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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
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.	)

ANSWER TO NOVATION DEFENDANTS' MOTION FOR SANCTIONS

Comes now the plaintiff Medical Supply Chain, Inc. and makes the present reply to the Novation defendants' motion to sanction Medical Supply or its counsel for correctly stating civil claims against the defendants.

The defendants in their multiple dismissals and baseless sanction motions are violating 28 U.S.C. Sec. 1927.

> "Section 1927 provides that "[a]ny attorney ... 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 attorneys fees reasonably incurred because of such conduct." Sanctions under Sec. 1927 are appropriate "for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir.1987)."

Resolution Trust Corp. v. Dabney, 73 F.3d 262 at 265 (C.A.10 (Okla.), 1995).

This is a case where the conspiracy evidence is exclusively in the hands of the defendants. Even if the plaintiff's claims were inaccurate, neither Medical Supply or its counsel could be sanctioned.

> "4 This is not, of course, a claim **the details of which were uniquely and exclusively in the control of the defendant. Were that the case, we would not find plaintiffs' conduct sanctionable**. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 896 (D.C.Cir.1989), aff'd in part, rev'd in part sub nom. *Cooter & Gell v. Hartmarx Corp.*, --- U.S. ----, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). "[Emphasis added]

White v. General Motors Corp., Inc., 908 F.2d 675 at fn 4 (C.A.10 (Kan.), 1990).

The Tenth's remand for sanctioning in the unpublished GE case is not a directive to this court to sanction Medical Supply or its counsel. It is also unlawful. See Exb. 1. In *Burkhart Through Meeks v. Kinsley Bank*, 852 F.2d 512 (C.A.10 (Kan.), 1988), the trial court again refused to sanction the plaintiff even after the case was remanded with instructions to do so: "On remand, the district court, after hearing, again denied the Bank's motion for sanctions, and the present appeal is from that order." *Id* at 513. The Tenth Circuit upheld the trial court's continued denial of sanctions:

> "In the instant case, we do not believe that the district court abused its discretion in denying the Bank's motion for sanctions. As the district judge noted, several rulings by a bankruptcy judge in Kansas did support the Burkharts' theory of the case. Also, Burkharts' counsel apparently conferred with the bankruptcy judge about the matter, and counsel communicated with the Bank about the possibility of litigation before the action was filed."

Burkhart Through Meeks v. Kinsley Bank, 852 F.2d 512 (C.A.10 (Kan.), 1988). The startling difference between the *Burkhart* plaintiff's position and Medical Supply's is that the plaintiff's counsel in *Burkhart* was wrong about the applicable law and was still not sanctioned. Here Medical Supply was right in its USA PATRIOT Act and antitrust claims against US Bancorp and right in its claims against the General Electric defendants including most especially Jeffrey Immelt.

Starting with Hon. Judge Murguia's review evading flourish falsely stating that Medical Supply's counsel had not researched the facts applicable to its claims against the US Bank defendants and repeating the same misrepresentation in his GE decision, the court has been in error. The record and the discoverable facts clearly show Medical Supply's antitrust claims were valid. The decisions evidence that the trial court and appellate panels understood them to be so because the memorandums do not make necessary findings of fact or law and when they do, they misstate the pled facts and demonstrate a complete renouncing of US Supreme Court pleading standards. Much of this is excusable however because of the spurious and unresearched legal arguments of Mr. Olthoff and Mr. Powers in which this action continues to suffer.

The defense counsel has demonstrated an inability to research the appropriate law of either circuit regarding the plaintiff's claims. In the two previous actions, this district was forced to make shaky *sua sponte* decisions to uphold a healthy free market skepticism toward Sherman Act claims that is required to protect the powerful statutes from being used to thwart competitive capitalism. One can only wonder at the career cost to various counsel, law clerks and judges associated with these actions where the defense is unwilling to exercise the most basic research and scholarship and the resulting decisions are clearly

erroneous on many issues. The complaint itself alleges that the defendants were forced to rely on the *ex parte* advocacy of Magistrate James P. O'Hara. Neither group of defendants bothered to research the case law giving a federal cause of action against misconduct in an earlier federal court. Similarly, all defense counsel were unaware that law firms are properly RICO defendants in the wake of such misconduct.

When the Tenth Circuit panel was forced to evade making independent findings of fact or law in order to uphold the clearly erroneous dismissal of the US Bancorp action, Medical Supply in its first en banc motion dated November 24, 2004 cautioned the Tenth Circuit that if left unchanged, the inaccurate and clearly erroneous decision on a critical national issue, the anticompetitive effects of GPO's which was the subject of US Senate Judiciary Committee hearings would become part of the policy dialogue on the appointment of judges.:

> "The conflict of the trial court with US Supreme Court authority (and the controlling cases of this circuit) on the requirements of initial pleadings raise extremely important questions of law. Medical Supply's brief identified these errors. **The fact that this appellate decision was released shortly after the third committee hearing on the GPO monopoly conduct and its costs to our nation certainly means that this decision left unchanged will become part of the coming judicial appointment policy debates in addition to the continuing search for a solution to the GPO monopoly**, which will now unfortunately discredit antitrust enforcement in favor of increased regulation. If a rehearing is granted, addressing the above cited mistaken points of law, debate on this important national policy issue will be aided."[Emphasis added]

Medical Supply En Banc Hearing Motion, pg 15-16. The panel and the entire court declined to rehear the matter and Medical Supply's brief went unread.

Soon thereafter, because of the defendants' scheme to deprive medical Supply of counsel described in Medical Supply's claims against the defendants, Chief Judge Deanell Reece Tacha was forced to choose between investigating how Magistrate James P. O'Hara influenced a Kansas District court case where Magistrate James P. O'Hara was not even assigned to honor Chief Justice William H. Rehnquist's commitment[1] to the US Congress on judicial complaints or sweeping Medical Supply's judicial complaint under the rug in an effort to save what was left of the honor of the Kansas District Court. Chief Judge Deanell Reece Tacha did not even wait for the transcripts before dismissing the plaintiff's complaint against Magistrate James P. O'Hara.

On Friday, July 1, 2005, Justice Sandra Day O'Connor announced she was retiring. Slate Magazine, an online publication of the Washington Post Newsweek company published on Wednesday,

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[1] *Rehnquist's Olive Branch Too Late?* Tony Mauro Legal Times 06-01-2004

July 6, 2005 an article entitled "A Different Shortlist How about an old-style conservative Supreme Court nominee?"By Emily Bazelon and David Newman. The article suggested Chief Judge Deanell Reece Tacha as an appropriate nominee to replace Justice Sandra Day O'Connor as a conservative in the traditional sense of the word, a distinguished jurist who believes in moderation, judicial restraint, and deference to Congress.

The defense counsels' lack of scholarship and continued unwillingness to address fundamental issues like the current US Supreme Court rulings regarding notice pleading or the Tenth Circuit's transaction and privity requirements for claim and issue preclusion fails to aid this Kansas District court and the Tenth Circuit in competently resolving this complex litigation addressing an important nationwide crisis. See Exb. 2 generally. The defense counsels' continuing *sub rosa* efforts to throw the outcome of this litigation have made it incredibly difficult to lobby political interest groups for Chief Judge Deanell Reece Tacha's nomination. It is deeply important to Kansas and the Tenth Circuit that she have the opportunity to advance and take with her much of the law we as practitioners have developed in this circuit.

After Medical Supply filed the present complaint, Novation, UHC and VHA disclosed to Neoforma, Inc. that their long term (10 year) exclusive contract for Neoforma's web based hospital supply distribution was keeping the price of that service much higher than it would be in a competitive market. Bob Zollars and Neoforma, Inc. was forced to publicize that disclosure because it is a publicly traded company. This publicized restraint of trade completes Medical Supply's Sherman 1 proof. ,Novation, UHC, VHA, Neoforma, Inc. and their named coconspirators are liable to Medical Supply Chain, Inc. for three times what Medical Supply would have made had it been allowed to enter the market for hospital supplies.

Jeffrey Immelt and General Electric which itself is in a consent decree with the US Justice Department over monopolization of the market for hospital supplies have helped to publicize that over 50,000 people a year die from the lack of efficient hospital supply chain systems:

> "Hospitals need to be efficient just as much as factories or supply chains--but they're not. The results are expensive, accounting for one-third of $1.3 trillion in U.S. medical spending in 2000, and perhaps deadly: It is estimated that medical errors lead to 50,000 deaths per year…GE Medical Systems, the $8 billion division that was once headed by GE Chief Executive Jeffrey Immelt, actually teaches Six Sigma as part of its consulting business. It now has Six Sigma projects at more than 3,000 health care providers, and gets dozens of new health care requests a month. The consulting business, known as GE Medical Services, is the fastest-growing unit of the medical systems division and should account for 50% of its business by the end of next year."

GE Helps Hospitals To Help Themselves Matthew Herper, Forbes.com, 02.01.02, 8:00 AM ET.

If Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq of Vinson & Elkins L.L.P. and John K. Power, Esq. Husch & Eppenberger, LLC have no means to overcome their clients' guilt defend their clients if discovery is allowed, one has to ask who Blefeld, Spangler and Power expect to be indicted or impeached as a sacrifice to protect Novation, LLC, VHA Inc.,University Healthcare Consortium, Robert Baker And Curt Nonomaque's criminal conspiracy to artificially inflate healthcare costs though restraint of trade and racketeering.

CONCLUSION

Whereas for above stated reasons, the plaintiff Medical Supply respectfully requests that the court reject the defendants request to sanction Medical Supply or its counsel.

Respectfully Submitted

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Certificate of Service

I certify that on August 30th, 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:

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US BANK	)
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ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

And

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
	) Case No. 03-2324-CM
vs.	)
	)
JEFFREY R. IMMELT	)
GENERAL ELECTRIC COMPANY	)
GENERAL ELECTRIC CAPITAL BUSINESS	)
ASSET FUNDING CORPORATION	)
GE TRANSPORTATION SYSTEMS GLOBAL	)
SIGNALING, L.L.C.	)
Defendants.	)

MOTION TO REQUIRE CONSOLIDATION ARGUMENTS TO BE IN THE FORM OF PLEADINGS ON THE RECORD AND NOTICE OF THREAT OF UNLAWFUL SANCTIONS

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel Bret D. Landrith and makes the above captioned Motion To Require Consolidation Arguments To Be In The Form Of Pleadings On The Record And Notice Of Threat Of Unlawful Sanctions. Medical Supply seeks to have all issues regarding consolidations of actions raised in pleadings instead of a defendants' letter to the court incorrectly stating the controlling law of our circuit. Medical Supply also seeks to provide the court notice of yet another threat of unlawful sanction made to intimidate Medical Supply and its counsel into withdrawing valid state and federal law claims.

STATEMENT OF FACTS

1. The defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. sent a letter to the court misstating the law of our circuit in an effort to prejudice Medical Supply's right to consolidate its actions and further amend its claims.

2. The defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. did not object to consolidating the two actions.

3. As a letter instead of a motion with a memorandum of law, the court and Medical Supply are both hindered in addressing the defendants' assertions.

4. On Wednesday, August 24th, Jonathan L. Glecken lead counsel for the defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. , threatened Medical Supply's counsel with the loss of his home if he did not withdraw Medical Supply's claims.

5. Jonathan L. Glecken was unaware that the defendants' cartel had already injured Medical Supply's counsel by causing him to lose his house as part of numerous informal sanctions in retaliation for representing Medical Supply in seeking redress from the cartel's repeated refusals to deal and other antitrust prohibited acts in the hospital supply market.

6. The Tenth Circuit decision awarding sanctions for Medical Supply's claims against defendants Jeffrey R. Immelt because the complaint did not allege Jeffrey R. Immelt personally knew General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C's conduct according to plans instructions the complaint alleges Jeffrey R. Immelt personally ordered to prevent web based hospital supply distributors using Medical Supply Chain, Inc. is clearly in error factually and at law.

7. US law jurisdictions provide Medical Supply standing for seeking relief under Antitrust and RICO claims against defendants who were the *proximate* cause of Medical Supply's injuries. Hon. Judge Lucero knew and is responsible for knowing that the sanction order against Medical Supply is unlawful.

8. Medical Supply adequately pled that Jeffery Immelt is an antitrust "person" capable of intraenterprise and interenterprise conspiracy because of the complaint's averment of a substantial self interest as the president of GE Medical, an unnamed defendant legal entity. Paragraph 5 of the Amended Complaint, Exhibit 2 states:

> "Jeffrey R. Immelt, Chief Executive Officer, General Electric Company (herein "GE"). Mr. Immelt has been a long time employee of the many divisions and entities of General Electric Company. In 1997 Mr. Immelt was made president of GE Medical, the subsidiary corporation owned and controlled by GE responsible for selling products to the healthcare industry. In or about 1998 GE directed Immelt to identify the form of internet business model that would be a threat to GE Medical's profit margin. Mr. Immelt directed a study that determined that an internet marketplace which was independent of manufacturers and existing healthcare group purchasing organizations would threaten GE by causing prices to be much lower and by freeing hospitals, clinics and doctors from having to purchase products only from channels controlled by GE. These customers would then have access to competing products. Mr. Immelt found GE Medical's healthcare industry customers were rapidly adopting the Internet for purchasing decision making. GE made Immelt and his managers wargame out strategies to prevent an internet based competitor with a more efficient business model from entering the hospital supply market. As part of that strategy, Immelt spent $50,000,000.00 in 1999 on web site, database and internet communications technologies."

9. Medical Supply adequately pled that Jeffery Immelt's conduct intentionally and foreseeably injured web based hospital supply distributors including Medical Supply Paragraph 6 of the Amended Complaint, Exhibit 1 states:

> "The second part of the strategy Immelt developed and implemented under the direction of GE was to organize GE Medical's competitors and combine with them to create a preemptive internet marketplace where prices could be protected from competitive pressure caused by new market entrants and market shares could be preserved by the assignment of territories and the allotment of product markets. Immelt presided over the formation of this cartel and the engineering of the conspiracy to rig prices and markets through exchange of price, volume and other product data in a per se restraint of trade. See United States v. Andreas, 216 F.3d 645 (7th Cir., 2000)."

10. Medical Supply adequately pled that Jeffery Immelt's conduct intentionally created an integrated enterprise or joint venture with his competitors as a conspiracy to restrain trade. Paragraph 7 of the Amended Complaint, Exhibit 1 states:

> "7. Mr. Immelt signed and oversaw the preparation of documents incorporating the conspiracy as Global Health Exchange, LLC in 2000. Mr. Immelt oversaw GE's capitalization of the cartel, and caused the articles of incorporation and the operating agreement to secure GE's control of the entity, including the placement of an interlocking board of directors with the other founders of the trust and made the explicit requirement an officer of GE is on the board of directors."

11. Medical Supply adequately pled that Jeffery Immelt's conduct was intentionally unlawful. Paragraph 8 of the Amended Complaint, Exhibit 1 states:

> "8. Mr. Immelt knew that the illegitimate increased cost of hospital supplies due to the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause and is

causing Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel's supplies."

12. Medical Supply adequately pled that Jeffery Immelt's conduct was intentionally targeted at consumers in the market for hospital supplies and intentionally targeted at the specific consumer Medicare. Paragraph 9 of the Amended Complaint, Exhibit 1 states:

"9. Mr. Immelt knew the decreased access to healthcare resulting from the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause employers and health insurers to reduce coverage and benefits to the nation's citizens leading to injury and death."

13. Medical Supply adequately pled that Jeffery Immelt's conduct included intentionally forming a conspiracy, combination and cartel with competitors including Neoforma, Inc. to control 80% of the hospital supply market and maintain high prices through intentional monopolization. Paragraph 10 of the Amended Complaint, Exhibit 1 states:

"10. Mr. Immelt became CEO of The General Electric Company in September 2001. Under Immelt's leadership, GE's Global Exchange's inefficient and technologically inferior internet marketplace for its appliances was sold off. Immelt, however continued GE's support and participation in GHX, LLC. Immelt's purpose was to prevent other healthcare internet marketplaces from providing competition in hospital supplies. Immelt also expanded the membership to include non-manufacturer members, including the Group Purchasing Organizations that distributed most of the nation's hospital supplies. Immelt caused GHX, LLC. to be even more protective against internet competitors by requiring members to force their customers and suppliers to make anticompetitive contracts with other member companies. Immelt allied GHX, LLC with the other internet marketplace, Neoforma, Inc. to control 80% of the existing hospital supply e-commerce market. Immelt made GHX, LLC. require customers to join both the former competing internet marketplace, Neoforma and GHX, LLC.'s internet marketplaces. See Attachment 2, Marketplace @Novation, Master Supplier Agreement, Schedule B. In this way, GE could allocate customers and suppliers among the members of GHX, LLC and obtain real time price and volume data to enforce the cartel's goal of illegitimately higher hospital supply prices."

14. Medical Supply adequately pled that Jeffery Immelt knew his conduct increasing the costs of hospital supplies was the proximate cause of injury to American working families in the market for healthcare. Paragraph 11 of the Amended Complaint, Exhibit 1 states:

"11. Mr. Immelt knew the gravamen of his actions when the trade unions of GE held a two day, nationwide strike on January 14 th, 2003 to call attention to the high cost of healthcare and the rapid price increases for American working families. This effort to call public attention to the crisis cost the life of a GE worker. Kjeston Michelle Rodgers, a member of IUE-CWA Local 83761, was hit by a police car and killed while on the picket line."

15. Medical Supply adequately pled that Jeffery Immelt's conduct is a felony under federal law: Paragraph 12 of the Amended Complaint, Exhibit 1 states:

"12. Mr. Immelt's violations of 15 U.S.C. § 1, injuring healthcare supply consumers; including hospitals and patients, in addition to competitors like Medical Supply Chain, Inc. is egregious

conduct equivalent to felony. Antitrust Procedures and Penalties Act, Pub.L.No. 93-528, § 3, 88 Stat. 1706, 1708."

16. Medical Supply adequately pled that Jeffery Immelt's was personally responsible for GE's antitrust prohibited conduct as a matter of federal law under the Sarbanes-Oxley Act of 2002, an issue neither the trial or appellate courts addressed. Paragraph 12 of the Amended Complaint, Exhibit 1 states:

"13. As CEO, under the Sarbanes-Oxley Act of 2002 Mr. Immelt is responsible for putting in place antitrust compliance procedures. Mr. Immelt failed to stop GE's pernicious antitrust misconduct of price fixing, group boycott refusals to deal and customer allotment, endangering the investment of the corporation's stock holders and injuring the public by preventing competition and efficient delivery of hospital supplies. Mr. Immelt allowed his authority to be used to command GE corporate, its capital and transportation subsidiaries to repudiate a contract designed to capitalize Medical Supply Chain, Inc.'s entry into the hospital supply market to prevent Medical Supply from introducing competition and efficiency into that market."

17. A plaintiff need only allege an antitrust defendant or Racketeering Influenced Corrupt Organization (RICO) 18 U.S.C. § 1962 defendants' conduct was the proximate cause of injury to consumers in the market (antitrust) or injury to the plaintiff's business (RICO).

18. The difference between this appellate panel's sanction order that remands the action back to the trial court and the earlier *sua sponte* sanctions against Medical Supply for appealing what the panel admitted was a mistake of law by the trial court demonstrates an awareness that this new sanction is unlawful. The earlier sanction has been docketed in the US Supreme Court as *Bret D. Landrith v. US S Bancorp NA et al* Case No. 05-5503.

19. The earlier appellate panel memorandum and order in Medical Supply v US Bancorp NA *et al* made no independent finding of law or fact and upheld the trial court's facially erroneous conclusions of law including the express affirming of the error that the USA PATRIOT Act provides no private rights of action when the statute expressly provides several.

20. The panel's memorandum and order of sanctions in Medical Supply v GE *et al* originates not from documents in the case record of that action but from a motion to dismiss and suggestion in support filed in Medical Supply v Novation *et al* on behalf of the defendant Robert J. Zollars, The CEO Of Neoforma, Inc. also a defendant in Medical Supply v Novation *et al* and alleged to be a GE coconspirator in the Medical Supply v GE complaint. See reference to attached contract *infra*.

21. The documents were accessed on the Medical Supply Chain, Inc. web site, www.medicalsupplychain.com. While informative to many law firms and law clerks and arguably

applicable to Robert J. Zollars given his counsel's informative service of process arguments, the antitrust "person" argument was irrelevant to Jeffery Immelt who did not contest service or status as an antitrust "person." In Medical Supply v GE *et al*, the Robert J. Zollars documents were material e

22. The Tenth Circuit's memorandum and order upholding in part and reversing in part the trial court's ruling in Medical Supply v GE *et al* is being prepared for US Supreme Court review to address the fact Medical Supply did adequately plead Sherman Act antitrust claims against all defendants.

23. Medical Supply's sole question in its petition:

> "Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products";

has already been granted certiorari by the US Supreme Court on June 27th, 2005 in *Texaco, Inc. v. Fouad N. Dagher, et al.*, No. 04-805, and *Shell Oil Company v. Fouad N. Dagher, et al.*, No. 04-814, petitions for writ of certiorari to the U.S. Court of Appeals for the 9th Circuit.

MEMORANDUM OF LAW

The defendants' letter describing the jurisdiction of trial courts in this jurisdiction upon a directed remand is erroneous. The GE defendants' letter to Judge Murguia incorrectly stated the applicable law governing the trial court's jurisdiction on remand. As a letter to the court instead of a motion addressed to all parties, the errors of the legal assertions cannot be adequately addressed.

The GE defendants are mistaken in that the trial jurisdiction after the appellate mandate was altered by Medical Supply's motion to combine the GE and Novation actions. The Tenth Circuit has recently illustrated the effect of a Rule 21 motion to add parties is made after a remand mandate to dismiss claims in a dispositive motion has been made in trial court. In footnote 2 of *Thompson v. State of Colorado*, 2003 C10 279 (USCA10, 2003), the Tenth Circuit described Rule 21 even in a post remand context

> "*fn2 Rule 21 provides that "[p]arties may be . . . added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Resort to Rule 21 is appropriate where, as in this case, "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U. S. 826, 836 (1989)."

The Tenth Circuit stated a non-general mandate directing dismissal does not prevent the trial court from continuing to apply the law based on the new amended complaint:

> "All the mandate required was that the district court grant summary judgment to the State on the issue of sovereign immunity and dismiss it as a defendant. It would not be contrary to the mandate

to allow plaintiffs to amend their complaint or, alternatively, to add Mr. Fisher in his official capacity as a defendant pursuant to Federal Rule of Civil Procedure 21 *fn2 , before doing so."

Thompson v. State of Colorado, 2003 C10 279 at ¶23 (USCA10, 2003).

The assertion made by the GE defendants in their letter to Judge Murguia is entirely erroneous. The defendants in *Thompson* argued the mandate rule requires a district court to "comply strictly with the mandate rendered by the reviewing court." from *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001) (holding that district court had no authority to grant motion for appeal-related fees after appellate court had expressly denied motion for those fees) (quotation omitted). However the Tenth Circuit took into account the issues related to the plaintiff's post remand amendment were like those in Medical Supply's post remand consolidation, issues including racketeering and later antitrust prohibited conduct to fix prices that were expressly not ruled on by the appellate court or never considered by the trial or appellate courts.

