various entities and individuals in the nationwide hospital supply market, venture capital firms, a bank, a law firm, and a magistrate of the U.S. District Court for Kansas. Plaintiff also seeks damages arising from its allegations that Medicare, Medicaid and Champus have been defrauded into paying inflated prices for medical supplies by an alleged cartel involving some of the defendants. Plaintiff's recent filings in opposition to Defendants' motion to dismiss allege an even broader conspiracy

involving city, state and judicial officials in Kansas—a conspiracy which Plaintiff asserts engages in witness harassment, covert surveillance of Plaintiff's CEO and his family, and even has possible involvement in attorneys' disappearances and deaths.

By this lawsuit, Plaintiff is re-litigating in Missouri claims that have been dismissed with prejudice twice in Kansas. Plaintiff originally filed a lawsuit against many of these same defendants in the United States District Court for the District of Kansas in 2002, styled *Medical Supply Chain, Inc. v. US Bancorp, NA, et al*., Civil Action No. 02-2539-CM (Judge Carlos Murguia) (the "US Bancorp Case"). In that case, Plaintiff asserted virtually identical claims arising out of the same transactions and same set of operative facts as are alleged here even though Plaintiff was warned by the District Court in its order dismissing the complaint in that case "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *See* Memorandum and Order, at p. 11. Indeed, the district judge noted, with regard to Plaintiff's USA Patriot Act violations (which are also made here) that "plaintiff's allegation [is] so completely divorced from rational thought that the court will refrain from further comment . . . ." *See id.* at pp. 14-15. The Tenth Circuit affirmed the District Court's dismissal. Because the Tenth Circuit concluded that Plaintiff's appeal was not supported by the law or the facts, it ordered Plaintiff and its counsel to show cause why it should not be sanctioned for filing a frivolous appeal. *Medical Supply Chain, Inc. v. US Bancorp, NA*, 2004 WL 2504653, *1 (10th Cir. 2004).

In June of 2003, Plaintiff filed suit in the District Court of Kansas against many of the GE-related parties alleged to be unnamed co-conspirators in this action. That case was styled *Medical Supply Chain, Inc. v. General Electric Company, et al.*, Civil Action No. 03-2324-CM (Judge Carlos Murguia) (the "GE case"). That case also involved many of the same factual and

legal allegations as alleged here. In the District Court's order dismissing that suit, the Court noted that the federal antitrust claims failed "at the most fundamental level." *See* Memorandum and Order, at p. 5.

Plaintiff and its counsel have chosen to ignore the Tenth Circuit's and the Kansas District Court's admonitions regarding Plaintiff's attorney's Rule 11 responsibilities and have tried to assert these claims again, arguing that its lack of success in Kansas is due to the Kansas' lawlessness and disregard for the Constitution. *See* Affidavit of Samuel Lipari ("Lipari Aff.") at ¶¶ 15, 33 (attached as an Exhibit to Plaintiff's Suggestions in Opposition to Defendants' Motion to Dismiss).

However, as set forth in more detail in Defendants' Motion to Dismiss and the Suggestions in support thereof, the U.S. District Court in Kansas correctly concluded that Plaintiff's claims are legally defective. The prior dismissals bar most of Plaintiff's claims here under the doctrine of collateral estoppel. In addition, Plaintiff's claims suffer from numerous other deficiencies. Indeed, the legal defects and factual gaps in this case compel a finding that this is a frivolous lawsuit, filed in violation of Plaintiff's counsel's Rule 11 responsibilities and represents the vexatious and unreasonable multiplication of proceedings prohibited by 28 U.S.C. § 1927.

II. ARGUMENT AND AUTHORITIES

I. The Complaint Violates Rule 11

Rule 11(b), which applies to pleadings, motions and other papers, provides in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to

> the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations an other factual contentions have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

Rule 11 is "intended to be vigorously applied by district courts to curb widely acknowledged abuse resulting from the filing of frivolous pleadings and other papers." *Perkins v. General Motors Corp*., 129 F.R.D. 655, 658 (W.D.Mo. 1990) (*quoting Aduono v. World Hockey Ass'n*., 824 F.2d 617, 621 (8th Cir. 1987)). The Rule grants the Court discretion to sanction a party with "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2).

The filing of this Complaint violates Rule 11. First, its allegations lack evidentiary support. Indeed, the lawsuit appears to have been filed in order to allow Plaintiff's CEO and its counsel to vent wholly unsupported and delusional conspiracy theories such as those discussed in the affidavit of Samuel Lipari, which was filed among Plaintiff's papers in opposition to Defendants' Motion to Dismiss. That affidavit 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 nefarious acts ranging from the harassment of potential witnesses, surveillance of Lipari's home, retaliation against Plaintiff's attorney, and unspecified

involvement in attorney deaths in Ft. Worth. In Plaintiff's Complaint, it discusses at length its allegations of alleged bias against Plaintiff's attorney by a federal magistrate in a wholly unrelated case.

These ridiculously broad and patently frivolous conspiracy theories demonstrate that Plaintiff's case is without factual basis. "While irrelevant allegations, standing alone, may not be cause of Rule 11 sanctions, the existence of numerous irrelevant, unsubstantiated, and sensational allegations is an appropriate factor for a district court to consider in determining whether the pleading as a whole lacks adequate factual foundation." *Kunstler v. Britt*, 914 F.2d 505, 515 (4th Cir. 1990). Moreover, the Complaint lacks the most basic factual allegations necessary to support these claims against Defendants. For example, Plaintiff alleges that Defendants were part of a conspiracy to harm Plaintiff by blocking its efforts to obtain financing, escrow services, and office space, but alleges no facts regarding Defendants' involvement in, or even knowledge of, Plaintiff's efforts in this regard. Further, Plaintiff alleges a RICO claim, but fails to allege that Defendants had any involvement in acts of racketeering. In addition, Plaintiff alleges a fraud claim without alleging a misrepresentation or actionable omission.

Moreover, Plaintiff's Complaint is not warranted by existing law nor by a nonfrivolous argument for the extension or modification of current law. Plaintiff seeks to recover for damages arising from an alleged antitrust conspiracy for which it has no standing to complain. *See* Defendants' Suggestions in Support of Motion to Dismiss for Failure to State a Claim, at p. 4. Plaintiff's RICO claim is based upon a series of cases that have been overruled by the U.S. Supreme Court. *See* Defendants' Reply Suggestions in Support of Motion to Dismiss for Lack of Personal Jurisdiction, at pp. 6-7. Plaintiff has also failed to articulate a non-frivolous reason that its antitrust claims are not barred by collateral estoppel. *See* Defendants' Reply Suggestions

in Support of Motion to Dismiss, at pp. 3-5. *See Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 682 (8th Cir. 1997) (affirming award of sanctions where the plaintiff's attorney "has presented no valid reason for seeking to relitigate" a claim previously asserted in another proceeding).

Rule 11 "requires counsel to read and consider before litigating." *In re Cascade Energy & Metals Corp*., 87 F.3d 1146, 1151 (10th Cir. 1996) (*quoting Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986)); *see also Monument Builders of Greater Kansas City, Inc. v. American cemetery Assn. of Kansas*, 891 F.2d 1473, 1484-85 (10th Cir. 1989) ("Rule 11 imposes an obligation on the signer of a pleading to conduct a reasonable inquiry into whether the pleading is legally frivolous or factually unsupported."). Once the Court has found a Rule 11 violation, "imposition of sanctions is mandatory." *Perkins*, 129 F.R.D. at 658 (*citing Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988)). Moreover, upon finding a violation, the Court may sanction the lawyer, the client, or both. *White*, 908 F.2d at 679 (citation omitted). Plaintiff's counsel has wholly failed to discharge the responsibilities imposed by Rule 11.

II. The Complaint Violates 28 U.S.C. § 1927

Title 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Sanctions under § 1927 are discretionary, unlike those under Rule 11, and may be imposed by this Court if it finds that plaintiff's counsel acted either in subjective bad faith or that counsel's conduct was objectively vexatious. *Perkins*, 129 F.R.D. at 657 (citations omitted); *see also Tenkku v. Normandy Bank*, 348 F.3d 737, 743 (8th Cir. 2003) ("Section 1927 warrants

sanctions when an attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'") (quoting *Perkins*).

This lawsuit was filed despite (1) two prior dismissals of substantially similar claims; (2) prior warnings regarding Rule 11; (3) the Tenth Circuit's Show Cause Order against Plaintiff as to why sanctions should not be awarded; and, (4) the operation of collateral estoppel against many of the claims. Plaintiff's counsel fails to articulate a non-frivolous basis for why the claims should be entertained again in this forum, and primarily contends that its prior losses are the result of the corruption, bad faith, and misconduct of the Kansas judiciary. In *Healey v. Labgold*, 231 F.Supp.2d 64 (D.D.C. 2002), the court noted that:

> By its express terms, § 1927 punishes the purposeful multiplying of proceedings. Surely, the filing of a lawsuit that contains five counts that another federal court has expressly stated you have no right to press qualifies as the multiplying of proceedings. If that is not a violation of the statute, one wonders what is.

Id. at 68. *See also KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 630 (8th Cir. 1999), (affirming an award of attorneys' fees and costs under § 1927 on the ground that plaintiff's counsel had unreasonably and vexatiously multiplied the proceedings in filing a subsequent action asserting identical claims which had already been rejected in an earlier suit). Plaintiff's counsel should be sanctioned under this statute.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, Defendants pray this Court enter its Order sanctioning plaintiff and plaintiff's counsel under Rule 11 and/or § 1927, including striking the Complaint in this case and awarding Defendants their expenses and reasonable attorneys' fees incurred in defending this lawsuit, preparing and presenting this motion and any other further relief to which they are entitled.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power
John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 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::

Andrew M. DeMarea	ademarea@stklaw.com
Jonathan H. Gregor	jgregor@stklaw.com
Kathleen Ann Hardee	khardee@stklaw.com
Bret D. Landrith	landrithlaw@cox.net
Mark A. Olthoff	molthoff@stklaw.com
Logan Wade Overman	logan.overman@stklaw.com

/s/ John K. Power
John K. Power

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

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

DEFENDANTS' MOTION FOR SANCTIONS

Defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cecere and Andrew S. Duff (hereinafter collectively referred to as "defendants"), pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927, move this Court for its Order imposing sanctions against plaintiff Medical Supply Chain, Inc. ("Medical Supply Chain"), and its counsel Bret Landrith ("Landrith"). Defendants request that they be awarded their expenses and reasonable attorneys' fees incurred in defending this lawsuit as well as expenses and attorneys' fees incurred in preparing and presenting this motion and suggestions in support. In further support of this motion, defendants state:

1. Plaintiff filed its Complaint in this case on March 7, 2005.

2. In this lawsuit, plaintiff asserts many of the same underlying purported "facts," conduct and many of the same claims against these defendants (or those in privity with them) already dismissed by the Kansas District Court and affirmed by the Tenth Circuit Court of Appeals in *Medical Supply Chain, Inc. v. US Bancorp, et al.,* Case No. 02-2539-CM. Many of the same facts alleged in this case also were alleged in another suit dismissed as to Medical Supply Chain. *Medical Supply Chain, Inc. v. General Elec. Co., et al.*, Case No. 03-2324-CM. Defendants have thus filed motions to dismiss the current lawsuit on a number of separate grounds.

3. Plaintiff has filed additional frivolous and unsupported claims in this lawsuit, including claims against the law firm of "Shughart Thomson & Kilroy, P.C. Watkins Boulware," and has even implicated a current member of the Federal Bench as a participant in conduct it claims constitutes racketeering activity.

4. By filing this frivolous lawsuit, plaintiff and plaintiff's counsel have violated Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 and are liable to defendants for their expenses and reasonable attorneys' fees incurred in defending this lawsuit and preparing and presenting this motion.

5. Pursuant to Fed. R. Civ. P. 11(1)(A), defendants served this motion on plaintiff's counsel at least twenty-one (21) days before this Motion was filed with the Court. Counsel has refused to withdraw the objectionable pleading.

WHEREFORE, for these reasons and as more fully stated in the accompanying suggestions in support which are hereby incorporated, defendants pray this Court enter its Order sanctioning plaintiff and plaintiff's counsel under Rule 11 and/or § 1927, including striking the Complaint in this case, that defendants be awarded their expenses and reasonable attorneys' fees incurred in defending this lawsuit, preparing and presenting this motion and any other further monetary relief this Court deems just and reasonable.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
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 US BANCORP, U.S. NATIONAL ASSOCIATION, PIPER JAFFRAY COMPANIES, JERRY A. GRUNDHOFER, ANDREW CECERE AND ANDREW S. DUFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 3rd day of June, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendants

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

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

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION FOR SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL

The instant motion and these suggestions are not filed lightheartedly. The motion is not brought for tactical advantage but instead to protect these defendants and their counsel from further unwarranted attacks and unnecessary litigation. Plaintiff Medical Supply Chain, Inc. ("Medical Supply Chain"), and its counsel Bret Landrith ("Landrith") should be sanctioned by this Court under Fed. R. Civ. P. 11 and/or 28 U.S.C. § 1927 for their conduct. Rather than heed previous admonitions from the Kansas District Court and the Tenth Circuit Court of Appeals against filing certain claims as they have done in this case, plaintiff and its counsel have filed this lawsuit unnecessarily to continue to harass and annoy these defendants and their counsel through protracted, frivolous and costly litigation. Defendants, thus, request that they be awarded their expenses and reasonable attorneys' fees incurred in defending this lawsuit as well as expenses and attorneys' fees incurred in preparing and presenting the motion and these suggestions in support.

PROCEDURAL BACKGROUND

1. On October 22, 2002, plaintiff, through Landrith, filed a lawsuit against many of these same defendants in the United States District Court for the District of Kansas, styled *Medical Supply Chain, Inc. v. US Bancorp et al.*, Case No. 02-2539-CM.

2. Plaintiff filed its thirteen-count Amended Complaint in the District of Kansas on November 12, 2002.

3. On March 27, 2003, defendants moved to dismiss plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted.

4. On June 16, 2003, the Court granted defendants' motion to dismiss. The Court's Memorandum and Order cautioned plaintiff against bringing frivolous claims like these, stating:

> Prior to analyzing plaintiff's legal arguments, the court reminds plaintiff's counsel that, by signing the complaint and any other paper submitted to the court, he has certified, to the best of his belief and after a reasonable inquiry, that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2). *Plaintiff's counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts.*

(Ex. A, June 16, 2003 Memorandum and Order, at p. 11 (emphasis added)).

5. After the Court denied plaintiff's "Motion for New Trial and Motion for Rule 52(b) Amendment of Judgment" on November 19, 2003, plaintiff appealed the dismissal to the Tenth Circuit Court of Appeals.

6. On November 8, 2004, the Tenth Circuit affirmed the Court's June 16, 2003 Order granting defendants' motions to dismiss. Quoting the cautionary language of the District Court's June 16, 2003 Memorandum and Order, the Court of Appeals held that Medical Supply Chain's appeal was "not supported by the law or the facts" and ordered plaintiff's counsel to show cause why he should not be sanctioned for pursuing a frivolous appeal. (Ex. B, Nov. 8, 2004 Order, at p. 3.)

7. In a December 30, 2004 Order, the Tenth Circuit assessed attorneys' fees and double costs against plaintiff's counsel as a sanction, pursuant to Fed. R. App. P. 38. The Tenth Circuit remanded the case to the District Court to determine the amount of attorneys' fees to be awarded as a sanction. (Ex. C.)

8. On January 27, 2005, defendants filed their Motion for Attorneys' Fees, requesting the Kansas District Court to enter an order determining that the amount of defendants' attorneys' fees incurred in opposing plaintiff's frivolous appeal is $23,956.00 and awarding that amount to defendants pursuant to the Court of Appeals' order. The motion was sustained on May 13, 2005.

9. Plaintiff's counsel, Bret Landrith, filed this case on March 7, 2005, asserting the same underlying purported "facts" and conduct and realleged many of the same claims already dismissed by the Kansas District Court and affirmed by the Tenth Circuit Court of Appeals.[1]

STANDARD FOR IMPOSING SANCTIONS

A. Rule 11

Rule 11(b), which applies to pleadings, motions and other papers, provides in pertinent part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations an other factual contentions have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

[1] Plaintiff realleged U.S.A. Patriot Act claims in Count XVI. In dismissing one of the several Patriot Act claims in the earlier litigation, Judge Murgia stated the allegations were "so divorced from rational thought" that further discussion was unnecessary. (Ex. A, pp. 14-15.) Defendants believe that the current U.S.A. Patriot Act claim (Count XVI) is likewise insufficient and plainly not supported by the statute or case law. Likewise, it is clear that the other federal claims are barred by *res judicata* and/or collateral estoppel such that the claims should never have been filed in this Court.

Rule 11 is "intended to be vigorously applied by district courts to curb widely acknowledged abuse resulting from the filing of frivolous pleadings and other papers." *Perkins v. General Motors Corp*., 129 F.R.D. 655, 658 (W.D.Mo. 1990) (*quoting Aduono v. World Hockey Ass'n*., 824 F.2d 617, 621 (8th Cir. 1987)). The Rule grants the Court discretion to sanction a party with "an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2).

The party or its attorney need not act in subjective bad faith or with malice to trigger a violation of Rule 11. *Perkins*, 129 F.R.D. at 658. "Rather, an objective standard applies and the party or his attorney cannot argue 'that their subjective 'good faith' (i.e., ignorance of the law or legal procedures) somehow excuses their actions." *Id.* (*citing Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987)); *see also McCormick v. City of Lawrence, Kan.*, 218 F.R.D. 687, 690 (D.Kan. 2003) ("A person's actions must be objectively reasonable in order to avoid sanctions under Rule 11."); *White v. General Motors Corp*., 908 F.2d 675, 680 (10th Cir. 1990) ("A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances."). Moreover, "[a]n empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating." *In re Cascade Energy & Metals Corp*., 87 F.3d 1146, 1151 (10th Cir. 1996) (*quoting Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986)); *see also Monument Builders of Greater Kansas City, Inc. v. American cemetery Assn. of Kansas*, 891 F.2d 1473, 1484-85 (10th Cir. 1989) ("Rule 11 imposes an obligation on the signer of a pleading to conduct a reasonable inquiry into whether the pleading is legally frivolous or factually unsupported.").

Once the Court has found a Rule 11 violation, "imposition of sanctions is mandatory." *Perkins*, 129 F.R.D. at 658 (*citing Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988)).

Moreover, upon finding a violation, the Court may sanction the lawyer, the client, or both. *White*, 908 F.2d at 679 (citation omitted).

Under Rule 11, plaintiff and its counsel were provided notice of this filing and an opportunity to withdraw the objectionable pleading. (Ex. D.) They have, however, refused.

B. 28 U.S.C. § 1927

Title 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Sanctions under § 1927 are discretionary, unlike those under Rule 11, and may be imposed by this Court if it finds that plaintiff's counsel acted either in subjective bad faith or that counsel's conduct was objectively vexatious. *Perkins*, 129 F.R.D. at 657 (citations omitted); *see also Tenkku v. Normandy Bank*, 348 F.3d 737, 743 (8th Cir. 2003) ("Section 1927 warrants sanctions when an attorney's conduct 'viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.'") (*quoting Perkins*). As the *Perkins* decision notes, sanctions under § 1927 have been held appropriate in a variety of circumstances. *Id.* (*citing Taylor v. Belger Cartage Service, Inc.*, 102 F.R.D. 172 (W.D.Mo. 1984) (union member's attorney unreasonably and vexatiously multiplied proceedings by filing and pursuing the case)); *Fisher v. CPC International, Inc.*, 591 F. Supp. 228 (W.D.Mo. 1984) (all amounts incurred by defendants recoverable as excess costs under § 1927 where action never should have been filed and counsel for plaintiff proceeded recklessly); *see also Tenkku*, 348 F.3d 743-44 (where the Eighth Circuit affirmed the district court's imposition of sanctions, but imposing them on plaintiff's counsel instead of plaintiff, after the trial court noted that plaintiff's counsel's own motion for sanctions "while frivolous of its own accord, is the latest example of a pattern of unnecessary and hostile pleadings the court has been forced to

review in this matter," all of which "created unnecessary and protracted delays in discovery."); *Lee v. First Lenders Ins. Services, Inc*., 236 F.3d 443 (8th Cir. 2001).

Plaintiff's Counsel Has Violated Both Rule 11 and § 1927.

Plaintiff's counsel violated Rule 11 and § 1927 when he filed this lawsuit. Defendants should be awarded sanctions under Rule 11 and their attorneys' fees under § 1927 in this action because plaintiff's counsel has unreasonably and vexatiously multiplied proceedings by filing and pursuing this case after many of the same claims were previously dismissed by the Kansas District Court, with an express admonition to plaintiff's counsel that he was to take greater care to ensure that the claims he brings on his client's behalf are supported by the law and facts. *See* Ex. A, June 16, 2003 Memorandum and Order, at p. 11 (*citing* Rule 11(b)(2)). Succinctly, plaintiff's federal claims were dismissed outright as unsupported by the law or facts. *Id*. The Tenth Circuit affirmed, echoing the district court's cautionary language to plaintiff's counsel in its November 8, 2004 Order (at p. 3) and later imposing sanctions for filing a frivolous appeal. Ex. C, Tenth Circuit's December 30, 2004 Order.

Despite these clear admonitions and the imposition of sanctions, plaintiff has brought essentially the same lawsuit against these defendants in this Court. Plaintiff has also asserted additional claims which are equally devoid of factual or legal support as those previously brought in Kansas. This lawsuit represents just the latest example of a pattern of frivolous and legally and factually baseless pleadings filed by plaintiff's counsel. *See* Defendants' Motion to Dismiss, filed April 4, 2005, incorporated by reference herein (establishing that plaintiff's claims fail to state any claim upon which relief can be granted, are unsupported by the law or the facts, are barred as *res judicata* or under the doctrine of collateral estoppel, and are completely frivolous in nature). Such conduct is exactly the type Rule 11 and § 1927 were designed to redress.

Plaintiff asserts the same underlying purported "facts" and conduct and many of the same claims previously dismissed by the Kansas District Court. Plaintiff reasserts previously dismissed claims under the Sherman Act, the USA Patriot Act, and again seeks injunctive relief. Plaintiff has also "repackaged" the same purported "facts" into new antitrust causes of action, including alleged violations of Missouri's antitrust statutes.

Finally, plaintiff has resorted to filing a RICO claim and even ratcheted up its conduct by asserting claims against the law firm of "Shughart, Thomson & Kilroy, Watkins, Boulware, P.C." ("Shughart Thomson & Kilroy") for having been engaged to defend parties in the prior action. Complaint, Count XV, pp. 107-111. Included among plaintiff's allegations against Shughart Thomson & Kilroy are that, by defending the Kansas lawsuit and purportedly creating and arranging for ethics complaints to be prosecuted by the Kansas Disciplinary Administrator, Shughart Thomson & Kilroy engaged in racketeering. *Id*. Even if these bizarre allegations were taken as true, they are insufficient to state a RICO claim. The claims are wholly spurious.

If that was not enough, plaintiff also implicates a member of the Federal Bench as a participant in the conduct it now claims constitutes racketeering activity. Specifically, plaintiff alleges that Federal magistrate James P. O'Hara, a former partner with Shughart Thomson & Kilroy, provided "false and misleading testimony" to the Kansas Disciplinary Administrator against plaintiff's counsel, Bret Landrith. *Id*. at p. 108, ¶ 579. Not surprisingly, plaintiff fails to identify how the testimony was "false and misleading."

In *KPERS v. Reimer & Koger Assoc., Inc.*, 165 F.3d 627, 630 (8th Cir. 1999), the Eighth Circuit affirmed an award of attorneys' fees and costs under § 1927 on the ground that plaintiff's counsel had unreasonably and vexatiously multiplied the proceedings in filing a subsequent action asserting identical claims which had already been rejected in an earlier suit. Like in *KPERS*, this

Court should decide "enough is enough." Plaintiff and its counsel should be sanctioned, ordered to pay defendants' attorneys' fees and costs, and their Complaint should be stricken.

CONCLUSION

Plaintiff and its counsel have filed this lawsuit without having any factual or legal foundation. In fact, the Kansas District Court and the Tenth Circuit specifically advised plaintiff's counsel of this fact when dismissing plaintiff's lawsuit in Kansas and further admonishing him not to file future baseless claims. Undeterred, plaintiff and its counsel have now engaged in forum shopping to pursue these frivolous claims and bizarre allegations in this Court and to avoid further negative rulings in Kansas. Plaintiff's counsel makes baseless claims against these defendants, their counsel and further alleges a member of the Federal Bench has lied under oath in a disciplinary matter and has engaged in racketeering with private litigants or their counsel. Such vexatious multiplication of these proceedings, unreasonable and bad faith conduct constitutes intentional or reckless disregard of plaintiff's counsel's duties to this Court and has forced defendants to incur substantial expense in defending another of plaintiff's frivolous lawsuits. Plaintiff and its counsel should be sanctioned for this conduct under Rule 11 and § 1927 respectively. An award of attorneys' fees and costs is not only appropriate but necessary in this instance.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361
ATTORNEYS FOR DEFENDANTS US BANCORP, U.S. NATIONAL ASSOCIATION, PIPER JAFFRAY COMPANIES, JERRY A. GRUNDHOFER, ANDREW CECERE AND ANDREW S. DUFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 3rd day of June, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

John K. Power, Esq.
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122

Stephen N. Roberts, Esq.
Natausha Wilson, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111

Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002

Attorneys for Defendants

/s/ Mark A. Olthoff
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	No. 02-2539-CM
	)	
US BANCORP, NA, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Pending before the court is defendants' Motion to Strike Plaintiff's Answer to Defendants' Reply (Doc. 30). Also before the court are defendants' Motions to Dismiss (Docs. 21, 23, and 25), plaintiff's Response to defendants' Motions to Dismiss (Doc. 27), and defendants' Reply in Support of all Motions to Dismiss (Doc. 28). As set forth below, defendants' Motions to Dismiss are granted. Defendants' Motion to Strike is dismissed as moot.

I. Background[1]

1. The Parties

Plaintiff is a Missouri corporation which has developed a health care supply strategist certification program. According to plaintiff, defendant US Bancorp NA (hereinafter "US Bancorp") is a bank holding corporation headquartered in Minnesota and is the parent company of the employees and subsidiaries named as co-defendants. Defendant US Bancorp operates banks in several states under the name US Bank.

[1]The court exercises jurisdiction under 28 U.S.C. §§ 1331 and 1337.

Defendant Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC (hereinafter "defendant LLC"), is a subsidiary of defendant US Bancorp, also headquartered in Minneapolis. Defendant LLC is the division of defendant US Bancorp that is responsible for escrow accounts for health care systems. Defendant US Bancorp Piper Jaffray, Inc. is the investment banking subsidiary of defendant US Bancorp, and is headquartered in Minneapolis. It has underwriting and investment relationships with healthcare suppliers. Defendant Unknown Healthcare Entity is "believed to be a supplier or purchasing organization who has communicated with US Bancorp, its employees or its subsidiaries about plaintiff for the purpose of obstructing or delaying plaintiff's entry into commerce." Jerry A. Grundhofer is President and CEO of defendant US Bancorp. Defendant Andrew Cesere is Vice Chairman of the US Bancorp trust division. Defendant Susan Paine is the supervisor for US Bank's St. Louis, Missouri corporate trust office. Defendant Lars Anderson is the customer acquisition manager for US Bank's St. Louis, Missouri corporate trust office. Defendant Brian Kabbes is Vice President of Corporate Trusts for US Bank.

B. Plaintiff's Claims

Plaintiff contends defendants engaged in conduct violating (1) the Sherman Antitrust Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act. Plaintiff also alleges defendants (4) "fail[ed] to properly train [their] employees on the USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under the USA PATRIOT Act"; and (6) violated "criminal laws to influence policy under section 802 of the USA PATRIOT Act." The complaint further charges defendants with (7) misappropriation of trade secrets, under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good faith and fair dealing. Plaintiff seeks over $943

million in damages and declaratory relief.[2] Defendants request dismissal of the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff has failed to state a claim for which relief can be granted.