"Further, in *Huffman*, we ruled on the merits of the motion for appellate fees, see *id*., while, here, we simply refused to exercise our discretion in part because of the procedural posture of the case."

Thompson v. State of Colorado, 2003 C10 279 at ¶21 (USCA10, 2003). The *Thompso* court went on to elaborate:

"We recently re-emphasized that, while a district court is "bound to follow the mandate, and the mandate 'controls all matters within its scope, . . . a district court on remand is free to pass upon any issue which was not expressly or impliedly disposed of on appeal.'" Procter & Gamble Co. v. Haugen, ___ F.3d ___,___, 2003 WL 103011, at *3 (10th Cir. Jan 6, 2003) (quoting *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986). In declining to exercise our discretion to allow amendment, we did not preclude the district court from exercising its discretion to do so on remand. To the contrary, we noted that plaintiffs had neither "alleged nor shown that denial of the motion results in an advantage lost by the Plaintiffs or disadvantage incurred." *Thompson*, 278 F.3d at 1025 n.2. In other words, we refused plaintiffs' request in part because our denial of the motion to amend would not be to plaintiffs' ultimate detriment or prejudice them after remand."

Thompson v. State of Colorado, 2003 C10 279 at ¶22 (USCA10, 2003). The *Thompson* court stated an observation that fits Medical Supply's consolidation motion which by combining the averments of both cases adds parties and states viable claims against all defendants:"If we were to now foreclose the district court from considering a motion to amend on its merits, plaintiffs would be unfairly disadvantaged in a way clearly not contemplated by, and contrary to the express language of, the mandate."

No law of the case doctrine as a corollary to the mandate rule prevents Medical Supply's combined claims which now subject the GE defendants including Jeffrey Immelt to new theories of law from being viable:

> "Furthermore, it was unnecessary for the district court to declare any previous findings clearly erroneous under Fed.R.Civ.P. 52(a) when undertaking the task of making findings to address a totally new theory of law. See, e.g., *Holsey v. Armour & Co.*, 743 F.2d 199, 204 (4th Cir.1984) (in Title VII suit the district court complied with appellate court mandate when, after hearing from the parties, it exercised independent judgment and reconsidered findings of fact and conclusions of law in light of an intervening Supreme Court decision), cert. denied, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 784 (1985)."

Hicks v. Gates Rubber Co., 928 F.2d 966 at 971 (C.A.10 (Colo.), 1991). One such intervening appellate court decision studiously ignored by the Tenth Circuit panel though raised in the answer brief is the reversal of an antitrust dismissal is the 9th Circuit's reversal in *Dahger v. Motiva Enterprises*, 02-56509- intervening law.

The mandate upholding the dismissal of the earlier GE complaint cannot be useful guidance as law of the case when it addressed the lack of an alleged conspiracy between legally independent actors (that was clearly erroneous on the facts pled in the complaint) when Medical Supply's combined claims now clearly aver the GE defendants conspiracy with legally independent antitrust and RICO defendants in claims based on subsequent conduct never before the trial court in the earlier action. Similarly, the fact that the mandate upholds a dismissal on the pleadings where discovery was never permitted makes the mandate meaningless from a law of the case standpoint:

> "see *Barber v. International Bth'd of Boilermakers*, 841 F.2d 1067, 1071 (11th Cir. 1988) ("As should be apparent, the application of these mandate rule principles will . . . depend considerably on the stage a case has reached when it goes up on appeal and on the language of the appellate court's mandate and/or opinion."); see generally, 18 J. Moore et al., Moore's Federal Practice ¶ 134.23 (3d ed. 2002) (discussing the relationship between the law of the case and the mandate rule)."

Procter & Gamble Company v. Haugen, 2003 C10 17 at ¶ 27 (USCA10, 2003).

Averments Supporting federal causes of action were not addressed in the dismissed GE action. The trial and appellate court expressly declined to make findings of fact or law regarding a nascent federal False Claims Act cause of action and on averments related to the state law based claims.

A state law claim in Count 14, paragraph 51 of Medical Supply's Amended Complaint against the GE Defendants (Exhibit 1 on page 31 and 32 contained the averment of a federal law based Racketeering Influenced Corrupt Organization (RICO) 18 U.S.C. § 1962 predicate act, a violation of 18 U.S.C. § 1503 Obstruction of Justice in conspiracy with the US Bancorp NA (NYSE USB) defendants that was expressly not ruled on by the trial court, a decision that was affirmed by the appellate panel.

> "Count 14, Bad Faith: The defendants have refused to cooperate in determining if the contract sought to be enforced had been repudiated. The corporate counsel for each of the defendant entities

have received the antitrust implications of their GE's conduct and the antitrust harm that will be inflicted upon Medical Supply by the denial of the essential facility of financing that is the bargain obtained by Medical Supply in the contract. GE's counsel answered the plaintiff's Nelson v. Miller notice by denying without justification in fact or law the claims of the plaintiff. **The defendants' cartel members in a previous attack on Medical Supply to prevent market entry utilized a frivolous defense to delay Medical Supply's access to discovery, intimidate victims and witnesses through an effort to cut off all resources to the company during the litigation in an effort to prevent the plaintiff from testifying and seeking redress in a prima facie violation of 18 U.S.C. § 1503 Obstruction of Justice. GE and its subsidiaries have retained outside counsel that repeatedly threatened the plaintiff and has misrepresented the facts and applicable case law regarding this case in a letter dated June 13th, litigating defenses to enforcement that are without merit**. As a lender, the defendants can be found to be liable litigating defenses to enforcement that are without merit under Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 516, 209 Cal. Rptr. 551 (1985) [bank liable for "stonewalling" assertion of an invalid defense to customer's lawsuit]" [emphasis added]

Medical Supply Amended Complaint against Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. The complaint made allegations of fact supporting this averment that the defendants had violated a federal criminal statute that is a predicate act for a RICO claim.

"14. When Medical Supply Chain, Inc. prepared to seek redress in court for its injury, Mr. Immelt through his agents caused Medical Supply Chain, Inc., a victim of **GE's deliberate actions to be threatened and intimidated in conduct equivalent to the felony of 18 U.S.C. § 1503 Obstruction of Justice with the intent of preventing Medical Supply Chain, Inc. and its counsel from bringing these charges and to cause them to be withdrawn**. By deliberately refusing to cite any authority, case law or statute that Medical Supply's claims were invalid or frivolous, Mr. Immelt through his agents attempted to make GE's victims believe that **they would be sanctioned and fined not on the basis of law but on GE's power over the legal system**." [emphasis added]

Medical Supply v GE *et al* Exb. 1 Paragraph 14, page 32. As the Medical Supply v Novation *et al* complaint alleges, Medical Supply did not become aware that the defendants cartel was committing a pattern and practice of racketeering acts against Medical Supply until Magistrate James O'Hara testified:

"Plaintiff could not have reasonably discovered its injuries, or that its injuries were wrongfully caused, until January 21st, 2005, when Shughart Thomson & Kilroy's former managing partner testified under oath in the Kansas Attorney Disciplinary Prosecution of the plaintiff's counsel."

Medical Supply v Novation *et al* complaint Exb. 2 Paragraph 613, page 114. Our circuit's pattern discovery rule dictates that Medical Supply's RICO claims were not ripe until January 21st, 2005 and like the memorandum and order in Medical Supply v US Bancorp NA *et al*, the trial court in Medical Supply v GE *et al* expressly did not address the claims based on state law prohibited conduct that Medical Supply later discovered RICO 18 U.S.C. § 1962 predicate acts committed by the defendants in a continuing conspiracy

to eliminate competition in the hospital supply market as part of a scheme to defraud government health insurance through false claims made to Medicare, Medicaid and Champus.

Despite Medical Supply's action being remanded for sanctions, the GE defendants are still under jurisdiction of this court. The Medical Supply v Novation *et al* complaint which avers subsequent federal antitrust[1] and RICO and state law claims against the GE Defendants was served on their counsel when Medical Supply made its motion to consolidate the two actions.

Because the controlling law of our circuit is significantly contrary to the GE defendants assertion in their letter to Judge Murguia regarding the consolidation of both actions, Medical Supply respectfully requests the court disregard the legal assertions in the letter and require the parties to address in pleadings properly before the court any objections to the court's jurisdiction on remand in light of Medical Supply's post remand motion to consolidate.

THE UNLAWFULNESS OF THE GE DEFENDANTS' THREATENED SANCTIONS

The Tenth Circuit panel decisions have been replete with error. The decisions have not been published (because they are unpublishably erroneous) and are expressly nonbinding. The decision to sanction Medical Supply again is however is of a degree of error that appears to transcend mistake. In seeking to use this decision to justify sanctioning the plaintiff or its counsel, and to encourage the trial court not to grant Medical Supply discovery and the right to present evidence against the defendants even on claims and issues the trial court and Tenth Circuit expressly declined to consider, the defendants are participating in actionable conduct against Medical Supply.

The Jeffrey Immelt Sanction Is Overtly Unlawful

The defense counsel know or should have known that antitrust standing is not tort law based as stated in the Tenth Circuit's openly erroneous reversal of the trial court's decision not to sanction Medical Supply.

> "Although often applicable to a single dispute, tort and antitrust causes of action require widely divergent proofs. Moreover, these causes of action vindicate widely differing policies; the first is wholly personal to the plaintiff-competitor and the second requires the plaintiff to demonstrate harm to competition at large and antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, 97 S.Ct. 690, 696, 50 L.Ed.2d 701 (1977)."

Fineman v. Armstrong World Industries, Inc., 980 F.2d 171 at 187 (C.A.3 (N.J.), 1992).

[1] Sherman 1 price fixing is actionable again for subsequent transactions.

There can be no non frivolous argument that Jeffrey Immelt is not properly a defendant in Medical Supply's antitrust action. The facts describe his intentional conduct to violate the antitrust laws and his knowledge of the injury to consumers in the market, including Medicare from the cartel's artificially inflated costs. The complaint alleges that Jeffrey Immelt knew the injury and death resulting from his restraint of trade. The complaint describes Jeffrey Immelt's creation of the agreement to restrain trade in a combination with GE's competitors. The complaint alleged that Jeffrey Immelt's motive was to prevent a web based hospital supply distributor from competing with GE and thereby causing prices to fall. Title 15, Chapter 1§ 24 of the Sherman Act entitled "Liability of directors and agents of corporation" expressly makes corporate officers responsible when their companies violate Sherman 1 as Medical Supply has alleged GE has done.

Jeffrey Immelt Has An Independent Personal Stake Making Him Liable Under RICO And Antitrust Law For Subsequent Price Fixing And Restraint of Trade In the Hospital Supply Market

The defense counsel knew or should have known that Jeffery Immelt alleged to be the President of GE Medical and then the CEO of General Electric in addition to founding GHX, Inc. is an actor with an independent personal stake.The majority of jurisdictions recognize an "independent personal stake" exception, holding that corporate officers or employees can conspire with the corporation when they act in their own interest and stand to benefit personally from the conspiracy. See*, e.g., Fraser v. Major League Soccer*, 97 F. Supp. 2d. 130, 136 (D. Mass. 2000). Jeffrey Immelt is clearly alleged to have an independent personal stake as a principal of more than one legally distinct entity, subjecting him to inter and even intra enterprise liability under the antitrust laws as the later RICO allegations also make the other defendant corporate officers liable in Medical Supply's actions against the cartel.

> "In our view, in order for the concept of a conspiracy between a principal and an agent to apply in the antitrust context, the exception to the general rule should arise only where an agent acts to further his own economic interest in a marketplace actor which benefits from the alleged restraint, and causes his principal to take the anticompetitive actions about which the plaintiff complains. In this way, the exception captures agreements that bring together the economic power of actors which were previously pursuing divergent interests and goals, the type of activity that section 1 was intended to oversee. *Copperweld*, 467 U.S. at 752, 104 S.Ct. at 2731."
>
> *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125 at 1136-1137 (C.A.3 (Pa.), 1995).

The Clear Error On Standing To Charge Jeffrey Immelt

The Tenth Circuit sanction recommendation is ill informed. Jeffrey Immelt's targeting of Medical Supply does not require his personal knowledge of the Blue Springs company but only his intent to prevent

web based hospital supply distributors from entering the market for hospital supplies. We now know from the facts averred in the Novation complaint that Medical Supply and Sam Lipari's work was the technology directly copied by GHX, LLC the incorporated agreement to restrain trade between Jeffrey Immelt, GE and their hospital supplier competitors.

In fact Jeffrey Immelt's personal targeting of Medical Supply would not be relevant to whether Medical Supply has standing to sue Jeffrey Immelt of GE. Antitrust standing requires more than the "injury in fact" and the "case or controversy" required by Article III of the Constitution. Todorov, 921 F.2d at 1448. Rather, the doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims. Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545, 103 S.Ct. 897, 912, 74 L.Ed.2d 723 (1983). See also Todorov, 921 F.2d at 1448 ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws."); PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW p 334.2 at 409 (1993 Supp.).

A two-pronged approach is followed in deciding whether a plaintiff has antitrust standing. *Municipal Utils. Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1499 (11th Cir.1991). First, the plaintiff must establish that it has suffered "antitrust injury." *Id.* As the Supreme Court has made clear, to have standing antitrust plaintiffs "must prove more than injury casually linked to an illegal presence in the market [i.e., but for causation]. Plaintiffs must prove antitrust injury, which is to say injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

Second, the plaintiff must establish that it is an efficient enforcer of the antitrust laws. *Municipal Utils. Bd. of Albertville*, 934 F.2d at 1499. This determination is predicated on the "target area test." *Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1388 (11th Cir.1990). The 1L Clear error of the Tenth Circuit law clerks assisting in drafting the opinion of the Tenth Circuit panel is that Medical Supply had to be personally targeted. This is contrary to 100 years of antitrust law and subsuquent RICO case law which is also based on proximate cause. Medical Supply was clearly the Web based independent distributor of hospital supplies targeted by the illegal combination and conspiracy which the complaint alleges Jeffrey

Immelt is the architect of. The target area test merely requires that an antitrust plaintiff both "**prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry" and that he is "the target against which anticompetitive activity is directed**." *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution C*o., 748 F.2d 602, 608 (11th Cir.1984), cert. denied sub nom., *Patterson v. Buena Vista Distribution Co*., 474 U.S. 1013, 106 S.Ct. 544, 88 L.Ed.2d 473 (1985). **Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market**. *Associated General Contractors*, 459 U.S. at 539, 103 S.Ct. at 909,*Florida Seed Co., Inc. v. Monsanto Co.*, 105 F.3d 1372 at 1374 (C.A.11 (Ala.), 1997).

This well established concept has been part of Tenth Circuit antitrust jurisprudence for a considerable period of time before our circuit's recent succession from US Antitrust law when hospital supply issues are raised:

> "*Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir.), the court had before it a motion to dismiss granted by the trial court. The appellate court reversed, golding that plaintiff was 'within that area of the economy which is endangered,' and was within the 'target area of the illegal practices' of the defendant."

Nationwide Auto Appraiser Service, Inc. v. Association of Cas. & Sur. Companies, 382 F.2d 925 (C.A.10 (Okl.), 1967).

Jeffrey Immelt's antitrust felonies not only hit Medical Supply but were clearly aimed at web based independent hospital supply distributors on Medical Supply's model to preserve his cartel's illegally inflated hospital supply prices. Under the "target area" test. See, e.g., *In re Multidistrict Vehicle Air Pollution* M.D.L. No. 31, 481 F.2d at 127-30 (rejecting the "direct/remote injury" test and embracing the "target area" approach). The target area rule confers standing if the plaintiff was within the target area of the defendant's illegal practices and was not only "hit", but also "aimed at." *Karseal v. Richfield Oil Corp*., 221 F.2d 358, 362 (9th Cir.1955).

Discussing what it meant by "target area," the court, in *Karseal*, referred to it as a factor in determining whether there was proximate causation. At two places in that opinion, there is language indicating that one was not in the "target area" unless he was "aimed at" by the conspirators.

But in using the words "aimed at" the *Karseal* court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then known to the conspirators,

plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy. This is made clear by the court's quotation, in *Karseal*, of this excerpt from the opinion in *Conference of Studio Unions v. Loew's Inc.*, 9 Cir., 193 F.2d 51, 54-55:

> "A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured `by reason' of anything forbidden in the anti-trust laws."

See generally, *Twentieth Century Fox Film Corporation v. Goldwyn*, 328 F.2d 190 (9th Cir., 1964).

A plaintiff satisfies this standard by being "within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir.1973), cert. denied sub nom., 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474 (1974). The key to meeting this burden is a demonstration that the plaintiff suffered the type of core injury that Congress sought to prevent by enacting the antitrust laws. *Solinger v. A & M Records*, 586 F.2d 1304, 1311 (9th Cir.1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979). See also 2 Areeda & Turner, Antitrust Law p 334d at 166 (1978). The Supreme Court refined these principles in *Blue Shield of Virginia v. McCready,* --- U.S. ----, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). The court held that when "faced with a claim that an injury is too remote from the alleged violation to warrant Sec. 4 standing", a court must look to (1) the nexus between the injury and the statutory violation, and (2) the relationship of the injury alleged to the forms of injury that Congress sought to prevent or remedy by enacting the statute. Id. 102 S.Ct. at 2548.

The Tenth circuit has limited standing to some potential plaintiffs that are too remote, such as employees injured in their employment, while reemphasizing that buyers and sellers in the monopolized markets like Medical Supply always have standing. This circuit laid out the test for standing under the antitrust laws in *Farnell v. Albuquerque* Publishing Co., 589 F.2d 497 at pg. 500 (10th Cir. 1978).To establish standing to maintain a private antitrust action in this Circuit, a plaintiff must meet a two-pronged test. First, he must allege injury to his "business or property" within the meaning of the Act and, second, he must show proximate causation that the injury directly resulted from a violation of the antitrust laws.

The Tenth Circuit expanded on the second prong of the *Farnell* test in *Reibert v. Atlantic Richfield Co*., 471 F.2d 727 (10th Cir.), Cert. denied, 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 399 (1973).The aggrieved party must satisfy the "by reason of" and/or "by" requirements found in (the antitrust statutes). This prerequisite boils down to complainant proving that the antitrust violations are the proximate cause of his injury. Two elements are necessary to demonstrate proximate cause: (1) there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage; and (2) that the illegal act is linked to a plaintiff engaged in activities intended to be protected by the antitrust laws.*Id*. at 731.

In *Reibert*, the Tenth Circuit concluded that **buyers and sellers in the defendants' market** are within the target of the antitrust laws. The Tenth circuit panel that remanded the GE action back for sanctioning Medical Supply and its counsel are of course immune but the GE defendants are not if they seek to sanction Medical Supply or its counsel for being correct in charging Jeffrey Immelt under US law.

> "While there are many persuasive policy arguments in favor of granting immunity to private threats of litigation, these do not override the clear language of the First Amendment…In summary, we hold that when the basis for immunity is the right to petition, purely private threats of litigation are not protected because there is no petition addressed to the government."

Cardtoons v. Major League Baseball Ass'n, (en banc) 208 F.3d 885 at 893 (10th Cir., 2000).

Medical Supply made a counter offer to the GE defendants' unlawful threat. Medical Supply will accept four hundred and fifty million dollars and the Blue Springs, Missouri office building (both of which are state law contract damages) if delivered in thirty days to Medical Supply release GE and Jeffrey Immelt from their liability in this action.

CONCLUSION

Whereas the plaintiff has demonstrated the unlawfulness of the defendants' threats of sanction. Medical Supply respectfully requests that the court take notice of this continued intimidation and harassment. Medical Supply further requests that the court require the defendants raise any and all issues regarding the consolidation of actions in the above captioned cases as pleadings on the record of both actions.

Respectfully Submitted

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Certificate of Service

I certify that on August 29th, 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:

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

Medical Supply CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
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.	)

ANSWER MEMORANDUM IN SUPPORT OF RECONSIDERATION OF TRANSFER

Comes now the plaintiff Medical Supply Chain, Inc. and makes an answer to defendants' suggestion opposing reconsideration of the court's order transferring this action to Kansas. Because the papers of this case have been transferred to Kansas District court even while the transfer is to be reconsidered, the plaintiff is required under *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509 (10th Cir.1991) to file its answer memorandum in the transferee court. In *Chrysler Credit*, the Tenth Circuit held that "[o]nce the files in a case are transferred physically to the court in the transferee district, the transferor court loses all jurisdiction over the case, including the power to review the transfer." *Id.* at 1516-17 (footnote omitted).

The Plaintiff is entitled to Choice of Forum

Medical Supply brought this action in the Western District of Missouri. "In general, federal courts give considerable deference to a plaintiff's choice of forum and thus the party seeking a transfer under section 1404(a) typically bears the burden of proving that a transfer is warranted. See *Jumara*, 55 F.3d at 879; *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir.1992)." *Terra Intern., Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688 at 695 (C.A.8 (Iowa), 1997). Deference to the plaintiff's choice of forum is particularly strong where the plaintiff has chosen his home forum. See *Nichols v. United States Bureau of Prisons*, 895

F.Supp. 6, 8 (D.D.C.), pet. for writ of mandamus den., 1995 WL 551095 (D.C.Cir.1995).

Plaintiff and The State of Missouri Have Substantial Interests in This Action

Both the forum state of Missouri and the plaintiff Medical Supply have substantial interests in the litigation proceeding in the Western District of Missouri because the claims are based conduct committed against the plaintiff in Missouri and in violation of Missouri's state antitrust and contract laws. This state interest is immense. While this reconsideration of transfer motion is being argued, the first 65,000 Missouri residents were cut off of Medicaid benefits on July 1, 2005. A July 2nd , 2005 Los Angeles Times article stated 1/3 of the Missourians losing insurance coverage are children: "An estimated 24,000 children are expected to lose their benefits, dental coverage is being cut for adults, and disabled people are losing coverage for crutches and other aids." See Missouri's Sharp Cuts to Medicaid Called Severe-*More than 68,000, a third of them children, may lose benefits in the move to avoid tax hikes*. LA Times, July 1, 2005.

On June 29, 2005, David Moskowitz MD, was invited to testify before the Missouri Medicaid Reform Commission and in his released pretestimony stated for the 65,000 patients losing coverage; "Since oxygen tanks are among the items no longer covered**, many patients will soon die**"[emphasis added]. Of course patients are the consumers in the market for hspital supplies that is the primary relevant market of Medical Supply's antitrust claims. Doctor Moskowitz also stated; "The Missouri Legislature is wrestling with the most critical domestic issue of our time. It is literally a life and death issue for tens of millions of Americans. It seems to me profoundly un-American, on the eve of our nation's birthday, to have people die simply because Medicaid is still paying retail for drugs."

The plaintiff's complaint alleges that the costs of hospital supplies including equipment like oxygen tanks and consumables like prescription drugs are artificially inflated from the defendants' market manipulations in violation of the State of Missouri's antitrust laws and the Sherman Antitrust Act as part of the defendants' common enterprise to overcharge Medicaid and Medicare. This court is required to make its initial determinations on the merits of the plaintiff's complaint for both jurisdiction and sufficiency of the claims based on the averments in the plaintiff's complaint and to take them as true.

Medical Supply and the State of Missouri's Interests Can Only Be Served By Civil Enforcement

On July 11th, 2005, Jeffrey Hill, a correspondent for The Hill, The Newspaper For and About Congress, reported that with the support of Kansas Senator Sam Brownback, the hospital supply industry

will not be regulated for the abuses of the defendants in their Group Purchasing Organization practices and that instead a voluntary disclosure scheme to counter act the serious conflicts of interest recognized in the industry:

> "After a series of behind-the-scenes talks with key senators, companies that supply medical devices, drugs and other products appear to have dodged an onerous regulatory bullet.
>
> The suppliers, known as hospital group-purchasing organizations (GPOs), received a boost when three senators and the hospital industry backed new voluntary ethical guidelines for the industry.
>
> The Judiciary Committee has scrutinized the potentially anti-competitive practices of these GPOs. But today Sens. Jon Kyl (R-Ariz), Sam Brownback (R-Kan.) and Charles Schumer (D-N.Y.), all members of the judiciary panel, plan to offer their support of the GPOs' guidelines.
>
> In a statement to be released today, Schumer praises the "strong" code of conduct issued by the Healthcare Group Purchasing Industry Initiative. "I am hopeful that, with the steps the industry has taken, the Senate will not have to intervene," Schumer said.
>
> The Senate Judiciary Committee's Antitrust Subcommittee has held a series of hearings in the past few years, and the panel's chairman, Mike DeWine (R-Ohio), and ranking Democrat, Herb Kohl (Wis.), have pressured the industry to provide safeguards to ensure that GPOs are engaging in fair business practices and providing their clients with lower prices.
>
> Though unknown to most outside of the healthcare sector, GPOs act as middlemen, making large-volume buys from healthcare-products manufacturers for hospitals and other healthcare providers. The industry estimates it moves about $80 million worth of supplies each year.
>
> Kohl and DeWine co-wrote the Medical Device Competition Act in the 108th Congress that would have directed the Department of Health and Human Services to design ethics standards for the industry. The measure has not been introduced in the 109th Congress.
>
> Demands from Kohl, DeWine and other senators resulted in ever-stricter guidelines' being considered by the GPOs over the past several years. "As this initiative has developed, the degree of disclosure [required for GPOs] we committed to has been ratcheted up many times," said Richard Norling, CEO of Premier Inc., a GPO and hospital chain.
>
> The policies represent "a gold standard for public disclosure and best practices," Norling said in a written statement.
>
> The hospital industry praised the guidelines.
>
> "The initiative offers stakeholders greater insight into GPO business practices and decisionmaking," six hospital organizations said in a joint statement. "It also ensures that GPOs who are part of the initiative operate ethically and are held accountable."
>
> The organizations include the American Hospital Association and the Federation of American Hospitals. The National Rural Health Association is slated to release a supportive statement of its own today.
>
> The hospital industry's endorsement of the GPO guidelines suggests confidence that they will result in fair competition and deeper discounts. Supply costs are topped only by labor among hospitals' expenses.
>
> Issued in April, the ethics standards rely heavily on the GPOs' willingness to report accurately company policies designed to prevent conflicts of interest involving GPO board members and officers with the GPOs' business partners. Questionnaires measuring GPOs' adherence to the standards must be answered each year; the results are made available to policymakers, competitors and the public.
>
> The initiative says that 80 percent of GPOs are endorsing the guidelines."

Jeffrey Hill "Healthcare Providers Look To Dodge New Mandates",The Hill, July 11th, 2005.

On July 12th, 2005, the defendants UHC, VHA and Novation strongly endorsed this substitute for regulation in a press release by their lobbying organization Healthcare Group Purchasing Industry Initiative entitled "Key Senators And Largest Hospital Groups Express Support For New Initiative Promoting

Greater GPO Transparency-*Initiative is Most Extensive, Voluntary Disclosure of Ethical and Business Practices Undertaken by Any U.S. Industry, Experts Say*."

Of course, for Medical Supply and its counsel Bret Landrith to have suggested in a Kansas District Court in October of 2002 that conflicts of interest between US Bank, US Bancorp NA (USB), Piper Jaffray Companies (PJC) arising from their exclusive heathcare technology company capitalization agreements with the GPO Novation LLC and their investment relationships and coverage with Neoforma, Inc. were harming hospitals and patient consumers in the nationwide market for hospital supplies invited the Kansas District judge who had heard no evidence to admonish Medical Supply's counsel to check his facts. When Medical Supply brought the clear errors of law on appeal, the Tenth Circuit demonstrating no independent consideration dismissed the appeal with a show cause order and sanctioned Medical Supply's counsel with its harshest sanctions for a "frivolous" appeal. The defendants continue to this day quoting these biased and ill informed decisions and failing to provide legal support for motions in opposition to the plaintiff's claims.

On July 13th, 2005, The Kansas State Disciplinary Administrator, Stanton Hazlett served notice he would formally prosecute Medical Supply's counsel for making an appeal in the earlier Kansas District court case. This is despite his admission in the previous prosecution that he omitted exculpatory evidence from the two *ex parte* probable cause hearings before commencing the earlier prosecution. Medical Supply's counsel lost his family, his house and income as result of the earlier two year prosecution in furtherance of the defendants' obstruction of justice.

The earlier prosecution which is still ongoing has materially harmed Medical Supply's representation, being temporally coordinated to disrupt Medical Supply's counsel in the trial court jury trial and appeal of *Bolden v. City of Topeka*, the case that was pretextually used by the defendants.

Kansas utterly flunks as a forum where litigation on these issues can be pursued in the interest of justice. State of Kansas Judicial Branch officials including Stanton Hazlett certainly have no governmental interest in preventing competition in the hospital supply market or in punishing claims or appeals for being in the form of proper complaints under the federal antitrust statutes and the USA PATRIOT Act. The State of Kansas also suffers from Medicaid overcharging that has led to budget shortfalls and a finding by Governor Sebelius's administration that the state's minorities continue to suffer from lack of access to healthcare. See the Kansas Health Institute Report entitled Racial and Ethnic Minority Health Disparities in Kansas:A Data and Chartbook, State of Kansas Judicial Branch officials certainly could have no legitimate interest in retaliating against victims or their counsel who are seeking redress in federal court. Similarly, State of Kansas Judicial Branch officials and their agents shouldn't interfere in representation agreements of private litigants on behalf of the defendants or offer $300,000.00 bribes in an attempt to fix this case while it was in the Missouri Western District Court. See attached affidavit of Sam Lipari, exb. 1.

In contrast with Stanton Hazlett's felonious criminal use of his Kansas Judicial Branch Office to punish each and every ethical act of Medical Supply's counsel, the Texas solution described in the plaintiff's complaint of merely terminating attorneys capable of enforcing the federal antitrust laws against the defendants now seems commendably humane.

The Kansas District Court And The Tenth Circuit Do Not Honor Federal Antitrust Statutes In the Hospital Supply Market

The Kansas District court abused its discretion in dismissing an injunction to prevent the defendants from keeping Medical Supply out of the market for hospital supplies and even admonished the plaintiff's counsel in the mistaken belief that artificially created shortages of hospital supplies from contract price manipulation could not cause patient deaths. These are determinations that could only be made by the court after evidence had been presented. The Tenth Circuit panel never the less sanctioned the plaintiff's counsel for even appealing the trial court's clear mistake and error regarding the USA PATRIOT Act used by the defendants to keep Medical Supply out of the market for hospital supplies and in contradiction to established Tenth Circuit precedent on identified but uncharged antitrust coconspirators and discoverable unknown defendants.

Kansas Has No Developed State Antitrust Law

There is no body of state antitrust law in Kansas that has been developed like that of the State of Missouri's and under which the plaintiff has brought its claims. The Kansas Supreme Court described the Kansas antitrust statutes in 1999:

> "That the statutes are broad may not be denied. That there has been no meaningful interpretation of these statutes in Kansas is also true. For a comprehensive discussion of the state of antitrust law under the Kansas statutes at the time Noah filed the underlying antitrust action, see Kenton C. Granger, A Glimpse at a Plaintiff's Remedies Under Kansas' Antitrust Laws, 8 Washburn L.J. 1 (1968). The statutes relied upon by Noah were enacted 1889, 1897 (a year before Congress passed the Sherman Act), and 1899. **The statutes have been virtually ignored by the bar, with only a few cases coming to this court since their enactment**." [emphasis added]

Bergstrom v. Noah, 974 P.2d 520 at 530, 266 Kan. 829 (Kan., 1999).

The Kansas District court which was unable to rule consistently with federal antitrust acts and Tenth Circuit established precedent will now be called upon to interpret Missouri's antitrust laws while Missouri's own residents are being subjected to the hell the plaintiff sought to prevent and to which Kansas officials have no interest in stopping (The affidavit of Samuel Lipari even reveals State of Kansas officials including Stanton Hazlett are actively trying to obstruct justice and prevent these claims from being

litigated by depriving Medical Supply of counsel).

The Interests of Justice Favor The Western District of Missouri

The Interests of Justice Favor The Western District of Missouri, the plaintiff's chief executive has been witness to the injustice, intimidation and harassment that has been meted out in Kansas against the plaintiff, the plaintiff's representation and witnesses in federal actions in Kansas as a direct result of the defendants' conduct averred in the complaint.

> "Section 1404(a) governs the ability of a federal district court to transfer a case to another district. This provision reads: "For 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." 28 U.S.C. § 1404(a) (1994). The statutory language reveals three general categories of factors that courts must consider when deciding a motion to transfer: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice. *Id.*"

Terra Intern., Inc. v. Mississippi Chemical Corp., 119 F.3d 688 at 691 (C.A.8 (Iowa), 1997). The plaintiff's suggestion opposing transfer of this action to the District of Kansas concentrated on the third element, the interests of justice that would be disserved by a transfer to Kansas District Court. The plaintiff explained how many of the issues raised by the defendants in their response to the complaint would be resolved in the favor of the plaintiff under Kansas District court precedent and when applying the law of the transferee forum state. The defendants unanimously answered, acknowledging the plaintiff's arguments regarding the change of venue's modification of the parties' substantive rights without controverting the plaintiff's arguments.

The Interests of Justice Are Defeated By The Choice of Law Rule

Of particular note is the defendants' lack of informing argument and acceptance of the plaintiff's assertion on which venue's law will apply. Normally, the rule is contrary to the plaintiff's assertion:

> "The rule is settled that when a district court grants a venue change pursuant to 28 U.S.C. § 1404, the transferee court is obligated to apply the law of the state in which the transferor court sits." *Benne v. International Business Machines Corp.*, 87 F.3d 419, 423 (10th Cir.1996) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 820, 11 L.Ed.2d 945 (1964) (rule applies whether defendant or plaintiff initiates change of venue))."

Yoder v. Honeywell Inc., 104 F.3d 1215 at 1219 (C.A.10 (Colo.), 1997). However, the defendants asserted in their initial response to the complaint that personal jurisdiction over some of the defendants was lacking. "When the transferor court lacks personal jurisdiction, however, the choice of law rules of the transferee court apply. "*Doering v. Copper Mountain Inc.,* 259 F.3d 1202 at 1209 (10th Cir., 2001). The Tenth Circuit has ruled that when jurisdiction is corrected by the transfer, 28 U.S.C. § 1631 is properly

used, mandating the law of the transferee forum:

> "In such cases, the transferee jurisdiction's substantive and choice of law rules apply so long as the transfer did in fact cure a jurisdictional defect, as we note below. *Trierweiler,* 90 F.3d at 1532. We note below that the proper course of action since the enactment of 28 U.S.C. § 1631 is to transfer pursuant to that statute, which requires that the transferee court apply that jurisdiction's law. *Ross v. Colorado Outward Bound School, Inc*., 822 F.2d 1524, 1526-27 (10th Cir.1987)."

Viernow v. Euripides Development Corp., 157 F.3d 785 at 793 (C.A.10 (Utah), 1998).

The transfer of this action to the Kansas District court is a situation in which the transferee court should consider the transfer "clearly erroneous," and therefore seeks to transfer the case back to the transferor court, the doctrine of the law of the case provides that such retransfers "should necessarily be exceptional," and "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 819, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).

The Court Is In Error Because of The Affidavit of Intimidation and Harassment Outweighs Any Experience Or Efficiency In A Kansas District Court or Tenth Circuit Court of Appeals That In Its Prejudice And Bias Refused To Read The Plaintiff's Pleadings or Briefs

No evidence was heard in two emergency preliminary injunction hearings and no findings of fact or law were made in the Tenth Circuit interlocutory appeal of denial of preliminary injunctive relief which was later dismissed as moot. The defendants' reply tries to argue that the Tenth Circuit appellate panel's handling of the Medical Supply vs. US Bancorp appeal lends efficiency in the conservation of judicial resources since the circuit has become familiar with the parties and the facts of the case. The show cause order and the judgment of the same panel belies this contention. Medical Supply sought *en banc* reconsideration precisely because the panel had demonstrated no familiarity with any of Medical Supply's filings. See

The Western District of Missouri transferor court has ruled interpreting the interest of justice factor similar to the court in *Reiffin v. Microsoft Corp*., 104 F.Supp.2d 48 (D.C., 2000) responded to many of the same issues regarding venue as raised in this action. However, as will be explained *infra*, important differences exist between Medical Supply and Reiffin that cause a similar outcome to be an abuse of discretion. The *Reiffin* court examined transfer where facts and claims are identical or closely related to an earlier action in transferee forum and the transferee forum had extensive familiarity with parties, facts and legal issues. The *Reiffin* court observed:

> "[t]he interest-of-justice factor encompasses the desire to avoid multiple litigation from a single transaction [and] to try related litigation together ...." See *Vencor Nursing Centers, L.P. v. Shalala*, 63 F.Supp.2d 1, 6 (D.D.C.1999) (emphasis added); *Hawksbill Sea Turtle v. FEMA*, 939 F.Supp. 1, 3 (D.D.C.1996). A court considering transfer of venue "may consider the interest of conserving judicial resources and practical considerations which will facilitate a final resolution of the litigation in an expeditious and inexpensive manner." *Harris v. Republic Airlines*, 699 F.Supp. 961, 962 (D.D.C.1988).

Reiffin v. Microsoft Corp., 104 F.Supp.2d 48 at 55 (D.C., 2000). Medical Supply's claims are not based on the same transactions as the earlier litigation as clearly stated in *Lawlor v. Nat'l Screen Services*, 349 U.S. 322 (1955) and *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).

The *Reiffin* court noted the steps the plaintiff could have taken instead of re-filing his complaint in another district court:

> "[T]he plaintiff has a strong belief, forcefully expressed, that Microsoft acted dishonestly and in bad faith in the related California proceeding, and that that conduct led the Northern District Judge to issue an erroneous ruling. This court expresses no opinion on the merits of those beliefs. However, there were several potential avenues for the plaintiff to raise these concerns, and none of them involve filing a largely duplicative action in this district. Specifically, the plaintiff might have filed a motion for reconsideration, with the Northern District Judge, pursuant to Federal Rule of Civil Procedure 59(e). Alternately, if he believes that Microsoft's alleged dishonesty led the Northern District Judge to issue an erroneous ruling, he could file a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). Lastly, the plaintiff can ask that court to impose sanctions on Microsoft or its counsel."

Reiffin v. Microsoft Corp., 104 F.Supp.2d 48 at 55 (D.C., 2000). In the earlier action in Kansas District court, Medical Supply sought a reconsideration under Rule 59(e). The trial court did not acknowledge the clear error in failing to recognize coconspirators when identified in the complaint and the express language in the USA PATRIOT Act granting private rights of action, supplemented by quotes from a legal article on anti money laundering suspicious activity reporting liability after implementation of the USA PATRIOT Act.

When Medical Supply made an appeal, seeking the only remedy for errors of law and the only remedy for the court's misconduct, a Tenth Circuit panel made no independent findings of fact or law and issued a show cause order against the plaintiff and its counsel. Medical Supply answered that show cause order, citing several private rights of action in the text of the USA PATRIOT Act contradicting the Tenth Circuit panel's formal memorandum and order.

In its findings on the show cause response, the Tenth Circuit panel acknowledged that Medical

Supply's issue on appeal was indeed wrongly decided when it admitted that there are private rights of action under the USA PATRIOT Act. The same panel went on to rule contradicting the circuit's controlling opinions on unnamed but identified antitrust coconspirators and on dismissals related to discoverable unknown civil defendants and sanctioned Medical Supply's counsel over $23,000.00.

The Tenth Circuit's Overt Retaliatory Hostility To Medical Supply And To Federal Law Being Applied In The Market For Hospital Supplies Transcends Concerns Over Forum Shopping

While the above may be seen as mere bad out comes a forum shopper may seek to avoid, the plaintiff disagrees. The plaintiff exercised its freedom to bring a new claim in a different venue, including one like Missouri District court that honors United States law. The advantages to the plaintiff and defendants are many and include the Missouri court's opinion which so closely tracks with *Reiffin v. Microsoft Corp*. another federal court in another circuit as to permit a scholarly resolution of the transfer issue to the satisfaction of all parties regardless of their location or circuit jurisdiction precisely because the Missouri district follows US law. The Kansas decisions and those of the Tenth Circuit over the earlier Medical Supply action have no such utility.

Counsel for the many defendants in this action are united in seeking the transfer of this action to Kansas District court, it does not appear consideration has been given to the fact that some of the defendants are publicly held and have already lost over several hundred million dollars of assets as a result of the non US law based outcomes of Kansas District court in the prior litigation (See plaintiff's complaint ¶¶ 330-336 US Bancorp NA (USB) $750 million dollar loss of Piper Jaffray , ¶¶ 370, 371 Piper Jaffray Companies $225,000,000.00 loss (PJC), ¶¶ 375,376,377 describing Neoforma's (NEOF) likely loss of $61 million dollars per year in VHA and UHC fees.

Clearly, if Kansas District court followed federal statutes and controlling case law, Medical Supply would have obtained preliminary injunctive relief under the Sherman Antitrust Act and with US Bank escrow accounts could have entered the market for hospital supplies in December of 2002, preventing the above described losses to the publicly traded defendant companies US Bancorp NA, The Piper Jaffray Companies and Neoforma. The defendants would also not now be liable for their contemplated damages (now trebled) inflicted upon Medical Supply when they took Sherman Act antitrust law prohibited actions against the plaintiff.

At the time counsel for the Kansas action defendants and charged conspirators US Bancorp NA

and Piper Jaffray also sought the court outcomes that injured their clients. No doubt because even these staggering losses are far less than the illegitimate monopoly profit from the conspiracy's artificial inflation of hospital supplies. Currently, the defendants' counsel seeks to transfer this new action back to the Kansas District court where that court and the Tenth Circuit have demonstrated a hostile unwillingness to follow US Supreme Court decisions regarding sufficiency of pleadings in hospital supply market antitrust cases as if the jurisdiction has seceded from the Union.

The danger to the interests of justice if this transfer is made is the potential for further injury to the share holders of US Bancorp NA (USB), The Piper Jaffray Companies (PJC) and Neoforma (NEOF) who do not enjoy distributions of the illegitimate hospital supply monopoly profit received by the principals of VHA, UHC and Novation. It is unlikely that their interests as shareholders will be protected when the Tenth Circuit would not even accept the concept of capital markets when Medical Supply described the defendants' actions to monopolize the upstream market for hospital supplies, the capitalization of healthcare technology companies through the sale of shares of stock.

The plaintiff's complaint and the uncontroverted affidavit of its chief officer state that the plaintiff and its counsel were intimidated and harassed outside of the Kansas legal action by the defendants and a Kansas District Court official who was not assigned to the case. The affidavit describes how witnesses are intimidated, threatened and harassed to prevent or retaliate against their testimony in Kansas District court. The affidavit and complaint also describe the retaliatory actions taken against the plaintiff's counsel because of Medical Supply's claims, even after the earlier Kansas action was dismissed and continuing to this day. See attached affidavit of Sam Lipari Exb. 1.

Part of the foreseeable results of the defendants' direct conduct against the plaintiff's counsel and the defendants conduct against the plaintiffs' counsel through agents and employees of Shughart, Thomson and Kilroy includes depriving Medical Supply of representation in a US Supreme Court appeal of the Tenth Circuit decision. Transferring this action to the Kansas District court cannot be in the furtherance of the interests of justice.

Medical Supply seeks to invoke the power of the Missouri district court to scrutinize the conduct of the parties in the previous Kansas action. See *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). In addition to the witness and victim intimidation and harassment documented in Kansas district court, the affidavit of Sam Lipari also provided the court with the information that the Kansas District court judges had recused themselves from a related action brought by Medical Supply's counsel to enjoin a state ethics prosecution against plaintiff's counsel involving the same Kansas magistrate and conduct described in the current Medical Supply complaint. While that would seem to dispatch the idea that the interests of justice favor transfer to Kansas District court, further needs to be said. The Tenth Circuit provided the Chief Judge of the District of Utah who made no independent findings of law or fact, adopting by reference contradicting defense counsel arguments in non-specified pleadings. These adopted findings of law [Medical Supply's counsel's witness affidavits were uncontroverted] included that the Disciplinary Administrator whose prosecution was to be enjoined was immune because he is a judge [he is not a judge] and equally erroneously that 42 U.S.C. §1981 no longer provided rights protecting African Americans enforceable under 42 U.S.C. §1983.

CONCLUSION

Whereas the transferor court abused its discretion ignoring the obstruction of justice experienced by the plaintiff in Kansas and the certain irreparable harm that will result from the transfer, the plaintiff Medical Supply respectfully requests that this action be returned.

"

Respectfully Submitted

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Certificate of Service

I certify that on July 20th, 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:

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Attorneys for Defendants

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Bret D. Landrith

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
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.	)

And

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
	) Case No. 03-2324-CM
vs.	)
	)
JEFFREY R. IMMELT	)
GENERAL ELECTRIC COMPANY	)
GENERAL ELECTRIC CAPITAL BUSINESS	)
ASSET FUNDING CORPORATION	)
GE TRANSPORTATION SYSTEMS GLOBAL	)
SIGNALING, L.L.C.	)
Defendants.	)

MOTION FOR CLARIFICATION OF ORDER IN CASE NO. 03-2324

Comes now the plaintiff Medical Supply Chain, Inc. through its attorney Bret D. Landrith, Esq. and respectfully requests that the court clarify its ruling determining consolidation to be moot made without finding of fact or law and contrary to clear Tenth Circuit controlling authority.