On March 12, 2002, plaintiff's President and CEO, Sam Lipari, began a process of selecting a national bank to provide services including nationwide checking, escrow services, credit facilities, and other banking services. Mr. Lipari opened a corporate account with US Bank on or about April 15, 2002. On October 1, 2002, plaintiff contacted a US Bank employee at the Noland Road, Independence, Missouri branch of US Bank. Plaintiff requested the bank to provide escrow services. Defendants ultimately denied plaintiff's request, and plaintiff claims it was damaged as a result.

II. Legal Standard for Motions to Dismiss

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

---

[2]On January 9, 2003, the Tenth Circuit affirmed this court's order denying plaintiff's requests for preliminary injunction.

III. Analysis

A. Sherman Act (Count I)

In Count I of the Amended Complaint, plaintiff alleges defendants have violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

1. Section 1

A plaintiff must plead three elements to state a claim under § 1 of the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. 15 U.S.C. § 1; *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992); 1 Irving Scher, et al., *Antitrust Adviser* (4th ed. 2001) § 1.04.

With regard to § 1, plaintiff states defendants are a "vertically integrated" entity that exercises monopoly power over "the specific market" of companies seeking to supply new products, services, and technology in the field of health care, because new entrants into the market "are dependent" upon defendants' approval and endorsement. Plaintiff alleges that defendants violated Section 1 by stating that defendants "are believed to be the largest holder of health care supplier equity issues"; that defendants US Bancorp , US Bank, and defendant LLC, as well as US Bancorp Piper are "alter egos" of each other which have, *inter alia*, "completely dominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics"; that defendants use "anticompetitive sole source contracts between their client health care suppliers and health care GPOs [sic] the defendants have developed" in order to inflate the value of equity shares that defendants market; that defendants "operate a conspiracy among their subsidiaries and parent companies" for the purpose of restraining commerce; that defendants rejected plaintiff's application for escrow accounts in order to prevent plaintiff's entry into the

market; and that defendants have acted in furtherance of the conspiracy through a refusal to deal, denial of services, and boycotting or withholding of critical facilities in order to exclude plaintiff from the market.

a. Contract, Combination, or Conspiracy

Plaintiff alleges that defendants have conspired to prevent plaintiff's entry into the market through refusal to deal, denial of services, and boycotting or withholding critical facilities. Defendants contend plaintiff has failed to allege the existence of an agreement among defendants, and that plaintiff cannot show that two or more independent actors were present. Accepting the allegations contained in the complaint as true, the court finds plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1.

First, the court finds that plaintiff has not demonstrated that a plurality of actors existed among defendants. In the complaint, plaintiff states that all individuals named as defendants are officers or employees of defendant US Bancorp, and that all business entities named as defendants are subsidiaries of defendant US Bancorp. Officers, directors, and employees of the **same** company cannot conspire with each other to violate § 1, because they cannot comprise the plurality of actors necessary for a conspiracy. As the Supreme Court held in *Copperweld Corp. v. Independence Tube Corp.*:

> [A]n internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

467 U.S. 752, 769 (1984). Likewise, a parent corporation is incapable of conspiring with its wholly owned subsidiaries:

> [T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Id. at 771; *see also In re Indep. Serv. Orgs. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1149 (D. Kan. 2000) (following *Copperweld* in finding that coordination among divisions of a corporation does not violate Sherman Act).

Second, the court finds that even if the allegations of conspiracy alleged in plaintiff's complaint encompassed a plurality of actors, plaintiff has failed to state a claim for relief. Here, plaintiff has not pled the existence of a pricing agreement, or agreement of any kind, among the defendants in restraint of trade. "Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief." *TV Communications Network, Inc.*, 964 F.2d at 1024 (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir. 1980)). A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. *Id.*; *see also Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) (holding that to survive a motion to dismiss, a complaint stating violations of the Sherman Act "must allege facts sufficient, if they are proved, to allow the court to conclude that claimant has a legal right to relief"). Conclusory allegations that the defendant violated those laws are insufficient.

Id. (citing *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965)). The court grants defendants' motion to dismiss plaintiff's claim under § 1 of the Sherman Act.

2. Section 2

Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90, (1956); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987).

Plaintiff states defendants "have violated Section 2," and that they "have acquired, maintained and extended their monopoly power through improper means, including attempting to extort healthcare technology companies into using US Bancorp as the underwriter of capitalization against securities regulations and in denying [plaintiff] the escrow accounts it required to capitalize its entry into commerce through extortion under the color of official right - the USA PATRIOT Act." Further, plaintiff alleges defendants' "vertical integration is part of a calculated scheme to gain control over the $1.3 trillion health care supplier and distribution segment of the health care industry and to restrain or suppress competition," and that defendants "engage in predatory tactics and dirty tricks including . . . extortion [and] 'laddering' schemes to fraudulently inflate equity values of competitors they own interests in." Plaintiff claims defendants "invest in and promote engage in [sic] anticompetitive predatory sole source contract agreements." In addition, according to plaintiff, defendants have

gained "the power to control prices of health care supplies . . . that are higher than those negotiated directly by hospitals."

With regard to the effects of defendants' alleged actions, plaintiff states, without elaboration, that "new technologies have been prevented from entering the health care market," resulting "in the unavailability of superior products and services that would have been able to save lives and alleviate suffering." Further, plaintiff contends "[t]he public is being severely injured by defendants' actions" and that plaintiff "has been severely injured and is in danger of further injury."

The court construes plaintiff's complaint as attempting to state a claim of combination or conspiracy to monopolize. It is unclear whether plaintiff claims that actual or attempted monopolization occurred. Applying all three theories of recovery, the court finds that plaintiff has failed to state a claim under § 2.

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In the Tenth Circuit, "monopoly power is defined as the ability both to control prices and exclude competition." *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1567 (10th Cir. 1991). Further, "determination of the existence of monopoly power requires proof of relevant product and geographic markets." *Id.*

Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, plaintiff has not pled the existence of a relevant product market or geographic market. Plaintiff has not stated that defendants' alleged market power stems from defendants' willful acquisition or maintenance of that

power rather than from defendants' development "of a superior product, business acumen, or historic accident." The court finds plaintiff has failed to state a claim of monopoly under § 2.

To state a claim for attempted monopolization under § 2, the plaintiff must plead: "(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999) (citing *TV Communications, Inc.*, 964 F.2d at 1025). "Factors to be considered in determining dangerous probability include the defendant's market share, 'the number and strength of other competitors, market trends, and entry barriers.'" *Id.* (citing *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991). Plaintiff has neither adequately pled the existence of a relevant market nor alleged that defendants have a "dangerous probability" of success in monopolization. The court finds plaintiff has not stated a claim for attempted monopolization under § 2.

With regard to combination or conspiracy to monopolize, "[a] plaintiff must show conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy." *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan.*, 891 F.2d 1473, 1484 (10th Cir. 1989) (*citing Perington Wholesale*, 631 F.2d at 1377; *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988)). As with § 1, the court finds that plaintiff cannot state a claim for conspiracy because plaintiff has not alleged a plurality of actors and has made only very conclusory allegations of conspiracy. Thus, the court finds plaintiff has not stated a claim for combination or conspiracy to monopolize. Count I of the complaint is dismissed.

B. Clayton Act (Count II)

Plaintiff contends that defendants' refusal to provide escrow account services was a denial of a critical facility in violation of the Robinson-Patman Act, located at 15 U.S.C. § 13 of the Clayton Act. The Robinson-Patman Act, in part, makes it "unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers **of a commodity** bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." § 13(e) (emphasis added).

The court finds plaintiff cannot state a claim under the Robinson-Patman Act, because the act prohibits only the sale of commodities. As numerous courts have held, the Act does not concern the sale of services, including financial services as provided by defendants in this case. *E.g.*, *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739, 745 (6th Cir. 1993); *Norte Car Corp. v. FirstBank Corp.*, 25 F. Supp. 2d 9, 18 (D.P.R. 1998). Count II is dismissed.

C. Hobbs Act (Count III)

Plaintiff states defendants violated the Hobbs Act's provision against racketeering, 18 U.S.C. § 1951(b)(2), "by preventing plaintiff's entry into commerce under color of official right." The court is persuaded by the findings of other courts which have determined that no private right of action exists to enforce the Hobbs Act. *See Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 408-09 (8th Cir. 1999) (citing cases and holding that "neither the statutory language of 18 U.S.C. § 1951 nor its legislative history reflect an intent by Congress to create a private right of action").

Even if such an action were authorized, there is no showing that defendants - private parties - acted with the requisite "official color of right."

> In general, proceeding against private citizens on an official right theory is inappropriate under the Act, irrespective of the actual control that citizen purports to maintain over governmental activity. Private persons have been convicted of extortion under color of official right, but these cases have been limited to ones in which a person masqueraded as a public official, was in the process of becoming a public official, or aided and abetted a public official's receipt of money to which he was not entitled.

35 C.J.S. *Extortion* § 12. The complaint contains no contention that defendants presented themselves as public officials or acted in any manner connected with a public official. Plaintiff cannot state a claim under the Hobbs Act. Count III is dismissed.

D. USA PATRIOT Act Claims (Counts IV-VI)

Prior to analyzing plaintiff's legal arguments, the court reminds plaintiff's counsel that, by signing the complaint and any other paper submitted to the court, he has certified, to the best of his belief and after a reasonable inquiry, that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11 (b)(2). Plaintiff's counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts.

Plaintiff seeks to bring claims that defendants failed to properly train their employees on the USA PATRIOT Act (hereinafter "Patriot Act") or provide a compliance officer related to the Act, violating section 352 of the Act, codified at 31 U.S.C. § 5318 (Count IV); "misused their authority" and engaged in excessive use of force as "enforcement officers" under the Act (Count V); and "violated criminal laws to influence public policy" under the Act (Count VI). The Act states, in relevant part,

> **(h) Anti-money laundering programs.–**
> **(1) In general.**–In order to guard against money laundering through financial institutions, each financial institution shall establish anti-money laundering programs, including, at a

minimum--
(A) the development of internal policies, procedures, and controls;
(B) the designation of a compliance officer;
(C) an ongoing employee training program; and
(D) an independent audit function to test programs.

31 U.S.C. § 5318 (h).

First, with regard to Count IV, the court finds plaintiff lacks standing. The court is obligated to raise the issue of standing *sua sponte* to ensure that an Article III case or controversy exists. *PeTA, People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 (10th Cir. 2002). "To establish Article III standing, the plaintiff must show injury in fact, a causal relationship between the injury and the defendants' challenged acts, and a likelihood that a favorable decision will redress the injury." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In ruling on a motion to dismiss for lack of standing, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (citing *Warth v. Seldin*, 422 U.S. 490, 501, (1975)).

Here, the court finds plaintiff lacks standing because it has failed to allege a redressable injury. Even if defendants failed to train their employees in order to guard against money laundering and also failed to designate a compliance officer as required by the Act, plaintiff has not pled that it was injured due to such omissions. Moreover, there is no basis to conclude that any order from the court directing defendants to comply with the Act could redress plaintiff's grievance that defendants denied plaintiff escrow services.

Second, the court finds that, even if Count IV were justiciable, no private right of action exists to enforce the Patriot Act. As a result, Counts IV, V, and VI fail to state a claim for which relief can be granted. Plaintiff

has not identified a provision of the Patriot Act expressly authorizing enforcement by private citizens. In its response to the motion to dismiss, plaintiff states that the failure to train and excessive use of force claims are actionable under 42 U.S.C. § 1983.

Section 1983 provides a cause of action against any person who, **under color of state law**, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." § 1983 (emphasis added). The complaint has failed to allege that defendants acted under color of state law, an essential element of a § 1983 suit. *E.g.*, *Sooner Prods. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983). Although plaintiff later states in its response that defendants acted "as an agent for the Department of the Treasury"[3] and that § 1983 liability may extend to private individuals if they engage in joint action with state officials, these allegations do not appear in the complaint and are, nevertheless, so conclusory that they cannot state a claim. *See, e.g.*, *Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir. 1994); *Sooner Prods. Co.*, 708 F.2d at 512. ("When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action."). In *Blessing v. Freestone*, the Supreme Court explained the factors courts must consider in determining whether a statute gives rise to a right enforceable under § 1983:

> In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have

---

[3]Plaintiff's argument implicates action under color of federal rather than state law, thus giving rise to an action under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), rather than § 1983.

> intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. 329, 340 (1997) (citations omitted). Plaintiff has not alleged the existence of any of these necessary elements.

Further, plaintiff has not attempted to state a claim that an implied private right of action exists under the Act. "A plaintiff asserting an implied right of action under a federal statute bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute. In other words, he must overcome the familiar presumption that Congress did not intend to create a private right of action." *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 521 (5th Cir. 2002); *see also Cort v. Ash*, 422 U.S. 66, 78 (1975) (setting forth the four-factor test for whether a statute creates an implied private right of action as (1) whether plaintiff is a member of the class for whose benefit the statute was passed; (2) whether there is evidence of legislative intent, either explicit or implicit, to create or deny a private remedy; (3) whether it is consistent with the legislative scheme to imply a private remedy; (4) whether the cause of action [is] one traditionally relegated to state law so that implying a federal right of action would be inappropriate). The complaint alleges none of these elements.

Finally, with regard to Count VI in particular, in which plaintiff actually contends defendants "are preventing [plaintiff]'s entry into commerce in violation of Section 802 of the USA Patriot Act which creates a federal crime of 'domestic terrorism' that broadly extends to 'acts dangerous to human life that are a violation of the criminal laws," the court finds plaintiff's allegation so completely divorced from rational thought that the

court will refrain from further comment until such time as federal criminal proceedings are commenced, if indeed they ever are.

Counts IV, V, and VI are dismissed.

E. State Law Claims (Counts VII-XIII)

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only supplemented state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). If the parties have already expended "'a great deal of time and energy on the state law claims,' it is appropriate for the district court to retain supplemented state claims after dismissing all federal questions." *Vllalpando v. Denver Health & Hosp. Auth.*, 2003 WL 1870993, at *5 (10th Cir. 2003) (citing *Botefuhr*, 309 F.3d at 1273). Here, the court finds no compelling reason to retain jurisdiction over the state law claims, and dismisses them without prejudice.

IV. Order

IT IS THEREFORE ORDERED THAT defendants' Motions to Dismiss (Docs. 21, 23, and 25) are granted.

IT IS FURTHER ORDERED THAT defendants' Motion to Strike Plaintiff's Answer to Defendants' Reply (Doc. 30) is dismissed as moot.

IT IS FURTHER ORDERED THAT this case is hereby dismissed.

Dated this 16th day of June 2003, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff-Appellant,

v.

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.

No. 03-3342
(D.C. No. 02-CV-2539-CM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **McCONNELL, HOLLOWAY,** and **PORFILIO,** Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

01/10/05

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Medical Supply Chain, Inc. appeals from the dismissal of its complaint asserting claims under the Sherman Antitrust Act, the Clayton Antitrust Act, the Hobbs Act, and the USA Patriot Act, and various state law claims. In dismissing the complaint, the district court determined that plaintiff failed to state a claim for relief under each of the antitrust acts and that there was no private right of action under the USA Patriot Act. Because the district court dismissed all of plaintiff's federal law claims, it declined to retain jurisdiction over appellant's state law claims. Plaintiff argues that the district court erred by: 1) dismissing plaintiff's antitrust claims by imposing a heightened pleading standard,[1] and 2) finding no private right of action under the USA Patriot Act. We review de novo the district court's grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

---

[1] Appellant's brief mentions its Clayton Act and Hobbs Act claims, but appellant fails to include any argument as to how the district court erred in dismissing those claims. *See* Aplt. Br. at 7-8, 19. Any issue with respect to those claims is therefore waived. *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555 (10th Cir. 1992).

Having reviewed the briefs, the record, and the applicable law pursuant to the above-mentioned standard, we conclude that the district court correctly decided this case. We therefore AFFIRM the challenged decision for the same reasons stated by the district court in its Memorandum and Order of June 16, 2003. Appellant's Motion to Amend Complaint on Jurisdictional Grounds is DENIED.

Finally, in the district court's order, the court reminded plaintiff's counsel of his obligations under Rule 11 and stated "[p]laintiff's counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." Aplt. App. Vol. II at 402. Plaintiff then proceeded to file this appeal that is not supported by the law or the facts. Accordingly, we ORDER the plaintiff and plaintiff's counsel to SHOW CAUSE in writing within twenty days of the date of this order why they, jointly or severally, should not be sanctioned for this frivolous appeal pursuant to Fed. R. App. P. 38. *See Braley v. Campbell*, 832 F.2d 1504, 1510-11 (10th Cir. 1987) (discussing court's ability to impose sanctions against clients and their attorneys under Fed. R. App. P. 38).

Entered for the Court

John C. Porfilio
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC., Plaintiff-Appellant, v. 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.	No. 03-3342

ORDER
Filed December 30, 2004

Before **McCONNELL**, **HOLLOWAY**, and **PORFILIO**, Circuit Judges.

On November 8, 2004, we entered an order and judgment affirming the district court's dismissal of plaintiff's complaint alleging, among other things, violations of the Sherman Act, 15 U.S.C. §§ 1-37a, and of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). In the order and judgment, we

directed plaintiff and plaintiff's counsel, Bret D. Landrith, Esq., to show cause why they, jointly or severally, should not be sanctioned pursuant to Fed. R. App. P. 38 for pursuing a frivolous appeal. Plaintiff and Mr. Landrith were given an opportunity to file objections to the proposed sanctions, and they have done so. Based upon our review, we conclude that Mr. Landrith's objections on his own behalf are inadequate to avoid sanctions. We further conclude, however, that given the nature of the claims presented, plaintiff is not as culpable as its counsel and, therefore, plaintiff should not bear the burden of sanctions.

Mr. Landrith objects to sanctions on the ground that the appellate arguments he advanced on plaintiff's behalf had merit. In particular, he maintains that he was correct when he argued that the district court erroneously applied a heightened pleading standard to the Sherman Act claims and that he was correct when he argued that the district court erroneously failed to recognize a private right of action in the USA PATRIOT Act for the claims asserted in the amended complaint.

The district court found that the allegations underlying the Sherman Act claims were inadequate on several grounds, any one of which would have justified dismissal. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade. 15 U.S.C. § 1. In his response to the show cause order, Mr. Landrith focuses on only one of the district court's grounds for

dismissal of the § 1 claim: that the amended complaint did not adequately allege the participation of two or more independent actors in the alleged contract, combination, or conspiracy. Mr. Landrith contends that the district court applied a heightened pleading standard by ignoring the fact that defendant "Unknown Healthcare Supplier" qualified as an actor economically independent from the other defendants, all of whom were related to US Bancorp.

Our review shows that the district court did not apply a heightened pleading standard to the amended complaint. Rather, Mr. Landrith's reliance on the naming of an "Unknown Healthcare Supplier" as a defendant ignores the fact that the allegations concerning this unknown defendant were completely speculative. The very existence of such a defendant, whom the amended complaint described as an entity "believed to be a supplier or purchasing organization who has communicated with US Bancorp NA, its employees or its subsidiaries about [plaintiff] for the purpose of obstructing or delaying [plaintiff's] entry into commerce," Amended Complaint, para. 30, had no factual support in the amended complaint. Allegations of an agreement between one or more of the defendants and the chimerical defendant Unknown Healthcare Supplier certainly were not sufficient to establish a § 1 violation. Mr. Landrith makes no comment on the other failings the district court found in the allegations of the § 1 claim, any one of which also would have justified the claim's dismissal.

The district court also found numerous flaws in the allegations relating to a violation of § 2 of the Sherman Act, which prohibits monopolization of trade. 15 U.S.C. § 2. There are two elements of a monopoly offense under § 2, the first of which is "possession of monopoly power in the relevant market." *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966). The district court found that plaintiff failed to allege facts necessary to establish the first element, including the exercise of monopoly power, the identity of a relevant product market, and the identity of the relevant geographic market.

In his response to the show cause order, Mr. Landrith raises only one brief argument in support of the § 2 allegations, and again that argument is misplaced. Citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), as "[t]he leading case imposing § 2 liability for refusal to deal with competitors," Mr. Landrith argues that US Bancorp's refusal to provide escrow services to plaintiff evidenced illegal anticompetitive behavior. Answer to Show Cause on Sanctions, at 3 (quotation omitted). *Aspen Skiing Co.* is quite inapposite, however, not the least because plaintiff and US Bancorp are not competitors.

The Court in *Aspen Skiing Co.* was concerned with whether the refusal of an established monopolist to cooperate with a smaller competitor in a marketing arrangement could be found to violate § 2. In answering that question, the Court noted that "the right of a monopolist to deal with whom he pleases" is qualified,

and that the exercise of that right "as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act." 472 U.S. at 602, 603 (quotation omitted). One of the many problems with the amended complaint here was that it did not adequately allege facts that could establish US Bancorp as a monopolist in a relevant market in the first instance.

Plaintiff tried to shore up these weaknesses on appeal by arguing that a liberal reading of the complaint revealed that the relevant geographic market was national and that there were two relevant product markets: healthcare supplies and capitalization of healthcare technology companies. US Bancorp does not even compete in the healthcare supplies market, however, much less is it capable of monopolizing that market. Similarly, whatever the alleged market of "capitalization of healthcare technology companies" may be, it is clear that it is one in which plaintiff neither does nor intends to compete.

Plaintiff's arguments on appeal did little to address the many grounds for dismissal of the Sherman Act claims articulated by the district court, and Mr. Landrith's response to the show cause order does even less. The appeal of the Sherman Act claims was frivolous, and Mr. Landrith has provided no justification for its pursuit.

Plaintiff's appeal also challenged the district court's dismissal of three claims alleged under the USA PATRIOT Act. It did so despite the fact that the

allegation of those claims prompted the district court to remind Mr. Landrith of his obligations under Fed. R. Civ. P. 11(b)(2), and to advise him to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." Memorandum & Order of June 16, 2003, at 11.

The first of the USA PATRIOT Act claims sought to impose liability for defendants' failure to adequately train their employees on the provisions of the Act or to designate a compliance officer as provided for in section 352 of the Act (modifying 31 U.S.C. § 5318(h)(1)). The second claim alleged that by denying plaintiff escrow services, defendants misused their authority and used excessive force as enforcement officers under the Act. The third claim alleged that by denying plaintiff escrow services, defendants engaged in "domestic terrorism" as that term is defined in 18 U.S.C. § 2331, as modified by section 802 of the Act. The district court determined that plaintiff had no standing to assert the first of these claims, that there was no private right of action in the Act for any of these claims, and that the allegations of the third claim were "completely divorced from rational thought," Memorandum & Order of June 16, 2003, at 14-15.

Ignoring all but one of the grounds articulated by the district court, plaintiff argued on appeal that the district court erred in dismissing the USA PATRIOT Act claims because the Act does in fact provide a private right of action for those claims. In his response to the show cause order, Mr. Landrith repeats the

arguments advanced on appeal. He boldly declares that he declines to accept this panel's "revisionist pronouncement about the lack of a private right of action in the USA PATRIOT Act," and he argues that the Act contains at least two private rights of action. Answer to Show Cause on Sanctions, at 4.

The two sections of the Act to which Mr. Landrith points are section 223 (codified at 18 U.S.C. § 2712), which relates to civil actions against the United States, its officers or employees, and section 355 (amending 12 U.S.C. § 1828(w)), which limits the immunity available to a financial institution and its employees when voluntarily disclosing suspicious activity in an employment reference if the disclosure is made with malicious intent. Even if these two sections did create private rights of action under the Act for some types of conduct, a matter we need not decide here, neither creates a private right of action for the conduct alleged in the amended complaint, and counsel's reliance on them is frivolous.

Once again, the arguments advanced on appeal in support of the USA PATRIOT Act claims not only failed to address all the grounds for dismissal articulated by the district court, but they were themselves frivolous. Mr. Landrith's response to the show cause order only magnifies these deficits.

Rule 38 provides that if we determine that an appeal is frivolous, we may "award just damages and single or double costs to the appellee." Sanctions under

Rule 38 serve two purposes: not only do they "punish the offender as a deterrence to future misconduct; but, with equal importance, they . . . compensate a party who has had to finance the defense of a groundless action." *Braley v. Campbell*, 832 F.2d 1504, 1516 (10th Cir. 1987) (Moore, J., dissenting).

An appeal may be frivolous as filed or as argued. *See Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1578-79 (Fed. Cir. 1991). This appeal was both. Keeping in mind that as between a party and its attorney, the impact of a sanction should be felt by the one(s) at fault, we conclude that only Mr. Landrith, and not plaintiff, should bear the burden of sanctions here. "[A]n attorney must realize, even if a party does not, that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk-reaction to every unfavorable ruling." *Braley*, 832 F.2d at 1513 (en banc) (quotation omitted). Mr. Landrith's response to the show cause order demonstrates that he did not make the considered judgment required before taking an appeal here, nor has he considered what the district court, or this court, has said before advancing his arguments.

As a sanction under Rule 38, we assess attorney fees and double costs against Mr. Landrith. Procedures for the taxation of costs shall be in accordance with Fed. R. App. P. 39(d) and (e). The case shall be REMANDED to the district court to determine the amount of attorney fees to be awarded as a sanction.

Entered for the Court
PATRICK FISHER, Clerk

By: Steve Larson
Deputy Clerk

Mark Olthoff

From: Mark Olthoff
Sent: Tuesday, May 10, 2005 4:37 PM
To: 'landrithlaw@cox.net'
Cc: 'Spangler, Kathleen'; 'sroberts@nossaman.com'; Wilson, Natausha; 'john.power@husch.com'; Kathy Hardee
Subject: FW: Attached Files

Dear Mr. Landrith, attached please find our notice, pursuant to Fed. R. Civ. P. 11, that the parties we represent intend to file a motion for sanctions under Rule 11 in 21 days unless the complaint filed in the Western District of Missouri is dismissed by you and your client by that time. A copy of the letter, the motion and suggestions will be sent by regular mail today as well.

Mark Olthoff

Shughart Thomson & Kilroy

May 10, 2005

4:35 p.m. (Central Time).
-----Original Message-----
From: Sandra Pitts
Sent: Tuesday, May 10, 2005 9:26 AM
To: Mark Olthoff
Subject: Attached Files

The Law Firm Of

SHUGHART THOMSON & KILROY

A Professional Corporation

Mark A. Olthoff
molthoff@stklaw.com
Direct Dial (816) 395-0620
Fax (816) 374-0509

May 10, 2005

VIA ELECTRONIC MAIL and U.S. MAIL

Bret D. Landrith, Esq.
#G33
2961 S.W. Central Park
Topeka, KS 66611

Re: *Medical Supply Chain, Inc. v. Novation, LLC, et al.*

Dear Mr. Landrith:

Enclosed with this letter are Defendants' Motion and Suggestions in Support of Motion for Sanctions in the above-referenced matter pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. § 1927. Please be advised that, under Fed.R.Civ.P. 11(c)(1)(A), Medical Supply Chain has twenty-one (21) days after receipt of this motion to withdraw its claims against defendants. If Medical Supply Chain fails to do so within the time period set forth in Rule 11, defendants intend to and will file the motion and suggestions in support with the Court.

Very truly yours,

MARK A. OLTHOFF

MAO:slp
Enclosures

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

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

DEFENDANTS' MOTION TO STAY
RULE 26(f) CONFERENCE AND DISCOVERY

TO THE HONORABLE JUDGE OF THIS COURT:

Defendants respectfully request that the Court stay all discovery proceedings, including the Rule 26(f) conference, currently required to be held on or before June 13, 2005, until the resolution of the pending motions for transfer, motions to dismiss, and and/or motions for sanctions.