The plaintiff respectfully requests the clarification for the following reasons:

1. The motion was filed in both actions, only one judge has ruled. The "text" of that ruling is as follows:

"ORDER finding as moot [41] Motion to Consolidate Cases, finding as moot [44] Motion to Amend/Correct. Case closed on 2/13/2004. The only remaining issue is the 10th Circuit's remand regarding defendant's motion for sanctions. Signed by Judge Carlos Murguia on 8/31/2005.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (js) "

2. Medical Supply is clearly entitled to amend its dismissed complaint to include additional claims based on subsequent conduct. See Exb 1 pgs 6-10 incorporated here by reference.

3. Jeffrey Immelt is clearly an antitrust defendant liable to Medical Supply Chain, Inc. under US law. See Exb 1 generally.

4. Neither GE or this court can lawfully sanction Medical Supply Chain, Inc. or its counsel without exceeding the lawful jurisdiction of this court. See Exb 2 pg. 2 incorporated here by reference.

5. The failure to make findings of fact or law will result in this appeal able issue being remanded back to this district court for further development:

"The problem of a trial court failing to make findings of fact or law has been previously recognized by the Tenth Circuit: "However, we are compelled to address the issue because, without adequate findings of fact and conclusions of law, appellate review is in general not possible. *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1227 (1st Cir. 1994) (noting that Rule 52(a) requires a trial court to "set forth the findings of fact and conclusions of law which constitute the grounds of its action" and that the rule "reflects the importance of injunctions and of providing an adequate basis for their appellate review") (internal quotation marks omitted); *Curtis v. Commissioner,* 623 F.2d 1047, 1051 (10th Cir. 1980) (noting that a trial court's findings of fact "may be challenged as inadequate to give a clear understanding of the process by which the court's ultimate conclusions were reached and thus inadequate to permit appellate review")."

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234 at 1245 (10th Cir., 2001).

6. If the court still has not exercised the diligence and research required for its actions, Medical Supply Chain and its counsel give notice that they will no longer rest while they are falsely libeled or charged with failing to research the facts or the law.

Respectfully Submitted

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Certificate of Service

I certify that on August 31, 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:

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
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.	)

And

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
	) Case No. 03-2324-CM
vs.	)
	)
JEFFREY R. IMMELT	)
GENERAL ELECTRIC COMPANY	)
GENERAL ELECTRIC CAPITAL BUSINESS	)
ASSET FUNDING CORPORATION	)
GE TRANSPORTATION SYSTEMS GLOBAL	)
SIGNALING, L.L.C.	)
Defendants.	)

MOTION TO REQUIRE CONSOLIDATION ARGUMENTS TO BE IN THE FORM OF PLEADINGS ON THE RECORD AND NOTICE OF THREAT OF UNLAWFUL SANCTIONS

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel Bret D. Landrith and makes the above captioned Motion To Require Consolidation Arguments To Be In The Form Of Pleadings On The Record And Notice Of Threat Of Unlawful Sanctions. Medical Supply seeks to have all issues regarding consolidations of actions raised in pleadings instead of a defendants' letter to the court incorrectly stating the controlling law of our circuit. Medical Supply also seeks to provide the court notice of yet another threat of unlawful sanction made to intimidate Medical Supply and its counsel into withdrawing valid state and federal law claims.

STATEMENT OF FACTS

1. The defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. sent a letter to the court misstating the law of our circuit in an effort to prejudice Medical Supply's right to consolidate its actions and further amend its claims.

2. The defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. did not object to consolidating the two actions.

3. As a letter instead of a motion with a memorandum of law, the court and Medical Supply are both hindered in addressing the defendants' assertions.

4. On Wednesday, August 24th, Jonathan L. Glecken lead counsel for the defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. , threatened Medical Supply's counsel with the loss of his home if he did not withdraw Medical Supply's claims.

5. Jonathan L. Glecken was unaware that the defendants' cartel had already injured Medical Supply's counsel by causing him to lose his house as part of numerous informal sanctions in retaliation for representing Medical Supply in seeking redress from the cartel's repeated refusals to deal and other antitrust prohibited acts in the hospital supply market.

6. The Tenth Circuit decision awarding sanctions for Medical Supply's claims against defendants Jeffrey R. Immelt because the complaint did not allege Jeffrey R. Immelt personally knew General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C's conduct according to plans instructions the complaint alleges Jeffrey R. Immelt personally ordered to prevent web based hospital supply distributors using Medical Supply Chain, Inc. is clearly in error factually and at law.

7. US law jurisdictions provide Medical Supply standing for seeking relief under Antitrust and RICO claims against defendants who were the *proximate* cause of Medical Supply's injuries. Hon. Judge Lucero knew and is responsible for knowing that the sanction order against Medical Supply is unlawful.

8. Medical Supply adequately pled that Jeffery Immelt is an antitrust "person" capable of intraenterprise and interenterprise conspiracy because of the complaint's averment of a substantial self interest as the president of GE Medical, an unnamed defendant legal entity. Paragraph 5 of the Amended Complaint, Exhibit 2 states:

> "Jeffrey R. Immelt, Chief Executive Officer, General Electric Company (herein "GE"). Mr. Immelt has been a long time employee of the many divisions and entities of General Electric Company. In 1997 Mr. Immelt was made president of GE Medical, the subsidiary corporation owned and controlled by GE responsible for selling products to the healthcare industry. In or about 1998 GE directed Immelt to identify the form of internet business model that would be a threat to GE Medical's profit margin. Mr. Immelt directed a study that determined that an internet marketplace which was independent of manufacturers and existing healthcare group purchasing organizations would threaten GE by causing prices to be much lower and by freeing hospitals, clinics and doctors from having to purchase products only from channels controlled by GE. These customers would then have access to competing products. Mr. Immelt found GE Medical's healthcare industry customers were rapidly adopting the Internet for purchasing decision making. GE made Immelt and his managers wargame out strategies to prevent an internet based competitor with a more efficient business model from entering the hospital supply market. As part of that strategy, Immelt spent $50,000,000.00 in 1999 on web site, database and internet communications technologies."

9. Medical Supply adequately pled that Jeffery Immelt's conduct intentionally and foreseeably injured web based hospital supply distributors including Medical Supply Paragraph 6 of the Amended Complaint, Exhibit 1 states:

> "The second part of the strategy Immelt developed and implemented under the direction of GE was to organize GE Medical's competitors and combine with them to create a preemptive internet marketplace where prices could be protected from competitive pressure caused by new market entrants and market shares could be preserved by the assignment of territories and the allotment of product markets. Immelt presided over the formation of this cartel and the engineering of the conspiracy to rig prices and markets through exchange of price, volume and other product data in a per se restraint of trade. See United States v. Andreas, 216 F.3d 645 (7th Cir., 2000)."

10. Medical Supply adequately pled that Jeffery Immelt's conduct intentionally created an integrated enterprise or joint venture with his competitors as a conspiracy to restrain trade. Paragraph 7 of the Amended Complaint, Exhibit 1 states:

> "7. Mr. Immelt signed and oversaw the preparation of documents incorporating the conspiracy as Global Health Exchange, LLC in 2000. Mr. Immelt oversaw GE's capitalization of the cartel, and caused the articles of incorporation and the operating agreement to secure GE's control of the entity, including the placement of an interlocking board of directors with the other founders of the trust and made the explicit requirement an officer of GE is on the board of directors."

11. Medical Supply adequately pled that Jeffery Immelt's conduct was intentionally unlawful. Paragraph 8 of the Amended Complaint, Exhibit 1 states:

> "8. Mr. Immelt knew that the illegitimate increased cost of hospital supplies due to the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause and is

causing Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel's supplies."

12. Medical Supply adequately pled that Jeffery Immelt's conduct was intentionally targeted at consumers in the market for hospital supplies and intentionally targeted at the specific consumer Medicare. Paragraph 9 of the Amended Complaint, Exhibit 1 states:

"9. Mr. Immelt knew the decreased access to healthcare resulting from the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause employers and health insurers to reduce coverage and benefits to the nation's citizens leading to injury and death."

13. Medical Supply adequately pled that Jeffery Immelt's conduct included intentionally forming a conspiracy, combination and cartel with competitors including Neoforma, Inc. to control 80% of the hospital supply market and maintain high prices through intentional monopolization. Paragraph 10 of the Amended Complaint, Exhibit 1 states:

"10. Mr. Immelt became CEO of The General Electric Company in September 2001. Under Immelt's leadership, GE's Global Exchange's inefficient and technologically inferior internet marketplace for its appliances was sold off. Immelt, however continued GE's support and participation in GHX, LLC. Immelt's purpose was to prevent other healthcare internet marketplaces from providing competition in hospital supplies. Immelt also expanded the membership to include non-manufacturer members, including the Group Purchasing Organizations that distributed most of the nation's hospital supplies. Immelt caused GHX, LLC. to be even more protective against internet competitors by requiring members to force their customers and suppliers to make anticompetitive contracts with other member companies. Immelt allied GHX, LLC with the other internet marketplace, Neoforma, Inc. to control 80% of the existing hospital supply e-commerce market. Immelt made GHX, LLC. require customers to join both the former competing internet marketplace, Neoforma and GHX, LLC.'s internet marketplaces. See Attachment 2, Marketplace @Novation, Master Supplier Agreement, Schedule B. In this way, GE could allocate customers and suppliers among the members of GHX, LLC and obtain real time price and volume data to enforce the cartel's goal of illegitimately higher hospital supply prices."

14. Medical Supply adequately pled that Jeffery Immelt knew his conduct increasing the costs of hospital supplies was the proximate cause of injury to American working families in the market for healthcare. Paragraph 11 of the Amended Complaint, Exhibit 1 states:

"11. Mr. Immelt knew the gravamen of his actions when the trade unions of GE held a two day, nationwide strike on January 14 th, 2003 to call attention to the high cost of healthcare and the rapid price increases for American working families. This effort to call public attention to the crisis cost the life of a GE worker. Kjeston Michelle Rodgers, a member of IUE-CWA Local 83761, was hit by a police car and killed while on the picket line."

15. Medical Supply adequately pled that Jeffery Immelt's conduct is a felony under federal law: Paragraph 12 of the Amended Complaint, Exhibit 1 states:

"12. Mr. Immelt's violations of 15 U.S.C. § 1, injuring healthcare supply consumers; including hospitals and patients, in addition to competitors like Medical Supply Chain, Inc. is egregious

conduct equivalent to felony. Antitrust Procedures and Penalties Act, Pub.L.No. 93-528, § 3, 88 Stat. 1706, 1708."

16. Medical Supply adequately pled that Jeffery Immelt's was personally responsible for GE's antitrust prohibited conduct as a matter of federal law under the Sarbanes-Oxley Act of 2002, an issue neither the trial or appellate courts addressed. Paragraph 12 of the Amended Complaint, Exhibit 1 states:

"13. As CEO, under the Sarbanes-Oxley Act of 2002 Mr. Immelt is responsible for putting in place antitrust compliance procedures. Mr. Immelt failed to stop GE's pernicious antitrust misconduct of price fixing, group boycott refusals to deal and customer allotment, endangering the investment of the corporation's stock holders and injuring the public by preventing competition and efficient delivery of hospital supplies. Mr. Immelt allowed his authority to be used to command GE corporate, its capital and transportation subsidiaries to repudiate a contract designed to capitalize Medical Supply Chain, Inc.'s entry into the hospital supply market to prevent Medical Supply from introducing competition and efficiency into that market."

17. A plaintiff need only allege an antitrust defendant or Racketeering Influenced Corrupt Organization (RICO) 18 U.S.C. § 1962 defendants' conduct was the proximate cause of injury to consumers in the market (antitrust) or injury to the plaintiff's business (RICO).

18. The difference between this appellate panel's sanction order that remands the action back to the trial court and the earlier *sua sponte* sanctions against Medical Supply for appealing what the panel admitted was a mistake of law by the trial court demonstrates an awareness that this new sanction is unlawful. The earlier sanction has been docketed in the US Supreme Court as *Bret D. Landrith v. US S Bancorp NA et al* Case No. 05-5503.

19. The earlier appellate panel memorandum and order in Medical Supply v US Bancorp NA *et al* made no independent finding of law or fact and upheld the trial court's facially erroneous conclusions of law including the express affirming of the error that the USA PATRIOT Act provides no private rights of action when the statute expressly provides several.

20. The panel's memorandum and order of sanctions in Medical Supply v GE *et al* originates not from documents in the case record of that action but from a motion to dismiss and suggestion in support filed in Medical Supply v Novation *et al* on behalf of the defendant Robert J. Zollars, The CEO Of Neoforma, Inc. also a defendant in Medical Supply v Novation *et al* and alleged to be a GE coconspirator in the Medical Supply v GE complaint. See reference to attached contract *infra*.

21. The documents were accessed on the Medical Supply Chain, Inc. web site, www.medicalsupplychain.com. While informative to many law firms and law clerks and arguably

applicable to Robert J. Zollars given his counsel's informative service of process arguments, the antitrust "person" argument was irrelevant to Jeffery Immelt who did not contest service or status as an antitrust "person." In Medical Supply v GE *et al*, the Robert J. Zollars documents were material e

22. The Tenth Circuit's memorandum and order upholding in part and reversing in part the trial court's ruling in Medical Supply v GE *et al* is being prepared for US Supreme Court review to address the fact Medical Supply did adequately plead Sherman Act antitrust claims against all defendants.

23. Medical Supply's sole question in its petition:

> "Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products";

has already been granted certiorari by the US Supreme Court on June 27th, 2005 in *Texaco, Inc. v. Fouad N. Dagher, et al.*, No. 04-805, and *Shell Oil Company v. Fouad N. Dagher, et al.*, No. 04-814, petitions for writ of certiorari to the U.S. Court of Appeals for the 9th Circuit.

MEMORANDUM OF LAW

The defendants' letter describing the jurisdiction of trial courts in this jurisdiction upon a directed remand is erroneous. The GE defendants' letter to Judge Murguia incorrectly stated the applicable law governing the trial court's jurisdiction on remand. As a letter to the court instead of a motion addressed to all parties, the errors of the legal assertions cannot be adequately addressed.

The GE defendants are mistaken in that the trial jurisdiction after the appellate mandate was altered by Medical Supply's motion to combine the GE and Novation actions. The Tenth Circuit has recently illustrated the effect of a Rule 21 motion to add parties is made after a remand mandate to dismiss claims in a dispositive motion has been made in trial court. In footnote 2 of *Thompson v. State of Colorado*, 2003 C10 279 (USCA10, 2003), the Tenth Circuit described Rule 21 even in a post remand context

> "*fn2 Rule 21 provides that "[p]arties may be . . . added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Resort to Rule 21 is appropriate where, as in this case, "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U. S. 826, 836 (1989)."

The Tenth Circuit stated a non-general mandate directing dismissal does not prevent the trial court from continuing to apply the law based on the new amended complaint:

> "All the mandate required was that the district court grant summary judgment to the State on the issue of sovereign immunity and dismiss it as a defendant. It would not be contrary to the mandate

to allow plaintiffs to amend their complaint or, alternatively, to add Mr. Fisher in his official capacity as a defendant pursuant to Federal Rule of Civil Procedure 21 *fn2 , before doing so."

Thompson v. State of Colorado, 2003 C10 279 at ¶23 (USCA10, 2003).

The assertion made by the GE defendants in their letter to Judge Murguia is entirely erroneous. The defendants in *Thompson* argued the mandate rule requires a district court to "comply strictly with the mandate rendered by the reviewing court." from *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001) (holding that district court had no authority to grant motion for appeal-related fees after appellate court had expressly denied motion for those fees) (quotation omitted). However the Tenth Circuit took into account the issues related to the plaintiff's post remand amendment were like those in Medical Supply's post remand consolidation, issues including racketeering and later antitrust prohibited conduct to fix prices that were expressly not ruled on by the appellate court or never considered by the trial or appellate courts.

"Further, in *Huffman*, we ruled on the merits of the motion for appellate fees, see *id*., while, here, we simply refused to exercise our discretion in part because of the procedural posture of the case."

Thompson v. State of Colorado, 2003 C10 279 at ¶21 (USCA10, 2003). The *Thompso* court went on to elaborate:

"We recently re-emphasized that, while a district court is "bound to follow the mandate, and the mandate 'controls all matters within its scope, . . . a district court on remand is free to pass upon any issue which was not expressly or impliedly disposed of on appeal.'" Procter & Gamble Co. v. Haugen, ___ F.3d ___,___, 2003 WL 103011, at *3 (10th Cir. Jan 6, 2003) (quoting *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986). In declining to exercise our discretion to allow amendment, we did not preclude the district court from exercising its discretion to do so on remand. To the contrary, we noted that plaintiffs had neither "alleged nor shown that denial of the motion results in an advantage lost by the Plaintiffs or disadvantage incurred." *Thompson*, 278 F.3d at 1025 n.2. In other words, we refused plaintiffs' request in part because our denial of the motion to amend would not be to plaintiffs' ultimate detriment or prejudice them after remand."

Thompson v. State of Colorado, 2003 C10 279 at ¶22 (USCA10, 2003). The *Thompson* court stated an observation that fits Medical Supply's consolidation motion which by combining the averments of both cases adds parties and states viable claims against all defendants:"If we were to now foreclose the district court from considering a motion to amend on its merits, plaintiffs would be unfairly disadvantaged in a way clearly not contemplated by, and contrary to the express language of, the mandate."

No law of the case doctrine as a corollary to the mandate rule prevents Medical Supply's combined claims which now subject the GE defendants including Jeffrey Immelt to new theories of law from being viable:

> "Furthermore, it was unnecessary for the district court to declare any previous findings clearly erroneous under Fed.R.Civ.P. 52(a) when undertaking the task of making findings to address a totally new theory of law. See, e.g., *Holsey v. Armour & Co.*, 743 F.2d 199, 204 (4th Cir.1984) (in Title VII suit the district court complied with appellate court mandate when, after hearing from the parties, it exercised independent judgment and reconsidered findings of fact and conclusions of law in light of an intervening Supreme Court decision), cert. denied, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 784 (1985)."

Hicks v. Gates Rubber Co., 928 F.2d 966 at 971 (C.A.10 (Colo.), 1991). One such intervening appellate court decision studiously ignored by the Tenth Circuit panel though raised in the answer brief is the reversal of an antitrust dismissal is the 9th Circuit's reversal in *Dahger v. Motiva Enterprises*, 02-56509- intervening law.

The mandate upholding the dismissal of the earlier GE complaint cannot be useful guidance as law of the case when it addressed the lack of an alleged conspiracy between legally independent actors (that was clearly erroneous on the facts pled in the complaint) when Medical Supply's combined claims now clearly aver the GE defendants conspiracy with legally independent antitrust and RICO defendants in claims based on subsequent conduct never before the trial court in the earlier action. Similarly, the fact that the mandate upholds a dismissal on the pleadings where discovery was never permitted makes the mandate meaningless from a law of the case standpoint:

> "see *Barber v. International Bth'd of Boilermakers*, 841 F.2d 1067, 1071 (11th Cir. 1988) ("As should be apparent, the application of these mandate rule principles will . . . depend considerably on the stage a case has reached when it goes up on appeal and on the language of the appellate court's mandate and/or opinion."); see generally, 18 J. Moore et al., Moore's Federal Practice ¶ 134.23 (3d ed. 2002) (discussing the relationship between the law of the case and the mandate rule)."

Procter & Gamble Company v. Haugen, 2003 C10 17 at ¶ 27 (USCA10, 2003).

Averments Supporting federal causes of action were not addressed in the dismissed GE action. The trial and appellate court expressly declined to make findings of fact or law regarding a nascent federal False Claims Act cause of action and on averments related to the state law based claims.

A state law claim in Count 14, paragraph 51 of Medical Supply's Amended Complaint against the GE Defendants (Exhibit 1 on page 31 and 32 contained the averment of a federal law based Racketeering Influenced Corrupt Organization (RICO) 18 U.S.C. § 1962 predicate act, a violation of 18 U.S.C. § 1503 Obstruction of Justice in conspiracy with the US Bancorp NA (NYSE USB) defendants that was expressly not ruled on by the trial court, a decision that was affirmed by the appellate panel.

> "Count 14, Bad Faith: The defendants have refused to cooperate in determining if the contract sought to be enforced had been repudiated. The corporate counsel for each of the defendant entities

have received the antitrust implications of their GE's conduct and the antitrust harm that will be inflicted upon Medical Supply by the denial of the essential facility of financing that is the bargain obtained by Medical Supply in the contract. GE's counsel answered the plaintiff's Nelson v. Miller notice by denying without justification in fact or law the claims of the plaintiff. **The defendants' cartel members in a previous attack on Medical Supply to prevent market entry utilized a frivolous defense to delay Medical Supply's access to discovery, intimidate victims and witnesses through an effort to cut off all resources to the company during the litigation in an effort to prevent the plaintiff from testifying and seeking redress in a prima facie violation of 18 U.S.C. § 1503 Obstruction of Justice. GE and its subsidiaries have retained outside counsel that repeatedly threatened the plaintiff and has misrepresented the facts and applicable case law regarding this case in a letter dated June 13th, litigating defenses to enforcement that are without merit**. As a lender, the defendants can be found to be liable litigating defenses to enforcement that are without merit under Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 516, 209 Cal. Rptr. 551 (1985) [bank liable for "stonewalling" assertion of an invalid defense to customer's lawsuit]" [emphasis added]

Medical Supply Amended Complaint against Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. The complaint made allegations of fact supporting this averment that the defendants had violated a federal criminal statute that is a predicate act for a RICO claim.

"14. When Medical Supply Chain, Inc. prepared to seek redress in court for its injury, Mr. Immelt through his agents caused Medical Supply Chain, Inc., a victim of **GE's deliberate actions to be threatened and intimidated in conduct equivalent to the felony of 18 U.S.C. § 1503 Obstruction of Justice with the intent of preventing Medical Supply Chain, Inc. and its counsel from bringing these charges and to cause them to be withdrawn**. By deliberately refusing to cite any authority, case law or statute that Medical Supply's claims were invalid or frivolous, Mr. Immelt through his agents attempted to make GE's victims believe that **they would be sanctioned and fined not on the basis of law but on GE's power over the legal system**." [emphasis added]

Medical Supply v GE *et al* Exb. 1 Paragraph 14, page 32. As the Medical Supply v Novation *et al* complaint alleges, Medical Supply did not become aware that the defendants cartel was committing a pattern and practice of racketeering acts against Medical Supply until Magistrate James O'Hara testified:

"Plaintiff could not have reasonably discovered its injuries, or that its injuries were wrongfully caused, until January 21st, 2005, when Shughart Thomson & Kilroy's former managing partner testified under oath in the Kansas Attorney Disciplinary Prosecution of the plaintiff's counsel."