1. Plaintiff filed its Complaint in this case on March 7, 2005, seeking several billions of dollars in damages which it alleges arose from Plaintiff's inability to lease desired office space, to obtain financing, and to establish escrow accounts allegedly necessary to enter the medical supply market. Plaintiff asserts that these harms flowed from a vast conspiracy involving, *inter alia*, various entities and individuals in the nationwide hospital supply market, venture capital firms, a bank, a law firm, and a magistrate of the U.S. District Court for Kansas. Plaintiff also alleges that several of the Defendants comprise a cartel which defrauds Medicare, Medicaid and Champus into paying inflated prices for medical supplies and seeks to recover the overpayments allegedly made by those entities.

2. This Court has issued an order requiring the parties to hold a Rule 26(f) conference by June 13, 2005, to exchange Rule 26 disclosures ten days later, and to provide the Court with a joint proposed discovery/scheduling plan by June 27, 2005.

3. Defendants have filed a motion to transfer the case to the U.S. District Court in Kansas, which has previously dismissed two Complaints in which Plaintiff asserted claims based on the same facts at issue in this case. Plaintiff has opposed that transfer, primarily on the basis of its contention that Kansas is a lawless, corrupt and dangerous venue.

4. In addition, several of the Defendants have filed Rule 12(b)(6) Motions to Dismiss the action in its entirety, arguing, among other things, that Plaintiff's claims are barred by res judicata, collateral estoppel and lack of standing. In fact, the legal defects of Plaintiff's claims are so numerous and fundamental that several of the Defendants have filed Motions for Sanctions against Plaintiff and its counsel. The determination of the legal issues presented in the motions to dismiss does not require discovery; indeed, Plaintiff filed oppositions to the motions without requesting leave to conduct discovery prior to filing its oppositions.

5. Defendants recognize that the pendency of motions to transfer venue, to dismiss, and for sanctions does not automatically entitle Defendants to a stay of discovery. However, the circumstances of this case justify a stay of discovery, the Rule 26(f) conference, and related deadlines pursuant to the Court's inherent power to control its docket in the interest of judicial efficiency and for the interest of the parties. *See Landis v. North American Co.*, 299 U.S. 248, 254 (1936). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the U.S. Supreme Court has recognized that because discovery can be "wide-ranging, time consuming" and involve "considerable cost," staying discovery until the disposition of threshold dispositive issues, such as the immunity issues implicated in the *Harlow* case, is warranted. *Id.* at 817, n. 29.

6. It would be inefficient and costly to conduct discovery prior to the Court's determination of whether this case should be heard in this Court or transferred to Kansas, whether the Complaint asserts any legally viable claim, and whether the Complaint was filed in violation of Plaintiff's counsel's Rule 11 duties. In addition, several of the individual Defendants have asserted objections to this Court's exercise of *in personam* jurisdiction over them and it would be inappropriate to require those Defendants to move forward with discovery obligations until the jurisdictional issue is resolved.

7. While it is always hoped that the Rule 26 process will proceed in an efficient and cooperative manner, there is reason to believe that the positions of the parties regarding the proper scope of discovery in this case will be widely divergent. Plaintiff's counsel, by an email note on June 1, 2005, informed Defendants' counsel that it believes that there are "millions" of relevant documents in the possession of Defendants and that presentation of Plaintiff's case to the jury will require 90 days. *See* Email from Bret Landrith to Defendants' counsel, attached as Exhibit A. Defendants will vigorously oppose any proposed discovery plan and trial schedule of such an enormous and unwarranted scope.

8. The proposed stay will obviate the time and expense necessary to address these issues in advance of the resolution of the pending motions. Any resulting delay in the commencement of discovery will not prejudice the Plaintiff and, in any event, is justified by the judicial efficiency benefits of the stay.

WHEREFORE, for all of these reasons, Defendants pray this Court enter an Order staying discovery, and the need to hold a Rule 26(f) Conference, prepare a proposed joint discovery plan and scheduling order, and exchange Rule 26 disclosures until the resolution of the

pending Motions to Dismiss, Motions for Sanctions, and Motions to Transfer Venue and for any other further relief to which they are entitled.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power
John K. Power, # 35312
Joel K. Goldman, #40453
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, VOLUNTEER HOSPITAL ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTHSYSTEM CONSORTIUM, ROBERT J. BAKER

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 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:

Andrew M. DeMarea	ademarea@stklaw.com
Jonathan H. Gregor	jgregor@stklaw.com
Kathleen Ann Hardee	khardee@stklaw.com
Bret D. Landrith	landrithlaw@cox.net
Mark A. Olthoff	molthoff@stklaw.com
Logan Wade Overman	logan.overman@stklaw.com

/s/ John K. Power
John K. Power

0827087.01

Power, John

From: Bret Landrith [landrithlaw@cox.net]

Sent: Wednesday, June 01, 2005 5:37 PM

To: logan.overman@stklaw.com; demarea@stklaw.com; bblefeld@velaw.com; bretl@medicalsupplychain.com; jgregor@stklaw.com; john.power@husch.com; Dennis Hawver; jvaughnmock@nossaman.com; molthoff@stklaw.com; sroberts@nossaman.com; khardee@stklaw.com

Subject: Medical Supply v. Novation et al ,Case 4:05-cv-00210-ODS Rule 16 Conference

June 1, 2005

Medical Supply v. Novation et al ,Case 4:05-cv-00210-ODS

Dear Defendant Counsel

I have a schedule without set appointments between now and June 13th. All my time is currently devoted to researching and writing a brief in opposition to disbarment. If you can set a time for a telephone conference amongst yourselves, I will likely be able to be free for the conference.

Medical Supply is scanning and saving our Rule 26 disclosure documents with bates stamp numbers starting at 000001. We have over 2000 so far. Our biggest concern as highlighted in the demand letter is complying with electronic discovery guidelines and case law, including recent controversial federal rulings. We realize several million documents are in possession of the parties that are relevant to the claims being tried. The vast majority were electronically created and our concern is that they be exchanged electronically or stored in a common limited access server.

We anticipate mutual protective order concerns related to sensitive proprietary data.

The field of maneuver in contests over the extent of reasonable discovery are understandably a significant defense interest. We are amenable to bifurcating summary judgment motions with a view to limiting the burden of initial discovery. Our suggestion is that we start with the per se antitrust claims where clearly discoverable contracts and transactions would largely resolve dispositive issues.

We anticipate requiring 90 days to present our case to a jury. ½ the time taken in the Kansas District Court case for Reazin vs Blue Cross Blue Shield.

We don't anticipate any possibility prompt settling of the case.

Sincerely,

Bret D. Landrith

Attorney for Medical Supply Chain, Inc.

785-267-4084

785-876-2233

Excerpt from Court's Order of Rule 26 Conference. Case 4:05-cv-00210-ODS Document 29 Filed 04/05/2005:

"The Proposed Plan shall also state whether the case will be tried to the Court or to a jury and the anticipated length of the trial. See Local Rule 16.1(f)(5). In accordance with Local Rule 16.1(d), plaintiff's counsel shall take the lead in preparing the Proposed Plan. The Rule 26(f) conference shall take place on or before June 13, 2005. Counsel are reminded that FRCP 26(a)(1) disclosures must be completed within ten (10) days after the Rule 26(f) conference. During the Rule 26(f) conference, the parties shall discuss the nature and bases of their claims and defenses and shall discuss the possibilities for a prompt settlement of the case. Discovery may not commence before the conference is held except under the conditions set forth in FRCP 26(d)."

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W- ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

SUGGESTION IN OPPOSITION TO STAY

Comes now the plaintiff Medical Supply and makes the present suggestion in opposition to defendants' motion for stay. Medical Supply opposes the stay for the following reasons:

The defendants' use of *Harlow* is inapplicable to staying discovery between private litigants where there are no defendant government officials entitled to ***qualified immunity***: Qualified or "good faith" immunity is an affirmative defense that must be pleaded by a defendant official. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). By official, the doctrine refers to a government official:

> "[I]n *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Court redefined qualified immunity for government officials. Justice Powell's opinion for the Court explained that henceforth, qualified immunity would extend to governmental officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S.Ct. at 2738."

Schultea v. Wood, 47 F.3d 1427 (C.A.5 (Tex.), 1995).

Tragically, Mr. Powers and Mr. Olthoff have been engaged with Medical Supply's counsel in a two year dialogue over exactly the thread running through *Harlow, Leatherman, Crawford-El* and finally *Currier v. Doran*. The defense counsel aspersed these cases as being civil rights matters unrelated to the pleading standard in antitrust cases. Now, when it suits Mr. Powers, *Harlow* becomes an antitrust pleading

standard requiring this court to weigh the burdens of discovery on the defendants against something other than Federal Rules of Civil Procedure. An interpretation even *Harlow* itself does not support.

> "**A rule requiring plaintiffs to meet a higher evidentiary standard in qualified immunity cases has never been endorsed by the Supreme Court**, and (contrary to the suggestion in Judge Williams's opinion) Harlow itself gives no indication that the Court contemplated such an onerous requirement. Indeed, Judge Williams's opinion completely ignores the fact that, although the Court in Harlow stated that "insubstantial suits against high public officials should not be allowed to proceed to trial," the decision relies on the "firm application of the Federal Rules of Civil Procedure" to achieve this objective. *Harlow*, 457 U.S. at 819-20 n. 35, 102 S.Ct. at 2738-39 n. 35 (internal quotations omitted). Thus, nothing in Harlow gives appellate courts free-reign to perform their own cost-benefit analysis or to select new evidentiary standards out of thin air.
>
> Furthermore, the recent case of *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), broadly repudiates the use of heightened, judge-made standards to fulfill policy-related goals such as those advanced by the judges who view this case differently. **Although *Leatherman* addressed only claims against municipalities, it is significant that the Court explicitly rejected the justifications for a heightened standard that had been offered by the defendants, and instead insisted that the Federal Rules remain the sole touchstone for determining the sufficiency of the plaintiff's case.** As the Court stated, additional requirements can be imposed only "by the process of amending the Federal Rules, and not by judicial interpretation." Id. at 168, 113 S.Ct. at 1163."

Crawford-El v. Britton, 93 F.3d 813 at 862 (C.A.D.C., 1996). The Kansas District Court which followed Mr. Olthoff and Mr. Power instead of Medical Supply's argument. In Medical Supply's unread opposition to Mr. Power's motion for dismissal in *Medical Supply Chain, Inc. v. General Electric, et al*, KS Dist. Case No. 2:03-cv-2324 , Medical Supply stated:

> "The plaintiff believes the Tenth Circuit decision in *Currier v. Doran*, 242 F.3d 905 (10th Cir., 2001), a later case than the court's authority and cited treatise now controls heightened pleading standards for non official immunity and fraud claims in this jurisdiction after *Leatherman* 507 U.S. 163. *Currier v. Doran,* 242 F.3d 905 (10th Cir., 2001). When faced with a 1998 decision by the US Supreme Court again reemphasizing the liberal pleading requirements and destroying exceptions in Crawford-El v. Britton, 118 S. Ct. 1584 (1998), the Tenth Circuit explains how it had in the past responded to *Leatherman* 507 U.S. 163 and found a viable exception limited to a special issue in civil rights cases, that of official immunity. At page 914 of Currier, the 10th circuit explains: "Our reasons for those unanimous rulings apply with equal force to the imposition of a clear and convincing burden of proof in cases alleging unconstitutional motive." At page 916-7, **The *Currier* court resolves that its heightened pleading standards do not survive *Crawford-El Britton*, stating: "Like the D.C. Circuit's heightened proof requirement, this court's heightened pleading requirement finds no support in the Federal Rules of Civil Procedure and constitutes a deviation from the notice-pleading standards of Rule 8. See Fed. R. Civ. P. 8(a) ('A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .'); Fed. R. Civ. P. 9(b) ('Malice, intent, knowledge, and other condition of mind of a person may be averred generally.')" and returns to the liberal pleading requirement quoting"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.**
>
> The plaintiff's amended complaint adequately pleads general and specific intent for both monopolization and attempted monopolization. As stated above in *Currier v. Doran*, 242 F.3d 916-17 (10th Cir., 2001),"

The Kansas trial court found that Medical Supply had failed to adequately plead antitrust claims against the G.E. defendants alleged to have conspired with the nondefendant Neoforma, Inc. a defendant in the present case. Since in antitrust cases, coconspirators are jointly and severally liable for all damages occasioned by their illegal acts, Medical Supply is not required to sue all coconspirators, but may choose to proceed against less than all or even one of them for damages. See *Homeco Developments v. Markborough Properties, Ltd*. 709 F. Supp. 1137. The US Supreme court has made the antitrust pleading standard perfectly clear as Medical Supply answered the Novation defendants on page 2 of Medical Supply's suggestion in opposition to dismissal:

"The defendants seek to have the court contradict 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).

> "In the aftermath of Leatherman, antitrust heightened pleading has certainly been curtailed. Finding the Leatherman rationale applicable to antitrust, many lower courts have re-embraced notice pleading and Rule 8 as the appropriate pleading standard in antitrust cases. The Seventh Circuit is illustrative. Soon after Leatherman, the court made clear that the "nascent movement" to add judge made exceptions to notice pleading was now precluded. Consequently, antitrust plaintiffs were not required to plead with particularity. Moreover, the court denounced pre-Leatherman cases applying heightened pleading as no longer authoritative." [footnotes omitted]
> Fairman, Christopher M., The Myth Of Notice Pleading Arizona Law Review pgs. 1018-19, Vol. 45:987 (2003)."

This very issue is on appeal in *Medical Supply Chain, Inc. v. General Electric, et al* and currently before the Tenth Circuit, but in this jurisdiction Medical Supply's current complaint based on later and continuing antitrust misconduct cannot be dismissed for failure to state a claim:

> **Although the complaint was in narrative form, Mr. Jones's recitations clearly identified how each defendant was involved in the conduct about which he complains, which is all the federal rules require.** See Fed. R. Civ. P. 8(a)(2) (complaint must include only "short and plain statement of the claim showing that the pleader is entitled to relief"); *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002) (complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)))

Jones v. Pollard-Buckingham, No. 03-2695 (8th Cir. 11/12/2003) (8th Cir., 2003). Stays of discovery are exceedingly rare outside of securities fraud cases . The defendants seek a protection from Federal Rules of Civil Procedure Congress granted only to securities fraud defendants under the Private Securities Litigation Reform Act (the "PSLRA"), 15 U.S.C. 78u-4 et seq.

> "The PSLRA's stay of discovery procedures was intended by Congress to protect innocent defendants from having to pay nuisance settlements in securities fraud actions in which a foundation for the suit cannot be pleaded; rather than lead to the conclusion that plaintiffs should receive more leniency in amending their pleadings, the stay of discovery procedures adopted in conjunction with

the heightened pleading standards under the PSLRA is a reflection of the objective of Congress "to provide a filter at the earliest stage (the pleading stage) to screen out lawsuits that have no factual basis." [Champion Enters., 145 F.Supp.2d] at 874 (quoting Selected Bill Provisions of the Conference Report to H.R. 1058/§ 240, 141 Cong. Rec. § 19152 (daily ed. Dec. 22, 1995)).”

In re Nahc, Inc. Sec. Litig., 306 F.3d 1314, 1332-333 (3d Cir. 2002) (quoting *In re Nahc, Inc. Sec. Litig*., No. 00-4020, 2001 U.S. Dist. LEXIS 16754, at *81-82 (E.D. Pa. Oct. 17, 2001)). Only the defendants US Bancorp NA (NYSE USB), The Piper Jaffray Companies (NYSE PJC) and Neoforma, Inc. (NASDQ NEOF) are publicly traded companies and the plaintiff is not bringing any claims for relief based on securities fraud.

Much of the difficulty all parties have with what occurred in Kansas District court stems from the denial of discovery, including a stay granted by Magistrate O’Hara (lately Managing Partner of Shughart, Thomson and Kilroy, the head of Andrew DeMarea’s Overland Park, KS office where he was in charge of hiring) in the *Medical Supply Chain, Inc. vs. GE et al* case, where GE like the Novation defendants today were also represented by John Power. Even in Kansas, stays of discovery are unusual:

Q. Would you deny discovery in a case because of a pendency of a dismissal motion by the opposing party?
A. Well, I have. But as a general proposition the precedent in our district and my policy that the mere pendency of a dispositive motion by itself is not a basis to stay discovery. There’s a three part test that we go through to determine whether a particular case discovery ought to be stayed until that dispositive

motion is ruled.
Q. But in that case, wasn’t it true that Medical Supply’s discovery was stayed not on the basis of any action or inaction of mine, but solely-¬

Excerpt from testimony of Magistrate O’Hara from *In the matter of Bret D. Landrith*, Kansas Disciplinary Hearing, January 20th, 2005.

The Eighth Circuit requires discovery before dispositive motions requiring specific knowledge of facts solely in possession of the opposing party may be granted:

“It appears from the record that some discovery was necessary for Iverson to present his fraud claim. He was a salesman and not the keeper of the financial records. The truth of the statements regarding the profitability of the Summit stores and the value of Iverson's rights under the 1988 contract could not be evaluated without access to relevant financial records. Discovery was also relevant to the reasonableness of Iverson's reliance on O'Donnell's statements. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn.1995).”

Iverson v. Johnson Gas Appliance Co., 172 F.3d 524 (C.A.8 (Minn.), 1999).

Both Kansas complaints were dismissed before discovery. The Kansas court stated that the plaintiff had failed to adequately state a claim and in both cases discussed the admonishment of Medical Supply's counsel for failing to investigate the factual basis for his claims. In the complaint before this court, Medical Supply has attributed each significantly material fact alleged to its source. Three consecutive US Senate Antitrust Subcommittee hearings on Novation's anticompetitive conduct in combination with its member hospitals and suppliers, along with government and expert studies accompanied by New York Times investigative reporting has created a prima facie case against the Novation defendants that meets even the irrelevant PSLRA heightened pleading standard.

Contrary to Mr. Olthoff's sanction assertions, Medical Supply has diligently prepared for this case and has evidence supporting its claims, even though the Sherman Act specifically provides for discovery recognizing all the evidence is normally in the hands of the offending monopolists. Attached is the current version of the plaintiff's Rule 26 initial disclosures which are still being updated. EXB 1. A substantial number of witnesses to Novation's antitrust conduct have already been identified and thousands of documents do support the plaintiff's complaint. Defense counsel might do well to familiarize themselves with their clients. Over one hundred thousand distinct products are distributed to hospitals through group purchasing organizations. Novation supplies over two thousand hospitals and another six thousand health systems. Multi-product tying schemes tied to performance rebates and membership payments further multiplies the records or distinct documents that prove Medical Supply's case. Thankfully most records are in the form of Electronic Data Interface compatible electronic files.

The email sent by Medical Supply's counsel(EXB. 2) discusses lessening the burden of discovery by bifurcating summary judgment rounds. The case likely will be resolved on the first round per se claims. When a complained of violation is classified as a *per s*e violation of the antitrust laws the court will not consider elaborate arguments (that are routine in rule of reason cases) that a particular practice is actually pro-competitive. To the contrary, the court will condemn the practice without taking any arguments into account. The purpose of the *per se* rule is to avoid expensive litigation in areas in which it is not likely to be fruitful. Currently the *per se* rule is applied to horizontal price fixing, horizontal territorial or customer

division, vertical price fixing and some concerted refusals to deal and tying arrangements, the conduct alleged against the Novation and US Bancorp defendants.

The defendants are incorrect in their assertion the plaintiff would not be harmed by delaying discovery. Medical Supply is likely to be deprived of its counsel if this case is stayed. As the complaint alleges, Medical Supply's counsel is being prosecuted by the State of Kansas, largely on Magistrate O'Hara's testimony. If this prosecution fails, the state is proceeding on Andrew DeMarea's complaint against Medical Supply' s attorney.

The Tenth Circuit's harshest *sua sponte* sanction in excess of $23,000.00 for appealing a clearly erroneous ruling on the USA PATRIOT Act, even acknowledged by the sanctioning court is also a foreseeable deterrent to Medical Supply obtaining substitute counsel Both Mr. Olthoff and Mr. Power are actively supplementing this deprivation of counsel with their new motions seeking sanctions which of course still don't identify any transactions which might be subject to preclusion by the earlier case. Certainly facts like the defendant's addresses are common to the Kansas litigation, however the transactions had not yet occurred. The Novation defendants and Neoforma, Inc. were also not defendants or in a recognized form of privity that would give rise to preclusion. However, Mr. Olthoff and Mr. Power suggest that somehow their conclusory "same facts" motions to dismiss and for sanctions merit a stay when in fact they violate the defendant counsel's duties under Rule 11.

Finally, despite Mr. Powers pedantic characterizations of hospital supply antitrust as a office space lease problem, Medical Supply has twice lost its capitalization for market entry due to the defendants' prohibited conduct. The three hundred thousand dollars has not been replaced, nor the time lost. Extending this case through a stay of discovery would work a great injustice upon the plaintiff.

CONCLUSION

Whereas for the above stated reasons Medical Supply respectfully requests the court deny the defendants' motion for a stay of all proceedings pending resolution of dispositive motions.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611

1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on June 7th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W- ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

INITIAL DISCLOSURE UNDER FRCP 26(a)(1),

Pursuant to FRCP 26(a)(1), [party] makes its mandatory initial disclosures as follows:

*****IN PROGRESS NOT COMPLETE*****

A. WITNESSES

1. [Name], [address], [telephone number]. [Name] knows information relevant to [explain basis of knowledge relevant to the case].

Bob Bissell	GPO Workings
Lawton Burns	GPO Workings
Allen Caudle	GPO Workings
Kevin Connor	GPO Workings
Eric Norman	GPO Workings
Joe Kiani	GPO Contracting
Patti King	GPO Contracting
Mark Leahey	GPO Contracting
Jerry Leong	GPO Contracting
Bill McFaul	GPO Contracting
Phil Profeta	GPO Contracting
Marvin Smart	GPO Contracting
Nick Toscano	GPO Contracting
James Graff	GPO Contracting
Jonathan Yarowsky	GPO Safe Harbor
Einer Elhauge	Antitrust
Melissa Osborne	FBI
Elizabeth Weatherman	Healthcare Investment
Lynn Everard	Healthcare Market
Howard Fullman	Healthcare Market

Thomas Farb	Funding
Mary Suther	Funding
Suzanne Passalacqua	Funding
Chuck Frary	Funding
Ken Aldrich	Funding
Neil Marsh	Funding
Richard Heard	Funding
Craig Evans	Funding
Ron Sheffron	Funding
Charlie Smith	E-Commerce Origins
Martin Taylor	E-Commerce Origins
Phil Perry	E-Commerce Origins
Ray Latus	Technology
Mike Patton	Technology
Rob Rennie	Technology
John Haggard	Technology
David Taylor	Technology
George Puckett	Technology
David Dresner	Technology
Jon Yost	Technology

B. DOCUMENTS [List documents]

Ken Aldrich Intro	000001
Ken Aldrich ND/NC	000004
Ken Aldrich Marketing & Implementation Program	000007
Ken Aldrich MSM Intro	000012
Ken Aldrich MSM Financing Options	000015
Ken Aldrich Travel to KC	000019
Amerinet's Purchasing Programs	000020
Ken Aldrich Travel Schedule	000025
Ken Aldrich Follow Up To Meeting	000028
Proactive Medical Assessment	000034
Encompass ILC	000042
Ken Aldrich Update	000048
Ken Aldrich Supply Chain Update	000053
Ken Aldrich Supply Chain Concept Development	000054
Ken Aldrich Visionary Statement	000055
Thomas Farb Contact Information	000057
Thomas Farb Funding Outline	000060
Thomas Farb Document Request	000062
Thomas Farb Promissory Note	000065
Thomas Farb Notice Of Stop Payment	000073
Thomas Farb Update Private Placement	000076
Thomas Farb Review Ken Aldrich Financing Options	000078
Thomas Farb Request For Financials	000082
Thomas Farb Promissory Note	000087
Thomas Farb Peter Brown DH Blair Investment Bank	000089
Thomas Farb Fax Explaining Kimberley-Clark Model	000091
Thomas Farb MSM Projections	000093
Thomas Farb MSM Request For Information	000095
Thomas Farb MSM Update on Lenders	000097
Thomas Farb MSM Request For Information	000098
Thomas Farb MSM Request For Information	000100
Thomas Farb D&B Reports	000103

Thomas Farb MSM Request For Information On Sun capital	000114
Thomas Farb MSM Update	000115
James Graff Prime Care Health Network	000117
James Graff Letter of Intro	000128
James Graff Financial Services (Bernd Moos)	000129
Medical Financial services LTD	000132
New Loan funding Program	000134
James Graff MSM Business Plan Documents	000136
James Graff Letter Regarding Earnings	000141
James Graff Savings Calculations	000145
James Graff Update	000146
Prime Care Health Network	000149
Phil Perry McKesson Buyout of General Medical	000156
Phil Perry MSM Info	000162
Phil Perry Letter Regarding MSM Synergy with McKesson	000164
Jim Chapman World Funding Intro	000165
Jim Chapman MSM Letter of Project Intro	000169
World Funding ND/NC	000199
Anthony Tobin Engagement Letter	000202
Anthony Tobin Financial Engagement Agreement	000204
Anthony Tobin Change of Position	000208
Anthony Tobin Letter of Concern	000210
Anthony Tobin Follow up to Letter of Concern	000212
Anthony Tobin 2nd Financial Engagement Agreement	000215
Anthony Tobin MSM Follow up to Engagement Agreement	000219
Anthony Tobin Letter of Agreement Changes	000222
Anthony Tobin Financial Engagement Agreement	000223
Anthony Tobin Wire Transfer Instruction	000231
Bruce Sanders Engagement Agreement Changes	000233
Anthony Tobin Financial Engagement Agreement	000236
Anthony Tobin Follow up Letter	000241
Anthony Tobin Update	000243
Anthony Tobin Update	000245
Anthony Tobin Update	000247
Anthony Tobin MSM Program	000249
Neil Barnet Express Business Funding	000255
Anthony Tobin Fee Refund Request	000257
Anthony Tobin Fee Refund Request Follow up	000260
Arij de Logt State of Georgia Suit Against WF	000262
World Funding D&B Report	000275
Concept Development Project Agreement	000282
Concept Development Wire Transfer	000284
Chuck Frary Info Request	000285
Chuck Frary MSM Project Request	000286
Chuck Frary Business Activity	000288
Chuck Frary Outline of Market Partners	000290
Chuck Frary Business Outline Example	000293
Chuck Frary Fax Contact For Lynn	000294
Chuck Frary Follow up With Lynn's Paper	000295
Chuck Frary Letter to Rob Rennie	000296
Chuck Frary Non Circumvent	000298
Chuck Frary Business Agreement	000299
Chuck Frary Business Plan Recommendations	000302
Chuck Frary Will Send Bridge Funding Advance	000305
Chuck Frary Business Plan Recommendations	000306
Chuck Frary Funding Update	000307

Chuck Frary Funding Update	000308
Chuck Frary Funding Update	000309
Chuck Frary Funding Update	000310
Chuck Frary Funding Update	000311
Chuck Frary Funding Update	000312
Chuck Frary Funding Update	000313
Chuck Frary Regarding Trip to Supply Chain	000314
Chuck Frary Funding Update	000315
Chuck Frary Proposed Roll Out	000316
Chuck Frary Funding Update	000318
Chuck Frary General Announcement	000320
Chuck Frary Update	000323
Chuck Frary Information Request	000324
Chuck Frary Business Outline	000325
Chuck Frary Information Request	000326
Chuck Frary Project Launch	000327
Chuck Frary Owen Notification	000328
Chuck Frary Owen Proposal	000330
Chuck Frary MSM Projections	000332
Chuck Frary Article Notification	000339
Chuck Frary Business Plan Notification	000364
Chuck Frary Sun Capital	000366
Chuck Frary Sun Capital Arrangement	000367
Chuck Frary Sun Capital Proposal	000369
Chuck Frary Fax	000371
Chuck Frary PMG Recap	000372
Chuck Frary MSM Activity	000373
Chuck Frary Follow up Sonny Decker	000376
Chuck Frary Fax Letter of Understanding	000389
Chuck Frary Intro to Project	000390
Chuck Frary World Funding	000392
Chuck Frary Customer List	000395
Chuck Frary World Funding	000397
Chuck Frary Spending Requirements	000399
Chuck Frary World Funding Reference List	000400
Chuck Frary World Funding Proposal	000402
Chuck Frary Firm Update	000411
Chuck Frary Project Invitation	000413
Chuck Frary Project Analysis Agreement	000415
Sonny Decker Intro to Chuck Frary	000420
Chuck Frary Intro	000421
Sonny Decker MSM Business Proposal	000427
MSM Authorization	000429
Sonny Decker V/C Agreement	000431
MSM Financial Status	000437
MSM Strategic Acquisition Schedule	000438
Chuck Frary Letter Request	000439
Chuck Frary Update	000441
Chuck Frary PB Update	000442
Chuck Frary Disclosure Outline	000443
Chuck Frary Buyer Empowerment	000445
Chuck Frary Letter of Concern	000446
Chuck Frary MSC Development	000447
Chuck Frary MedCenterDirect Supply Track	000448
Chuck Frary Magnet	000449
Chuck Frary MedCenterDirect	000450