Medical Supply v Novation *et al* complaint Exb. 2 Paragraph 613, page 114. Our circuit's pattern discovery rule dictates that Medical Supply's RICO claims were not ripe until January 21st, 2005 and like the memorandum and order in Medical Supply v US Bancorp NA *et al*, the trial court in Medical Supply v GE *et al* expressly did not address the claims based on state law prohibited conduct that Medical Supply later discovered RICO 18 U.S.C. § 1962 predicate acts committed by the defendants in a continuing conspiracy

to eliminate competition in the hospital supply market as part of a scheme to defraud government health insurance through false claims made to Medicare, Medicaid and Champus.

Despite Medical Supply's action being remanded for sanctions, the GE defendants are still under jurisdiction of this court. The Medical Supply v Novation *et al* complaint which avers subsequent federal antitrust[1] and RICO and state law claims against the GE Defendants was served on their counsel when Medical Supply made its motion to consolidate the two actions.

Because the controlling law of our circuit is significantly contrary to the GE defendants assertion in their letter to Judge Murguia regarding the consolidation of both actions, Medical Supply respectfully requests the court disregard the legal assertions in the letter and require the parties to address in pleadings properly before the court any objections to the court's jurisdiction on remand in light of Medical Supply's post remand motion to consolidate.

THE UNLAWFULNESS OF THE GE DEFENDANTS' THREATENED SANCTIONS

The Tenth Circuit panel decisions have been replete with error. The decisions have not been published (because they are unpublishably erroneous) and are expressly nonbinding. The decision to sanction Medical Supply again is however is of a degree of error that appears to transcend mistake. In seeking to use this decision to justify sanctioning the plaintiff or its counsel, and to encourage the trial court not to grant Medical Supply discovery and the right to present evidence against the defendants even on claims and issues the trial court and Tenth Circuit expressly declined to consider, the defendants are participating in actionable conduct against Medical Supply.

The Jeffrey Immelt Sanction Is Overtly Unlawful

The defense counsel know or should have known that antitrust standing is not tort law based as stated in the Tenth Circuit's openly erroneous reversal of the trial court's decision not to sanction Medical Supply.

> "Although often applicable to a single dispute, tort and antitrust causes of action require widely divergent proofs. Moreover, these causes of action vindicate widely differing policies; the first is wholly personal to the plaintiff-competitor and the second requires the plaintiff to demonstrate harm to competition at large and antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, 97 S.Ct. 690, 696, 50 L.Ed.2d 701 (1977)."

Fineman v. Armstrong World Industries, Inc., 980 F.2d 171 at 187 (C.A.3 (N.J.), 1992).

[1] Sherman 1 price fixing is actionable again for subsequent transactions.

There can be no non frivolous argument that Jeffrey Immelt is not properly a defendant in Medical Supply's antitrust action. The facts describe his intentional conduct to violate the antitrust laws and his knowledge of the injury to consumers in the market, including Medicare from the cartel's artificially inflated costs. The complaint alleges that Jeffrey Immelt knew the injury and death resulting from his restraint of trade. The complaint describes Jeffrey Immelt's creation of the agreement to restrain trade in a combination with GE's competitors. The complaint alleged that Jeffrey Immelt's motive was to prevent a web based hospital supply distributor from competing with GE and thereby causing prices to fall. Title 15, Chapter 1§ 24 of the Sherman Act entitled "Liability of directors and agents of corporation" expressly makes corporate officers responsible when their companies violate Sherman 1 as Medical Supply has alleged GE has done.

Jeffrey Immelt Has An Independent Personal Stake Making Him Liable Under RICO And Antitrust Law For Subsequent Price Fixing And Restraint of Trade In the Hospital Supply Market

The defense counsel knew or should have known that Jeffery Immelt alleged to be the President of GE Medical and then the CEO of General Electric in addition to founding GHX, Inc. is an actor with an independent personal stake.The majority of jurisdictions recognize an "independent personal stake" exception, holding that corporate officers or employees can conspire with the corporation when they act in their own interest and stand to benefit personally from the conspiracy. See*, e.g., Fraser v. Major League Soccer*, 97 F. Supp. 2d. 130, 136 (D. Mass. 2000). Jeffrey Immelt is clearly alleged to have an independent personal stake as a principal of more than one legally distinct entity, subjecting him to inter and even intra enterprise liability under the antitrust laws as the later RICO allegations also make the other defendant corporate officers liable in Medical Supply's actions against the cartel.

> "In our view, in order for the concept of a conspiracy between a principal and an agent to apply in the antitrust context, the exception to the general rule should arise only where an agent acts to further his own economic interest in a marketplace actor which benefits from the alleged restraint, and causes his principal to take the anticompetitive actions about which the plaintiff complains. In this way, the exception captures agreements that bring together the economic power of actors which were previously pursuing divergent interests and goals, the type of activity that section 1 was intended to oversee. *Copperweld*, 467 U.S. at 752, 104 S.Ct. at 2731."
>
> *Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125 at 1136-1137 (C.A.3 (Pa.), 1995).

The Clear Error On Standing To Charge Jeffrey Immelt

The Tenth Circuit sanction recommendation is ill informed. Jeffrey Immelt's targeting of Medical Supply does not require his personal knowledge of the Blue Springs company but only his intent to prevent

web based hospital supply distributors from entering the market for hospital supplies. We now know from the facts averred in the Novation complaint that Medical Supply and Sam Lipari's work was the technology directly copied by GHX, LLC the incorporated agreement to restrain trade between Jeffrey Immelt, GE and their hospital supplier competitors.

In fact Jeffrey Immelt's personal targeting of Medical Supply would not be relevant to whether Medical Supply has standing to sue Jeffrey Immelt of GE. Antitrust standing requires more than the "injury in fact" and the "case or controversy" required by Article III of the Constitution. Todorov, 921 F.2d at 1448. Rather, the doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims. Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 545, 103 S.Ct. 897, 912, 74 L.Ed.2d 723 (1983). See also Todorov, 921 F.2d at 1448 ("Antitrust standing is best understood in a general sense as a search for the proper plaintiff to enforce the antitrust laws."); PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW p 334.2 at 409 (1993 Supp.).

A two-pronged approach is followed in deciding whether a plaintiff has antitrust standing. *Municipal Utils. Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1499 (11th Cir.1991). First, the plaintiff must establish that it has suffered "antitrust injury." *Id.* As the Supreme Court has made clear, to have standing antitrust plaintiffs "must prove more than injury casually linked to an illegal presence in the market [i.e., but for causation]. Plaintiffs must prove antitrust injury, which is to say injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

Second, the plaintiff must establish that it is an efficient enforcer of the antitrust laws. *Municipal Utils. Bd. of Albertville*, 934 F.2d at 1499. This determination is predicated on the "target area test." *Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1388 (11th Cir.1990). The 1L Clear error of the Tenth Circuit law clerks assisting in drafting the opinion of the Tenth Circuit panel is that Medical Supply had to be personally targeted. This is contrary to 100 years of antitrust law and subsuquent RICO case law which is also based on proximate cause. Medical Supply was clearly the Web based independent distributor of hospital supplies targeted by the illegal combination and conspiracy which the complaint alleges Jeffrey

Immelt is the architect of. The target area test merely requires that an antitrust plaintiff both "**prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry" and that he is "the target against which anticompetitive activity is directed**." *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution C*o., 748 F.2d 602, 608 (11th Cir.1984), cert. denied sub nom., *Patterson v. Buena Vista Distribution Co*., 474 U.S. 1013, 106 S.Ct. 544, 88 L.Ed.2d 473 (1985). **Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market**. *Associated General Contractors*, 459 U.S. at 539, 103 S.Ct. at 909,*Florida Seed Co., Inc. v. Monsanto Co.*, 105 F.3d 1372 at 1374 (C.A.11 (Ala.), 1997).

This well established concept has been part of Tenth Circuit antitrust jurisprudence for a considerable period of time before our circuit's recent succession from US Antitrust law when hospital supply issues are raised:

> "*Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir.), the court had before it a motion to dismiss granted by the trial court. The appellate court reversed, golding that plaintiff was 'within that area of the economy which is endangered,' and was within the 'target area of the illegal practices' of the defendant."

Nationwide Auto Appraiser Service, Inc. v. Association of Cas. & Sur. Companies, 382 F.2d 925 (C.A.10 (Okl.), 1967).

Jeffrey Immelt's antitrust felonies not only hit Medical Supply but were clearly aimed at web based independent hospital supply distributors on Medical Supply's model to preserve his cartel's illegally inflated hospital supply prices. Under the "target area" test. See, e.g., *In re Multidistrict Vehicle Air Pollution* M.D.L. No. 31, 481 F.2d at 127-30 (rejecting the "direct/remote injury" test and embracing the "target area" approach). The target area rule confers standing if the plaintiff was within the target area of the defendant's illegal practices and was not only "hit", but also "aimed at." *Karseal v. Richfield Oil Corp*., 221 F.2d 358, 362 (9th Cir.1955).

Discussing what it meant by "target area," the court, in *Karseal*, referred to it as a factor in determining whether there was proximate causation. At two places in that opinion, there is language indicating that one was not in the "target area" unless he was "aimed at" by the conspirators.

But in using the words "aimed at" the *Karseal* court did not mean to imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages. Rather, it was intended to express the view that the plaintiff must show that, whether or not then known to the conspirators,

plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy. This is made clear by the court's quotation, in *Karseal*, of this excerpt from the opinion in *Conference of Studio Unions v. Loew's Inc.*, 9 Cir., 193 F.2d 51, 54-55:

> "A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured `by reason' of anything forbidden in the anti-trust laws."

See generally, *Twentieth Century Fox Film Corporation v. Goldwyn*, 328 F.2d 190 (9th Cir., 1964).

A plaintiff satisfies this standard by being "within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir.1973), cert. denied sub nom., 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474 (1974). The key to meeting this burden is a demonstration that the plaintiff suffered the type of core injury that Congress sought to prevent by enacting the antitrust laws. *Solinger v. A & M Records*, 586 F.2d 1304, 1311 (9th Cir.1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979). See also 2 Areeda & Turner, Antitrust Law p 334d at 166 (1978). The Supreme Court refined these principles in *Blue Shield of Virginia v. McCready,* --- U.S. ----, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). The court held that when "faced with a claim that an injury is too remote from the alleged violation to warrant Sec. 4 standing", a court must look to (1) the nexus between the injury and the statutory violation, and (2) the relationship of the injury alleged to the forms of injury that Congress sought to prevent or remedy by enacting the statute. Id. 102 S.Ct. at 2548.

The Tenth circuit has limited standing to some potential plaintiffs that are too remote, such as employees injured in their employment, while reemphasizing that buyers and sellers in the monopolized markets like Medical Supply always have standing. This circuit laid out the test for standing under the antitrust laws in *Farnell v. Albuquerque* Publishing Co., 589 F.2d 497 at pg. 500 (10th Cir. 1978).To establish standing to maintain a private antitrust action in this Circuit, a plaintiff must meet a two-pronged test. First, he must allege injury to his "business or property" within the meaning of the Act and, second, he must show proximate causation that the injury directly resulted from a violation of the antitrust laws.

The Tenth Circuit expanded on the second prong of the *Farnell* test in *Reibert v. Atlantic Richfield Co*., 471 F.2d 727 (10th Cir.), Cert. denied, 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 399 (1973).The aggrieved party must satisfy the "by reason of" and/or "by" requirements found in (the antitrust statutes). This prerequisite boils down to complainant proving that the antitrust violations are the proximate cause of his injury. Two elements are necessary to demonstrate proximate cause: (1) there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage; and (2) that the illegal act is linked to a plaintiff engaged in activities intended to be protected by the antitrust laws.*Id*. at 731.

In *Reibert*, the Tenth Circuit concluded that **buyers and sellers in the defendants' market** are within the target of the antitrust laws. The Tenth circuit panel that remanded the GE action back for sanctioning Medical Supply and its counsel are of course immune but the GE defendants are not if they seek to sanction Medical Supply or its counsel for being correct in charging Jeffrey Immelt under US law.

> "While there are many persuasive policy arguments in favor of granting immunity to private threats of litigation, these do not override the clear language of the First Amendment…In summary, we hold that when the basis for immunity is the right to petition, purely private threats of litigation are not protected because there is no petition addressed to the government."

Cardtoons v. Major League Baseball Ass'n, (en banc) 208 F.3d 885 at 893 (10th Cir., 2000).

Medical Supply made a counter offer to the GE defendants' unlawful threat. Medical Supply will accept four hundred and fifty million dollars and the Blue Springs, Missouri office building (both of which are state law contract damages) if delivered in thirty days to Medical Supply release GE and Jeffrey Immelt from their liability in this action.

CONCLUSION

Whereas the plaintiff has demonstrated the unlawfulness of the defendants' threats of sanction. Medical Supply respectfully requests that the court take notice of this continued intimidation and harassment. Medical Supply further requests that the court require the defendants raise any and all issues regarding the consolidation of actions in the above captioned cases as pleadings on the record of both actions.

Respectfully Submitted

S/Bret D. Landrith
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Certificate of Service

I certify that on August 29th, 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:

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Attorneys for Defendants

S/Bret D. Landrith
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY, KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
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.	)

ANSWER TO NOVATION DEFENDANTS' MOTION FOR SANCTIONS

Comes now the plaintiff Medical Supply Chain, Inc. and makes the present reply to the Novation defendants' motion to sanction Medical Supply or its counsel for correctly stating civil claims against the defendants.

The defendants in their multiple dismissals and baseless sanction motions are violating 28 U.S.C. Sec. 1927.

> "Section 1927 provides that "[a]ny attorney ... 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 attorneys fees reasonably incurred because of such conduct." Sanctions under Sec. 1927 are appropriate "for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir.1987)."

Resolution Trust Corp. v. Dabney, 73 F.3d 262 at 265 (C.A.10 (Okla.), 1995).

This is a case where the conspiracy evidence is exclusively in the hands of the defendants. Even if the plaintiff's claims were inaccurate, neither Medical Supply or its counsel could be sanctioned.

> "4 This is not, of course, a claim **the details of which were uniquely and exclusively in the control of the defendant. Were that the case, we would not find plaintiffs' conduct sanctionable**. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 896 (D.C.Cir.1989), aff'd in part, rev'd in part sub nom. *Cooter & Gell v. Hartmarx Corp.*, --- U.S. ----, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). "[Emphasis added]

White v. General Motors Corp., Inc., 908 F.2d 675 at fn 4 (C.A.10 (Kan.), 1990).

The Tenth's remand for sanctioning in the unpublished GE case is not a directive to this court to sanction Medical Supply or its counsel. It is also unlawful. See Exb. 1. In *Burkhart Through Meeks v. Kinsley Bank*, 852 F.2d 512 (C.A.10 (Kan.), 1988), the trial court again refused to sanction the plaintiff even after the case was remanded with instructions to do so: "On remand, the district court, after hearing, again denied the Bank's motion for sanctions, and the present appeal is from that order." *Id* at 513. The Tenth Circuit upheld the trial court's continued denial of sanctions:

> "In the instant case, we do not believe that the district court abused its discretion in denying the Bank's motion for sanctions. As the district judge noted, several rulings by a bankruptcy judge in Kansas did support the Burkharts' theory of the case. Also, Burkharts' counsel apparently conferred with the bankruptcy judge about the matter, and counsel communicated with the Bank about the possibility of litigation before the action was filed."

Burkhart Through Meeks v. Kinsley Bank, 852 F.2d 512 (C.A.10 (Kan.), 1988). The startling difference between the *Burkhart* plaintiff's position and Medical Supply's is that the plaintiff's counsel in *Burkhart* was wrong about the applicable law and was still not sanctioned. Here Medical Supply was right in its USA PATRIOT Act and antitrust claims against US Bancorp and right in its claims against the General Electric defendants including most especially Jeffrey Immelt.

Starting with Hon. Judge Murguia's review evading flourish falsely stating that Medical Supply's counsel had not researched the facts applicable to its claims against the US Bank defendants and repeating the same misrepresentation in his GE decision, the court has been in error. The record and the discoverable facts clearly show Medical Supply's antitrust claims were valid. The decisions evidence that the trial court and appellate panels understood them to be so because the memorandums do not make necessary findings of fact or law and when they do, they misstate the pled facts and demonstrate a complete renouncing of US Supreme Court pleading standards. Much of this is excusable however because of the spurious and unresearched legal arguments of Mr. Olthoff and Mr. Powers in which this action continues to suffer.

The defense counsel has demonstrated an inability to research the appropriate law of either circuit regarding the plaintiff's claims. In the two previous actions, this district was forced to make shaky *sua sponte* decisions to uphold a healthy free market skepticism toward Sherman Act claims that is required to protect the powerful statutes from being used to thwart competitive capitalism. One can only wonder at the career cost to various counsel, law clerks and judges associated with these actions where the defense is unwilling to exercise the most basic research and scholarship and the resulting decisions are clearly

erroneous on many issues. The complaint itself alleges that the defendants were forced to rely on the *ex parte* advocacy of Magistrate James P. O'Hara. Neither group of defendants bothered to research the case law giving a federal cause of action against misconduct in an earlier federal court. Similarly, all defense counsel were unaware that law firms are properly RICO defendants in the wake of such misconduct.

When the Tenth Circuit panel was forced to evade making independent findings of fact or law in order to uphold the clearly erroneous dismissal of the US Bancorp action, Medical Supply in its first en banc motion dated November 24, 2004 cautioned the Tenth Circuit that if left unchanged, the inaccurate and clearly erroneous decision on a critical national issue, the anticompetitive effects of GPO's which was the subject of US Senate Judiciary Committee hearings would become part of the policy dialogue on the appointment of judges.:

> "The conflict of the trial court with US Supreme Court authority (and the controlling cases of this circuit) on the requirements of initial pleadings raise extremely important questions of law. Medical Supply's brief identified these errors. **The fact that this appellate decision was released shortly after the third committee hearing on the GPO monopoly conduct and its costs to our nation certainly means that this decision left unchanged will become part of the coming judicial appointment policy debates in addition to the continuing search for a solution to the GPO monopoly**, which will now unfortunately discredit antitrust enforcement in favor of increased regulation. If a rehearing is granted, addressing the above cited mistaken points of law, debate on this important national policy issue will be aided."[Emphasis added]

Medical Supply En Banc Hearing Motion, pg 15-16. The panel and the entire court declined to rehear the matter and Medical Supply's brief went unread.

Soon thereafter, because of the defendants' scheme to deprive medical Supply of counsel described in Medical Supply's claims against the defendants, Chief Judge Deanell Reece Tacha was forced to choose between investigating how Magistrate James P. O'Hara influenced a Kansas District court case where Magistrate James P. O'Hara was not even assigned to honor Chief Justice William H. Rehnquist's commitment[1] to the US Congress on judicial complaints or sweeping Medical Supply's judicial complaint under the rug in an effort to save what was left of the honor of the Kansas District Court. Chief Judge Deanell Reece Tacha did not even wait for the transcripts before dismissing the plaintiff's complaint against Magistrate James P. O'Hara.

On Friday, July 1, 2005, Justice Sandra Day O'Connor announced she was retiring. Slate Magazine, an online publication of the Washington Post Newsweek company published on Wednesday,

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[1] *Rehnquist's Olive Branch Too Late?* Tony Mauro Legal Times 06-01-2004

July 6, 2005 an article entitled "A Different Shortlist How about an old-style conservative Supreme Court nominee?"By Emily Bazelon and David Newman. The article suggested Chief Judge Deanell Reece Tacha as an appropriate nominee to replace Justice Sandra Day O'Connor as a conservative in the traditional sense of the word, a distinguished jurist who believes in moderation, judicial restraint, and deference to Congress.

The defense counsels' lack of scholarship and continued unwillingness to address fundamental issues like the current US Supreme Court rulings regarding notice pleading or the Tenth Circuit's transaction and privity requirements for claim and issue preclusion fails to aid this Kansas District court and the Tenth Circuit in competently resolving this complex litigation addressing an important nationwide crisis. See Exb. 2 generally. The defense counsels' continuing *sub rosa* efforts to throw the outcome of this litigation have made it incredibly difficult to lobby political interest groups for Chief Judge Deanell Reece Tacha's nomination. It is deeply important to Kansas and the Tenth Circuit that she have the opportunity to advance and take with her much of the law we as practitioners have developed in this circuit.

After Medical Supply filed the present complaint, Novation, UHC and VHA disclosed to Neoforma, Inc. that their long term (10 year) exclusive contract for Neoforma's web based hospital supply distribution was keeping the price of that service much higher than it would be in a competitive market. Bob Zollars and Neoforma, Inc. was forced to publicize that disclosure because it is a publicly traded company. This publicized restraint of trade completes Medical Supply's Sherman 1 proof. ,Novation, UHC, VHA, Neoforma, Inc. and their named coconspirators are liable to Medical Supply Chain, Inc. for three times what Medical Supply would have made had it been allowed to enter the market for hospital supplies.

Jeffrey Immelt and General Electric which itself is in a consent decree with the US Justice Department over monopolization of the market for hospital supplies have helped to publicize that over 50,000 people a year die from the lack of efficient hospital supply chain systems:

> "Hospitals need to be efficient just as much as factories or supply chains--but they're not. The results are expensive, accounting for one-third of $1.3 trillion in U.S. medical spending in 2000, and perhaps deadly: It is estimated that medical errors lead to 50,000 deaths per year…GE Medical Systems, the $8 billion division that was once headed by GE Chief Executive Jeffrey Immelt, actually teaches Six Sigma as part of its consulting business. It now has Six Sigma projects at more than 3,000 health care providers, and gets dozens of new health care requests a month. The consulting business, known as GE Medical Services, is the fastest-growing unit of the medical systems division and should account for 50% of its business by the end of next year."

GE Helps Hospitals To Help Themselves Matthew Herper, Forbes.com, 02.01.02, 8:00 AM ET.

If Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq of Vinson & Elkins L.L.P. and John K. Power, Esq. Husch & Eppenberger, LLC have no means to overcome their clients' guilt defend their clients if discovery is allowed, one has to ask who Blefeld, Spangler and Power expect to be indicted or impeached as a sacrifice to protect Novation, LLC, VHA Inc.,University Healthcare Consortium, Robert Baker And Curt Nonomaque's criminal conspiracy to artificially inflate healthcare costs though restraint of trade and racketeering.

CONCLUSION

Whereas for above stated reasons, the plaintiff Medical Supply respectfully requests that the court reject the defendants request to sanction Medical Supply or its counsel.

Respectfully Submitted

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Certificate of Service

I certify that on August 30th, 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:

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MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
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NEOFORMA, INC.	) Attorney Lien
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VOLUNTEER HOSPITAL ASSOCIATION	)
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ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

FIRST PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
UNDER F. R. CIV. P. LOCAL RULE 56.1

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel Bret D. Landrith and makes the above captioned first motion for partial summary judgment that each defendant is distinct from the RICO enterprise, that a defendant's liability for RICO conspiracy does not require that defendant to participate in the operation or management of the enterprise, that RICO liability extends to aiders and abettors and that the law firm Shughart, Thomson & Kilroy, Watkins, Boulware, P.C. (Shughart, Thomson & Kilroy) is properly a RICO Defendant. The plaintiff's suggestion that summary judgment motions be bifurcated was not controverted and the plaintiff expects to file fact based summary judgment motions based on the defendants' *per se* antitrust violations. Medical Supply respects the court grant this pure legal question summary judgment for the following reasons:

Summary judgment is appropriate for purely legal questions. See generally Moore's Federal Practice, P56.20(3.-2)(2ded. 1976). A determination on a strict legal issue can "narrow the issues in [a] case, advance the progress of the litigation, and provide the parties with some guidance as to how they proceed with the case." *Warner v. United States*, 698 F. Supp. 877, 879 (S.D. Fla. 1988). "Summary judgment can thus serve to set the issues for trial .... The outcome of [the] dispute will have an immediate impact on the proofs to be offered at trial in support of the elements of the statutory causes of action."

Disandro v. Makahuena Corp., 588 F. Supp. 889, 892 (D. Haw. 1984); see *also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 768-69 (9th Cir. 1981).

In the present Motion, Medical Supply seeks partial summary judgment striking certain affirmative defenses of Defendants and on particular issues of law relating to proof of liability. Medical Supply argues:

Requirements to prove violations of Sections 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq..

To demonstrate violations of Section 1962(d), Medical Supply must prove: (1) that two more people agreed to violate Section 1962(c), and (2) that the defendant knew of and agreed to the overall goal of the violation. *United States v. Philip Morris Inc.*, 130 F.Supp.2d 96 (D.D.C. 2001).

Issues Over Assertions Of Law Sought To Be Summarily Resolved

First that, as a matter of law, each Defendant is distinct from the alleged RICO enterprise.

Second, Medical Supply argues that, as a matter of law, a Defendant's liability for RICO conspiracy under Section 1962(d) does not require proof that such Defendant participated in the operation or management of the alleged enterprise.

Third, Medical Supply argues that, as a matter of law, liability for committing a racketeering act under Section 1962(c) extends to those Defendants who aided and abetted the commission of that act.

Finally, Medical Supply argues that, as a matter of law, a law firm including Shughart, Thomson & Kilroy can be a RICO “person” with liability for committing or conspiring to commit racketeering acts.

CONCLUSION

Whereas the plaintiff has in its supporting memorandum shown that the controlling authority for our jurisdiction defines each defendant under the facts averred in the complaint to be distinct from the RICO enterprise, that a defendant's liability for RICO conspiracy does not require that defendant to participate in the operation or management of the enterprise, that RICO liability extends to aiders and abettors and that the law firm Shughart, Thomson & Kilroy, Watkins, Boulware, P.C. (Shughart, Thomson & Kilroy) is properly a RICO Defendant, the plaintiff Medical Supply respectfully requests the court grant this partial summary judgment.

Respectfully Submitted

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I certify that on September 6th, 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:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
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MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
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NEOFORMA, INC.	) Attorney Lien
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THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

MEMORANDUM IN SUPPORT OF FIRST PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER F. R. CIV. P. LOCAL RULE 56.1

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel Bret D. Landrith and makes the above captioned memorandum in support of plaintiff's first motion for partial summary judgment. Medical Supply respectfully requests rulings that each defendant is distinct from the RICO enterprise, that a defendant's liability for RICO conspiracy does not require that defendant to participate in the operation or management of the enterprise, that RICO liability extends to aiders and abettors and that the law firm Shughart, Thomson & Kilroy, Watkins, Boulware, P.C. (Shughart, Thomson & Kilroy) is properly a RICO Defendant. The plaintiff's suggestion that summary judgment motions be bifurcated was not controverted and the plaintiff expects to file fact based summary judgment motions based on the defendants' *per se* antitrust violations. Medical Supply respects the court grant this pure legal question summary judgment for the following reasons:

STATEMENT OF FACTS FOR PARTIAL SUMMARY JUDGMENT ON LEGAL ISSUES

1. On September 2, 2005, The Kansas City Business Journal published an article about the racketeering conduct of Shughart Thomson & Kilroy's nearest Kansas City competitor Shook, Hardy and Bacon LLP. See Exb. 1

2. The Notre Dame law School Professor G. Robert Blakey was interviewed and stated it was wrong for the law firm not to be made a defendant in the civil RICO action against the tobacco companies. See Exb. 1, pg. 1
3. On August 15, 2005, the US Justice Department filed a post trial proposed finding of fact in the civil racketeering case against tobacco companies mentioning at least 15 Shook Hardy lawyers by name and referring to the firm more than 250 times. See Exb. 1, pg. 1, Exb 2 generally.
4. On August 24, 2005, the US Justice Department filed a post trial brief arguing with controlling legal authority that the law firm Shook, Hardy and Bacon LLP had the requisite intent to be liable as a RICO person. See Exb 3 generally.
5. Medical Supply filed an amended complaint against Unknown Healthcare, for Brian Kabbes, for Lars Anderson, for Susan Paine, for Andrew Cesere, for Piper Jaffray, for Mutual Fund Services, for Institutional Trust, for Corporate Trust, for US Bank Private and for US Bancorp, NA some of whom are the current defendants on See Exb 4 generally.
6. The complaint described the defendants' conduct violating the Hobbs Act against racketeering in keeping Medical Supply out of the market to further the defendants' monopolization of the hospital supplies by falsely using the USA Patriot Act "know your customer" provision and the US Bank's official role enforcing the USA Patriot Act. See Exb 4 pg. s 44-47
7. The witnessed conduct was attested to by Sam Lipari in an affidavit at the end of the complaint. See Exb 4 pg.68
8. The plaintiff was unsuccessful in obtaining injunctive relief to prevent the defendants' monopolization.
9. Medical Supply notified the non defendant hospital supply cartel members participating in the agreement to boycott Medical Supply in December 2004. See Novation Complaint Exb 5 pg.s 85-86.
10. Shughart Thomson & Kilroy a law firm stepped up their efforts to obstruct justice and prevent medical Supply from having representation and legal resources to expose the cartel's monopolization of hospital supplies. See Novation Complaint Exb 5 pg. 108-111
11. The Shughart Thomson & Kilroy lawyer Andrew DeMarea filed a fraudulent Kansas Disciplinary complaint against Medical Supply's counsel for appealing a trial court ruling the Tenth Circuit panel

admitted was incorrect about the USA Patriot Act statute. See De Marea Complaint Exb 6 pg.1, See also Tenth Circuit Sanction order, Exb 7.

12. Andrew DeMarea's former boss, Kansas US District Court Magistrate James P. O'Hara altered his testimony on the stand on January 21, 2005 revealing for the first time the defendants' continuing pattern and practice of racketeering to Medical Supply's President and counsel. See Novation Complaint Exb 5 pg., See also Magistrate O'Hara Testimony Sup 1 Atch 9 pg.s 609-669
13. Medical Supply then documented the newly discovered pattern events and incorporated the into the complaint filed against the defendants for damages resulting from the earlier injury Medical Supply had tried to enjoin. See Supplement 1, Federal Bureau of Investigation Complaint and Sup.1 Atch 1 thru 13.
14. The extra legal or outside of court racketeering to obstruct justice, intimidate and retaliate against witnesses and victims is still continuing and has led to injury of Medical Supply principals. See affidavit of Sam Lipari Exb. 8 generally.

ARGUMENTS AND AUTHORITIES

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Material facts are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a summary judgment motion, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255; see also *Washington Post Co. v.United States Dep't of Health and Human Servs.*, 865 F.2d 320, 325 (D.C. Cir. 1989).

Additionally, summary judgment is appropriate for purely legal questions. See generally Moore's Federal Practice, P56.20(3.-2)(2ded. 1976). A determination on a strict legal issue can "narrow the issues in [a] case, advance the progress of the litigation, and provide the parties with some guidance as to how they proceed with the case." *Warner v. United States*, 698 F. Supp. 877, 879 (S.D. Fla. 1988). "Summary judgment can thus serve to set the issues for trial .... The outcome of [the] dispute will have an immediate

impact on the proofs to be offered at trial in support of the elements of the statutory causes of action." *Disandro v. Makahuena Corp.*, 588 F. Supp. 889, 892 (D. Haw. 1984); see *also Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 768-69 (9th Cir. 1981).

The party opposing the motion "'may not rest upon the mere allegations or denials of his pleadings' to avoid summary judgment. *Bacchus*, 939 F.2d at 891 (quoting *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510)." *Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089 at 1097-1098 (10th Cir., 1999).

Plaintiff, Medical Supply Chain, Inc. (Medical Supply),has brought this suit against the Defendants1 pursuant to Sections 1962(c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq.. Medical Supply alleges violations of both Sections 1962(c) and (d).[1] To prove the alleged violations of Section 1962(c), Medical Supply must show: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas v. United States*, 522 U.S. 52, 62 (1997). S. P. R.L. v. Imrex Co., Inc., 473 U. S. 479, 496 (1985*); BancOklahoma Mortgage Corp. v. Capital Title Co. Inc.*, 194 F.3d 1089, 1100 (10th Cir. 1999). *Robbins v. Wilkie*, 2002 C10 944 ¶20 (USCA10, 2002).

Whether § 1962(c) should be interpreted to require a substantial effect on interstate commerce is an open question in Tenth circuit. However, neither the Supreme Court nor any courts of appeals have held that the effect must be substantial, and a number of our sister circuits have held that a de minimis effect on interstate commerce is sufficient to satisfy this statutory requirement. See *United States v. Shyrock*, 342 F.3d 948, 984 (9th Cir. 2003) (holding that the district court properly instructed the jury that § 1962(c)'s jurisdictional element was satisfied if the jury found "a de minimis affect [sic] on interstate commerce"); *United States v. Marino*, 277 F.3d 11, 35 (1st Cir. 2002) (holding that "the government does not need to show that the RICO enterprise's effect on interstate commerce is substantial"); *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001) (holding that a "RICO enterprise's necessary relationship to interstate commerce" is "de minimis"); *United States v. Miller*, 116 F.3d 641, 674 (2d Cir. 1997) (holding that "the

[1] Sections 1962(c) and (d) provide:
(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debts.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section. 18 U.S.C. §§ 1962(c)-(d).

government need only prove that the individual subject transaction has a de minimis effect on interstate commerce" in order to satisfy § 1962(c)).

An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity." 18 U.S.C. § 1961(4). Racketeering activity includes, among other things, acts prohibited by any one of a number of criminal statutes. 18 U.S.C. § 1961(1). A "pattern" is demonstrated by two or more instances of "racketeering activity" that occur within 10 years of one another. 18 U.S.C. § 1961(5). In this case, the alleged racketeering acts are violations of 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud).

To demonstrate violations of Section 1962(d), Medical Supply must prove: (1) that two more people agreed to violate Section 1962(c), and (2) that the defendant knew of and agreed to the overall goal of the violation. *United States v. Philip Morris Inc*., 130 F.Supp.2d 96 (D.D.C. 2001).

In the present Motion, Medical Supply seeks partial summary judgment striking certain affirmative defenses of Defendants and on particular issues of law relating to proof of liability. Medical Supply argues first that, as a matter of law, each Defendant is distinct from the alleged RICO enterprise. Second, Medical Supply argues that, as a matter of law, aDefendant's liability for RICO conspiracy under Section 1962(d) does not require proof that such Defendant participated in the operation or management of the alleged enterprise. Finally, Medical Supply argues that, as a matter of law, liability for committing a racketeering act under Section 1962(c) extends to those Defendants who aided and abetted the commission of that act.

A. EACH DEFENDANT IS DISTINCT FROM THE ALLEGED RICO ENTERPRISE

Medical Supply seeks partial summary judgment that each Defendant is distinct from the RICO enterprise.[2] To establish an enterprise under Section 1962(c), a plaintiff must allege and prove the existence of two distinct entities: (1) a 'person' and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S.158, 161 (2001). In King, the Court concluded that a RICO defendant, or 'person', must be distinct from the RICO 'enterprise' that the defendant is associated with or employed by. Id. at 161-62.

[2] Medical Supply seeks summary judgment not on some abstract issue, as Defendants argue, but rather on its request to strike the affirmative defenses denying distinctness. Thus, the Court's conclusion on the distinctness element and is proper under Fed.R.Civ.P. 56.

Regardless of how the enterprise is defined (if at all), Medical Supply has proven the distinctness element in this case. Courts have already held that an "association-in-fact" enterprise can be a group of corporations. See *Philip Morris*, 116 F.Supp.2d at 152-53. Moreover, there is no dispute that each individual Defendant is a separate legal entity or an individual with the capacity of being a RICO person. Thus, if this Court should find an enterprise comprised of at least two of the Defendants, the Defendants will be distinct from the enterprise itself. Of course, Medical Supply must also prove, as it acknowledges, the requirements of the alleged enterprise –- common purpose, organization, and continuity –- in order to prevail on its RICO claims. *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988)). However, there is no reason to postpone a definitive determination on distinctness.

Accordingly, Medical Supply's Motion for partial summary judgment removing potential affirmative defenses of failure to identify a RICO enterprise separate and distinct from the Defendants themselves should be granted.

B. A DEFENDANT'S LIABILITY FOR CONSPIRACY UNDER 18 U.S.C. § 1962(d) DOES NOT REQUIRE THAT DEFENDANT TO PARTICIPATION THE OPERATION OR MANAGEMENT OF THE ENTERPRISE

In *Salinas*, the Supreme Court held that liability under Section 1962(c) is not a prerequisite to finding liability under Section 1962(d). See Salinas, 522 U.S. at 66. In that case, the defendant was charged with criminal violations of Sections 1962(c) and (d) but was convicted on the conspiracy charge alone. In concluding that a RICO conspiracy defendant need not commit a substantive RICO offense under Section 1962(c), the Court explained that "it is sufficient that the [defendant] adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65. The Court noted that RICO's conspiracy section is to be interpreted in light of the common law of criminal conspiracy. See *id.*[3] The tenth Circuit stated:

> "Because this conspiracy provision lacks an overt act requirement, a defendant can be convicted under § 1962(d) upon proof that the defendant knew about or agreed to facilitate the commission of acts sufficient to establish a § 1962(c) violation. See *Salinas v. United States*, 522 U.S. 52, 63-66 (1997)."
>
> *United States v. Smith*, No. 03-4240 at pg.1 (Fed. 10th Cir. 7/6/2005) (Fed. 10th Cir., 2005).

[3] "If conspirators have a plan which calls for some conspirators to perpetrate a crime and others to provide support, the supporters are as guilty as the perpetrators ... so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators." *Salinas*, 522 U.S. at 64.

Accordingly, one who opts into or participates in a Section 1962(d) conspiracy to violate Section 1962(c) is liable for the acts of his co-conspirators even if that defendant did not personally agree to commit, or to conspire with respect to, any particular one of those acts. *Id.*

This liability for the "passive conspirator" exists notwithstanding *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). Some defendants claim that the law requires a showing of "operation or management of the enterprise" to demonstrate a RICO conspiracy under Section 1962(d).Even though the Supreme Court did hold in Reves that, to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs, one must participate in the operation or management of the enterprise itself," the passive conspirator immunity argument fails for the following reasons.

First, *Reves* involved a Section 1962(c) substantive RICO offense not a Section 1962(d) RICO conspiracy offense. In *Reves*, the Supreme Court held that an accounting firm could not be liable under Section 1962(c) for incorrectly valuing a farm cooperative's assets listed on its financial statements. Reves, 507 U.S. at 179. The Court reasoned that the firm had not "conduct[ed] or participated ... in the conduct" of the enterprise's affairs because it did not participate in the "operation or management of the enterprise itself." *Id.*

All circuits but the Ninth have concluded that *Reves* addressed only the extent of conduct or participation necessary to violate Section 1962(c), and did not address the principles of conspiracy law under Section 1962(d).[4] See *Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001); *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998); *Napoli v. United States*, 45 F.3d 680, 683-84 (2d Cir. 1995); *MCM Partners, Inc. v. Andrews-Bartlett & Assoc.*, 62 F.3d 967, 979 (7th Cir. 1995); *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995); *United States v. Quintanilla*, 2 F.3d 1469, 1485 (7th Cir. 1993) ("to hold that under section 1962(d) the government must show that an alleged coconspirator ... participated to the extent required in *Reves* would add an element to RICO conspiracy that Congress did not direct"). The tenth Circuit stated:

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[4] As noted, only the Ninth Circuit has ruled that Reves' on or management" test applies to RICO conspiracy charges. See *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1128-29 (9th Cir. 1997). However, Neibel was decided before *Salinas*, and the Ninth Circuit has not yet revisited its ruling. Moreover, Neibel relied upon *United States v. Antar*, 53 F.3d 568, 581 (3d Cir. 1995), another pre-Salinas decision, which the Third Circuit subsequently ruled was no longer good *Smith v. Berg*, 247 F.3d at 534.

> "[T]he word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required." *Reves* II, 507 U.S. at 179, 113 S.Ct. at 1170 (footnote omitted). Id. (footnote omitted). Outsiders, such as the Title Companies, who are associated with a RICO enterprise and participate in the operation or management of the enterprise may also be liable under 1962(c). *Reves* II, 507 U.S. at 185, 113 S. Ct. at 1173."

BancOklahoma Mortgage Corp. v. Capital Title Co. Inc., 194 F.3d 1089, 1100 (10th Cir. 1999).

Thus, *Reves*' "operation or management" standard applies only to substantive RICO offenses under Section 1962(c) and not to a conspiracy to violate RICO under Section 1962(d).

Second, after *Reves*, the Supreme Court specifically set forth in Salinas the standard for liability under Section 1962(d). See *Salinas,* 522 U.S. at 65. Such conspiracy liability requires a showing that: (1) two or more people agreed to commit a substantive RICO offense, and (2) the defendant knew of and agreed to the overall objective of the violation. Id.; See *Posada-Rios*, 158 F.3d at 857 (citing *Salinas*); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000) (same). There can be no question that the Supreme Court was aware of its decision in *Reves* when it decided Salinas, and there is nothing inconsistent between the two decisions.

Thus, reading *Reves* and *Salinas* together, it is clear that a defendant may be held liable for conspiracy to violate Section1962(c) if it knowingly agrees to violate the elements of Section 1962(c), one of which is the "operation or management" of a RICO enterprise.[5] However, liability for a RICO conspiracy under Section 1962(d) does not require the same proof of participation in the "operation or management" of the alleged RICO enterprise, just as it does not require proof of commission of all the

[5] Relying upon *Beck v. Prupis*, 529 U.S. 494 (2000), Defendants could assert that *Salinas* is irrelevant for the purpose of civil RICO claims. *Beck* involved a chief executive officer whose employment was terminated when he discovered that certain of his company's officers were engaged in racketeering. The Court ruled that the termination, allegedly in furtherance of a RICO conspiracy, was not independently wrongful under any substantive RICO provision and did not give rise to a cause of action under Section 1962(c). In *Beck*, the only mention of Salinas appears in a footnote:
"[w]e have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), ... This case,however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation." *Beck*, 529 U.S. at 501 n.6. However, this sentence does not in any way repudiate or undercut the Salinas holding. The Beck decision turns rather on the injury requirement of Section 1964(c). *Id.* Thus, violations of Section 1962(d) continue to be defined under and governed by *Salinas.*

other elements of the Section 1962(c) substantive offense. *Salinas*, 522 U.S. at 65; see also *Smith*, 247 F.3d at 537.

Accordingly, Medical Supply's Motion for partial summary judgment that a Defendant's liability for RICO conspiracy does not require that Defendant to participate in the operation or management of the enterprise should be granted.

C. WHETHER LIABILITY FOR A PARTICULAR RACKETEERING ACT EXTENDS TO AIDERS AND ABETTORS MUST BE DETERMINED AT TRIAL

To establish a "pattern of racketeering activity" for purposes of Section 1962(c), Medical Supply must show that each Defendant committed at lease two acts of racketeering, "the last of which occurred within ten years ... after the commission of a prior racketeering act." 18 U.S.C. § 1961(5). Medical Supply argues that a defendant's liability for a particular racketeering act may be established by proof that the Defendant aided and abetted the commission of that racketeering act. *Pereira v. United States*, 347 U.S. 1, 9 (1954) (a person who aids and abets another in the commission of mail fraud, a violation of § 1341, also violates §1341); *United States v. Shifman*, 124 F.3d 31, 36 (1st Cir. 1997).

Aiding and abetting is no longer applicable to securities fraud under RICO *after Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). In *Central Bank*, the Supreme Court held that there can be no private civil liability for aiding and abetting securities fraud under Section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5. *Central Bank*, 511 U.S. at 185. After examining the language and structure of the Act, the Court concluded that "the text of the 1934 Act does not itself reach those who aid and abet a Section 10(b) violation." Id. At 183.

However, the plaintiff does not raise securities law based claims. It is clear from the averments in the complaint that Neoforma, Inc. (NEOF) and Robert Zollars are subject to civil liability under the securities laws to shareholders. Neoforma, Inc. (NEOF) and Robert Zollars have previously defended against shareholder liability lawsuits without disclosing that Neoforma, Inc.’s technology and market potential described in its prospectuses and quarterly reports was compromised against the interests of the company’s shareholders in agreements to enforce the artificially inflated prices of the established “bricks and mortar” distributors UHC, VHA and Novation, LLC.

An argument can be made that *Central Bank* eliminates aiding and abetting in non securities fraud based RICO claims. See the discussion of *American Honda Motor Co., Inc., Dealerships Relations Litigation*. 958 F.Supp. 1045 (D. Md. 1997) under Law firm RICO liability *infra*. However in the Tenth Circuit this issue does not yet appear to be resolved against civil aiding and abetting liability and RICO aiding and abetting is still liberally applied in criminal cases.

The Tenth Circuit has clearly set out the elements of aiding and abetting:

> "The elements of aiding and abetting are also well-settled. *Jones,* 44 F.3d at 869.[*United States v. Jones,* 44 F.3d 860, 869 (10th Cir. 1995).] Under 18 U.S.C. § 2, the Government must prove beyond a reasonable doubt the defendant: (1) "willfully associate[d] with the criminal venture," and (2) "aid[ed] such venture through affirmative action." *Jones*, 44 F.3d at 869. Mere presence at a crime scene is insufficient to prove aiding and abetting. See *id*. Although knowledge a crime is being committed is relevant, some showing of intent to further the criminal venture must be introduced at trial. See *id*."

United States v. Delgado-Uribe, No. 03-8003 (10th Cir. 4/13/2004) (10th Cir., 2004). The Tenth Circuit still applies the shared intent standard for aiding and abetting in criminal acts:

> "This Court has held that, in order to be convicted of aiding and abetting, a defendant must "share[] in the intent to commit the [underlying] offense." *U.S. v. Thurmond*, 7 F.3d 947, 950 (10th Cir. 1993)...We agree with the First Circuit and therefore conclude that Mr. Vallejos possessed the intent necessary to be found guilty of aiding and abetting a carjacking if he "shared some knowledge" of Mr. Sanchez's intent to commit the carjacking."