Chuck Frary Lynn	000452
Chuck Frary Lynn	000453
Chuck Frary Executive Summary	000454
Chuck Frary Lynn	000455
Chuck Frary Request Funds	000456
Chuck Frary MHS HSCA	000457
Chuck Frary Supply solution	000458
Chuck Frary MSC Press Release	000459
Sun Capital Application	000461
Jay Atkins Previous Contracts	000472
Jay Atkins Term Sheet	000478
Jay Atkins Term Sheet Follow up	000482
Jay Atkins General Terms	000484
Jay Atkins Application Competition	000499
Sun Capital Acceptance Notice	000511
Sun Capital D&B Report	000515
Kurt Church Application	000519
Kurt Church Letter of Intent	000523
Express Business Funding Application	000525
Tom Farb D&B Request	000536
Kurt Church Letter of Concern	000538
Express Business Funding D&B	000540
Dr. Howard Fullman Program Intro	000547
Kaiser Permanente Intro	000549
Dr. Howard Fullman Follow up	000587
Dr. Howard Fullman Ken Aldrich	000590
Capital Funding Corp. Referral Agreement	000592
Ron Sheffron Precious Gems	000595
Ron Sheffron Letter of Concern	000597
Capital Funding Intro	000599
Chuck Frary Capital Funding valuation	000610
Florida Finance Directory	000611
Capital Funding Agreement Acceptance	000614
Ron Sheffron Investment Opportunities	000615
Ron Sheffron Info Request Trade Programs	000618
Ron Sheffron Promotional Program	000620
Ron Sheffron Letter of Confidence	000631
Ron Sheffron Banking Conference	000633
Ron Sheffron BP Update	000634
Ron Sheffron Follow Up	000635
Neil Marsh Intro	000640
Neil Marsh Project Review	000642
Neil Marsh Meeting	000647
Neil Marsh HSCA VNA	000650
Neil Marsh Invoice	000651
Neil Marsh Announcement	000653
Neil Marsh Announcement Changes	000654
Neil Marsh Invoice	000661
Neil Marsh Invoice	000663
Neil Marsh Invoice Announcement Draft	000665
Neil Marsh Invoice	000683
Neil Marsh Invoice	000690
Neil Marsh Executive Outline	000692
Capital Healthcare Financing Application	000694
Owen Healthcare Meeting	000698
Chuck Frary Buyout Letter	000702

Richard Heard Buy Out Letter	000706
Richard Heard Information Request	000709
Chuck Frary Follow up to Owen Response	000710
Richard Heard Business Plan Request	000711
Richard Heard Requesting Response	000712
Richard Heard Product Demonstration	000714
Richard Heard Declining to Move Forward	000716
Richard Heard Update MSC	000718
Notes	000719
HSCA Eric Norman Price Request	000720
VNA Mary Suther Neil Marsh Meeting	000728
VNA Mary Suther Pricing	000730
VNA Mary Suther Cost Comparison	000736
HSCA Valuation	000737
VNA Mary Suther Cost Comparison	000740
VNA Mary Suther Neil Marsh Meeting	000745
VHA Mary Reynolds Product Valuation Results	000753
VNA Mary Reynolds Clarification	000754
VNA Mary Reynolds Procedural Kits	000759
Gatekeepers International Job Request	000760
Mike Patton Intro	000767
Mike Patton Follow up	000768
Mike Patton Follow up to Meeting	000769
Executive Summary	000772
Mike Patton Proposal	000778
Purchasing First Intro	000780
Corporate Strategic Services Intro	000790
TheSupplyChain.com Glossary	000797
TheSupplyChain.com Market maker Agreement	000800
TheSupplyChain.com Overview	000810
TheSupplyChain.com Supplier content Management	000831
TheSupplyChain.com Price List	000853
Concept Development Update	000859
TheSupplyChain.com Letter of Intent	000862
TheSupplyChain.com Software Agreement	000864
TheSupplyChain.com Letter of Intent	000873
TheSupplyChain.com Wire Transfer	000875
TheSupplyChain.com Invoice	000877
TheSupplyChain.com Statement	000878
TheSupplyChain.com Invoices	000879
Supply Solution ND/NC	000891
Supply Solution Referral Agreement	000894
Supply Solution Reseller Agreement	000904
GoCo-op Intro	000918
GoCo-op Proposal	000927
GoCo-op Letter of Agreement	000930
CoalesCo Ltd. Iowa Meeting	000939
Quantum Corporate Funding Application	000943
Career Builders Service Agreement	000946
Virtual Supply Chain ND/NC	000950
Virtual Supply Chain Proposal	000957
Virtual Supply Chain Illustration	000960
MSC Web Services	000962
Suzanne Passalacqua ND/NC	000975
Suzanne Passalacqua Service Agreement	000981
Supply Track Acquisition Proposal	000983

Supply Track Business Plan	001003
MSIS Operating System	001073

C. BENCHMARK SOFTWARE APPLICATIONS

Choice Echo Application
HSCA Application
MedEcon Application
MSIS Application
Peri Application
WinMDR Application

D. COMPUTATION OF DAMAGES

[Explain amount of damages party seeks and how that amount was calculated. Attach supporting documents.]

E. INSURANCE POLICIES [List policies and attach copies]

Dated: _____

Signed:

_____
[Signature of attorney for disclosing party]

Page 1 of 2

Power, John

From: Bret Landrith [landrithlaw@cox.net]
Sent: Wednesday, June 01, 2005 5:37 PM
To: logan.overman@stklaw.com; demarea@stklaw.com; bblefeld@velaw.com; bretl@medicalsupplychain.com; jgregor@stklaw.com; john.power@husch.com; Dennis Hawver; jvaughnmock@nossaman.com; molthoff@stklaw.com; sroberts@nossaman.com; khardee@stklaw.com
Subject: Medical Supply v. Novation et al ,Case 4:05-cv-00210-ODS Rule 16 Conference

June 1, 2005

Medical Supply v. Novation et al ,Case 4:05-cv-00210-ODS

Dear Defendant Counsel

I have a schedule without set appointments between now and June 13th. All my time is currently devoted to researching and writing a brief in opposition to disbarment. If you can set a time for a telephone conference amongst yourselves, I will likely be able to be free for the conference.

Medical Supply is scanning and saving our Rule 26 disclosure documents with bates stamp numbers starting at 000001. We have over 2000 so far. Our biggest concern as highlighted in the demand letter is complying with electronic discovery guidelines and case law, including recent controversial federal rulings. We realize several million documents are in possession of the parties that are relevant to the claims being tried. The vast majority were electronically created and our concern is that they be exchanged electronically or stored in a common limited access server.

We anticipate mutual protective order concerns related to sensitive proprietary data.

The field of maneuver in contests over the extent of reasonable discovery are understandably a significant defense interest. We are amenable to bifurcating summary judgment motions with a view to limiting the burden of initial discovery. Our suggestion is that we start with the per se antitrust claims where clearly discoverable contracts and transactions would largely resolve dispositive issues.

We anticipate requiring 90 days to present our case to a jury. ½ the time taken in the Kansas District Court case for Reazin vs Blue Cross Blue Shield.

We don't anticipate any possibility prompt settling of the case.

6/6/2005

Sincerely,

Bret D. Landrith

Attorney for Medical Supply Chain, Inc.

785-267-4084

785-876-2233

Excerpt from Court's Order of Rule 26 Conference. Case 4:05-cv-00210-ODS Document 29 Filed 04/05/2005:

"The Proposed Plan shall also state whether the case will be tried to the Court or to a jury and the anticipated length of the trial. See Local Rule 16.1(f)(5). In accordance with Local Rule 16.1(d), plaintiff's counsel shall take the lead in preparing the Proposed Plan. The Rule 26(f) conference shall take place on or before June 13, 2005. Counsel are reminded that FRCP 26(a)(1) disclosures must be completed within ten (10) days after the Rule 26(f) conference. During the Rule 26(f) conference, the parties shall discuss the nature and bases of their claims and defenses and shall discuss the possibilities for a prompt settlement of the case. Discovery may not commence before the conference is held except under the conditions set forth in FRCP 26(d)."

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

Office of the Clerk
400 East Ninth Street
Kansas City MO 64106

PETITION FOR ADMISSION PRO HAC VICE

Affidavit of Movant

I, John K. Power, an active member in good standing of the Bar of the United States District Court for the Western District of Missouri, request that this court admit pro hac vice, Bruce A. Blefeld, an attorney admitted to practice in the Texas Supreme Court and U.S. District Court for the Southern District of Texas, but not admitted to the Bar of this court, who will be counsel for Defendants Robert Baker, Curt Nonomaque, Novation L.L.C., VHA Inc. and University Healthsystem Consortium, in the case listed below. I am aware that the local rules of this court require that I participate in the preparation and presentation of said case(s), and that I accept service of all papers served.

35312
(MO Attorney License NO)

(Signature)

Date: June 9, 2005

Address:
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105

Phone: 816-421-4800

Affidavit of Proposed Admittee

I, Bruce A. Blefeld, am currently a member in good standing of the bar of the Texas Supreme Court and the U.S. District Court for the Southern District of Texas, but not admitted to the Bar of this court. I understand that if this court grants me admission pro hac vice, the movant bringing this motion must participate in the preparation and presentation of the matters listed below and must accept service of all papers served.

Case Number(s):
05-0210-CV-W-ODS

Case Title(s)
Medical Supply Chain v. Novation LLC. etal

(Signature)

Date: 5-31-05

Address: Vinson + Elkins L.L.P., 1001 Fannin Suite 2300, Houston TX 77002

Appendix "A"

Phone: 264 713 758-3610

MOTION GRANTED: _____ _____
(Date) (Clerk of Court)

The original **plus two copies** of this form and the Pro Hac Vice admission fee of $50.00 shall be filed with this court.

Appendix "A"

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

Office of the Clerk
400 East Ninth Street
Kansas City MO 64106

PETITION FOR ADMISSION PRO HAC VICE

Affidavit of Movant

I, John K. Power, an active member in good standing of the Bar of the United States District Court for the Western District of Missouri, request that this court admit pro hac vice, Kathleen Bone Spangler, an attorney admitted to practice in the Texas Supreme Court and U.S. District Court for the Southern District of Texas, but not admitted to the Bar of this court, who will be counsel for Defendants Robert Baker, Curt Nonomaque, Novation L.L.C., VHA Inc. and University Healthsystem Consortium, in the case listed below. I am aware that the local rules of this court require that I participate in the preparation and presentation of said case(s), and that I accept service of all papers served.

35312
(MO Attorney License NO)

(Signature)

Date: June 9, 2005

Address:
Husch & Eppenberger, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105

Phone: 816-421-4800

Affidavit of Proposed Admittee

I, Kathleen Bone Spangler, am currently a member in good standing of the bar of the Texas Supreme Court and the U.S. District Court for the Southern District of Texas, but not admitted to the Bar of this court. I understand that if this court grants me admission pro hac vice, the movant bringing this motion must participate in the preparation and presentation of the matters listed below and must accept service of all papers served.

Case Number(s):
05-0210-CV-W-ODS

Case Title(s)
Medical Supply Chain v. Novation LLC et al.

(Signature)

Date:

Address: Vinson & Elkins L.L.P.

Appendix "A"

Phone: 713 758-2853

1001 Fannin
Suite 2300
Houston TX 77002

MOTION GRANTED: _____ _____
(Date) (Clerk of Court)

The original **plus two copies** of this form and the Pro Hac Vice admission fee of $50.00 shall be filed with this court.

Appendix "A"

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

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

ORDER (1) GRANTING DEFENDANTS' MOTIONS TO TRANSFER AND (2) TRANSFERRING THE MATTER TO THE DISTRICT OF KANSAS

Pending are Defendants US Bancorp, US Bank, Jerry Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew Duff's Motion to Transfer, Dismiss and/or Strike (Doc. # 18), Defendant Shughart Thomson & Kilroy's Motion to Transfer, Dismiss and/or Strike (Doc. # 25) and Defendants Novation, VHA and University Healthcare Consortium's Motion to Transfer Venue or Dismiss (Doc. # 26). For the following reasons, the motions to transfer are granted.

I. BACKGROUND

On October 22, 2002, Plaintiff Medical Supply Chain, Inc., filed suit in the District of Kansas (Medical Supply Chain, Inc. v. US Bancorp, NA, Case No. 02-2539-CM) against various defendants alleging a conspiracy to prevent Plaintiff's entry into the health care supply market. The Honorable Carlos Murgia, United States District Court Judge for the District of Kansas, ultimately dismissed the case. The Tenth Circuit Court of Appeals affirmed the district court's decision and remanded the case to the district court to impose sanctions against Plaintiff's counsel for prosecution of a frivolous appeal.

On March 9, 2005, Plaintiff filed the above-captioned matter alleging almost identical claims against many of the same defendants. Defendants request that this Court transfer the case to the District of Kansas.

II. DISCUSSION

Pursuant to 28 U.S.C. § 1404(a), "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Essentially, the Court must consider: (1) whether there is a justification for the transfer by balancing factors of convenience and justice, and (2) whether there is a proper alternative district to which the case may be transferred. See Terra Int'l v. Miss. Chem. Corp., 119 F.3d 688, 691 (8th Cir. 1997).

Plaintiff argues that the District of Kansas is not the proper venue for this case because the district court and court of appeals have displayed a bias against Plaintiff when issuing rulings on Plaintiff's previous case. Plaintiff also claims that the District of Kansas lacks the resources to manage an antitrust case. Defendant contends, quite persuasively, that venue is more properly set in the District of Kansas because the District of Kansas is thoroughly familiar with the same allegations and claims Plaintiff asserts in this case and, in order to conserve judicial resources and avoid the possibility of conflicting ruling from different courts, the case should be transferred to the District of Kansas.

Mere disappointment with the result of a case does not give a party the right to file an almost an identical second cause of action and, moreover, does not entitle a party to forum shop. Based on the District of Kansas' extensive experience with the almost identical previous lawsuit and in the interest of justice, the above-captioned matter is transferred to the District of Kansas.

III. CONCLUSION

For the foregoing reasons, the Defendants' Motions to Transfer are granted, and the case is transferred to the District of Kansas, along with the remaining pending motions, for all further proceedings.

IT IS SO ORDERED.

DATE: June 15, 2005

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

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

Medical Supply CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

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

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

STATEMENT OF FACTS

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

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

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

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

ARGUMENTS AND AUTHORITIES

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

Medical Supply's new case meets each of the qualifications the Eighth Circuit has recognized defeat res judicata under *Lawlor v. Nat'l Screen Services*, 349 U.S. 322 (1955), "the conduct presently complained of was all subsequent to the . . . [previous] judgment." *Id.* at 328, 330. Moreover, additional defendants were named (*Id.* at 325) and new antitrust violations were alleged. *Id.* at 328. In Lawlor, five new defendants were added, medical Supply has added eight, seven of whom were without recognizable privity[1] with any of the prior defendants. See also *Wilford Banks v. International Union Electronic,*

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

Electrical, No. 03-3982 at pg. 5-6 and fn 2 (Fed. 8th Cir. 12/3/2004) (Fed. 8th Cir., 2004)(distinguished from *Lawlor* on other grounds) and *Engelhardt v. Bell & Howell Co.,* 327 F.2d 30 at pg. 36 (C.A.8 (Mo.), 1964).

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

> "Professor Moore in his work on federal practice recognizes this exception to the collateral estoppel doctrine. See 1B Moore's Federal Practice P0.443(2).
>
> Our court has also held that collateral estoppel does not apply where the issue emerges differently in two different contexts. *Embry v. Equitable Life Assurance Society*, 451 F.2d 472 (10th Cir. 1971), cert. denied, 405 U.S. 1041, 92 S.Ct. 1316, 31 L.Ed.2d 582 (1972). To the same effect is *Young & Company v. Shea*, 397 F.2d 185, 188 (5th Cir. 1968), cert. denied, 395 U.S. 920, 89 S.Ct. 1771, 23 L.Ed.2d 237 "(1969).

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

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

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

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

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

While the above describes law and facts Mark A. Olthoff, Jonathan H. Gregor, Logan W. Overman and Andrew M. DeMarea are responsible for knowing and therefore showing they have intentionally violated Rule 11 and Title 28 U.S.C. § 1927 in filing the present motion for sanctions, there are additional reasons outside the defendant counsels' expected knowledge that provide Medical Supply the right to bring new claims: "[A]n adverse party may, **by bringing a new proceeding,** invoke the power of the courts to scrutinize the conduct of the parties in the previous action. *Marshall v. Holmes*, 141 U.S. at 599, 12 S.Ct. at 65, quoting *Johnson v. Waters*, 111 U.S. 640, 667, 4 S.Ct. 619, 633, 28 L.Ed. 547 (1884)" [emphasis added] *Leber-Krebs, Inc. v. Capitol Records,* 779 F.2d 895 at 901 (C.A.2 (N.Y.), 1985).

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on June17th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. DeMarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

S/Bret D. Landrith
Bret D. Landrith

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Suggestion in Opposition to defendants US Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Shughart Thomson & Kilroy, P.C., Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duff Motion To Transfer, Dismiss And/Or Strike

1. The plaintiff has addressed the request to transfer in this action to the Kansas District Court in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

2. The plaintiff has addressed the claim and issue preclusion arguments in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference with the addition of the mention that the defendants are seek to contradict *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) which appears in all respects to be a bay horse case:

> "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. And so it is here. 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.

This conclusion is unaffected by the circumstance that the 1942 complaint sought, in addition to treble damages, injunctive relief which, if granted, would have prevented the illegal acts now complained of. A combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought. And, as already noted, a prior judgment is res judicata only as to suits involving the same cause of 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."

Lawlor v. National Screen Service Corporation, 349 U.S. 322 at 327-329, 75 S.Ct. 865, 99 L.Ed. 1122 (1955).

3. The plaintiff has addressed the arguments related to the sufficiency of its pleading of its federal actions in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

4. The notice pleading requirements of federal claims also extend to the plaintiff's state claims:

"Under the Federal Rules, it is not necessary to plead every fact with formalistic particularity. Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."). Rather, the question for us is whether BJC's complaint put Columbia on notice as to the substance of the claim. *Swierkiewcz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1057-58 (8th Cir. 2002). We conclude that it did. The allegations that BJC had a binding agreement with Columbia, that Columbia breached the agreement,

> and that BJC suffered injury as a result of the breach, are sufficient to satisfy the requirements of Rule 8(a)."

BJC Health System v. Columbia Casualty Company at page 5 (8th Cir., 2003).

5. The plaintiff has addressed the arguments related to the sufficiency of its pleading fraud in its Suggestion in Opposition to VHA, UHC and Novation and incorporates it by reference.

6. In response to the defendants' request to strike allegations related to Magistrate James P. O'Hara and the law firm of "Shughart, Thomson & Kilroy Watkins Boulware, P.C.," for being immaterial, impertinent and scandalous under Rule 12(f). There is no automatic immunity for attorneys from their tortious conduct. *Havens v. Hardesty*, 43 Colo.App. 162, 600 P.2d 116 (1979). The plaintiff calls the defendants' attention to *Handeen v. Lemaire*, 112 F.3d 1339 (C.A.8 (Minn.), 1997) in which the court of appeals found merit to RICO claims against a law firm. See also *Raymark Industries, Inc. v. Stemple*, 714 F.Supp. 460 (Kan., 1988).

7. The plaintiff also requires Shughart, Thomson & Kilroy Watkins Boulware, P.C.'s presence for injunctive relief to prevent indemnification of other defendants' antitrust liabilities in contradiction of public policy. See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 at 1186 (C.A.8 (Minn.), 1979).

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 19th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

Suggestion in Opposition to
Novation, LLC, VHA Inc., And University Healthsystem Consortium's Motion To Transfer Venue Or Alternatively Motion To Dismiss Complaint For Failure To State A Claim

Comes now the plaintiff Medical Supply and respectfully requests the court deny the defendants motion (Doc. 26, 27) for the following reasons:

Statement of Facts

Medical Supply brought claims that VHA, UHC and Novation have conspired and combined to monopolize the market for hospital supplies and the related markets of hospital supplies through e-commerce and healthcare technology company finance with the other named defendants in a RICO conspiracy to prevent competition and thereby overcharge Medicare and Medicaid.

On April 18, 2005 at 7:11 pm ET, the defendant Neoforma, Inc. a publicly traded company announced SEC mandated disclosures in a judicially noticeable press release under Rule 201(b) of the Federal Rules of Evidence that the defendant hospital supply distributors VHA, UHC and Novation are in a long term agreement with Neoforma, an electronic marketplace distributor competitor of Medical Supply Chain, Inc. and that VHA and UHC have determined Neoforma's services are materially higher than they would be in a competitive market:

> "VHA and UHC also have indicated that, based in part on the findings of their consultant, they believe **a market competitive price of the services provided by Neoforma should be**

significantly less than the current fee. They also have indicated that they intend to renegotiate the outsourcing agreement to which Neoforma, VHA, UHC and Novation are all parties…" [emphasis added]

Neoforma, Inc. press release, Exb 1. Medical Supply has alleged the defendants' actions to keep Medical Supply from distributing hospital supplies and the defendants' long term anticompetitive contracts have created artificially inflated hospital supply prices as part of their RICO common enterprise to submit False Claims to the US Government. While disclosing VHA, UHC and Novation's communications as required under SEC regulations, Neoforma disputes its services are not competitive.

Medical Supply opposes dismissal, having standing under the Sherman and RICO acts and having sufficiently pled its federal and state claims. Medical Supply also opposes transfer of venue which would defeat the interests of justice.

∫∫VHA, UHC and Novation's Argument Medical Supply's Claims and Issues Are Precluded

The defendants plead claim and issue preclusion but use the word "transaction" only once and in a denial on page 14 that they participated in the GE real estate transaction, in effect denying being in privity with the defendants Medical Supply brought its second action against. *Williams v. Marlar*, 267 F.3d 749 (8th Cir., 2001). Privity is also a word absent from their preclusion arguments but a required element of res judicata.

Medical Supply can now bring an action for damages based on what it tried to prevent. "As this court explained in *Baker Group, L.C.*, claim preclusion cannot apply to a claim that arises after the first suit is filed, as is the case here. Accordingly, we reverse and remand to the district court." *Lundquist v. Rice Memorial Hospital*, 238 F.3d 975 at 978 (8th Cir., 2000)

Despite never being allowed discovery, after two years, Medical Supply has obtained a lot of information unavailable to it when the emergency relief in the form of a temporary restraining order and preliminary injunctive relief were being sought in Kansas District Court. Medical Supply now raises timely new claims against the defendants based on transactions not covered by the previous action or reasonably discoverable.

The VHA, UHC and Novation defendants seek to preclude issues from being resolved in this case that were never ruled on in the prior trial or appellate court decisions. "A prerequisite to the use of issue preclusion is that the issue actually be litigated." *Jack Faucett Associates, Inc. v. American Tel. and Tel.*

Co., 744 F.2d 118 at 132 (C.A.D.C., 1984). There is no issue preclusion related to the theft of intellectual property, contract or interference with contract which were expressly dismissed without prejudice. Most saliently, Judge Murguia recognized the earliness of the litigation by repeatedly and expressly stating Medical Supply did not allege price fixing, the present complaint against different defendants is primarially a retail price maintenance, price fixing case under federal and state antitrust law.

The trial court and the court of appeals, despite repeated requests, refused to determine if the threat of a USA PATRIOT Act suspicious activity report was a Sherman §2 violation and of course could not have determined if VHA, UHC, and Novation's coconspirators and common enterprise member US Bank's filing of a suspicious activity report to help Piper Jaffray and Novation monopolize hospital supplies and defraud government insurance programs is a Sherman §2 violation because it had not yet happened and the Kansas District court refused to consider allegations related to US Bank, US Bancorp and Piper Jaffray being in a combination or conspiracy with Novation, UHC and VHA as stated numerous times in the Kansas complaint.

The defendants might mistake the meaning of the Kansas trial judge's comments regarding the USA PATRIOT Act, even though they quote the order in their suggestion: "Indeed, the district judge noted, with regard to Plaintiff's USA Patriot Act violations (which are also made here) that "plaintiff's allegation [is] so completely divorced from rational thought that the court will refrain from further comment . . . ." See Exhibit 1 at pp. 14-15." Suggestion at page 2. While the fact allegations tracked the statute's prohibited conduct exactly, the sole requirement for pleading sufficiency the trial judge seems to be expressing his disdain for the USA PATRIOT Act, and Medical Supply certainly supports the desire to criticize the act. There is no preclusive effect to these comments as an interpretation of the act that might preclude the national interest in Congress's enforcement as expressly stated. The plaintiff or the defendants would have to challenge the constitutionality of the statute.

Transfer of Venue is Inappropriate

Section 1404(a) of Title 28 provides that: "for the convenience of parties and witnesses, in the interest of justice, a district may transfer any civil action to any other district where it might have been brought." An authority on the standards for each element is *American Standard, Inc. v. Bendix Corp.* which states the burden to show particularized inconveniences for attorneys representing the defendants whose

local counsel are in this district or the defendants witnesses, identifying them by name, the subject of their testimony and how they will be inconvenienced, when both venues are in sight of each other. Finally the movant must show the variety of ways the transfer could be in the interest of justice. See *American Standard, Inc. v. Bendix Corp.*, 487 F.Supp. 254 at 261-263 (W.D. Mo., 1980).

The Chief Justice of the Tenth Circuit Court of Appeals, Deanell R. Tacha in a confidential order dated March 23, 2005 determined the conduct this lawsuit describes in relationship to improper influence alleged in the Kansas District court is in the nature of bias, even over the case the defendants allege to preclude this action where the magistrate was not assigned. See Exb. 2 Affidavit of Sam Lipari, pg. 2. The conduct this lawsuit describes extended to the Tenth Circuit see attached letter to Clerk Fisher. See Exb 3. Most disturbingly, there is a pattern and practice of intimidating witnesses and their counsel in Kansas District court cases described in depth in Sam Lipari's affidavit that endangers the parties. Obviously, a transfer to the District of Kansas cannot be in the interest of justice.

The judicial economy argument while an immeasurably less important factor in light of the documented misconduct is also in error. Medical Supply, awaiting an order on a reconsideration of the dismissal of the Bancorp case and while in the General Electric case became concerned that the Kansas District court did not have sufficient resources to adjudicate the two antitrust cases. A letter was written to the Chief Administrative Judge of the District of Kansas explaining the basis for Medical Supply's concerns:

> "I have written this letter in the hopes that these concerns will cause an inquiry into what resources the court would need to adequately administer justice in an antitrust case and should those resources not be available, it would give the parties in these two cases the opportunity to consider other forums."

Letter to Chief Judge John W. Lungstrum, November 7, 2003. Alas, the Kansas District court did not even have the resources to answer the letter. However it was added to the GE case record by court order and it is Exb. 4 to this document.