United States v. Vallejos, No. 04-2216 (Fed. 10th Cir. 8/19/2005) (Fed. 10th Cir., 2005). The Tenth Circuit's most extensive defining of the elements required for aiding and abetting liability is contained in *USA v. Jackson*, 213 F.3d 1269 (10th Cir., 2000)

> "Whoever ... aids, abets, counsels, commands, induces or procures [the] commission [of a crime] is punishable as a principal." 18 U.S.C. 2(a). "To be guilty of aiding and abetting the commission of a crime, the defendant must willfully associate himself with the criminal venture and seek to make the venture succeed through some action of his own." *United States v. Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999). *United States v. Smith*, 133 F.3d 737, 742 (10th Cir. 1997) ("To be liable as an aider and abettor under 18 U.S.C. 2, the evidence must establish a defendant associated himself with a criminal venture; participated in the venture as something he wished to bring about; sought by his actions to make the venture succeed; and the evidence must establish both the commission of the offense by someone and the aiding and abetting by the defendant."), cert. denied, 524 U.S. 920 (1998). Thus, the crime of aiding and abetting is a specific intent crime because it requires the defendant to act willfully by participating in the venture and also requires the defendant to have the specific intent to make the venture succeed through his or her acts."

USA v. Jackson, 213 F.3d 1269 at 1292 (10th Cir., 2000). The Jackson court also discussed the participation requirement for furthering the RICO enterprise:

> "[A]cts committed in furtherance of the commission of a crime by another constitute 'abetting.'" *Slater*, 971 F.2d at 632 (citation omitted). "Participation in the criminal venture may be established

by circumstantial evidence and the level of participation may be of 'relatively slight moment.'" *United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997).

In *Slater*, we rejected the same argument raised by Mr. Jackson and pointed out one

"may 'abet' the crime of possession with intent to distribute by procuring the customers and maintaining the market in which the possession is profitable, even though you do nothing else to help the possessor get or retain possession. Middlemen aid and abet the offense of possession with intent to distribute."

971 F.2d at 632 (quoting with approval *United States v. Wesson*, 889 F.2d 134, 135 (7th Cir. 1989)). Furthermore, if we were to hold one cannot be convicted of aiding and abetting the possession of a controlled substance with the intent to distribute without proving possession, this would be tantamount to holding one cannot be convicted of aiding and abetting without committing the principal offense. Such a result would dismantle the crime of aiding and abetting. *Id.* at 632-33.

While the government must show that a defendant engaged in two or more predicate acts to state a claim under one of RICO's substantive provisions (Section 1962(a), (b), or (c)), Salinas rejected such a requirement with respect to RICO's conspiracy provision (Section 1962(d)), Philip Morris, 130 F.Supp.2d at 99, although it did not specifically address the role of the Reves' "operation or management" test in assessing liability under Section 1962(d)."

USA v. Jackson, 213 F.3d 1269 at 1299 (10th Cir., 2000).

Accordingly, RICO aiding and abetting liability is appropriately defined and does not have to be determined at trial. Medical Supply's Motion for partial summary judgment that a Defendant's liability for RICO aiding and abetting liability does not have to be determined at trial.

D. WHETHER A LAW FIRM IS IMMUNE FROM CIVIL RICO CLAIMS.

The defendants have argued that the defendant Shughart Thomson and Kilroy is immune from liability as a RICO defendant. While no law supporting this assertion has been advanced, it would appear from the renewed motions to dismiss and motions to sanction Medical Supply and its attorney that law firm RICO liability is an issue to be resolved in this action.

Medical Supply researched its claims before filing its complaint in the Western District of Missouri and found that the Eight Circuit had resolved the issue of whether an inherent civil immunity to private RICO liability existed for law firms. There is no immunity and a law firm is properly a RICO defendant.

1. Claims against Law Firms under Section 1962(c) and (d)

The law firm sued for RICO violations in *Handeen v. Lemaire* 12 F.3d 1339 (8th Cir. 1997) represented a client who had been convicted of aggravated assault. The victim of the aggravated assault had obtained a civil judgment against the client. The attorneys counseled the client and his family to avoid liability on the judgment by filing bankruptcy and then inflating his debts and concealing earnings. The victim sued the family and the law firm under RICO, alleging that they had violated section 1962(c) by

conducting the affairs of the bankruptcy estate (the enterprise) through a pattern of racketeering activity. The district court dismissed the RICO claims (as well as related state law causes of action). The Eighth Circuit reversed.

The *Handeen* court conceded that after *Reves*, RICO liability did not attach to those who furnished a client (even one engaged in a RICO enterprise) "with ordinary professional assistance" and that "RICO is not a surrogate for professional malpractice actions." *Id*. at 1348. Nevertheless, the court found that *Reves* did not insulate the law firm from liability fro RICO where the firm, in representing its clients in a bankruptcy proceeding, allegedly directed the clients to create false promissory notes and other sham debts to dilute the estate; defended the family's fraudulent claims against objections; prepared filing and schedules with the court which contained erroneous information; formulated and promoted fraudulent repayment plans; participated in a scheme to conceal the client's new job (and increased earnings); and otherwise controlled the bankruptcy estate to permit the client to avoid the judgment against him. *Id*. at 1350.

> "T]his would not be a case where a lawyer merely extended advice on possible ways to manage an enterprise's affairs . . . Instead, if the Firm truly did associate with the enterprise to the degree encompassed by the Complaint, we would not hesitate to hold that the attorneys "participated in the core activities that constituted the affairs of the [estate]. . ."

Id. A multidistrict proceeding arose as a result of allegations that high level executives of American Honda received kickbacks from various dealers in exchange for favors, primarily increased allocates of automobiles or the award of new dealerships, in *American Honda Motor Co., Inc., Dealerships Relations Litigation*. 958 F.Supp. 1045 (D. Md. 1997). The claims were not dissimilar to Medical Supply's claims against the defendants for monopolizing hospital supplies through kickbacks from manufacturers and bribes paid to hospital administrators. Included among the defendants was the law firm of yon & Lyon, which was accused of participating in the concealment of the illegal scheme. The plaintiffs asserted RICO violations under section 1962(c) based on acts of alleged mail fraud arising from the mailing of false statements that American Honda would deal with the plaintiffs fairly and distribute Honda products to them in a fair and reasonable manner.

The plaintiffs alleged that Lyon & Lyon was not only American Honda's general counsel but also had attorneys serving as voting directors of the company. Lyon & Lyon conducted training sessions at sales meetings and handled allegations of misconduct, including conflict of interest complaints involving

dealers or potential dealers. The plaintiffs alleged that after Lyon & Lyon received dealer complaints about the kickback scheme, it took action s to conceal the scheme, amounting to obstruction of justice. Lyon & Lyon attorneys allegedly counseled witnesses to give evasive or incomplete testimony and intentionally limited an investigation of the kickback allegations by not interviewing key witnesses. Lyon & Lyon attorneys also allegedly directed American Honda to make false and misleading assertions about the results of its investigation in a hearing. *Id.* at 1056-57.

Lyon & Lyon's motion to dismiss the section 1962(c) claim against it was denied. In denying the motion, the American Honda court initially found that Lyon & Lyon had a sufficient role in the enterprise's activities to satisfy the Reves "operation or control" test:

> [F]or over ten years Lyon & Lyon took on the responsibility of pretending to enforce American Honda's conflict of interest policy and of not following up on dealer complaints in order to perpetuate the kickback scheme. Concealment is a necessary element of any ongoing illegal activity, and a person who is in charge of the coverup plays an operational and management role in the enterprise conducting that activity.

Id. at 1057. However, the American Honda court did not feel that Lyon & Lyon's participation in the management of the racketeering enterprise was in and of itself sufficient to impose RICO liability on the law firm. It is not enough, however, for a defendant to have 'conduct[ed] or participate[d] directly or indirectly, in the conduct of [an] enterprise's affairs' in order for him to be held liable under § 1962(c). He also must have done so 'through a pattern of racketeering activity.'" *Id.* The American Honda court noted that the predicate acts of racketeering charged by the plaintiffs were acts of mail fraud, and that Lyon & Lyon did not mail any of the fraudulent materials involved. *Id.* Moreover, the court did not dispute the "conventional wisdom that feels that aiding and abetting liability under § 1962(c) does not survive the Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*..." *Id.* at 1057-58.

Nevertheless, the American Honda court concluded that "[t]his does not mean, however, that aiding and abetting principles do not apply in considering whether a defendant has participated in the enterprise 'through a pattern of racketeering activity,' *i.e.*, whether he has committed at least two predicate acts." *Id.* at 1058. Rather, where a person involved in the management or control of a racketeering enterprise aids and abets in the commission of predicate acts, the person faces liability under § 1962(c), because a distinction must be made between aiding and abetting a violation of section 1962(c) (an offense

which does not survive the holding of *Reves* and *Central Bank of Denver*) and aiding and abetting in the commission of a substantive offense constituting a predicate act.

> "Unless the distinction is recognized, in most cases there would be no principled basis for imposing § 1962(c) liability upon a class of defendants whom Congress surely intended should be within the statute's purview: leaders of enterprises who do not themselves commit predicate acts but who cause others to do so. *Id.*
> . .
> Although Lyon & Lyon may only have aided and abetted the commission of the predicate acts of mail fraud, as indicated above its management role in concealing the scheme is sufficient to meet the "operation and management" test of Reves. Plaintiffs have therefore stated a viable § 1962(c) claim against Lyons & Lyons."

American Honda Motor Co., Inc., Dealerships Relations Litigation. 958 F.Supp. 1045 at 1059 (D. Md. 1997). American Honda thus suggests that the concealment of a pattern of racketeering by one who also exercises some element of control over the racketeering enterprise is sufficient to impose section 1962(c) liability.

2. Conspiracy Claims against Law Firms under Section 1962(c) and (d)

Where a plaintiff is able to establish that the professional conspired by agreeing to commit at least two predicate cats of racketeering in violation of section 1962(d), the plaintiff may be able to state a RICO violation even without satisfying the "operation or management" standard enunciated in Reves as required for a claim under section 1962(c). Medical Supply's complaint avers Shughart Thomson & Kilroy's control over the RICO acts designed to protect and conceal the enterprise's ongoing scheme to artificially inflate prices of hospital supplies in the national market in furtherance of the defendants' scheme to overcharge Medicare, Medicaid and Champus.

Obviously, to the extent that Medical Supply's artful pleading avoids dismissal of a section 1962(d) conspiracy claim against an outside professional firm who cannot be held liable under section 1962(c) because he or she has no voice in directing the affairs of the enterprise, the protections of *Reves* may be severely curtailed.

> "[C]ourts risk eviscerating *Reves* by blanketly approving conspiracy convictions when substantive convictions under section 1962(c) are unavailable . . . As one commentator has explained, '[i]f Congress' restriction of section 1962(c) liability to those who operate or manage the enterprise can be avoided simply by alleging that a defendant aided and abetted or conspired with someone who operated or managed the enterprise, Reves would be rendered almost nugatory.'"

United States v. Antar, 53 F.3d 568, 580-82 (3d Cir. 1995) (citing Smith and Reed, Civil RICO, § 504 at 5-39 (1994)).However, the extent of Medical Supply's allegations against Shughart Thomson and

Kilroy reveal the law firm was the primary agency in securing the objectives of the unlawful enterprise in artificially inflating hospital supply prices for another three years. The complaint alleges the law firm conspired with other defendants in the cartel and was the architect of the racketeering campaign against Medical Supply's legal representation outside of court and also the extra legal influence over the Kansas District Court and the Tenth Circuit.

3.The Parallel to Shook Hardy & Bacon's Tobacco RICO Conduct

Medical Supply's allegations against Shughart Thomson & Kilroy closely parallel the nature of unlawful racketeering acts committed by Shook Hardy and Bacon LLP and described by US Department of Justice. U.S. Justice Department attorneys alleged lawyers from Shook Hardy & Bacon LLP acted with "fraudulent intent" in past efforts to protect cigarette manufacturers from lawsuits. Post-trial documents filed Aug. 15 and Aug. 24 in a civil racketeering case against tobacco companies mention at least 15 Shook Hardy lawyers by name and refer to the firm more than 250 times.

A September 2, 2005 Kansas City Business Journal print edition article quoted the Notre Dame Law School professor G. Robert Blakey who stated the government's many mentions of the lawyers in the case are "an indication they could have sued them," "Lawyers should not be above the law, but in practice they are," He said tobacco lawyers were defendants in just two of the 50 states' cases against tobacco companies. Professor Blakey said it's routine practice to excuse lawyers from conspiracy suits, in part because of the extra cost of litigating against a law firm's defenses. Professor G. Robert Blakey's comments as printed in the Kansas City Business Journal are however critical of the US Department of Justice for not including the private law firm or its attorneys as civil defendants, saying: "It's an indefensible practice," and "It's indefensible if lawyers could have been sued but they were not." See "U.S. attorneys take some shots at Shook Hardy" Mark Kind, Kansas City Business Journal - September 5, 2005 Exb 1.

Because of the continuing racketeering conduct directed at Medical Supply and its counsel by Shughart Thomson & Kilroy, Medical Supply had to name Shughart Thomson & Kilroy as a defendant even at the cost of the diversity jurisdiction that would have guaranteed all of its claims are resolved in federal court. The racketeering controlled and furthered by Shughart Thomson & Kilroy's employees, past employees and agents has denied Medical Supply access to the US Supreme Court and is in imminent danger of depriving Medical Supply of its counsel.

The US Department of Justice's Proposed Findings of Fact and and Post Trial Brief reveal that the attorneys including those of the law firm Shook Hardy and Bacon, representing the tobacco companies expanded litigation fraud to even controlling the nation's scientific research relating to tobacco for the purpose of conducting and furthering the goals of the unlawful enterprise. The US Justice Department's Post Trial Brief summarizes the RICO conduct of the tobacco companies in a way that makes it clear that the essential controlling agency and chief instrument of furthering the RICO enterprise were the management of the fraud by law firms including Shook Hardy and Bacon.

> "As indicated previously, however, litigation exposure was not the only reason for the suppression of scientific information. See Wigand WD, 80:24-81:5. The suppression also acted to directly support Defendants' enterprise by utilizing numerous means of concealing information that would have allowed the American public to learn the truth about smoking, both its addictiveness as well as its negative health consequences.
>
> - First, Defendants destroyed documents to prevent them from being released outside of the companies. See, e.g., US 21677 (O) (RJR scientists confirm they will remove documents from the research and development files if it becomes clear the documents will expose RJR in litigation); US 34839 (A) at 3682 (in notes of a BATCo meeting in 1986 it was reported that research documents would be destroyed under the guise of "spring cleaning").
> - Second, Defendants encouraged their employees, particularly scientists, not to create documents that contained sensitive information, particularly information related to smoking and health and addiction. BATCO and B&W implemented the "mental copy rule" to prevent the creation of sensitive documents. The "mental copy" rule asked employees to "imagine that the memo, note or letter you are about to write will be seen by the person that you would least like to read it." The employee is then to "send a 'mental copy' of your document to a newspaper, one of your competitors, a government agency, or potential plaintiff. Now: would you still write the memo? If so -would you still write it in the same way?" US 87012 at 4434 (A). See also, US 87003 at 1805-1806 (O) (setting forth Philip Morris's company policy encouraging employees not to create sensitive documents because they may one day have to answer for the contents of the document "while sitting in a witness chair in a court room in a lawsuit").
>
> - Third, Defendants employed lawyers to review and edit scientific documents to ensure that no contentious information was included in company files. See, e.g., US FF § III.E, ¶¶ 5116-5127, 5184-5221.
>
> - Fourth, Defendants established company policies to ship or secret scientific information outside of the United States. For example, Philip Morris established a foreign research facility known as INBIFO and established company policies to prevent research documents from the foreign research facility from entering or being kept in the United States. Farone WD, 21:16-22:9, 147:11-152:15; Farone TT, 10/07/04, 1938:2-1939:16. Similarly in 1994, Tommie Sandefur, the CEO and Chairman of B&W ordered that its sister companies around the world stop sending research materials to the United States. Read PD, U.S. v. Philip Morris, 05/01/02, 178:5-16, 179:2-181:4; (US 47616) (A); Read TT, 3/22/05, 16437:22-16441:12.
>
> - Fifth, Defendants employed company lawyers as repositories or conduits for scientific documents in an attempt to shield documents from production, even though they were not truly protected by the attorney-client privilege. One of the most notorious of these arrangements involved the shipment of BATCo documents to B&W through outside counsel by the name of Robert Maddox. See US FF § III.E(3), ¶¶ 5136-5179."

US Department Of Justice Post Trial Brief Exb 3 Page 85-86. The brief is informed of the outside professional liability requirement of control or management of the unlawful enterprise and it is clear that discovery and trial testimony revealed outside lawyers committed conduct meeting the liability standard:

> ”And as the Court is well aware, Defendants utilized their outside lawyers to further the goals of the Enterprise, including attorneys such as Janet Brown at Chadbourne & Parke, John Rupp at Covington & Burling, Andrew Foyle at Lovells, and others at Shook, Hardy & Bacon, Jones Day, and other firms.”

US Department Of Justice Post Trial Brief Exb 3 Page 12. Like Sam Lipari and his counsel Bret Landrith (see affidavit of Sam Lipari Exb. 8), key witnesses were made to fear for their lives in the defense firm efforts to obstruct justice:

> “Defendants also seek to have the Court make an affirmative finding that Robert McDermott of Jones Day and Lee Stanford of Shook, Hardy and Bacon acted appropriately in their conversations with Dr. Huber before his 1997 deposition. JD FF, ch. 3, ¶ 547. The Court should reject Defendants’ request. Dr. Huber specifically testified that McDermott and Stanford implied to Huber that he did not “fully appreciate the full weight of Shook, Hardy & Bacon and Jones Day” representatives of the tobacco industry; the calls caused Huber to fear for the safety and financial security of his family. Huber PD, Texas v. American Tobacco, 9/20/97, , 101:4-8, 10-21.”

US Department Of Justice Post Trial Brief Exb 3 FN 22 Page 44.

Another parallel with the Medical Supply litigation is the role defense law firms directly played in cutting Medical Supply’s access to financial inputs in order to starve out the cartel’s opposition and prevent the litigation from being funded. A critical role of defense counsel in furthering the unlawful enterprise was in cutting off funding to projects that the Tobacco defense perceived as a threat:

> “Defendants’ use of biased research for public relations and litigation purposes is well documented in the form of funding for CTR Special Projects, CIAR Applied Studies, and other Defendant-financed research initiatives such as ETS consultants recruited and managed by Covington & Burling and Shook, Hardy & Bacon. See US FF §§ I, III.A(1), III.A(2) and III.B. Evidence also unequivocally demonstrates Defendants’ successful efforts to terminate funding that they found threatening to the Enterprise. For example:
>
> - When researchers at Microbiological Associates made progress with inhalation research funded by CTR, Defendants expressed dire concern. Philip Morris scientist Thomas Osdene wrote: “I am forced of the opinion that the program seems to be misdirected since its main mission seems to be to prove that smoking causes cancer.” US 24708 at 3038 (O). Defendants discontinued their funding and, before publication of results from the work, manipulated the report from the scientists involved and added an introduction that omitted the scientists’ conclusion that there was carcinogenic response in animals after exposure to cigarette smoke. See US FF § III.B(2)(ii)(bb).
> - Dr. Gary Huber performed research at Harvard University pursuant to a contractual agreement with B&W, Liggett, Lorillard, RJR, and Philip Morris, and produced humantype diseases in the lungs of animals that inhaled cigarette smoke. After Huber reported to his tobacco company sponsors that his research demonstrated a response to inhaled cigarette smoke, including disease mechanisms similar to those associated with diseases in humans, Defendants cut off funding to Huber. In a 1980 meeting at a Boston hotel, Defendants’ attorneys told Huber that the reason funding for his research had been discontinued was because he was “getting too close to some things.” See generally Huber PD, Texas v. American Tobacco, 9/20/97; US FF § III.A. As the Court is well aware, Defendants subsequently fought to

keep the Huber story from the public by first, urging to "keep the faith, to hold the line," when he was subpoenaed for deposition in 1997, and then employing every strategy at their lawyers' disposal to keep the deposition under seal. Seven years after Huber's deposition, the United States was finally able to obtain the transcript, over vigorous opposition by Defendants, by initiating a court action in the Eastern District of Texas. In re United States' Motion to Modify Sealing Orders, 5:03MC-2 (E.D. Tex. June 8, 2004)."

US Department Of Justice Post Trial Brief Exb 3 Page 43-44.

Conversely, the Department of Justice's proposed finding of facts illustrate that the law firms identified as RICO co-conspirators including Shook Hardy and Bacon directed financing so that projects that would further the unlawful enterprise and perpetuate the deception and death causing fraud received funds:

> "Attorneys at Jacob, Medinger & Finnegan and Shook, Hardy & Bacon kept the Committee of Counsel apprised of the status of CTR Special Projects and also made recommendations to Defendants' General Counsel and to each other as to whether projects should be conducted through CTR Special Projects. TIMN261386-1387 (US 21288) (A); 1005048374-8374 (US 35939) (A). See also Lisanti PD, Arch v. American Tobacco, 6/10/97, 80:9-81:19, 82:10-19."

US Department Of Justice Proposed Findings of Facts Exb 2 ¶ 289. Also paralleling medical Supply's experience with Shughart, Thomson & Kilroy, the Justice Department described Shook, Hardy & Bacon's advice, guidance and direction to defendant corporate counsel to deliberately commit fraud in publicized research and to misrepresent the law:

> "For example, on May 19, 1967, William Shinn of Shook, Hardy & Bacon, sent a letter to Alexander Holtzman, Philip Morris General Counsel, regarding CTR Special Projects, outlining a proposal to support and publicize research advancing the theory of smoking as beneficial to health as a stress reducer, even for "coronary prone" persons; representing that stress (rather than nicotine addiction) explains why smoking clinics fail; and proposing to publicize the "image of smoking as 'right' for many people . . . as a scientifically approved 'diversion' to avoid disease causing stress." 1005083882-3882 (US 20204) (O).

US Department Of Justice Proposed Findings of Facts Exb 2 ¶ 290. Unfortunately, our legal system that could not justly resolve the misconduct of tobacco firms for decades is pretty hard wired for resolving the intentional false statements given investors in the publicly traded NASDQ stock Neoforma, LLC (NEOF) and our legal system will also quickly allow hospitals to recover funds fraudulently placed in Novation LLC by VHA and UHC. The outside law firm coordinating the defense ends up approving or disproving funding commitments in the same way GE and Jeffrey Immelt were directed by the unlawful cartel's legal defense (including chief counsel for the separate non defendant GE Medical Inc, and the Chief Counsel for GHX, LLC) not to honor GE's real estate contract with Medical Supply:

> "On June 3, 1986, Patrick Sirridge of Shook, Hardy & Bacon sent a letter to the ollowing General Counsel: Alexander Holtzman of Philip Morris; Wayne Juchatz of Reynolds; Josiah Murray

of Liggett; Ernest Pepples of B&W; Paul Randour of American; and Arthur Stevens of Lorillard, recommending approval for additional funding of Henry Rothschild through CTR Special Projects. 507878840-8840 (US 20802) (A)."