Medical Supply has never the less sought to address the judicial economy concern by making a motion (now contested) to consolidate the earlier Kansas case with the present action in Missouri District Court. There is a substantial basis for this because as the GE appeal brief gave notice to the conspirators, the United States ex rel action against the current defendants for Medicare, Medicaid and Champus fraud is in Kansas City, Missouri.

> "[T]he FCA "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co*., 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir.1995)."

Costner v. URS Consultants, Inc., 153 F.3d 667 at 677 (C.A.8 (Ark.), 1998). Both of these complex litigations share common issues of law and fact. The remaining Kansas case is on limited remand and the fact issue the Kansas District court has been tasked to determine is uncontested. The issue at law over whether Appellate sanctions should be imposed is contested but outside the limited remand jurisdiction of the Kansas court.

Finally, Medical Supply's substantive rights would be changed. The Western District of Missouri was chosen for the Eighth Circuit rule that contribution may be enforced among joint tortfeasors in an antitrust action. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc*., 594 F.2d 1179 at 1186 (C.A.8 (Minn.), 1979). Medical Supply also seeks to enjoin indemnification between defendants. *Id* Both are required to deter the defendants who continued to injure Medical Supply even after receiving notice of the gravamen of the antitrust violations.

The defendants seek to have the court contradict 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). See Fairman, Christopher M., The Myth Of Notice Pleading Arizona Law Review pgs. 1018-19, Vol. 45:987 (2003).

To prove a § 1 violation, a plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade. See *Tops Mkts*., 142 F.3d at 95; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc*., 996 F.2d 537, 542 (2d Cir. 1993).

It appears VHA, UHC and Novation have conceded the defendants are liable under Sherman § 1 for Medical Supply's *per se* price fixing claim. The dispositive question generally is not whether any price fixing was justified, but simply whether it occurred." *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133, 1144 (9th Cir. 2003) (citations omitted). The distributor competitors UHC and VHA's creation of an

LLC (Novation) to set prices *ex ante* is itself unlawful *per se* under the Sherman Act. *Dagher v. Saudi Refining Inc*., No. 02-56509 (Fed. 9th Cir. 6/1/2004) (Fed. 9th Cir., 2004).

The April 18th, 2005 Neoforma press release clearly describes an agreement between competing legally distinct distributors that unreasonably restrains trade in the form of uncompetitively high charges for its electronic marketplace service. However, below the facial § 1 elements of the press release are Medical Supply's allegations that VHA and UHC have placed member hospital money into Neoforma at artificially inflated initial public offering stock prices and that these hospitals that could have been Medical Supply's customers.

Just the long term agreements used jointly by Novation mandating Neoforma and GHX membership and that punish hospitals for even looking at other sources including Medical Supply state a Sherman § 1 claim: "[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action." *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc*., No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004).

Medical Supply alleged that VHA, UHC and Novation participated in a broad scheme to overcharge Medicare, the devices used by the conspirators included long term contracts with hospitals to exclude competitors including and most especially Medical Supply which as a web based distributor could not be allowed to survive and lower prices. The complaint documents in detail how upstream inputs required by Medical Supply to enter the market including the escrow accounts and the profit from the GE Transportation lease were withheld by VHA, UHC and Novation's coconspirators in furtherance of the scheme.

> "Under the liberal pleading standards of the Federal Rules, the allegations and the reasonable inferences to which they give rise sufficiently outline the illegal agreement, the "conscious commitment to a common scheme designed to achieve an unlawful objective," that the law requires to state this type of claim. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir.1980), cert. denied, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). An unlawful agreement to fix prices is sufficiently clear from the pleading to state a claim for both horizontal and vertical price-fixing."

In re Mercedes-Benz Anti-Trust Litigation, 157 F.Supp.2d 355 at 362 (N.J., 2001). The defendants also seek to impose the who what when and where requirement on interlocking directorates. No heightened standard applies.

Medical Supply alleges it was prevented from entering the market by US Bank and later GE who were directed by the coconspirator defendants to break written contacts and deprive Medical Supply of inputs it required to enter as a competitor. Recovery is 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).

In *Covad Communications*, the mere breaking of the agreement between the plaintiff and the monopolist alone become adequate to state a claim. **"[A]llegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws**." [emphasis added] *Covad Communications Co. v. Bellsouth Corp.*, at ¶63 2002 C11 260 (USCA11, 2002), reversed on other grounds. The US Supreme Court recently stated this point of law:

> "The leading case imposing § 2 liability for refusal to deal with competitors is *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U. S. 585, in which the Court concluded that ***the defendant's termination of a voluntary agreement with the plaintiff*** suggested a willingness to forsake short-term profits to achieve an anticompetitive end." [emphasis added]

Verizon Communications Inc. v. Law Offices of Trinko, 540 U.S. ___ (U.S. 1/13/2004) (2004).

The defendants in asserting the complaint only confusingly describes one relevant market are not aiding the court's informed resolution of this matter. The complaint expressly states three relevant nationwide markets, each of which VHA, UHC and Novation are alleged to restrain trade in. The market for hospital supplies, the market for hospital supplies in e-commerce where the enhanced efficiency of the web based and artificial intelligence enhanced procurement services Neoforma, Inc., GHX LLC and Medical Supply Chain, Inc. is not substitutable or interchangable by Novation's fax machine and early electronic data interface or EDI individual order taking between human clerks. Interchangeability may be measured by, and is substantially synonymous with, cross-elasticity. *Brown Shoe Co. v. United States*, 370 U. S. 294, 325 (1962). Finally, the complaint adequately alleges VHA, UHC and Novation participated with US Bancorp and Piper Jaffray in restraining the market for capitalization of healthcare technology companies, the third expressly stated relevant market. Long term contracts used to lock out competitors from a relative markets are described in *Telecor Communications, Inc. v. Southwestern Bell Telephone*, 2002 C10 1017 (USCA10, 2002).

The appropriate analysis of the sufficiency of Sherman 2 relative market averments cannot stop at the expressly stated markets, however. It is well settled that defining the relevant market is an issue of fact, *Westman Comm'n Co. v. Hobart Int'l, Inc*., 796 F.2d 1216, 1220 (10th Cir. 1986). *Westman* itself inspires an inquiry into the difference between forms of product distribution which this court requires evidence and a finder of fact to resolve.

The complaint details that two competing hospital supply distributors, VHA and UHC tied their member hospitals held by long term contracts into a market of 2300 hospitals controlled by their agreement in restraint of trade called Novation LLC. This adequately alleges a relative market of 2300 hospitals that VHA, UHC and Novation have agreed to give the Neoforma, GHX, LLC joint venture or strategic alliance 100% of.

The averments in Medical Supply's complaint also clearly state that in combination and conspiracy, VHA, UHC and Novation participated with US Bancorp and Piper Jaffray in restraining trade in the upstream market of capitalizing healthcare technology companies including Medical Supply to deny critical inputs required to enter the market for hospital supplies controlled through Novation.

The defendants are inaccurate in denying the complaint does not allege fraudulent misrepresentations. Price Fixing through Novation's misrepresentation of economic inflation and that it was getting discounts through group purchasing power to exclude hospitals from dealing with competitors including Medical Supply places Medical Supply within the proximate victim element of Missouri fraud. *In re Mercedes-Benz Anti-Trust Litigation,* 157 F.Supp.2d 355 (N.J., 2001) collects cases on price fixing's inherent fraudulent misrepresentation. The complaint alleges fraud on the Kansas District court through misrepresentations by Shughart Thomson and Kilroy and its agents meeting the standard for fraud on the court and RICO fraud set out in *Raymark Industries, Inc. v. Stemple,* 714 F.Supp. 460 (Kan., 1988).

No more averments needed to be made in the complaint to give the defendants notice of the gravamen of the charges against them and that the allegations included that the conduct was committed in a common conspiracy (complaint clearly alleges a specific claim of civil conspiracy to commit fraud and that it further alleges that Zahm and Guy participated in the conspiracy.)*Deere & Co. v. Zahm*, 837 F.Supp. 346 at fn1 (Kan., 1993). A conspiracy may exist between two or more individual persons or individual corporations or by a mixture of people and corporations. Essentially, civil conspiracy exists on the actions

of people to bring about an illegal result. *Intern. U., United Auto., Etc. v. Cardwell Mfg. Co*., 416 F.Supp. 1267 at 1290 (Kan., 1976).

Joint and Several Liablity among participants in antitrust conspiracy (as it would also be in antitrust combination) is a vital instrument for establishing deterrence. See *Paper Systems Inc. v. Nippon Paper Industries Co*., Ltd. 281 F.3d 629 at 633 (C.A.7(Wis.) 2002), referencing Lewis A. Kornhauser & Richard L. Revesz, Sharing Damages among Multiple Tortfeasors, 98 Yale L.J. 831 (1989). No basis for dismissal of any claim asserted by the defendant VHA, UHC and Novation can be dispositive unless it addressed the failure of a claim to meet pleading requirement against all defendant parties.

The complaint adequately alleges violation of § 1962(c), the elements contained in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd, post, [473 U.S.] p. 606 [105 S.Ct. 3291, 87 L.Ed.2d 437]…the statute requires no more than this." *Bowman v. Western Auto Supply Co.,* 985 F.2d 383 at 385 (C.A.8 (Mo.), 1993). VHA, UHC and Novation merely argue that the complaint does not describe their individual conduct violating § 1962(c). This is however an invalid argument. The complaint alleges VHA, UHC formed Novation to defraud Medicare and that VHA, UHC acquired control of Neoforma and that Novation used Neoforma to police the fraudulent pricing of the enterprise. To direct a business's normal activities is to participate in the conduct of an enterprise within the meaning of RICO.

See *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (RICO extends to those who participate in the operation or management of an enterprise, including outsiders associated with the enterprise who participate in the direction of its activities through a pattern of racketeering activity); *Handeen v. Lemaire*, 112 F.3d 1339, 1349 n.12 (8th Cir. 1997) (same). "The fact that some defendants were not involved in each aspect of the overall enterprise did not require severing them or the charges against them." *U.S. v. Cardall*, 885 F.2d 656 at 668 (C.A.10 (Utah), 1989)

The plaintiff's complaint describes many contracts and transactions conducted and controlled by VHA, UHC and Novation. "Even a commercial contract can serve as the basis of a RICO enterprise. See *River City Mkts., Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1462 (9th Cir.1992) ("Virtually every business contract can be called an `association in fact.'"); *Loma Linda Univ. Med. Ctr., Inc. v. Farmers Group, Inc*., No. Civ-S-94-0681 WBS/JFM, 1995 WL 363441, at *2 (E.D.Cal. May 15, 1995) (noting that

"contractual relationships can establish a RICO enterprise").” *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 29 F.Supp.2d 1253 at 1259 (Kan., 1998).

Medical Supply’s complaint ascribes different predicate conduct to each individual: “The plaintiff set forth separately the acts complained of by each defendant.*" Wiesner v. Willkie Farr & Gallagher*, 785 F.Supp. 408, 411 (S.D.N.Y.1992) (citing *Zerman v. Ball*, 735 F.2d 15, 22 (2d Cir. 1984)).See also *Gottstein v. National Ass'n for Self Employed*, 53 F.Supp.2d 1212 at 1223 (Kan., 1999).

Since irrefutably at least one RICO predicate is adequately pled, Medical Supply has adequately alleged RICO conspiracy: “A RICO conspiracy allegation requires at least the pleading of the existence of one or more overt acts by the defendant in furtherance of the conspiracy and the assent of each defendant to the conspiracy. *Seville Industrial Machinery v. Southmost Machinery*, 742 F.2d 786 (3d Cir. 1984); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir.1981), cert. denied 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982).Where persons associate "in fact" for criminal purposes, each person may be held liable under RICO for his, her, or its participation in conducting the affairs of the association in fact through a pattern of racketeering activity.” *Raymark Industries, Inc. v. Stemple*, 714 F.Supp. 460 at 474 (Kan., 1988).

VHA, UHC and Novation were alleged to be at the center of the enterprise having the common goal of defrauding Medicare, Medicaid Champus and private insurers:

> “VNA Plus alleges that Apria was involved in the day-to-day operations of the VNA Plus/Apria enterprise by its direct control over the billing services and practices of the enterprise. At a minimum, VNA Plus has alleged that Apria had "some part in directing" the affairs of the Apria/VNA Plus enterprise. Reves, 507 U.S. at 179, 113 S.Ct. 1163. For the above reasons, we find that VNA Plus has adequately alleged that Apria participated in the RICO enterprise.
>
> *VNA Plus, Inc. v. Apria Healthcare Group, Inc*., 29 F.Supp.2d 1253 at 1259 (Kan., 1998).

The plaintiff was not a party to the communications between VHA, UHC, NOVATION, their subsidiary Neoforma, Inc. and the other defendants including US Bancorp and Piper Jaffray. Without discovery, it is inappropriate to dismiss the plaintiffs’ claims on a heightened pleading requirement basis for facts they cannot yet know.“[A]lthough the plaintiffs have been allowed to amend their complaint, they have not had the benefit of discovery. We think it only fair to give them that benefit before requiring them to plead facts that remain within the defendants' private knowledge.”*Abels v. Farmers Commodities Corp*., 259 F.3d 910 at 921 (8th Cir., 2001).

In *Independent Drug Wholesalers Group, Inc. v. Denton*, 833 F.Supp. 1507 at 1517-1518 (Kan., 1993), the court dealt with the dismissal sought by a defendant that was not a principal in the RICO conspiracy and asserted requisite intent had not been established. The court found the individual defendant's intent was irrelevant when the complaint and facts alleged against the enterprise as a whole were sufficient.

> "Defendants insist that RICO plaintiffs must plead damages with particularity. Both Supreme Court precedent and the Federal Rules of Civil Procedure foreclose the adoption of Defendants' position. See *id*.;Fed. R. Civ. P. 8 (pleading requires short and plain statements meant to give notice to defendants); see also Michael Goldsmith, Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO, 30 Harv. J. on Legis. 1, 18-22 (1993) (criticizing several attempts at RICO reform through judicial revisionism including improper heightened pleading requirements). Defendants confuse the requirement to plead with particularity RICO acts predicated upon fraud pursuant to Rule 9(b) with Rule 8's more general notice pleading typically required of all litigants. See, e.g., *Farlow v. Peat, Marwick, Mitchell & Co*., 956 F.2d 982, 989- 90 (10th Cir. 1992) (predicate acts of mail fraud require heightened pleading pursuant to Rule 9(b)); *Cayman Exploration Corp. v. United Gas Pipe Line Co*., 873 F.2d 1357, 1362 (10th Cir. 1989) (Rule 9(b) requires particularity in pleading the predicate RICO acts of mail and wire fraud)."

Robbins v. Wilkie, 2002 C10 944 at ¶24 (USCA10, 2002). VHA, UHC and Novation are confused about the relevance of the conduct described to interfere in the administration of justice and to defraud the Kansas District court and to which the complaint avers that VHA, UHC and Novation ratified in an attempt to intimidate Medical Supply into not bringing the present claims:

> "In the context of this case, it is momentous that a plaintiff "need only establish a tacit understanding between the parties, and this may be shown wholly through the circumstantial evidence of [each defendant's] actions." *Darden*, 70 F.3d at 1518 (8th Cir.1995)(quotation omitted). On the force of these authorities, we believe that Handeen's Complaint, broadly construed, provides an ample foundation to sustain a finding that the Firm "objectively manifested an agreement to participate directly, or indirectly, in the affairs of [the] enterprise through the commission of two or more predicate crimes." *Bennet*t, 44 F.3d at 1372 (quotation omitted)."

Handeen v. Lemaire, 112 F.3d 1339 at 1354-55 (C.A.8 (Minn.), 1997).

Medical Supply disputes the theft of intellectual property is not a concrete RICO injury. In Formax Inc. v. Hosert, 841 F.2d 388, 389 (Fed. Cir. 1988), the court held that a civil RICO count was properly pleaded against a former employee "alleged to have stolen some drawings claimed to be trade secrets" from both the former employer and from one of the former employer's vendors. The fraud on the court is also concrete "[A] cause of action, of course, is a form of `property,' and when it arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as `business injury.'" *Malley-Duff & Assocs, Inc.. v. Crown Life Ins. Co*., 792 F.2d 341, 354 (3d Cir. 1986)." Likewise, fraud, as alleged in this case, that causes one to relinquish a cause of action arising out of his business is an

injury to "business or property." *Deck v. Engineered Laminates*, No. 02-3100 at page 1 (10th Cir. 11/17/2003) (10th Cir., 2003). Also the complaint seeks the injury Medical Supply was proximately caused losing sales to 2000 hospitals under the targeted direct competitor exception to concreteness under *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.,* 18 F.3d 260 (C.A.4 (Md.), 1994)(cert. denied)*Ideal Steel Supply Corp. v. Anza*, No. 03-7381 (Fed. 2nd Cir. 7/2/2004) (Fed. 2nd Cir., 2004)

Medical Supply and its counsel have been vilified for asserting that the USA PATRIOT Act qualifies immunity for suspicious activity reports and that through Public Law 107–56 Congress changed the Annunzio-Wylie Money Laundering Act by expressly provided for civil liability for malicious suspicious activity reports against bank employees that would include US Bank, US Bancorp and Piper Jaffray's use of the threat of a suspicious activity report to take property from Medical Supply and furthering a monopoly in hospital supplies where Novation is in open and publicized anticompetitive agreements with US Bancorp and Piper Jaffray. For just contradicting the clear error over the express wording of the USA PATRIOT Act, the Tenth Circuit deprived Medical Supply of its rights and *sua sponte* sanctioned its counsel with its most severe penalty and refused to permit review.

The Supreme Court of the State of Arkansas is out of the jurisdictional reach of the Tenth Circuit and one year after Medical Supply came to its informed and researched conclusion, the heroic and honorable justices ruled that a bank could not use the acts immunity to escape liability for filing a malicious suspicious activity report to cause the baseless criminal prosecutions of a landowner it sought to deprive of property. See *Bank Of Eureka Springs And John Cross v. Floyd Carroll Evans*, 109 S.W.3d 672 Syl. 10 (Ark. 2003). No doubt the Stanton Hazlett Kansas Disciplinary Office gang is saddling up to travel the highways and disbar these brave justices from the practice of law in Kansas under the pretext of incompetence.

Medical Supply's present complaint adequately described the FINCEN database the defendants are using to threaten public health and it is actionable.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611

1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on April 19th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

No. 05-_____

In the Supreme Court of the United States

BRET D. LANDRITH, ATTORNEY-PETITIONER

v.

US BANCORP NA.
US BANK
The PIPER JAFFRAY COMPANIES
JERRY GRUNDHOFFER
ANDREW CESERE
SUSAN PAINE
BRIAN KABBES
UNKNOWN HEALTHCARE SUPPLIER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR BRET D. LANDRITH IN SUPPORT

Bret D. Landrith, Esq.
Pro Se.
2961 SW Central Park, # G33
Topeka, KS 66611
1-785-267-4084
1-785-876-2233

QUESTION PRESENTED

Whether an argument the USA-PATRIOT Act, Pub. L. 107-56 express language in § 355 granting a private right of action for malicious suspicious activity reports and Congress' *in pari materia* express and implied good faith qualifications in §§ 314(b) and 351 deny immunity for intentional misuse of the act (over which circuits are in conflict) is *sua sponte* sanctionable without review?

TABLE OF CONTENTS

QUESTION PRESENTED

LIST OF PARTIES 3

TABLE OF AUTHORITIES 3

OPINIONS BELOW 5

JURISDICTION 5

STATUTORY PROVISIONS INVOLVED 5

STATEMENT OF THE CASE 5

A. FACTUAL BACKGROUND 6

B. PROCEEDINGS BELOW 7

REASONS FOR GRANTING THE WRIT 9

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit. The attorney petitioner here is Bret D. Landrith and the appellant below was Medical Supply Chain, Inc.

The respondents here and appellees below are US Bancorp, NA.

US Bank, US Bancorp Piper Jaffray, Jerry A. Grundhofer, Andrew Cesere

Susan Paine, Lars Anderson, Brian Kabbes, Unknown Healthcare Supplier

TABLE OF AUTHORITIES

Aspen Skiing Company v. Aspen Highlands Skiing Corporation, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985) 6

Bank of Eureka Springs v. Evans, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003) 11

Cooter Gell v. Hartmarx Corporation, 496 U.S. 384 at 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) 14

Krueger v. Doe, 162 F.3d 1173 (C.A.10 (Okla.), 1993) 14

Lee v. Bankers Trust Co., 166 F.3d 540, 544-45 (2d Cir. 1999). 9, 11

Lopez v. First Union Nat'l Bank and *Coronado v. BankAtlantic Bancorp., Inc*., both at 129 F.3d 1186 (11th Cir. 1997) 9,10

Murphree v. U.S. Bank of Utah, N.A., 293 F.3d 1220, 1222-23 (10th Cir. 2002) 15

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983) 14

People of State of California v. Federal Power Comm'n, 369 U.S. 482, 485, 82 S.Ct. 901,903—904, 8 L.Ed.2d 54 13

Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc., No. 03-14588 (Fed. 11th Cir. 6/30/2004) (Fed. 11th Cir., 2004) 14

Spectators' Communication Network, Inc. v. Colonial Country Club, 253 F.3d 215, 222 (5th Cir. 2001) 13

Stoutt v. Banco Popular De Puerto Rico, 2003 C01 48 (USCA1, 2003) 9, 11

United States v. Borden Co., 308 U.S. 188, 198 199, 60 S.Ct. 182, 188—189, 84 L.Ed. 181 13

United States v. Southern Pac. Co., 259 U.S. 214, 239—240, 42 S.Ct. 496, 501—502, 66 L.Ed. 907 13

United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963) 13

Sherman Antitrust Act §1 5

Sherman Antitrust Act §2 5

Fed.R.Civ.P. 12 (b)(6) 5

ESIGN Act 15 U.S.C. §§ 7001 *et seq* 7

USA PATRIOT Act 5,7,8,11, 12, 13

USA PATRIOT Act § 314(b) 9,12

Annunzio-Wylie Anti-Money-Laundering Act of 1992 10,11

USA PATRIOT Act § 355 11,12

USA PATRIOT Act § 314(a) 12

OPINIONS BELOW

The Court of Appeals opinion sought to be appealed is *Medical Supply Chain Inc. v. US Bancorp N.A. et al*, Case No. 03-3342 (10 C.A. 2004). The District Court opinion is *Medical Supply Chain, Inc. v. U S Bancorp, NA*, 2003 WL 21479192, (D. Kan. 2003). The appellate sanction order, memorandum and order and trial court order are attachments 1-3.

JURISDICTION

The Court of Appeals denied en banc rehearing of its judgment on February 10, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

USA PATRIOT Act, Pub. L. No. 107-56 §§ 314, 351 and 355

Annunzio-Wylie Anti-Money-Laundering Act 31 U.S.C. Section 5318(g)(3)

STATEMENT OF THE CASE

This is a petition for review of *sua sponte* sanctions against the petitioner based on an appeal of the dismissal of Medical Supply Chain, Inc.'s (Medical Supply) federal Sherman Antitrust Act §§1 and 2 claims against the defendants on a Fed.R.Civ.P. 12 (b)(6) motion, prior to the commencement of discovery. The petitioner argued that the threat of a USA PATRIOT Act suspicious activity report should be enjoined as a form of

Sherman §2 prohibited monopolization where the bank and investment bank participated in agreements to restrain trade in the market for hospital supplies with Medical Supply's competitors Novation and Neoforma.

A. Factual Background

The action arose when US Bank, a subsidiary of US Bancorp NA broke an agreement to provide escrow accounts Medical Supply sought to use to capitalize its entry into the national market for hospital supplies.

The national market for hospital supplies has been the subject of three successive US Senate Judiciary Antitrust Subcommittee hearings on April 30, 2002, July 16, 2003 and September 14, 2004 regarding the lack of competition and the unavailability of venture capital due to the control of the two dominant hospital supplier group purchasing organizations Novation, LLC and Premier.

Medical Supply Chain, Inc. had previously sought investment banking services from Piper Jaffray, then a subsidiary of US Bancorp NA with 70% of its venture funds concentrated in investments in hospital supplier companies. Piper Jaffray refused to return Medical Supplies calls, prompting Medical Supply with the advice of consultants to create its own capitalization program utilizing escrowed funds and fees from its prospective marketing representatives like the excluded mountain in *Aspen Skiing*.[1]

US Bank's trust department evaluated Medical Supply's business plan and the first ten candidates. US Bank, already Medical Supply's business account provider agreed to provide the escrow accounts and requested changes to the escrow contract and altering the placement of the funds of a company owned by US Bancorp NA. Medical

[1] *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)

Supply made the changes and the defendant Brian Kabbes, Vice President of the US Bank Trust office approved the changes via email and orally, knowing that Medical Supply was awaiting his approval before sending them to the candidates.

Brian Kabbes then called Medical Supply to break what Medical Supply argues is a written contract under the ESIGN Act 15 U.S.C. §§ 7001 *et seq*. stating the bank's reason for doing so was the USA PATRIOT Act "know your customer" provisions. In recorded conversations and letters up the chain of command of US Bancorp NA, Medical Supply confirmed it was USA PATRIOT Act "know your customer" provisions that were used as the business justification for the refusal to deal. Medical Supply informed the bank defendants that this justification was a pretext, that this provision did not apply to domestic trust accounts and had not yet been established by US Treasury regulation. Medical Supply also established in the recorded conversations that US Bancorp Piper Jaffray was continuing to provide escrow accounts to other new customers and that the defendants were doing business with other hospital suppliers.

B. Proceedings Below

Medical Supply brought suit for injunctive and declaratory relief to prevent the loss of $300,000.00 it would forfeit without the promised escrow accounts, and seeking prospective relief to prevent US Bank from filing a malicious suspicious activity report under the USA PATRIOT Act to restrain competition in the nationwide hospital supply market. The complaint alleged the US Bancorp defendants refused to deal with Medical Supply because of its participation in the hospital supply market in conspiracy, combination and agreement with a defendant Unknown Healthcare Supplier along with

Novation, LLC and Neoforma, Inc. Both of which were identified as coconspirators but not named as defendants.

The trial court ruled that Medical Supply was not entitled to relief because there was no private right of action under the USA PATRIOT Act and Medical Supply failed to allege a conspiracy between two legally independent entities.

Medical Supply timely sought reconsideration pointing out the Unknown Hospital Supplier defendant and the identified coconspirators Novation, LLC and Neoforma, Inc. alleged to have been in publicized exclusionary agreements with the US Bancorp Piper Jaffray defendants. Medical Supply also pointed out the express language of the USA PATRIOT Act providing for a private right of action. However the trial judge denied reconsideration.

The petitioner as sole counsel for Medical Supply appealed on these same grounds to the Tenth Circuit Court of Appeals. The Appellate Court without finding of law or fact upheld the trial court, stating again that the there was no private right of action created by the USA- PATRIOT Act and ordered the petitioner to show cause why he should not be sanctioned.

The petitioner made a timely response showing at law the sufficiency of Medical Supply's antitrust claims including the complaint's allegations of identified coconspirators that were legally separate entities from US Bancorp Piper Jaffray defendants and the express language of the USA PATRIOT Act creating several private rights of action.

The Tenth Circuit panel responded by *sua sponte* sanctioning the petitioner with attorney's fees and double costs, the most severe sanction available to it. The appellate

panel refused to reconsider its opinion and the sitting judges of the circuit en banc denied the petitioner review of the *sua sponte* sanction.

REASONS FOR GRANTING THE WRIT

The petitioner raises the following reasons that this court should grant review:

I. A Conflict Between Two Circuits And A Circuit and State Supreme Court Exists

A split in Circuits and the Arkansas Supreme Court exists over whether a good faith requirement exists for safe harbor immunity from civil liability. Cases recognizing liability in the absence of good faith are *Lopez v. First Union Nat. Bank of Florida*, 129 F.3d 1186 (C.A.11 (Fla.), 1997) and *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003). Cases opposing bad faith liability are *Stoutt v. Banco Popular De Puerto Rico*, 2003 C01 48 (USCA1, 2003) *Lee v. Bankers Trust Co*., 166 F.3d 540, 544-45 (2d Cir. 1999).

The USA PATRIOT Act provides for voluntary sharing of information among financial institutions under a safe harbor from liability. To encourage the free-flow of data, Congress created in Section 314(b) a broad safe harbor from any civil liability to any person pursuant to any law, regulation, contract or other legally enforceable agreement, provided that a financial institution complies with four basic procedures set forth in the regulations: Banks must annually file a specified form of notice of intent to share information with the Financial Crimes Enforcement Network, or Fincen; share such information only with other institutions or associations of institutions that have filed such a notice; maintain procedures to adequately protect the security and confidentiality of the information; and use it only for detecting, identifying, and reporting on activities that May involve terrorism or money laundering, and determining whether to establish or

maintain an account or to engage in a transaction. Medical Supply's complaint alleged in detail that US Bank was not complying with the requirement of maintaining procedures to prevent abuse and the loss of Medical Supply's confidential business information.

Though the language creating the safe harbor is broad and the required procedures are fairly simple, it is still unresolved how "safe" the safe harbor is. Courts should impose a good-faith standard with respect to the sharing of information, but doing so subjects a bank to potential liability. Insight into the appropriate judicial action comes from the pre USA PATRIOT Act interpretations of the earlier version of the safe harbor protecting an institution that files a suspicious-activity report to an agency in accordance with the Annunzio-Wylie Anti-Money-Laundering Act of 1992. Banks must file a SAR when a known or a suspected violation of law or a suspicious transaction related to money laundering has occurred according to certain statutory thresholds and may voluntarily file one for other suspicious activities not captured by those thresholds. The law provides that a bank filing an SAR is not liable to any person for the disclosures or for failing to notify the person involved in the transaction of them. One line of cases interpreting the Annunzio-Wylie safe harbor had provided that a bank must have a good-faith suspicion of a violation before it discloses information related to the suspected money laundering or other potential crime. In *Lopez v. First Union Nat'l Bank* and *Coronado v. BankAtlantic Bancorp., Inc*., both at 129 F.3d 1186, 1195 (11th Cir. 1997), a court held that the safe harbor was not intended to provide blanket immunity for disclosures. In the related action *Coronado v. BankAtlantic Bancorp, Inc*., the court held that it did not apply because the bank, which had notified law enforcement of suspicious activity and granted

federal agents access to about 1,100 accounts, had not shown that it had determined in good-faith that there was a connection between the activity and the disclosures.

Bank of Eureka Springs v. Evans, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003) most closely resembles the circumstances of the present case. In *Bank of Eureka Springs,* the court found the bank had filed a suspicious activity report in an attempt to have its client criminally prosecuted without cause so that it might take his property. The court found the bad faith conduct deprived the bank of immunity for the SAR. Medical Supply alleges that US Bank sought to file a malicious suspicious activity report to restrain competition in the market for hospital supplies where US Bancorp NA and Piper Jaffray were actively participating in agreements to exclude internet marketplaces like Medical Supply from undercutting Novation, LLC and Neoforma, Inc.'s maintenance of artificially inflated hospital supply prices.

Other courts, however, have expressly declined to impose the good-faith standard and reasoned that the plain language of the safe harbor provision of Annunzio-Wylie described an unqualified privilege with no mention of good faith or similar requirement. The courts in both *Lee v. Bankers Trust Company*, and most recently in *Stoutt v. Banco Popular de Puerto Rico*, concluded that the provision does not limit protection to disclosures based on a good-faith belief that a violation has occurred. The split in judicial opinion over whether the Annunzio-Wylie safe harbor includes an implicit requirement that a bank making a disclosure must first make its own good-faith determination raises general concern about the scope of these safe harbors. Like the Annunzio-Wylie safe harbor, the USA PATRIOT Act's safe harbor and the regulations implementing it contain no explicit qualifications as to the scope of the liability on the basis of good-faith

determinations. In contrast, other parts of the USA PATRIOT Act specifically include standards limiting the applicable safe harbor, such as in Section 355 which provides that with respect to an employment reference, an institution shall not be shielded from liability if a disclosure is made with "malicious intent." On the basis of the express provision for civil liability under Section 355 of the USA PATRIOT Act the petitioner believed his client had a cause of action for antitrust injunctive relief to prevent the filing of a suspicious activity report. Moreover, in section 314(a) of the act, Congress included specific standards with respect to information shared among financial institutions, regulators and law enforcement, and described the information subject to such disclosures as "reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities." The Patriot Act's safe-harbor section does not contain any similar modifiers of reasonable suspicions or credible evidence, though the final portion of section 314(b) does except from the safe harbor violations of the section generally. This court should resolve whether courts apply a good-faith standard in application of the safe harbor. Until clear parameters are established, banks are likely not to voluntarily participate in information sharing and are required to make careful determinations about what is shared.

II. IMPORTANT CONGESSIONAL PUBLIC POLICY IS DEFEATED BY USA PATRIOT ACT BAD FAITH IMMUNITY

Medical Supply's complaint sought to enjoin conduct that costs health insurers and the government healthcare finance programs Medicare and Medicaid over twenty billion dollars a year in hospital supply distribution inefficiency. This loss is based on the complaint's citation of the defendant investment bank Piper Jaffray's study revealing the savings an internet marketplace like Medical Supply would realize.

The trial court and Court of Appeals believed that the USA PATRIOT Act immunity could not be overcome, even for prospective injunctive relief and that no provision of the USA PATRIOT Act provided for private civil liability. This court has long contradicted this view:

> "It is settled law that '(i)mmunity from the antitrust laws is not lightly implied.' *People of State of California v. Federal Power Comm'n*, 369 U.S. 482, 485, 82 S.Ct. 901, 903—904, 8 L.Ed.2d 54. *United States v. Borden Co.*, 308 U.S. 188, 198 199, 60 S.Ct. 182, 188—189, 84 L.Ed. 181; *United States v. Southern Pac. Co.*, 259 U.S. 214, 239—240, 42 S.Ct. 496, 501—502, 66 L.Ed. 907. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here."

United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

Medical Supply's cause is controversial because it's an action seeking an injunction against the filing of a USA PATRIOT Act suspicious activity report in furtherance of a boycott US Bancorp and Piper Jaffray participated in with coconspirators identified in the complaint as Novation, a healthcare Group Purchasing Organization ("GPO") competitor of Medical Supply's in the hospital supply market identified in the complaint with its captive e-commerce marketplace Neoforma, Inc. competing with Medical Supply on the web. The court using the wrong standard believed US Bank, US Bancorp NA and Piper Jaffray could not violate antitrust laws in Medical Supply's market since they did not sell hospital supplies:

> "However, in Aquatherm the plaintiffs did not name (or even identify) the alleged co-conspirators who participated in the relevant market. In this case, SBS alleges a conspiracy between HBC, a clear market participant, and CC. Nothing in our case law suggests that a conspiracy must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy. Cf. *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir. 2001) ("[W]e conclude that there can be sufficient evidence of a combination or conspiracy when one

> conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive."). In its brief, CC correctly points out that Spectators involved a group boycott with multiple conspirators, thereby giving the non-participant defendant the power to injure the plaintiff." [emphasis added]

Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc., No. 03-14588 (Fed. 11th Cir. 6/30/2004) (Fed. 11th Cir., 2004).

III. THE USA PATRIOT ACT'S MISUNDERSTOOD GRANT OF IMMUNITY PREJUDICES THE RIGHTS OF LITIGANTS

The appellate panel's sanction order "relying on a materially incorrect view of the relevant law" based on the mistake first that no private rights of action were created by the USA PATRIOT Act and secondly that a reasonable challenge to the trial court's ruling on coconspirators could not be raised. The appellate panel's order of sanctions was 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. The decision also contradicts controlling case law of the Tenth circuit regarding the prohibition of dismissal when there is a discoverable unknown defendant *(Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993) and plurality of actors through expressly identified but unnamed coconspirators (*Olsen v. Progressive Music Supply, Inc*., 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983) as described infra. The en banc "appellate court would be justified in concluding that, in making such errors, the district court [here, the hearing panel] abused its discretion." *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402. "If the appeal is not frivolous under this standard, Rule 38 does not require the appellee to pay the appellant's attorney's fees." *I.d* at 407.

The basis for the Tenth Circuit's incongruous rulings in reaction to a challenge to the USA PATRIOT Act is likely the national emergency the USA PATRIOT Act legislation sought to address. The Tenth Circuit had recently recognized the limitation of immunity at common law where one who reports suspected criminal conduct already has a privilege, but a privilege often taken to require both a reasonable basis for the report and good faith in *Murphree v. U.S. Bank of Utah, N.A*., 293 F.3d 1220, 1222-23 (10th Cir. 2002).

CONCLUSION

Whereas for the above stated reasons, the petitioner Bret D. Landrith respectfully requests that the court grant certiorari over this matter or in the alternative to remand the action back to district court for discovery and further development.

Respectfully submitted,

S/ Bret D. Landrith

_____

Bret D. Landrith, Esq.
Appearing Pro Se
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-0210-CV-W-ODS
NOVATION, LLC	) Attorney Lien
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

MOTION FOR RECONSIDERATION OF ORDER TRANSFERRING VENUE

Comes now the plaintiff Medical Supply Chain, Inc. and makes the above captioned motion for reconsideration of the court's order transferring this action to Kansas District court. Plaintiff respectfully makes this motion for the following reasons:

1. US Supreme Court and Eighth Circuit controlling authority states that bringing new claims against the same and additional defendants creates new causes of action. Under *Lawlor v. Nat'l Screen Services*, 349 U.S. 322 (1955), "the conduct presently complained of was all subsequent to the . . . [previous] judgment." *Id.* at 328, 330. Moreover, additional defendants were named (*Id.* at 325) and new antitrust violations were alleged. *Id.* at 328. See also *Wilford Banks v. International Union Electronic, Electrical*, No. 03-3982 at pg. 5-6 and fn 2 (Fed. 8th Cir. 12/3/2004) (Fed. 8th Cir., 2004)(distinguished from *Lawlor* on other grounds) and *Engelhardt v. Bell & Howell Co.,* 327 F.2d 30 at pg. 36 (C.A.8 (Mo.), 1964).

2. The US District Court for the Western District of Missouri has declined to exercise clearly mandated federal jurisdiction "[A]n adverse party may, **by bringing a new proceeding,** invoke the power of the courts to scrutinize the conduct of the parties in the previous action. *Marshall v. Holmes*, 141 U.S. at

599, 12 S.Ct. at 65, quoting *Johnson v. Waters*, 111 U.S. 640, 667, 4 S.Ct. 619, 633, 28 L.Ed. 547 (1884)" [emphasis added] *Leber-Krebs, Inc. v. Capitol Records,* 779 F.2d 895 at 901 (C.A.2 (N.Y.), 1985).

3. The Western District of Missouri's transfer of the present action to the District of Kansas where the plaintiff's Chief Executive Officer was retaliated against and where the plaintiff was deprived of counsel for a US Supreme Court review and the defendants are as averred in the complaint, seeking the disbarment and removal of Medical Supply's trial counsel is adverse to justice. The court is in error when it places the interest of the District of Kansas in controlling Medical Supply current case over the interests of the plaintiffs and the defendants who as averred in the complaint were also harmed as a result of the District of Kansas's earlier decisions. No evidence was heard in the Kansas cases and the Kansas court has no special knowledge regarding the parties or these claims.

4. The plaintiff's only remedy to the conduct occurring in the Kansas District court was appeal, and for making an appeal where the trial court abused his discretion, the plaintiff's counsel was *sua sponte* sanctioned with the harshest penalty available to the court-double costs and attorney's fees in excess of $23,000.00 which the plaintiff's counsel, ineligible to represent Medical Supply in the US Supreme Court due to the disciplinary actions of the defendants now appeals in forma pauperis. This clearly shows the ends of justice are defeated by placing the current action in a district where even appealing a clear error regarding a federal statute's express language is punished and the parties representatives will not be able to advocate for their clients without fear.

5. The plaintiff's complaint is crafted for a jurisdiction following federal law of notice pleading, the plaintiff would be deprived of it claims if transferred to the District of Kansas.

ARGUMENTS IN SUPPORT OF MOTION FOR RECONSIDERATION

A motion to reconsider gives the court an opportunity to correct manifest errors of law or fact and to review newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985), cert. denied, 476 U.S. 1171, 106 S.Ct. 2895, 90 L.Ed.2d 982 (1986). A motion to reconsider is appropriate if the court has obviously misapprehended a party's position, the facts, or mistakenly has decided issues not presented for determination. See *Refrigeration Sales Co. v. Mitchell-Jackson, Inc.*, 605 F.Supp. 6, 7 (N.D.Ill.1983), aff'd, 770 F.2d 98 (7th Cir.1985).

The court's decision to transfer the action to the District of Kansas observes that the facts of the current action are almost like those pled in the earlier Kansas action against the US Bancorp defendants. It would be an abuse of discretion based on an error of law to find that res judicata or collateral estoppel applies to the earlier action in the Kansas jurisdiction where the first action was brought. See *Emery v. Hunt*, 272 F.3d 1042, 1046 (8th Cir. 2001) ("A district court abuses its discretion if it commits an error of law."). In Kansas, the law of res judicata and claim preclusion parallels *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122:

> "The court first noted that the doctrine of res judicata has two aspects: claim preclusion and issue preclusion and stated that under the claim preclusion aspect of res judicata:
> "An issue is res judicata when four conditions concur: (1) identity in the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made. [Citation omitted.]" 242 Kan. at 690, 751 P.2d 122.
> The *Jackson Trak Group, Inc*. court also stated:
> "Under Kansas law, collateral estoppel may be invoked where the following is shown: (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based upon ultimate facts as disclosed by the pleadings and judgment, (2) the parties must be the same or in privity, and (3) the issue litigated must have been determined and necessary to support the judgment. [Citation omitted.]" 242 Kan. at 690-91, 751 P.2d 122.
>
> In order to invoke the doctrine of res judicata or collateral estoppel, all of the elements must be met.

Hawkinson v. Bennett, 265 Kan. 564, 962 P.2d 445 at 465 (Kan., 1998). The current action does not include all the elements required for preclusion. The Kansas case *Jackson Trak Group By and Through Jackson Jordan, Inc. v. Mid States Port Authority*, 751 P.2d 122 disposes of all arguments and defenses raised by the defendants under the law of the jurisdiction this court seeks to transfer Medical Supply's action to:

A. No Preclusion Where the Kansas District Court Expressly Declined Jurisdiction

> "We note, however, that the doctrine of res judicata is held not to apply to issues raised in the previous case which were not decided by the court or jury. Hence, the doctrine of res judicata does not preclude relitigation of an issue raised by the pleadings in the prior action, but not considered either by stipulation of the parties or otherwise. More importantly, a judgment is not res judicata as to any matters which a court expressly refused to determine, and which it reserved for future consideration, or which it directed to be litigated in another forum or in another action. *American Home Assur. v. Pacific Indem. Co., Inc*., 672 F.Supp. 495 (D.Kan.1987); 46 Am.Jr.2d, Judgments § 419, p. 588-89."

Jackson Trak Group By and Through Jackson Jordan, Inc. v. Mid States Port Authority, 751 P.2d 122 at 128, 242 Kan. 683 (Kan., 1988).

B. Action For Injunction Does Not Preclude A Separate Cause Of Action For Damages

Kansas is even more expressly contrary to the defendants' dismissal arguments than *Lawlor*:

> "Further, a suit for an injunction is a separate cause of action from a suit for damages, and therefore res judicata does not preclude a subsequent action for damages. *Thompson-Hayward Chem. Co. v. Cyprus Mines Corp.*, 8 Kan.App.2d 487, 660 P.2d 973 (1983). Here, in the injunction action, the Phillips County District Court properly refused to address the contractual issue of damages for wrongful seizure."

Jackson Trak Group By and Through Jackson Jordan, Inc. v. Mid States Port Authority, 751 P.2d 122 at 128, 242 Kan. 683 (Kan., 1988).

C. Damages In Contemplation By Both Parties Will Not Be Reduced in Kansas

Of major concern to the defendants who cannot reasonably deny that Medical Supply was refused the required inputs of capital through escrow accounts and the repudiation of the real estate lease sale is being able to argue that Medical Supply's forward financials which were evaluated and accepted in both refusals to deal is the Kansas venue's utter elimination of the defendant's opportunity to with expert economic testimony reduce future profits damages that were in contemplation by both parties:

> Damages recoverable for breach of contract include consequential damages which arise, in the usual course of things, from the breach itself, or as may reasonably be assumed to have been within the contemplation of both parties as the probable result of the breach. *Kansas State Bank v. Overseas Motosport, Inc.,* 222 Kan. 26, 563 P.2d 414 (1977). The important aspect of the recovery of such consequential or special damages under a breach of contract theory is the element of [242 Kan. 695] foreseeability. 22 Am.Jur.2d, Damages §§ 56, 57. In this case, it is certainly foreseeable that the parties would have contemplated damages for loss of use of the equipment if it were wrongfully seized by Mid States and held over a period of time.

Jackson Trak Group By and Through Jackson Jordan, Inc. v. Mid States Port Authority, 751 P.2d 122 at 128, 242 Kan. 683 (Kan., 1988).

D. Service of Process And Personal Jurisdiction Issues Change in Kansas

The defendant hospital suppliers and their officers would be subject to uncontestable jurisdiction in Kansas under the state's long arm statutes:

> "Any supplier, whether or not a resident or citizen of this state, who in person or through an agent or an instrumentality, engages in a consumer transaction in this state, thereby submits the supplier to the jurisdiction of the courts of this state as to any cause of action arising from such consumer transaction."

Kluin v. American Suzuki Motor Corporation, 2002 KS 285 (KS, 2002). In the Kansas District Court case *Ledbetter v. City of Topeka, Kan.*, 112 F.Supp.2d 1239 (Kan., 2000), Judge Murguia ruled that where the head of the municipal corporation City of Topeka received notice via registered mail taken by a person in her office, both the city and its chief executive to be substantively served under Kansas law:

"The record here indicates that plaintiff has effected service of process of defendant Wagnon through substantial compliance with § 60-304(a). Plaintiff served the summons and complaint upon defendant Wagnon at her place of business via certified mail. Plaintiff did not personally serve defendant Wagnon. Instead, the return of service was signed by personnel in defendant Wagnon's office. Although plaintiff did not follow § 60-304(a)'s mandate to first attempt service of process by certified mail at the residence of the defendant, defendant Wagnon received actual notice of the lawsuit. This actual notice is evidenced by defendant Wagnon's answer to plaintiff's complaint filed within 30 days from the receipt of plaintiff's complaint by personnel in defendant Wagnon's business office. See *Vogel v. Missouri Valley Steel, Inc*., 229 Kan.492, 499, 625 P.2d 1123, 1128 (1981) ("Defendant had actual knowledge of the ... case[] and has shown no prejudice as a result of the alleged irregularity in service."). Although the service of process achieved in this case is not a model to follow, this court finds such service was proper under Kansas law.

Thus, plaintiff achieved proper service of process upon defendant Wagnon. Therefore, defendants' motions to dismiss are denied..."

Ledbetter v. City of Topeka, Kan., 112 F.Supp.2d 1239 at 1245-1246 (Kan., 2000). The *Ledbetter* ruling dispatches the individual defendants' arguments they were not properly served by Medical Supply.

CONCLUSION

Whereas for the above reasons, including the injustice to both the plaintiff and the defendants upon transfer of this action to the Kansas District Court, the plaintiff Medical Supply Chain respectfully requests the court reconsider its order transferring venue.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
KS00500
Kansas Supreme Court ID # 20380
2961 SW Central Park, # G33,
Topeka, KS 66611
1-785-876-2233
1-785-267-4084
landrithlaw@cox.net

Certificate of Service

I certify that on June 27th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff , Jonathan H. Gregor, Logan W. Overman, Shughart Thomson & Kilroy, P.C. 1700 Twelve Wyandotte Plaza 120 W 12th Street Kansas City, Missouri 64105-1929

Andrew M. Demarea, Corporate Woods Suite 1100, Building #32 9225 Indian Creek Parkway Overland Park, Kansas 66210 (913) 451-3355 (913) 451-3361 (FAX)

John K. Power, Esq. Husch & Eppenberger, LLC 1700 One Kansas City Place 1200 Main Street Kansas City, MO 64105-2122

Stephen N. Roberts, Esq. Natausha Wilson, Esq. Nossaman, Guthner, Knox & Elliott 34th Floor 50 California Street San Francisco, CA 94111

Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq. Vinson & Elkins L.L.P. 2300 First City Tower 1001 Fannin Houston, TX 77002

Attorneys for Defendants

S/Bret D. Landrith
Bret D. Landrith

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

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

DEFENDANTS' JOINT SUGGESTIONS IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER TRANSFERRING VENUE

Plaintiff's Motion for Reconsideration of Order Transferring Venue ("motion to reconsider") offers nothing warranting reconsideration of this Court's June 15, 2005 Order. As the Court found, the United States District Court for the District of Kansas is familiar with the substance of plaintiff's claims asserted in this lawsuit and the interests of justice are served by transfer. Plaintiff's motion should be denied.

ARGUMENT

Plaintiff asserts a number of arguments in support of its motion, including that neither *res judicata* nor collateral estoppel bar plaintiff's claims, especially those state law claims dismissed without prejudice (motion to reconsider, p. 3); that an action for injunction does not preclude a separate cause of action seeking damages (*id*. at pp. 3-4); that damages in contemplation by the parties will not be reduced in Kansas (*id*. at p. 4), and; the defendants were properly served with process (*id*. at pp. 4-5). None of these arguments, even those somehow tangentially related to the issue of transfer, merit the Court's reconsideration of its Order transferring this case. *See U.S. v. Metro Interior, Inc.*, 1993 WL 305960, *1-2 (W.D.Mo. 1993).

Plaintiff's argument concerning the application of collateral estoppel or *res judicata* to its claims in this lawsuit is irrelevant to this Court's Order granting transfer. This Court based its Order transferring the matter to the District of Kansas, at least in part, on that Court's "extensive experience with the almost identical previous lawsuit and in the interest of justice . . . ." (June 15, 2005 Order, at p. 2.) Whether *res judicata* or collateral estoppel applies to plaintiff's claims in this lawsuit is a substantive legal issue to be addressed by the Kansas District Court and is irrelevant to this Court's decision to transfer the matter to Kansas.

Plaintiff also argues that the claims asserted in this case are "new" and based on conduct occurring after the Kansas District Court dismissed its earlier lawsuit. (Motion to reconsider, at p. 1.) In fact, all of plaintiff's claims arise out of the same set of operative facts and most of plaintiff's "new" allegations are simply recycled from its first lawsuit against many of the same defendants. The Kansas District Court (and the Tenth Circuit Court of Appeals) reviewed the parties' extensive briefs regarding the sufficiency of these claims before entering its Order dismissing plaintiff's lawsuit. Further, while plaintiff argues that the Kansas District Court abused its discretion in dismissing this lawsuit when first brought there (motion to reconsider, p. 2) as this Court noted in its Order, plaintiff's "disappointment with the result . . . does not give [it] the right to file an almost identical second cause of action, and moreover, does not entitle a party to forum shop." (June 15, 2005 Order, at p. 2.) That plaintiff was unsuccessful in Kansas federal court is also an insufficient basis for moving this Court to *reconsider* its Order transferring venue.

Plaintiff's next two arguments, that supposed damages will not be reduced in Kansas (motion to reconsider, p. 4) and that the defendant hospitals and their officers are subject to Kansas long-arm jurisdiction (*id*. at pp. 4-5), must also fail. These issues are entirely unrelated to this Court's Order granting transfer and are insufficient to warrant reconsideration.

For all of these reasons, defendants collectively request the Court deny plaintiff's Motion for Reconsideration of Order Transferring Venue.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF #38572
JONATHAN H. GREGOR #50443
LOGAN W. OVERMAN #55002
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
Telephone: (816) 421-3355
Facsimile: (816) 374-0509
and
ANDREW M. DeMAREA KS #16141
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361

ATTORNEYS FOR DEFENDANTS US BANCORP, U.S. BANK NATIONAL ASSOCIATION, PIPER JAFFRAY COMPANIES, JERRY A. GRUNDHOFER, ANDREW CESARE AND ANDREW S. DUFF

/s/ John K. Power

John K. Power, Esq. MO #35312
Husch & Eppenberger, LLC
1700 One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2122
Telephone: (816) 421-4800
Facsimile: (816) 421-0596
and
Bruce Blefeld, Esq.
Kathleen Bone Spangler, Esq.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002
Telephone: 713-758-2222
Facsimile: 713-758-2346

ATTORNEYS FOR DEFENDANTS NOVATION, LLC, VOLUNTEER HOSPITAL ASSOCIATION, INC., UNIVERSITY HEALTHSYSTEM CONSORTIUM, CURT NANOMAQUE AND ROBERT J. BAKER

and

Stephen N. Roberts, Esq.
Janice Vaughan Mock, Esq.
Nossaman, Guthner, Knox & Elliott
34th Floor
50 California Street
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438

ATTORNEYS FOR DEFENDANTS NEOFORMA, LLC AND ROBERT J. ZOLLARS

/s/ Kathleen A. Hardee
KATHLEEN A. HARDEE MO #36071
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ATTORNEYS FOR DEFENDANT SHUGHART THOMSON & KILROY, P.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 11th day of July, 2005, to:

Bret D. Landrith, Esq.
#G33
2961 SW Central Park
Topeka, KS 66611

Attorney for Plaintiff

/s/ Mark A. Olthoff
Attorney for Defendants

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

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

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Pending is Plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. # 61). Plaintiff requests that the Court reconsider the Order entered on June 15, 2005, which transferred the case to the District of Kansas. Plaintiff does not present any new or different arguments that were not presented to the Court previously; thus, the motion is denied.

IT IS SO ORDERED.

Date: August 1, 2005

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

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

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	**State Court No. 0616-CV32307**
US BANCORP, NA	)	
AND US BANK, NA,	)	**JURY TRIAL DEMANDED**
	)	
Defendants.	)	

NOTICE OF REMOVAL OF CIVIL ACTION

To: The Judges of the United States District Court
for the Western District of Missouri
Western Division

Defendants U.S. Bancorp (misnamed as US Bancorp, NA) and U.S. Bank National Association (misnamed as US Bank, NA) (collectively, the "Defendants") submit this Notice of Removal of this action from the Circuit Court of Jackson County, Missouri at Independence, Missouri – where this case is currently pending under the case style of *Lipari v. US Bancorp, NA*, Case No. 0616-CV32307 – to the United States District Court for the Western District of Missouri. In support of this Notice of Removal, Defendants state as follows:

I. INTRODUCTION

1. Defendants desire to exercise their right under the provisions of 28 U.S.C. §§ 1441 *et seq.*, to remove this case from the Circuit Court of Jackson County, Missouri, at Independence, Missouri. 28 U.S.C. § 1441(a) provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

2. This civil action has not been tried. Plaintiff filed his Petition for Damages on November 28, 2006. Defendants first received a copy of Plaintiff's Petition on December 8, 2006 via certified mail. Rather than challenge service of process, Defendants voluntarily appear in this action, but hereby reserve all objections, arguments, and defenses to Plaintiff's Petition. A responsive pleading will be filed in accordance with Rule 81 of the Federal Rules of Civil Procedure.

II. NOTICE OF REMOVAL IS TIMELY

3. The time in which Defendants are required by the laws of the State of Missouri, by the Missouri Rules of Civil Procedure, or by the Rules of the Circuit Court of Jackson County, to move, answer or otherwise plead in response to Plaintiff's Petition has not elapsed.

4. In accordance with the requirements of 28 U.S.C. § 1446(b), this Notice of Removal is filed within thirty (30) days after the receipt by any defendant, through service, of a copy of the initial pleading setting forth the claim for relief on which Plaintiff's action is based.

III. DIVERSITY JURISDICTION EXISTS

5. This Court has original jurisdiction over this civil action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states.

6. Plaintiff Samuel K. Lipari is a citizen and resident of the State of Missouri. Defendant U.S. Bancorp is a Delaware corporation with its principal place of business at 800 Nicollet Mall, Minneapolis, Minnesota 55402. Defendant U.S. Bank National Association is a national banking association with its main office located at 800 Nicollet Mall, Minneapolis, Minnesota 55402. Complete diversity of citizenship therefore exists. *See* 28 U.S.C. §§ 1332, 1348; *Wachovia Bank, National Association v. Schmidt*, ___ U.S. ___, 126 S.Ct. 941, 945 (2006).

7. The $75,000 amount-in-controversy requirement found in 28 U.S.C. § 1332 is satisfied because Plaintiff's Petition seeks damages in the amount of four hundred fifty million dollars ($450,000,000.00). *See* Pl.'s Pet. at ¶ 263.

IV. REMOVAL TO THIS DISTRICT IS PROPER

8. Pursuant to 28 U.S.C. §§ 1441 *et seq*., the right exists to remove this case from the Circuit Court of Jackson County, Missouri at Independence, Missouri, to the United States District Court for the Western District of Missouri, which embraces the place where the action is pending.

V. MISCELLANEOUS

9. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings, and orders served on Defendants – including a copy of the Petition bearing Case No. 0616-CV32307 – is attached to this Notice of Removal as Exhibit A.

10. All Defendants join in this Notice of Removal.

11. Written notice of the filing of this Notice of Removal will be promptly served on counsel for all adverse parties as required by law or, as is the case here, on the alleged "*pro se*" Plaintiff.

12. A true and correct copy of this Notice of Removal will be promptly filed with the Clerk of the Circuit Court of Jackson County, Missouri at Independence, Missouri, as required by law, and served on Plaintiff.

13. Defendants reserve the right to amend or supplement this Notice of Removal, and Defendants reserve all defenses.

14. Defendants request a trial by jury on all issues triable by right to a jury trial.

WHEREFORE, Defendants U.S. Bancorp and U.S. Bank National Association pray that this case be removed from the Circuit Court of Jackson County, Missouri at Independence,

Missouri, where it is now pending, to this Court, that this Court accept jurisdiction of this action, and that this action be placed on the docket of this Court for further proceedings, same as though this case had originally been instituted in this Court.

Dated: December 13, 2006

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certified that the above and foregoing document was filed electronically with the above-captioned court, and a copy was sent by overnight mail on this 13th day of December, 2006 to:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Mark A. Olthoff
Attorney for Defendants

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

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	**State Court No. 0616-CV32307**
US BANCORP, NA	)	
AND US BANK, NA,	)	
	)	
Defendants.	)	

NOTICE TO PLAINTIFF OF FILING OF NOTICE OF REMOVAL

Please take notice that on the 13th day of December, 2006, Defendants U.S. Bancorp (misnamed as US Bancorp, NA) and U.S. Bank National Association (misnamed as US Bank, NA) filed a Notice of Removal of Civil Action, a copy of which is attached hereto, in the United States District Court for the Western District of Missouri.

You are also advised that after filing the Notice in the United States District Court for the Western District of Missouri, Defendants also filed a copy with the Circuit Court of Jackson County, Missouri, to effect removal pursuant to 28 U.S.C. §§ 1441 *et seq*.

Dated: December 13, 2006

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certified that the above and foregoing document was filed electronically with the above-captioned court, and a copy was sent by overnight mail on this 13th day of December, 2006 to:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Mark A. Olthoff
Attorney for Defendants

1990470.1

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

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	**State Court No. 0616-CV32307**
US BANCORP, NA	)	
AND US BANK, NA,	)	**JURY TRIAL DEMANDED**
	)	
Defendants.	)	

NOTICE OF REMOVAL OF CIVIL ACTION

To: The Judges of the United States District Court
for the Western District of Missouri
Western Division

Defendants U.S. Bancorp (misnamed as US Bancorp, NA) and U.S. Bank National Association (misnamed as US Bank, NA) (collectively, the "Defendants") submit this Notice of Removal of this action from the Circuit Court of Jackson County, Missouri at Independence, Missouri – where this case is currently pending under the case style of *Lipari v. US Bancorp, NA*, Case No. 0616-CV32307 – to the United States District Court for the Western District of Missouri. In support of this Notice of Removal, Defendants state as follows:

I. INTRODUCTION

1. Defendants desire to exercise their right under the provisions of 28 U.S.C. §§ 1441 *et seq.*, to remove this case from the Circuit Court of Jackson County, Missouri, at Independence, Missouri. 28 U.S.C. § 1441(a) provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

2. This civil action has not been tried. Plaintiff filed his Petition for Damages on November 28, 2006. Defendants first received a copy of Plaintiff's Petition on December 8, 2006 via certified mail. Rather than challenge service of process, Defendants voluntarily appear in this action, but hereby reserve all objections, arguments, and defenses to Plaintiff's Petition. A responsive pleading will be filed in accordance with Rule 81 of the Federal Rules of Civil Procedure.

II. NOTICE OF REMOVAL IS TIMELY

3. The time in which Defendants are required by the laws of the State of Missouri, by the Missouri Rules of Civil Procedure, or by the Rules of the Circuit Court of Jackson County, to move, answer or otherwise plead in response to Plaintiff's Petition has not elapsed.

4. In accordance with the requirements of 28 U.S.C. § 1446(b), this Notice of Removal is filed within thirty (30) days after the receipt by any defendant, through service, of a copy of the initial pleading setting forth the claim for relief on which Plaintiff's action is based.

III. DIVERSITY JURISDICTION EXISTS

5. This Court has original jurisdiction over this civil action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states.

6. Plaintiff Samuel K. Lipari is a citizen and resident of the State of Missouri. Defendant U.S. Bancorp is a Delaware corporation with its principal place of business at 800 Nicollet Mall, Minneapolis, Minnesota 55402. Defendant U.S. Bank National Association is a national banking association with its main office located at 800 Nicollet Mall, Minneapolis, Minnesota 55402. Complete diversity of citizenship therefore exists. *See* 28 U.S.C. §§ 1332, 1348; *Wachovia Bank, National Association v. Schmidt*, ___ U.S. ___, 126 S.Ct. 941, 945 (2006).

7. The $75,000 amount-in-controversy requirement found in 28 U.S.C. § 1332 is satisfied because Plaintiff's Petition seeks damages in the amount of four hundred fifty million dollars ($450,000,000.00). *See* Pl.'s Pet. at ¶ 263.

IV. REMOVAL TO THIS DISTRICT IS PROPER

8. Pursuant to 28 U.S.C. §§ 1441 *et seq*., the right exists to remove this case from the Circuit Court of Jackson County, Missouri at Independence, Missouri, to the United States District Court for the Western District of Missouri, which embraces the place where the action is pending.

V. MISCELLANEOUS

9. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings, and orders served on Defendants – including a copy of the Petition bearing Case No. 0616-CV32307 – is attached to this Notice of Removal as Exhibit A.

10. All Defendants join in this Notice of Removal.

11. Written notice of the filing of this Notice of Removal will be promptly served on counsel for all adverse parties as required by law or, as is the case here, on the alleged "*pro se*" Plaintiff.

12. A true and correct copy of this Notice of Removal will be promptly filed with the Clerk of the Circuit Court of Jackson County, Missouri at Independence, Missouri, as required by law, and served on Plaintiff.

13. Defendants reserve the right to amend or supplement this Notice of Removal, and Defendants reserve all defenses.

14. Defendants request a trial by jury on all issues triable by right to a jury trial.

WHEREFORE, Defendants U.S. Bancorp and U.S. Bank National Association pray that this case be removed from the Circuit Court of Jackson County, Missouri at Independence,

Missouri, where it is now pending, to this Court, that this Court accept jurisdiction of this action, and that this action be placed on the docket of this Court for further proceedings, same as though this case had originally been instituted in this Court.

Dated: December 13, 2006

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certified that the above and foregoing document was filed electronically with the above-captioned court, and a copy was sent by overnight mail on this 13th day of December, 2006 to:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Mark A. Olthoff
Attorney for Defendants

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

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	**State Court No. 0616-CV32307**
US BANCORP, NA	)	
AND US BANK, NA,	)	
	)	
Defendants.	)	

CORPORATE DISCLOSURE STATEMENT

Defendants U.S. Bancorp (misnamed as US Bancorp, NA) and U.S. Bank National Association (misnamed as US Bank, NA), through their attorneys of record, provide the following information in compliance with Rule 7.1 of the Federal Rules of Civil Procedure and W.D.Mo. Local Rule 3.1:

1. U.S. Bancorp has no parent corporation, and no publicly-held corporation owns 10% or more of U.S. Bancorp stock. No other company affiliated with U.S. Bancorp has issued shares to the public.

2. U.S. Bank National Association's parent corporation is USB Holdings, Inc. U.S. Bank National Association is wholly owned by USB Holdings, Inc., which in turn is wholly owned by U.S. Bancorp. No other company affiliated with U.S. Bank National Association has issued shares to the public.

Dated: December 13, 2006

Respectfully submitted,

/s/ Mark A. Olthoff

MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certified that the above and foregoing document was filed electronically with the above-captioned court, and a copy was sent by overnight mail on this 13th day of December, 2006 to:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Mark A. Olthoff
Attorney for Defendants

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

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	
US BANCORP, NA AND US BANK, NA,	)	
	)	
Defendants.	)	

CERTIFICATE OF FILING OF NOTICE OF REMOVAL IN STATE COURT AND PROOF OF SERVICE

PLEASE TAKE NOTICE that: (1) a Notice to State Court of Filing of Notice of Removal attaching a copy of the Notice of Removal of Civil Action and the pleadings and documents attached thereto was filed in the Circuit Court of Jackson County, Missouri in the action bearing Case No. 0616-CV32307 on the 13th day of December, 2006; and (2) a full and complete copy of the Notice to State Court of Filing of Notice of Removal and a Notice to Plaintiffs of Filing of Notice of Removal was sent by overnight mail to Plaintiff Samuel K. Lipari, 297 NE Bayview, Lee's Summit, MO 64064, on the 13th day of December, 2006.

Dated: December 14, 2006

Respectfully submitted,

/s/ Mark A. Olthoff

MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was filed electronically with the above-captioned court, and a copy was sent by overnight mail on this 14th day of December, 2006 to:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

/s/ Mark A. Olthoff
Attorney for Defendants

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

NOTICE OF INCLUSION IN THE EARLY ASSESSMENT PROGRAM
IN THE WESTERN DISTRICT OF MISSOURI

Case Number: 4:06-1012-CV-W-FJG

This case has been selected at random for inclusion in the Early Assessment Program.

Your case has been assigned at random as indicated below:

1. To a United States Magistrate Judge
   or to a United States Bankruptcy Judge;

2. To the Administrator of the Early Assessment Program;

3. To an outside mediator.

If your case has been assigned to a judge, you will be notified of the date, time and place of a settlement conference by the judge's office after responsive pleadings are filed.

If your case has been assigned to the Administrator of the Early Assessment Program, you will be notified by the Administrator's office of the date, time and place of the first early assessment meeting after responsive pleadings are filed.

If your case has been assigned to an outside neutral, after responsive pleadings are filed, the parties will be notified that they have 15 days to select an outside neutral of their choice and file a certificate with the Clerk's office stating the name, address and telephone number of the outside neutral selected, and the date, time and place of the first meeting scheduled with the outside neutral. The certificate must be filed within the time stated in the notice to the parties, and must be signed by or on behalf of each party.

A clear understanding should be entered into between the parties and the outside neutral as to the payment of the costs of the outside neutral, and how the costs are to be shared between the parties. Unless a party has been granted leave to proceed in forma pauperis, the parties are to promptly pay for the costs of the services of the outside neutral.

6/22/01

If a certificate is not timely filed, the parties will be provided with a list of potential neutrals as provided in Section VIII.D of the General Order, and the parties will have 10 days from the date on the list of the potential neutrals to:

a. Agree to a neutral on the list and report the selection of the agreed neutral to the Administrator of the Early Assessment Program in writing, or

b. Each party may designate a "strike" of the name of two potential neutrals on the list of potential neutrals. The strike shall be in writing and shall be delivered to the Administrator.

It is expected that cases assigned to the judges will use a settlement conference. It is expected that the cases assigned to the Administrator of the Early Assessment Program will have a mediation with the Administrator; however, if it appears helpful, the parties may discuss with the Administrator whether the case should be handled by mediation, early neutral evaluation or other alternative dispute resolution procedures.

It is anticipated that the cases assigned to an outside neutral will proceed with at least one mediation session; however, if agreeable to the parties, the case may be processed with early neutral evaluation or other alternative dispute resolution procedures.

Please read carefully the General Order describing the Early Assessment Program in more detail.

As a party to a lawsuit in this Court, you are entitled to pursue all claims or defenses to claims that you have asserted until a disposition of the claims or defenses is made by the Court or a jury. However, most of the lawsuits filed in this and other courts are resolved by voluntary settlement of the parties before trial. With a settlement, the expense and inconvenience of litigation can be reduced and the uncertainty of the outcome can be eliminated.

In many cases that are settled, the settlement does not take place as early or economically as possible. The purpose of the Early Assessment Program is to provide alternative dispute resolution (ADR) services to assist parties in arriving at a voluntary, early resolution of their dispute.

YOUR OBLIGATIONS IN THIS COURT ARE NOT AFFECTED BY YOUR INCLUSION IN THIS PROGRAM

Good faith participation in the Early Assessment Program and use of one of the alternative dispute resolution (ADR) processes is required, but you are not required to settle the case.

Inclusion in this program does not relieve you of any of the obligations or deadlines that you have in this lawsuit. **IF YOU HAVE BEEN SERVED, YOU MUST FILE A TIMELY RESPONSE IN ORDER TO AVOID THE RISK OF A DEFAULT JUDGMENT.**

The goals of the Assessment are to determine which ADR procedure is most likely to help the

parties reach a settlement, and to promptly begin settlement negotiations, if appropriate. Ideally, the parties will mutually decide which ADR option to use. However, if the parties are unable to agree, the decision will be made by the Administrator or by the person conducting the meeting.

It is important that you carefully review and objectively evaluate your case prior to the first meeting. You should come prepared to discuss and negotiate the settlement of your case.

PLEASE NOTE THAT PARTIES ARE REQUIRED TO ATTEND (IN PERSON) ALL MEETINGS UNLESS EXCUSED BY THE PERSON CONDUCTING THE MEETING.

The actions of the person conducting the meeting(s) have no binding effect on discovery, motion practice or other aspects of preparation for trial. Only the assigned judge can control these matters. However, all communications made in connection with the Early Assessment Program are confidential and cannot be used at trial, except as provided in the General Order and Federal Rule of Evidence 408.

Set out below are some of the major ADR options that are available through this program. This list does not preclude the development of some other procedures by the parties, in consultation with the Administrator or the person in charge of the meeting.

MEDIATION

Mediation is a process in which a neutral third party assists the parties in developing and exploring their underlying interests (in addition to their legal positions), promotes the development of options and assists the parties toward settling the case through negotiations.

The mediator is a lawyer who possesses the unique skills required to facilitate the mediation process, including the ability to help the parties develop alternatives, analyze issues, question perceptions, use logic, conduct private caucuses, stimulate negotiations between opposing sides and keep order.

The mediation process does not normally contemplate presentations by witnesses. The mediator does not review or rule upon questions of fact or law, or render a final decision in the case.

EARLY NEUTRAL EVALUATION (ENE)

Early neutral evaluation is a process in which parties obtain from an experienced neutral (an Evaluator) a non-binding, reasoned evaluation of their case on its merits. After essential information and position statements are exchanged, the Evaluator convenes a session which typically lasts about two hours. At the meeting, each side briefly presents the factual and legal basis of its position. The Evaluator may ask questions and help the parties identify the parties' underlying interests, the main issues in dispute, as well as areas of agreement. He or she may also help the parties explore options for settlement. If settlement does not occur, the Evaluator then offers his or her opinion as to the settlement value of the case, including the likelihood of

liability and the likely range of damages. With the benefit of this assessment, the parties are again encouraged to discuss settlement, with or without the Evaluator's assistance. They may also explore ways of narrowing the issues, exchanging information about the case or otherwise preparing efficiently for trial.

The Evaluator has no power to impose a settlement or to dictate any agreement regarding the pretrial management of the case.

JUDGE SETTLEMENT CONFERENCE

The purpose of the settlement conference is to permit an informal discussion between the lawyers, parties and the judge of every aspect of the lawsuit, thus permitting the judge privately to express his or her views concerning the actual dollar settlement value or other reasonable disposition of this case.

An oral settlement conference statement of each party will be presented to the judge, setting forth the positions of the parties concerning factual issues, issues of law, damage or relief requested. Pertinent evidence to be offered at trial, documents or otherwise, should be brought to the settlement conference for presentation to the judge, if reasonably relevant.

The judge may converse with any and all sides of the dispute outside the hearing of the other.

The failure to attend a settlement conference, or the refusal to cooperate fully, may result in the imposition of sanctions by the judge. The judge may issue such other and additional requirements of the parties or persons having an interest in the outcome as he or she will deem proper in order to expedite the amicable resolution of the case. The judge will not discuss the merits of the case with the assigned judge, but may discuss the status of motions and other procedural matters with the assigned judge.

OTHER ALTERNATIVE DISPUTE RESOLUTION METHODS

The Administrator, or the person conducting the meeting, and the parties may decide that a mini-trial, or binding arbitration, or some other form of ADR may be the best way to resolve the case.

The purpose of this program is to help parties save time and money. It will succeed if lawyers and parties make a good faith effort to comply with the spirit of the program.

Early Assessment Program
Charles Evans Whittaker Courthouse
400 E. 9th Street, Room 3238
Kansas City, Missouri 64106
816-512-5080

General Order
Western District of Missouri
EARLY ASSESSMENT PROGRAM
Effective May 9, 2002

I. PURPOSE

The Early Assessment Program is designed to encourage parties to: 1) confront the facts and issues in their case before engaging in expensive and time-consuming discovery procedures, 2) engage in early discussions of the issues, 3) consider the views of the opposing side, 4) consider the projected costs of future proceedings in an effort to settle the case before costs and lawyers' fees have made settlement more difficult, and 5) consider other methods of resolving their disputes. It recognizes that full formal litigation of civil claims can impose large economic and other burdens on parties and can delay the resolution of disputes. It will be administrated by a "Program Administrator" in the Western, Southern and Central Divisions of this Court. All references to "Administrator" shall be deemed to be referring to the "Program Administrator" or his/her designee.

This Program was carefully designed to allow measurement of savings of time and money to litigants. It has proven highly successful on both counts. Additionally, measures of satisfaction by judges, lawyers, participants and clients are reflected in the value and success of the Program.

II. PROGRAM DESCRIPTION AND PROCEDURE

A. Case Selection

1. All nonexcluded civil cases filed in the Western District shall be included in the Early Assessment Program.

2. *Excluded Cases.* The following cases are excluded from the program:

   a. Multi-district cases
   b. Social Security appeals
   c. Bankruptcy appeals
   d. Habeas Corpus actions
   e. Prisoner *pro se* cases and other *pro se* cases where motion for appointment of counsel is pending
   f. Prisoner cases
   g. Student Loan cases

3. *Class Actions*. The Administrator may determine in his or her discretion when and how to involve class action cases in the program.

B. **Early Assessment Meeting/Settlement Meeting (Meeting).** A meeting shall normally be held within thirty days after filing of responsive pleadings or as soon thereafter as practical. A meeting will be held at the time set by the Administrator or Designated Individual.

1. The Administrator or designated individual shall notify the lawyers (or *pro se* parties, if applicable) of the date of the meeting or a time frame to set the meeting.

2. At the meeting, the Administrator or designated individual should advise the parties and their lawyers of the various "alternative dispute resolution" (ADR) options available to them for a resolution of their dispute as set out in section VII.

3. If the Administrator or designated individual, in consultation with the parties, determines that additional discovery is needed , the Administrator or designated individual shall, working with the parties, devise a plan for sharing the important information and/or conducting the key discovery that will equip them, as expeditiously as possible, to enter meaningful settlement discussions.

4. Regardless of whether a case enters the ENE program, the Administrator or designated individual shall also help the parties identify areas of agreement and explore the possibility of settling the case through mediation techniques. If appropriate, a mediation or early neutral evaluation process may be initiated immediately, or at a later date, with the Administrator or designated individual serving as mediator.

5. Participants in the program must select, with the assistance of the Administrator or designated individual, one of the ADR options. If the parties are unable to agree, the Administrator or designated individual shall select the ADR option. If the Administrator or designated individual determines that a second session is necessary before a decision can be reached on the appropriate ADR process, it may be scheduled as soon as possible.

6. The first session of the ADR process selected should not be held later than forty-five days after the first meeting, unless the Administrator or designated individual, in his or her discretion, determines that a later date is necessary. Additional sessions can be required by the Administrator or Judge.

C. **Opting Out**. Cases will not normally be allowed to opt out of the program. However, there may be cases where good cause can be demonstrated for opting out. All requests to opt out shall be in letter form and shall set forth in detail the reasons for the request. A letter asking to opt out shall be directed to the Administrator within ten days of receiving notice that the case is assigned to the program. Subject to the considerations stated herein, the Administrator may grant or deny the request in his or her discretion. Appeals from the Administrator's decision, while discouraged, may be made by written motion to the judge to whom the case is assigned.

D. **Notice to Parties**. Notice to parties of case selection for the program shall be provided as follows:

1. The Clerk shall provide a copy of the Notice to each lawyer filing an action and to each eligible person filing such action *pro se*.

2. The Notice shall be attached by the Clerk to each summons issued in such action.

3. Each lawyer shall, within twenty days after notice of suit, mail or deliver a copy of the Notice to each party that he or she represents, and shall promptly file a certificate stating:

   (a) client's name, date and address to which the Notice was mailed; or
   (b) client's name and the date and place of delivery of the Notice.

   The certificate may be contained in the answer or other responsive pleading.

III. PROGRAM ADMINISTRATOR (ADMINISTRATOR)

A. **Selection**. A Program Administrator for each Division shall be selected by the Court.

B. **Administrator - Responsibilities**. In addition to any responsibilities or duties noted elsewhere in this General Order, the Administrator shall have the following responsibilities:

1. Administer the program, including developing rules consistent with this General Order and coordination of all activities with the office of the Western District Clerk. The Administrator shall be responsible for the assignment of cases in the Early Assessment Program.

2. Serve as a mediator at the assessment meeting or at any subsequent session in his or her discretion. The Administrator may set and conduct mediation sessions as time permits.

3. Assign cases for mediation or for other appropriate ADR procedure to: United States Magistrate Judges, United States Bankruptcy Judges, outside mediators (sometimes referred to as "designated individual"), the Administrator, and if a United States District Court Judge consents to the assignment, cases may be assigned to a United States District Court Judge.

4. Assist in monitoring the evaluation of the program, including participation in the development, compilation and analysis of questionnaires for lawyers and clients.

5. To require mediators on the list to take selected cases *pro bono*. Such assignment shall be made using a fair process in the sole discretion of the Administrator. The Administrator shall develop guidelines for determining whether a case qualifies for *pro bono* assignment.

6. Report to the Court on the status of the program, making appropriate recommendations for modifications of the program.

7. Decide, in his or her discretion, at any time in the process, to exempt, temporarily suspend, delay the start date or withdraw a case from the program, if for any reason, the case is not suitable for the program.

8. Permit, in his or her discretion, parties to submit written statements, no longer than ten pages, and no sooner than seven days prior to the session, for those ADR processes where written statements are not usually submitted.

9. Develop a policy which will address the collection of files, written statements, and other confidential materials for storage or destruction.

IV. ATTENDANCE AT PROGRAM SESSIONS

A. Parties

1. It is the intent of the Court that the parties attend all program sessions where there will be significant discussion about resolving the case. The parties themselves shall attend all program sessions unless their attendance has been excused in advance by the Administrator, Mediator or Designated Individual. This attendance requirement reflects the Court's view that one of the principal

purposes of the program sessions is to afford litigants an opportunity to articulate their positions and to learn about opposing parties' positions.

2. Where attendance of a party is required, a party other than a person satisfies the attendance requirement if it is represented by a person or persons, other than outside or local counsel, with authority to enter into stipulations, with reasonable settlement authority, and with sufficient stature in the organization to have direct access to those who make the ultimate decision about settlement. In addition, if an insurance company's approval is required by any party to settle a case, a representative of the insurance company with significant settlement authority shall attend the early assessment meeting in person. If it appears to the Administrator, Mediator or Designated Individual that a case is not being reasonably evaluated by the representative present, the Administrator, Mediator or Designated Individual may meet privately with one or both sides to determine the analysis that has gone into the evaluation of the case, including the names and the authority of the individual involved in the analysis. The Administrator, Mediator or Designated Individual may request identified individuals or designate a level of authority to be present if subsequent early assessment meetings or alternative dispute resolution procedures are scheduled under the Early Assessment Program. The Administrator, Mediator or Designated Individual may vary the mandates of this section IV.A.2.

B. **Counsel**. Each party shall be accompanied by the lawyer expected to be primarily responsible for handling the trial of the matter. If an individual is not represented by counsel, that party may appear on his or her own behalf.

C. **Location**. The program sessions shall be held in meeting space at the United States Courthouse, or in some other location selected by the Administrator, Mediator or Designated Individual, or in a location agreed to by the parties and approved by the Administrator, Mediator or Designated Individual.

V. CONFIDENTIALITY

A. General Provision

1. This Court shall treat as confidential all written and oral communications, not under oath, made in connection with or during any Early Assessment Program session except as noted in sections V.B. and D.

2. Any communication not under oath made in connection with this program shall not be disclosed to anybody unrelated to the program by the parties, their

counsel, mediators or any other participant in the program and shall not be used for any purpose in any pending or future proceeding in this Court except by consent of the parties or as allowed under the Federal Rules of Evidence or sections V.B. or D. below. Communications made in connection with any proceeding in connection with this program include the comments, assessments, evaluations or recommendations of the Administrator, Mediator or Designated Individual. Mediators shall not discuss any matter communicated to them during any program proceeding except with the permission of the parties or as allowed in sections V.B. or D. below.

B. **Exceptions**

1. The Administrator may attend any program session and may discuss with any Mediator, Designated Individual or party any communication, comment, assessment, evaluation or recommendation.

2. The Administrator may require any attorney or party to provide status reports on any ADR matter.

3. The Administrator, Mediators and Designated Individuals may communicate to the assigned judge or the Court en banc regarding noncompliance by parties or lawyers with this General Order.

4. Nothing in section V.A. above shall prevent any party, the Administrator, Mediator or Designated Individual from discussing with any other participant in the program any communication made in connection with the program.

C. **Information Under Oath**. Any information furnished under oath, whether by affidavit, testimony or otherwise, may be used for impeachment purposes in this Court or elsewhere. Nothing in this Order is intended to provide any protection from the criminal consequences of making a false statement under oath.

D. **Evaluation**. Nothing in section V.A. shall be construed to prevent parties, counsel, the Administrator, Mediator or Designated Individual from responding to inquiries by persons duly authorized by the Court en banc to analyze and evaluate the program. The names of the people responding and any information that could be used to identify specific cases or parties shall be confidential.

E. **No Recording**. No recording shall be made of any of the meetings or sessions held under the program, nor shall parties utilize private reporters or any other type of recording technology during the program meetings or sessions, unless all parties agree,

or unless the recording is made under non-binding arbitration, or unless the parties have agreed to binding arbitration.

VI. EVALUATION

If funds are available, the Court may require evaluation of the program to: (a) determine the success of the program in expediting the processing of cases and reducing costs; (b) measure the satisfaction of the parties with the program; and (c) compare components or elements of the program.

VII. ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS AND PROCEDURES

A. Procedures Applicable to Mediation, Early Neutral Evaluation and Any Other ADR Sessions

1. In every case, the Administrator shall:

   (a) designate the method of selection of the individual who will serve as the mediator in accordance with this program; and

   (b) designate the period in which the ADR process shall be conducted if the mediator is not an employee of the court.

2. Not later than ten days after selection of a mediator who is not a court employee, counsel shall file a report with the Administrator stating the agreed-upon meeting date for the ADR process selected. Where a court employee is the mediator, counsel shall work out the schedule with the court employee mediator.

3. Upon failure of counsel either to file the report or to secure a mutually agreeable date, the Administrator or judicial mediator shall fix the date, time and place for the ADR process.

4. Failure to comply with the attendance or settlement authority requirements of sections IV.A. and C. of the General Order may subject a party, and/or the lawyer, to sanctions by the Court.

5. The Mediator who is not an Administrator or Judge may, with the consent of all parties and counsel, reschedule the session to a date certain not later than ten days after the scheduled date. Any continuance beyond that time must be approved by the Administrator.

6. Subject to approval of the Mediator, the session may proceed in the absence of a party who, after due notice, fails to be present. Upon motion of an attending party or upon the Court's own motion, sanctions may be imposed by the Court on any party or lawyer who, absent good cause shown, failed to attend the meeting.

7. Within ten days following the conclusion of the session, the Mediator and counsel shall file a report with the Administrator stating whether all required parties were present and the outcome of the session, in addition to other information the Administrator may require for evaluation or follow-up purposes. The Administrator may request a status report from the lawyers at any time.

8. If the parties settle the case prior to the ADR session, the Mediator, Administrator and Court shall be advised promptly.

B. **Description of Specific ADR Options and Procedures**

1. **Mediation (including Facilitative Mediation, Evaluative Mediation and Judicial Mediation)**

a. Mediation is a process in which a neutral third party assists the parties in developing and exploring their underlying interests (in addition to their legal positions), promotes the development of options and assists the parties toward settling the case through negotiations.

b. The mediator should be a person who possesses the unique skills required to facilitate the mediation process, including the ability to help the parties develop alternatives, analyze issues, question perceptions, use logic, conduct private caucuses, stimulate negotiations between opposing sides and keep order.

c. The mediation process does not normally contemplate presentations by witnesses. The mediator does not review or rule upon questions of fact or law, or render any final decision in the case.

d. The Mediator may also offer a nonbinding, reasoned evaluation of the case on its merits.

e. No Evaluator or Mediator has power to impose a settlement or to dictate any agreement regarding the pretrial management of the case.

f. Mediation statements, if required, shall not be filed with the Court, and the Judge assigned to hear the case shall not have access to them.

g. The Mediator may give to any or all parties:

(1) an estimate, where feasible, of the likelihood of liability and the dollar range of damages; and

(2) an opinion of the verdict if he or she were the trier of fact.

2. **Early Neutral Evaluation**. Early neutral evaluation is a process in which parties obtain from an experienced neutral (an Evaluator) a non-binding, reasoned evaluation of the case on its merits. After essential information and position statements are exchanged, the Evaluator convenes a session which typically lasts about two hours. At the meeting, each side briefly presents the factual and legal basis of its position. The Evaluator may ask questions and help the parties identify the parties' underlying interests and main issues in dispute, as well as areas of agreement. He or she may also help the parties explore options for settlement. If settlement does not occur, the Evaluator then offers an opinion as to the settlement value of the case, including the likelihood of liability and the likely range of damages. With the benefit of this assessment, the parties are again encouraged to discuss settlement, with or without the Evaluator's assistance. They may also explore ways of narrowing the issues, exchanging information about the case or otherwise preparing efficiently for trial.

3. **Other Options**. The Administrator in his or her discretion, after consultation with the parties, may select some other form of alternative dispute resolution such as mini-trials, summary jury trials, or some hybrid form of alternative dispute resolution. The Administrator may not select binding arbitration unless all parties agree.

VIII. LIST OF NEUTRALS/MEDIATORS

A. **List of Mediators**. The Administrator shall prepare a list of persons who appear to have the minimum requirements to serve as a Mediator, as described below. The Administrator may add or delete persons from the List of Mediators. A copy of the List of Mediators will be furnished upon reasonable request.

A separate list shall be prepared for each of the following: the Western Division, Central Division, and Southern Division.

Being on the List of Mediators is not an indication that a person is a qualified mediator. The Court is not certifying or representing that persons on the List of Mediators are qualified.

B. **Minimum Requirements to be on the List of Mediators**

1. All applicants for the List of Mediators must complete the required application form.

2. A person may be placed on the List of Mediators if:

(a) the person has been a United States District Judge, a United States Appellate Judge, a United States Magistrate Judge, a United States Bankruptcy Judge, a Missouri Circuit Court Judge, or a Missouri Appellate Judge; and has had arbitration or mediation experience, and has not demonstrated any trait or behavior that is reasonably believed by the Administrator to be contrary to the effective and efficient management of this program; or

(b) the person is currently admitted to the Bar of this Court, has been a member of a state bar for at least eight consecutive years, has completed 16 hours of Continuing Legal Education training, certified under Missouri Supreme Court Rule 17 or by this Court, or the reasonable equivalent thereof, and has not demonstrated any trait or behavior that is reasonably believed by the Administrator to be contrary to the effective and efficient management of this program.

C. **Removal From List of Mediators.** The Administrator may remove any person from the List of Mediators for any reason consistent with the effective management of the program.

D. **Selection of Neutrals**

1. The parties or their attorneys may, within fifteen days after notice to select a Mediator, select as a Mediator any person on the List of Mediators. If the Administrator approves, in writing and in advance, the parties may select as a neutral a person not on the List of Mediators.

2. If the parties do not agree on a neutral, the Administrator will give the parties a list of potential neutrals selected by the Administrator. The number of potential

neutrals on the list will be twice the number of "sides" in the litigation plus one. (For example, in litigation having two "sides," the list will contain five names.) The list of potential neutrals will be dated the date it is delivered to the parties or the date it is mailed to the parties by the Administrator. The parties shall have ten days from the date on the list of potential neutrals to:

(a) agree as to a neutral on the list and to report the selection of the agreed neutral to the Administrator in writing, or

(b) designate a "strike" of the names of two potential neutrals on the list of potential neutrals. The strikes shall be in writing and shall be delivered to the Administrator.

Unless the parties have agreed on a neutral as set out above, the Administrator shall designate one of the persons remaining on the list of potential neutrals and shall promptly notify the parties and the neutral of the designation.

E. **Oath**. Each Mediator shall take and sign the oath or affirmation prescribed by 28 U.S.C. § 453 before acting as a Mediator.

F. **Disqualification**

1. Title 28 U.S.C. § 144 may be utilized to seek the disqualification of a Mediator.

2. No person shall serve as a Mediator in any action in which any of the circumstances specified in 28 U.S.C. § 455 exist and would apply if the mediator were a "judge."

3. Any party who believes that a Mediator has a conflict of interest or should be disqualified shall immediately bring the matter to the attention of the Administrator.

G. **Compensation**

1. a. Normally Mediators shall be compensated no more than the hourly rate listed by them in their application filed with the Administrator and shown on the List of Mediators. However, if agreed in writing and in advance between the Mediator and the parties, the Mediator may be compensated at the hourly rate stated in such agreement.

b. The Administrator may promulgate additional guidelines for Mediators for allowable charges by nonjudicial Mediators (e.g., for research, preparation, opinion writing, etc.) and expenses.

c. Absent agreement to the contrary, or unless the Administrator determines otherwise, the cost of the Mediator's services shall be borne equally by the parties.

d. A duplicate of all charges for a Mediator's compensation and expenses shall be sent to the Administrator.

e. Except as provided in this section, a Mediator shall not charge or accept anything of value from any source whatsoever for or relating to acting as a Mediator.

2. A party may request the service of a Mediator on a *pro bono* basis, if a party demonstrates to the Administrator an inability to pay the fees of the Mediator. As a condition to inclusion on the List of Mediators maintained by the Administrator, a Mediator shall agree to serve *pro bono* periodically as assigned by the Administrator.

H. **Mediators as Counsel in Other Cases**. Any person who is designated as a Mediator pursuant to this General Order shall not for that reason be disqualified from appearing as counsel in any other unrelated case pending before the Court.

I. **Reports of Violations**. Mediators and attorneys shall promptly report in writing violations of this General Order to the Administrator and the Court.

IX. SANCTIONS

If a party fails to make a good faith effort to participate in the program in accordance with the provisions and spirit of this Order, the assigned Judge or Court may impose appropriate sanctions.

(Adopted effective Jan. 1, 1992, through Dec. 31, 1994; amended April 7, 1992; ending date extended through Sept. 30, 1995, by General Order dated Oct. 27, 1994; ending date extended through Dec. 31, 1996, by General Order dated Nov. 15, 1995; amended by General Order effective Jan. 1, 1999, and extended through the effective date of this order;

amended effective March 1, 2002, by General Order dated Feb. 22, 2002; amended by General Order dated and effective May 9, 2002.)

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

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*	)))) Case No. 06-1012-CV-W-FJG) State Court No. 0616-CV32307
vs.	)) (Properly Case No. 05-0210-) CV-W-ODS)
US BANCORP, NA US BANK, NA *Defendants*	)))

REPLY TO NOTICE OF REMOVAL AND MOTION
TO REMAND THE MATTER TO STATE COURT ON GROUNDS THAT
THE REMOVAL LACKED JURISDICTION UNDER SECTION 1441 et seq

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following reply to the defendants US Bancorp NA and US Bank, NA's notice of removal in a timely motion for remand under 28 U.S.C. Sec. 1447(c).

SUMMARY OF REASON FOR REMAND

The plaintiff respectively calls attention to the court that the plaintiff's claims removed from Missouri State Court by defendants US Bancorp, NA and US Bank, NA are supplemental state law based claims originally filed in this court as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS, now Kansas District Court Case No. 05-2299-CM. The Kansas District Court has continuing supplemental jurisdiction under 28 U.S.C. § 1367(a) and the court's current order (Doc 78 Filed 03/07/2006) declining federal jurisdiction was not objected to or appealed by the defendants.

STATEMENT OF FACTS

1. The state law claims that comprise the current state action were the supplemental state law claims (¶¶252-329 including Trade Secret Relief at ¶¶325,325, ¶448, ¶454, ¶¶479-482, ¶¶488-494, Count XI , Damages For Breach Of Contract ¶¶538-543, Count XII Damages For Breach Of Fiduciary Duty ¶¶544-553) in the complaint filed as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS. The controversy was transferred to Kansas District court upon the contested motion of the defendants and currently exists as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Kansas District Court Case No. 05-2299-CM.

2. The order of the Kansas District court dismissing the plaintiff's federal claims and request to amend is currently on appeal to the Tenth Circuit US Court of Appeals as *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331. See **Exb. 1.** Tenth Circuit Docket

3. The defendants in *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM include the Voluntary Hospital Association ("VHA") and Novation, LLC. See **Exb. 2.** Original Complaint cover page.

4. The appellees in *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331 include VHA and Novation, LLC, *id.*

5. The state contract and fiduciary duty complaint removed from state court describes VHA and Novation LLC as coconspirators of US Bank NA and US Bancorp NA in ¶¶12, 13, 34, 43, 44, 222, 223, 236, 237, 257.

6. The plaintiff brought to the court's attention in the related action *Lipari v. General Electric Company, et al* Case No. 06-0573-CV-W-FJG that Hon. Judge Feranado J. Gaitan has a fiduciary interest in VHA and Novation, LLC (See **Exb. 3** Motion for Recusal)by virtue of his declared position as a Director of St. Luke's Health System, an owning member of Novation LLC's parent company VHA. See **Exb. 4.** St. Luke's Baldrige Award Application at pg. 7.

7. The plaintiff in the related case *General Electric* asserted that in the year 2002 alone, St. Luke's Health System (SLHS) did ninety seven million dollars of hospital supply business with Novation LLC and received a 2% rebate for every dollar spent.[1]

8. The plaintiff alleges in his state complaint that the defendants US Bancorp and US Bank broke a contract to provide escrow accounts to keep the plaintiff out of the national market for hospital supplies once US Bancorp and US Bank discovered the plaintiff was a threat to their interests in Novation LLC through their investment banking subsidiary US Bancorp Piper Jaffray.

---

[1] "SLHS is a shareholder and owner of VHA/Novation, the largest Group Purchasing Organization (GPO) in the nation. SLHS accessed 885 VHA/Novation contracts with a total spending of $97 million in 2002. VHA/Novation validates the quality, market share, and availability of the various vendors, and provides SLHS as much as a 6% increase in discounts plus an average 2% rebate for every contract dollar spent, thereby supporting the achievement of SLH objectives. Most key suppliers are accessed through VHA/Novation."

http://baldrige.nist.gov/PDF_files/Saint_Lukes_Application_Summary.pdf at page 7

9. The defendants US Bank and US Bancorp's exercise of removal for diversity jurisdiction from state court contradicts the Kansas trial court's decision in *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM to dismiss the supplemental claims from federal jurisdiction, continuing the action in federal court:

> "f. **State Law Claims**
> Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). Having dismissed each of plaintiff's federal claims, this court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice."

Exb. 5 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19.

10. The defendants did not object to or appeal Judge Carlos Murguia's decision dismissing the plaintiff's state claims.

11. Diversity Jurisdiction does not exist in the federal action having original jurisdiction over the present supplemental state law claims because the defendant Shughart Thomson & Kilroy Watkins Boulware, P.C is incorporated in and has its principal place of business in Missouri, the state where Samuel Lipari resides and where his predecessor in interest (the now dissolved Medical Supply Chain, Inc.) was incorporated.

12. The defendants' counsel Mark A. Olthoff's (Mo. Lic #38572) Notice of Removal does not disclose that the plaintiff's complaint is comprised of the claims in *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS now under the jurisdiction of Hon. Judge Carlos Murguia in *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM.

13. The defendants' counsel Mark A. Olthoff (Mo. Lic #38572) omitted from its *ex parte* removal the court order of Hon. Judge Carlos Murguia dismissing the supplemental state claims from federal jurisdiction, which neither Mark A. Olthoff (Mo. Lic #38572) or the defendants objected to and which was not appealed by the defendants.

SUGGESTION IN SUPPORT

The removal is improper for lack of jurisdiction in this US District Court and case, federal Diversity does not exist, and removal violates federal comity and the "first to file" rule as recognized by the Eight Circuit. The plaintiff has made a timely motion for remand. Section 1447(c) provides in relevant part

that "[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under [28 U.S.C.] Sec. 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1441 does not prescribe separate rules of subject matter jurisdiction. Rather, § 1441 merely provides a procedural mechanism for a party to remove a qualifying case to federal court. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1543-46 (5th Cir.1991) (distinguishing improper removal from lack of subject matter jurisdiction).

I. Kansas District Court Still Has Federal Jurisdiction Over the State Claims

Here the defendants' removal suffers from a jurisdictional defect. This is not a qualifying action because of the continuing jurisdiction of *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM over these state law claims under 28 U.S.C. § 1367 is well established:

> "Upon the dismissal of the Magnuson-Moss claims, this court continued to have subject matter jurisdiction under 28 U.S.C. § 1367, because we had not yet "decline[d] to exercise supplemental jurisdiction" under 28 U.S.C. § 1367(c). That this court has throughout also had supplemental jurisdiction over the pendent state law claims pursuant to 28 U.S.C. § 1367 is, furthermore, reflected in the plain language of § 1367(a), which states that "**in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" (emphasis added). Thus this court has always had subject matter jurisdiction over all the claims in this case, initially through original jurisdiction, and later through supplemental jurisdiction, which continues to the present time**." [Emphasis added]

In re Ford Motor Company Ignition Switch Products Liability Litigation, MDL No. 1112 at pg. 1(D. N.J. 8/27/1998) (D.N.J., 1998).

The Eight Circuit has acknowledged that there are circumstances in which a District court could continue to assert jurisdiction over supplemental claims after the federal claims are dismissed:

> "At any rate, KPERS cannot prevail even if we limit our analysis to supplemental jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349, 108 S.Ct. 614, 618, 98 L.Ed.2d 720 (1988), the Supreme Court distinguished between the power to exercise jurisdiction over pendent (or supplemental) claims and the advisability of exercising such jurisdiction. Under the familiar test, "**a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'** " *Cohill,* 484 U.S. at 349, 108 S.Ct. at 618 (quoting *Gibbs,* 383 U.S. at 725, 86 S.Ct. at 1138). The existence of this jurisdiction is determined at the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction was predicated. *Bank One Texas Nat'l Ass'n v. Morrison*, 26 F.3d 544, 547 (5th Cir.1994); see KPERS I, 4 F.3d at 622.

On the other hand, **the decision of whether to exercise supplemental jurisdiction after dismissal of the federal claim is discretionary**. *Cohill*, 484 U.S. at 349, 108 S.Ct. at 618 ("*Gibbs* drew a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power.") It is the district court's decision to retain jurisdiction, not the existence of jurisdiction in the first place, which KPERS contends was improper. In fact, we decided the first question, the existence of jurisdiction, in KPERS I, 4 F.3d at 622. Even if the district court abused its discretion in retaining the case, the court would not be without jurisdiction. *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir.1990), **we held that "it would have been more appropriate for the federal district court, once rejecting the federal claims, to have exercised its discretion and not passed on the pendent claim."** *Id.* at 220. However, the district court had in fact retained and decided the pendent claim. Despite our conclusion that the district court should not have decided the pendent claim, on appeal we proceeded to review the state claim on the merits. Id. at 220-21. **We could not have done so if the district court had lacked subject-matter jurisdiction.** Therefore, we need not review the propriety of the district court's decision to retain supplemental jurisdiction in order to decide this appeal." [Emphasis added]

Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc., 77 F.3d 1063 at 1067-68 (C.A.8 (Mo.), 1996).

The Eight Circuit has also recognized that under controlling US Supreme Court precedent the decision of the trial court to retain jurisdiction over supplemental claims is open throughout the litigation and subject to change:

"While the district court's power to exercise jurisdiction under the "same case or controversy" requirement in 28 U.S.C. § 1367(a) is one ordinarily resolved on the pleadings, the court's decision to exercise that jurisdiction "**is one which remains open throughout the litigation**." *United Mine Workers v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139-40, 16 L.Ed.2d 218 (1966) (discussion of pendent jurisdiction and discretionary power of federal trial court to refuse to hear state law claims, now codified by 28 U.S.C. § 1367).

Assuming the defendants' state law indemnification counterclaims were sufficiently related to the plaintiffs' jurisdictionally sufficient claims such that all claims could fairly be characterized as part of the "same case or controversy" pursuant to 28 U.S.C. § 1367(a), the district court had the discretion to decline to retain jurisdiction under section 1367(c)(3) (dismissal of all claims over which it had original jurisdiction) and 1367(c)(1) (complex issue of state law) at any time in the litigation. Further, because the timely filing of the Rule 59(e) motion tolled the appeal time in order to provide the district court with jurisdiction to resolve the motion, the district court's decision to relinquish supplemental jurisdiction was made before the case was "final" for appeal purposes.

Defendants Kirsch and Redden contend the district court's reversal of its decision to retain supplemental jurisdiction violates the law-of-the-case doctrine. However, none of the cases on which Kirsch and Redden rely involve a district court's decision to relinquish supplemental jurisdiction pursuant to 28 U.S.C. § 1367 in the context of resolving a Fed.R.Civ.P. 59(e) motion. *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C.Cir.1996); *Starks v. Rent-A-Center*, 58 F.3d 358 (8th Cir.1995); *Lovett v. General Motors Corp.*, 975 F.2d 518 (8th Cir.1992), cert. denied, 510 U.S. 1113, 114 S.Ct. 1058, 127 L.Ed.2d 378 (1994). In any event, a court has the power to revisit its prior decisions when "the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Starks*, 58 F.3d at 364 (quoting *Christianson v. Colt Indus.Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988)). As determined above, this is such a case." [Emphasis added]

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284 at 1287-88 (C.A.8 (S.D.), 1998).

II. US Bank NA and US Bancorp NA Failed to Appeal the Dismissal

In the Tenth Circuit where the defendants US Bank NA and US Bancorp NA represented there as here by Mark A. Olthoff (MO #38572) were presented with the order by Judge Carlos Murguia permitting the plaintiff to file his contract and fiduciary claims in state court (See Exb. 1 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19). The defendants were required to appeal the decision to retain the state claims in federal court:

> "Here, Cannondale sought final disposition on the merits as to all claims, but the district court granted summary judgment only on the federal claim. The court dismissed without prejudice the state law claims. As a result, Cannondale received only a part of what it sought. This disposition left Cannondale open to precisely what happened in this case, a second litigation. Cannondale was sufficiently aggrieved by this result, and consequently has standing to appeal. See *Jarvis*, 985 F.2d at 1425 ("In this case, a successful appeal by Nobel would eliminate any possible re-filing . . . in state court[, and because] avoiding a state court suit would substantially reduce Nobel's future litigation costs, we find that Nobel has the requisite stake in this appeal."); *Disher v. Information Res., Inc.*, 873 F.2d 136, 138-39 (7th Cir. 1989) (defendant prevailing on summary judgment on all but two claims may appeal dismissal without prejudice because the decision is not entirely in the defendant's favor by exposing the defendant to further litigation). Accordingly, we have jurisdiction over this appeal under 28 U.S.C. § 1291."

Amazon Inc. v. Dirt Camp Inc., 273 F.3d 1271at 1276 (10th Cir., 2001), The necessity of appeal to thwart a follow on state court action has been established in the Tenth Circuit since 1992:

> "(FN1). Although dismissals without prejudice are not usually considered final decisions, and therefore not appealable, "where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001). Where, as here, the district court dismissed a state claim without prejudice after granting summary judgment on the federal claims, and where the dismissal without prejudice was not sought by plaintiff for purposes of manufacturing finality, we may exercise appellate jurisdiction. See id. & n.4 (citing *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1424 (10th Cir. 1993) and *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992))."

BUI v. IBP Inc. at fn 1 (2002). The plaintiff appealed, suspending the effect of Judge Murguia's dismissal of federal claims, which the defendants contest and the Tenth Circuit action is captioned *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331. Only upon the success of the plaintiff's appeal can the defendants return these state claims to federal court. Possibly, the defendants can obtain relief from neglect or inadvertence from Judge Murguia and be permitted to file an untimely Rule 59(e) motion if they can demonstrate good cause.

III. Diversity Does Not Exist

The plaintiff concedes that the US Supreme Court has just determined that national associations are to be treated as residents of the state in which they have a principal place of business but that does not

save the defendants' removal from being frivolous. Diversity jurisdiction still does not exist, despite the movement of pendant (supplemental) claims to state court:

"It is a well-settled rule that diversity of citizenship is determined as of the date the action is commenced. *Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls*, 713 F.2d 1261, 1266 (7th Cir.1983); *Benskin v. Addison Township*, 635 F.Supp. 1014, 1017 (N.D.Ill.1986); C.A. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3608 (2d ed. 1984). At the time plaintiff commenced this suit, there was no diversity of citizenship between the parties and therefore no basis for diversity jurisdiction. It does not matter that plaintiff amended his complaint after he moved to Ohio. The amendment relates back to the date the lawsuit was commenced. See Fed.R.Civ.P. 15(c). There still was no diversity jurisdiction. *Oliney v. Gardner*, 771 F.2d 856, 858-59 (5th Cir.1985); Wright, Miller, & Cooper, § 3608 at 458-59. There is no diversity jurisdiction over Disher's state law claims; there is only pendent jurisdiction over those claims."

Disher v. Information Resources, Inc., 691 F.Supp. 75 at 81. (N.D. Ill., 1988). Here, the claims were filed with the Missouri domiciled defendant Shughart, Thomson & Kilroy as a defendant. Diversity did not exist. Nor does it exist at the time of removal of the concurrent state case because the US District Court still has original federal question jurisdiction over all supplemental claims under 28 U.S.C. § 1367(a). Alternatively the Missouri domiciled defendant Shughart, Thomson & Kilroy is in Privity with the state law claim defendants and by virtue of Mark A. Olthoff's (Mo. Lic #38572) entry of appearance, directly represented in state court.

IV. Comity

The defendants are attempting to have the "Judges of the Western District of Missouri" violate the time honored principal of Federal Comity in usurping the Kansas District Court's original federal question jurisdiction and continuing supplemental jurisdiction over all claims arising from the same controversy under 28 U.S.C. § 1367(a):

"Principles of comity come into play when separate courts are presented with the same lawsuit. When faced with such a dilemma, one court must yield its jurisdiction to the other, unless one court has exclusive jurisdiction over a portion of the subject matter in dispute. Principles of comity suggest that a court having jurisdiction over all matters in dispute should have jurisdiction of the case. Otherwise, the fractioned dispute would have to be resolved in two courts."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 at 1173 (C.A.11 (Fla.), 1982). The Tenth Circuit in which this action currently has its federal existence and this court's Eight Circuit both adhere to the "first to file" rule giving jurisdiction to *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS, now Kansas District Court Case No. 05-2299-CM:

"As detailed above, nearly two years have gone by while this case has proceeded on identical complaints in two jurisdictions. Generally, the doctrine of federal comity permits a court to decline jurisdiction over an action when a complaint involving the same parties and issues has

already been filed in another district. *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-5 (9th Cir.1982). Hence, courts follow a "first to file" rule that where two courts have concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case. *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1163 (10th Cir.), cert. denied, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982). The Eleventh Circuit has similarly stated that "[i]n the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case." *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 675 F.2d 1169, 1174 (11th Cir.1982). The purpose of this rule is to promote efficient use of judicial resources. The rule is not intended to be rigid, mechanical, or inflexible, but should be applied in a manner serving sound judicial administration. *Pacesetter Systems, Inc.*, 678 F.2d at 95.

We conclude that the federal comity doctrine is best served in this case by dismissing Orthmann's action in Minnesota district court. Although he filed his action first in Minnesota, the decision by the Seventh Circuit means that the controversy is now further developed in the Wisconsin district court."

Orthmann v. Apple River Campground, Inc., 765 F.2d 119 at 121 (C.A.8 (Minn.), 1985).

And as the *Orthmann* court shows, the exception proves the rule. The Kansas District court now being appealed in the Tenth Circuit has developed the case further than the Western District of Missouri.

In a possible future contest between state court and the District of Kansas, the state court would likely then lose:

"In absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case. *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971). It should make no difference whether the competing courts are both federal courts or a state and federal court with undisputed concurrent jurisdiction. There are no reasons compelling the federal court, last into this case, which remanded after removal proceedings, to decide the case."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 at 1174 (C.A.11 (Fla.), 1982).

CONCLUSION

This court is required to remand this case to state court. The Western District of Missouri has no jurisdiction to overturn Judge Murguia's order on 03/07/2006 over the claims now captioned *Samuel K. Lipari v US Bank NA, et al* Missouri 16th Cir. State Court Case No. 0616-CV32307 which are concurrent in jurisdiction with and part of the same case or controversy as the federal court case *Medical Supply Chain, Inc. v Neoforma et al*, Case No. 05-2299-CM under 28 U.S.C. § 1367(a). Diversity jurisdiction removal under 28 U.S.C. § 1441 *et seq* is inapplicable where a US District Court in the District of Kansas is already exercising original federal question jurisdiction over the parties and diversity did not exist at the time the action was filed originally as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS.

The plaintiff respectfully requests that this action be remanded to Missouri state court from whence it was removed.

Respectfully submitted,

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

Certificate of Service

I certify that on December 18th, 2006 I have served the opposing counsel with a copy of the foregoing notice using the CM/ECF system which will send a notice of electronic filing to the following:

Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEY FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

297 NE Bayview
Lees Summit, MO 64064
816-365-1306

Exhibits

Exb. 1. Tenth Circuit Docket
Exb. 2. Original Complaint cover page.
Exb. 3 Motion for Recusal
Exb. 4. St. Luke's Baldrige Award Application at pg. 7.
Exb. 5 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19.