US Department Of Justice Proposed Findings of Facts Exb 2 ¶ 292. The Justice Department's brief on page 86 reveals why Medical Supply was required to make Shughart Thomson & Kilroy a defendant and why Notre Dame Law School Professor G. Robert Blakey faults the DOJ for not making Shook, Hardy and Bacon defendants in the tobacco litigation:

"Joint Defendants' Proposed Findings suggest that the United States' claims of suppression of information fail because the evidence adduced at trial represented only disparate actions taken by individual Defendants, not concerted actions by the Defendants taken together. See, e.g., JD FF, ch. 8, ¶¶ 811, 934. First, this assertion is simply wrong. The evidence at trial confirms that many of the actions to suppress information were joint efforts by all of the Defendants through the Committee of Counsel, through other joint organizations, or through Defendants' law firms, including Covington & Burling and Shook, Hardy & Bacon. Second, Defendants apply a legal standard that does not exist. There is no requirement that each and every action taken in furtherance of the enterprise involve more than one Defendant. It is sufficient that the acts of suppression and destruction were undertaken in furtherance of the goals of the Enterprise (chiefly, denying causation and addiction and seeking protection against legal judgments). Contrary to Defendants contention, **no Court has held that a racketeering act must be "engaged in jointly by Defendants" to constitute a racketeering act that is actionable under RICO. Instead, it has long been the law under RICO that "it is irrelevant that each Defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as [the fact finder] may reasonably infer that each crime was intended to further or [was related to] the enterprise's affairs.**" *United States v. Elliot*, 571 F.2d 880, 902-03 (5th Cir. 1978). Moreover, **acts taken in furtherance of the Enterprise, even before an individual Defendant joined the conspiracy are actionable under Section 1962(d) if they further the objectives of the Enterprise**. *Salinas v. United States*, 522 U.S. 52, 63-64 (1997)."[Emphasis added]

US Department Of Justice Post Trial Brief Exb 3 Page 86. The Justice Department argues that the findings of fact force a conclusion that the law firms themselves had the requisite fraudulent intent because individuals at these law firms and other entities undertook actions that were intended to protect against disclosure of Defendants' fraudulent scheme and actions to promote its unlawful objectives. This argument is equally applicable to Shughart Thomson & Kilroy through their lawyer Andrea DeMarea fraudulently making a Kansas Disicplinary complaint against Medical Supply's counsel Bret Landrith when his former managing and employing partner, now Magistrate James P. O'Hara's sabotage of the African American James Bolden's civil rights case and altered testimony was failing to remove medical Supply's representation. The purpose of the defendant Shughart Thomson & Kilroy's action was clearly to starve out Medical Supply's counsel by fixing other unrelated cases and to cause his disbarment all in a deliberate ongoing scheme to prevent the defendants' unlawful hospital supply cartel from being exposed and to

promote the cartel's continued ability to steal money from Medicare, Medicaid and Champus through false claims:

> "Further, there is substantial undisputed evidence in the record that over the years, numerous executives and scientists of Defendants participated actively in the oversight and control of industry activities that were undertaken in execution of and in furtherance of the fraudulent scheme. These include, for example, the Chief Executive Officers of Philip Morris, Reynolds, B&W, Lorillard, American, and Liggett who served on the Board of Directors and/or the Executive Committee of the Tobacco Institute; the General Counsels of the Cigarette Company Defendants who were members of the Committee of Counsel; the Boards of Directors of CTR and CIAR, both of which were comprised of employees of Defendants; and the numerous other bodies whose structures, functions, and activities are described throughout the United States' Findings of Fact. See, e.g., US FF §§ I.B (CTR) & I.C (Tobacco Institute).
>
> Similarly, the evidence shows that members of the Enterprise who are not Defendants in this case – including law firms such as Shook, Hardy & Bacon and Covington & Burling, and other agents of Defendants – also possessed the requisite fraudulent intent. **Individuals at these law firms and other entities undertook actions that were intended to protect against disclosure of Defendants' fraudulent scheme and actions to promote its unlawful objectives.** The evidence of this is identified throughout the United States' Findings." [Emphasis added]

US Department Of Justice Post Trial Brief Exb 3 Page 106.

Accordingly, law firms have no special immunity for acts of fraud and racketeering. This court should summarily resolve that Shughart, Thomson & Kilroy has the capacity to be a RICO person.

CONCLUSION

Whereas the plaintiff has in its supporting memorandum shown that the controlling authority for our jurisdiction defines each defendant under the facts averred in the complaint to be distinct from the RICO enterprise, that a defendant's liability for RICO conspiracy does not require that defendant to participate in the operation or management of the enterprise, that RICO liability extends to aiders and abettors and that the law firm Shughart, Thomson & Kilroy, Watkins, Boulware, P.C. (Shughart, Thomson & Kilroy) is properly a RICO Defendant, the plaintiff Medical Supply respectfully requests the court grant this partial summary judgment.

Respectfully Submitted

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Certificate of Service

I certify that on September 6th, 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:

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Kansas City Business Journal - September 5, 2005
http://kansascity.bizjournals.com/kansascity/stories/2005/09/05/story2.html

KANSAS CITY BUSINESS JOURNAL

EXCLUSIVE REPORTS
From the September 2, 2005 print edition

U.S. attorneys take some shots at Shook Hardy

Mark Kind
Staff Writer

Lawyers from Shook Hardy & Bacon LLP acted with "fraudulent intent" in past efforts to protect cigarette manufacturers from lawsuits, U.S. Justice Department attorneys allege.

Post-trial documents filed Aug. 15 and Aug. 24 in a civil racketeering case against tobacco companies mention at least 15 Shook Hardy lawyers by name and refer to the firm more than 250 times.

But Shook Hardy is not a defendant, and legal observers disagreed whether the government should have sued the firm as well as its clients in the case, which was awaiting a judge's verdict.

The tobacco companies' court filings describe the lawyers' activities as proper and more passive than the government alleges. Shook Hardy Managing Partner John Murphy declined to discuss the case because it's in litigation.

Pleading its case that leading cigarette-makers engaged in a 52-year conspiracy to produce biased research on nicotine addiction, cancer, emphysema and secondhand smoke, the government alleges that Shook Hardy lawyers:

- Aided the conspiracy to confuse or deceive the public about dangers of tobacco that have been widely reported since the early 1950s.
- Caused tobacco scientist Gary Huber "to fear for the safety and financial security of his family" in 1997 before the former Harvard University scientist testified that the industry had cut his research money as he developed new evidence of tobacco health hazards.
- Participated from 1967 through 1993 in 24 "racketeering acts" in Kansas City, primarily mail fraud, by mailing or receiving letters that recommended suppression of research or that identified researchers who could create doubt about the dangers of cigarettes.
- Attempted "covert contamination of the scientific record" regarding the dangers of secondhand smoke.

A Justice Department spokesman refused to discuss why Shook Hardy wasn't sued along with Altria (formerly Philip Morris Co.), Brown & Williamson Tobacco Corp., British American Tobacco PLC, R.J. Reynolds Tobacco Co., The American Tobacco Co., The Council for Tobacco Research-USA Inc., The Tobacco Institute Inc. and The Liggett Group.

But the government's many mentions of the lawyers in the case are "an indication they could have sued them," said G. Robert Blakey, a professor at Notre Dame Law School.

"Lawyers should not be above the law, but in practice they are," he said.

Blakey represented Texas and Florida in suits against tobacco companies (but not their lawyers) in the 1990s and served as an expert witness in the federal government's suit.

He said tobacco lawyers were defendants in just two of the 50 states' cases against tobacco companies.

It's routine practice to excuse lawyers from conspiracy suits, in part because of the extra cost of litigating against a law firm's defenses, he said.

"It's an indefensible practice," Blakey said. "It's indefensible if lawyers could have been sued but they were not."

A private lawyer who opposes the tobacco companies in the federal case said lawyers aren't good targets for lawsuits, particularly in cases seeking monetary damages where the clients have deeper pockets than the law firms.

"What's the payoff?" said Scott Nelson of the Public Citizen Litigation Group in Washington. "You're not going to win against the attorneys if you don't win against the underlying conspirators."

Nelson declined to comment specifically on the federal tobacco case, but he said that suing lawyers of alleged conspirators usually is costly and risky.

"When you're trying to evaluate a conspiracy case against facially legitimate businesses, you've got to consider that in the course of doing business, clients have a right to receive legal advice, and attorneys have a right to give legal advice," he said. "The fact that you give advice to people who may, themselves, be conspiring does not make you a conspirator."

Shook Hardy has had a big tobacco defense practice since 1962, when David R. Hardy won a federal suit brought by a Johnson County smoker against Philip Morris. In the late 1960s, Hardy played a key role in finding researchers willing to testify that an "open question" remained about cigarettes causing cancer, the government alleges.

But by 1991, Shook Hardy foresaw allegations of fraud against tobacco companies and wrote memos addressing the subject.

"A responsible industry, faced with scientific studies questioning the safety of its product, would have, among other things, supported research by independent scientists addressing the basic causes of the purported problem and more focused studies relating specifically to that product," the law firm wrote. "This is precisely what the tobacco industry did."

Defense filings in the federal case against the tobacco companies said the lawyers' handling of research money largely was an accounting function.

"Defendants' counsel also set up special accounts to deal primarily with allocating costs among defendants for projects tied to litigation," the defense said in a June 2004 filing.

Disputing the allegation that lawyers torpedoed potentially embarrassing research, the defense said lawyers advised only against financing research that would have violated antitrust strictures.

Defense filings argued that tobacco was under increasingly intense regulation during much of the period covered by the government's suit and that tobacco companies consistently lost their public relations battle with government-sponsored researchers who continuously expanded the list of health harms attributable to smoking.

The government has asked U.S. District Judge Gladys Kessler to assess billions of dollars in payments from the tobacco companies to pay for anti-smoking ads and programs, alleging that previous settlements between the companies and various states did not deter the companies from improperly marketing their products.

Kessler's verdict faces an almost certain appeal to a higher court that already has ruled tobacco companies can't be punished for past conduct under civil racketeering charges, which target preventing future misconduct.

Although the industry still portrays secondhand smoke as an unproved health hazard, Shook Hardy attorneys now overtly acknowledge scientific evidence of smoking's effects on health. An Aug. 25 filing by Lorillard Tobacco Co. and signed by attorneys Gene Voigts and Richard Gray of the firm said: "Lorillard admits that cigarette smoking can be addictive. Lorillard believes, however, that cigarette smokers can reach and successfully carry out a decision to quit smoking.

"Lorillard admits that cigarette smoking can cause lung cancer and other serious diseases ... Lorillard further admits that the evidence is sufficient to infer a causal relationship between cigarette smoking and lung cancer and other serious diseases."

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INC., *et al.*, Defendants.	Civil Action No. 99-CV-02496 (GK) Next scheduled appearance: None Scheduled

UNITED STATES' NOTICE OF FILING PROPOSED
FINAL JUDGMENT AND ORDER PURSUANT TO ORDER #964-A

The United States hereby notifies the Court of the submission of a Proposed Final Judgment and Order concerning remedies pursuant to Order #964-A, ¶ 3.

Respectfully submitted,

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June 27, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. PHILIP MORRIS USA INC., f/k/a PHILIP MORRIS INCORPORATED, et al., Defendants.	Civil Action No. 99-CV-02496 (GK)

[PROPOSED] FINAL JUDGMENT AND ORDER

I. Definitions

Unless otherwise specified, the following definitions shall apply to the terms used in this Final Judgment and Order:

(1) "Countertop Display" means a free-standing display with a minimum height of 30 inches and a minimum width of 18 inches that is placed on the counter at retail within the line-of-sight of any customer who is standing in the line for the register.

(2) "Defendants" include Altria Group, Inc. f/k/a Philip Morris Companies, Inc. ("Altria"), American Tobacco Company ("American"), British American Tobacco (Investments) Ltd. ("BATCo"), Brown & Williamson Tobacco Company ("Brown & Williamson" or "B&W"), Council For Tobacco Research – U.S.A., Inc. ("CTR"), Liggett Group, Inc. ("Liggett"), Lorillard Tobacco Company ("Lorillard"), Philip Morris USA Inc. f/k/a Philip Morris Incorporated ("Philip Morris"), R.J. Reynolds Tobacco Company ("Reynolds" or "RJR"), and the Tobacco Institute, Inc. ("TI" or "Tobacco Institute").

(3) "Defendant Cigarette Manufacturers" are Defendants BATCo, Brown & Williamson, Liggett, Lorillard, Philip Morris, and R.J. Reynolds.

(4) "Direct Mail Marketing Database" means a database within which Defendants maintain information about individuals to whom they have sent mail in the past or intend to send mail in the future. The information maintained includes, for example, name, age, mailings sent and dates of mailings, demographic information, smoking preference, and whether the individual has provided any proof of age, such as a signature or government issued identification. Any records of any individuals who are currently alive and are 21 years of age or older to whom

Defendants have sent mail at any point in time shall be deemed to be included in this definition, even if Defendants have since moved those records to a second database, to an archive, or have in some other way designated them as not to receive additional mail.

(5) "Disaggregated Marketing Data" means data disaggregated – or broken down – by type of marketing (including sales data), brand, geographical region (to the smallest level of geographic specificity maintained by each Defendant), type of promotion or marketing used, number of cigarettes sold, advertising in stores and any other category of data collected and/or maintained by or on behalf of each Defendant.

(6) "Distinguishing Flavor" means a distinguishable taste or aroma other than tobacco or menthol that a cigarette or its tobacco smoke imparts either prior to consumption or during consumption, if a cigarette or any component thereof is marketed or packaged as having or producing a flavor, taste or aroma other than tobacco or menthol.

(7) "Header Display" means the banner that is displayed by a retailer at the top of a cigarette display case, which may show a cigarette brand name, cigarette brand imagery, prices for cigarettes, or promotional offers to consumers.

(8) "Internet Document Website" means any website providing access to documents and other information required to be publicly accessible pursuant to Section IV.F of this Final Judgment and Order, either previously established or created and maintained pursuant to this Section IV.F of this Final Judgment and Order.

(9) "Less Hazardous Cigarette," for purposes of this Final Judgment and Order only, refers to a cigarette product: (1) designed and intended by a Defendant to potentially reduce the adverse health effects of smoking or exposure to secondhand smoke; (2) designed and intended

by a Defendant to be marketed with one or more express statements claiming that the cigarette product: (a) potentially reduces exposure of smokers or nonsmokers to specified harmful chemical components of cigarette smoke ("exposure reduction claim"); or (b) potentially reduces the adverse health effects of smoking or exposure to secondhand smoke ("disease reduction claim"). Cigarettes traditionally advertised as reduced in tar ("light," "low tar," "mild," "medium," "ultralight") are excluded from the definition of "Less Hazardous Cigarette."

(10) "Motors Sports Brand Name Sponsorship" means any motor sports event or series of events with respect to which payment (or other consideration) is made by or on behalf of a Defendant or an entity within a Defendant's direction or control, in exchange for the association or use of a brand name with or in relation to the event or series of events.

(11) "Package Onsert" means a communication affixed to an individual cigaratte pack and/or carton purchased at retail by consumers, such as a miniature brochure included beneath the outer cellophane wrapping or glued to the outside of the cigarette packaging.

(12) "Price Promotion" means marketing activity that directly or indirectly lowers the price of cigarettes to a customer or provides added value. Price promotion includes: retail value added (defined by the Federal Trade Commission (FTC) as "[a]ll expenditures and costs associated with the value added to the purchase of cigarettes, including buy one get one free and buy one get x (promotional item) free"); promotional allowances (defined by the FTC as "promotional allowances paid to retailers and any other persons (other than full-time employees of the cigarette manufacturers) in order to facilitate the sale of any cigarette, excluding expenditures in connection with newspapers, magazines, outdoor, audio-visual, transit, and direct mail"); coupons (such as"cents off" type coupons that can apply to single pack, multi-pack, or

carton purchases distributed in a variety of ways, including at the point of sale, in newspaper and magazine advertisements, via direct mail, at sponsored events, in product packaging, and on the Internet); sampling (distribution of free cigarettes to the public, including at events sponsored by cigarette companies, bar and club promotions, and other venues); and specialty item distribution (programs that provide gifts that reward brand loyalty).

(13) "Retail Merchandising Program" means any program by which a Defendant incentivizes a retailer to take some action regarding its cigarette products, including but not limited to: stocking, display, or advertising cigarette products; setting or displaying special prices; displaying additional branded items; displaying exterior signage, such as signs at pumps, roadside, or doorways; displaying window or door signage or ceiling signage. Examples of such programs include Philip Morris's Retail Leaders program and the Lorillard Excel program.

(14) "Youth" means any person under 21 years of age.

II. Jurisdiction and Authority of the District Court

A. The District Court has jurisdiction over the subject matter of this action, has personal jurisdiction over the parties and legal successors in interest and shall retain exclusive jurisdiction of this action and any dispute, issue or matter arising under or relating to the Final Judgment and Order or relief until further order of the Court. The District Court shall have jurisdiction over any person or entity that receives funding pursuant to this Final Judgment and Order for the purposes of effectuating the remedies provided.

B. The District Court shall retain exclusive jurisdiction to supervise the activities of the court-appointed officers described in Section VI, below (the Independent Investigations Officer ("IO") and the Independent Hearing Officer ("IHO")).

C. The District Court shall enforce the Final Judgment and Order and its orders arising under and relating to the Final Judgment and Order through contempt and any other lawful means. Nothing in this Final Judgment and Order shall be construed to modify or limit the inherent power of the District Court, the law governing contempt proceedings or the District Court's discretion and authority in such matters.

D. The District Court shall have the authority to remove any of the court-appointed officers described in Section VI below and their supporting personnel for good cause, including for a conflict of interest as defined in Section VI.A.4.

III. Applicability

This Final Judgment and Order applies to each of the Defendants and to each of their current and future directors, officers, agents, servants, employees, subsidiaries, attorneys, assigns and successors. This Final Judgment and Order shall also apply to those persons in active concert or participation with Defendants and their current and future directors, officers, agents, servants, employees, subsidiaries, attorneys, assigns and successors who have received actual notice of this Final Judgment and Order by personal service or otherwise (hereinafter "Covered Persons and Entities"). See Fed. R. Civ. P. 65(d).

IV. Program Funding, Youth Smoking Reduction, Corrective Communications, Disclosure Requirements and Review of Business Policies and Practices

A. Funding for Remedial Measures

Defendants shall make quarterly payments to the entities and for the purposes specified in part IV.B and IV.C of this Final Judgment and Order in the amount of $600,000,000 per quarter over an initial period of 5 years, for a total of $12,000,000,000. Quarterly payments of $100,000,000 pursuant to Section IV.C of this Final Judgment and Order shall be made by Defendants for an additional five years. The first payment shall be made on January 15, 2006. Subsequent quarterly payments of $600,000,000 shall be made on April 15, July 15, October 15 and January 15 of every year until the later of October 15, 2010 or the 20th quarterly payment following the effective date of this Final Judgment and Order. Thereafter, quarterly payments of $100,000,000 pursuant to Section IV.C of this Final Judgment and Order shall be made on January 15, April 15, July 15 and October 15 of every year until the later of October 15, 2015 or the 40th quarterly payment under this Final Judgment and Order. Defendants shall be jointly and severally liable for the entire amount required under this Final Judgment and Order, except for payments that may be required by Section IV.B.5 and Section IV.D herein.

B. Smoking Cessation

1. $500,000,000 of each quarterly payment for the first five years after the date of this Final Judgment and Order shall be paid to an organization with the capacity to draw together necessary resources for the efficient and effective administration of a national smoking cessation program (hereinafter "Cessation Administrative Organization"), for the creation, oversight and administration of a National Smoking Cessation Quitline Network and the provision of smoking

cessation therapy to all American smokers who can be offered treatment at the funding levels provided in this Final Judgment and Order. The National Smoking Cessation Quitline Network shall be administered to provide:

a. A network for universal access to evidence-based, multi-session, proactive telephone counseling and FDA-approved medications for tobacco cessation, which shall be provided at no cost to a minimum of the first 2,500,000 smokers requesting treatment each year; and

b. A national media campaign to encourage cessation and publicize the availability of cessation therapies through the National Smoking Cessation Quitline Network.

c. If permitted by the funding levels provided in this Final Judgment and Order, the Cessation Administrative Organization shall also be permitted to make grants for:

(i) Research to develop new smoking cessation counseling and medication therapies; and

(ii) Training and education to ensure that clinicians in the United States have the knowledge, skills, and support systems necessary to help smokers quit tobacco use.

2. There shall be no restrictions on eligibility for treatment from the National Smoking Cessation Quitline Network.

3. Nothing in this Final Judgment and Order shall prohibit the Cessation Administrative Organization or any subsequent administrator of the National Smoking Cessation

Quitline Network from creating public-private partnerships or using funds received under this Final Judgment and Order to enhance existing resources in order to meet the requirement that comprehensive treatment consisting of multi-session, proactive telephone counseling and FDA-approved medications be made available at no cost to a minimum of 2,500,000 smokers each year.

4. Violations of this Final Judgment and Order occurring after the first year shall result in an obligation to fund the smoking cessation program for an additional 5 years as follows:

a. The requirement that Defendants fund the National Smoking Cessation Quitline Network shall be extended beyond five years in the event that the IO finds pursuant to the procedures set out in Section VI of this Final Judgment and Order, with such finding approved by the District Court, that any Defendant has continued to engage in conduct prohibited by the provisions contained in Section V with the intent to prevent smokers who want to quit from doing so or with the intent to fraudulently induce new smokers to begin daily smoking after one year from the date of this Final Judgment and Order.

b. For each year in which the IO finds that conduct as described in Section IV.B.5.a , with such finding approved by the District Court, the Defendant(s) found to have continued to engage in prohibited conduct shall be required to fund fully the National Smoking Cessation Quitline Network for an additional five years.

c. The annual cost of the National Smoking Cessation Quitline Network to be paid by Defendant(s) during any extended time period will be calculated by the IO as 15% of the total United States' smoking population multiplied by $670, plus $375,000,000 for promotional expenditures. The determination of the annual cost by the IO will be subject to the procedures contained in Section VI of this Final Judgment and Order. The annual cost will be paid in equal quarterly installments.

5. Nothing herein shall give rise to any right of action by any Defendant, Covered Person or Entity, or third party against the Cessation Administrative Organization based on any alleged violation of the terms of this Final Judgment and Order.

C. Public Education and Countermarketing

1. $100,000,000 of each quarterly payment for ten years following the date of this Final Judgment and Order shall be paid to the American Legacy Foundation to continue and supplement its activities and functions as established by and specified in Section VI of the Master Settlement Agreement. The American Legacy Foundation shall also carry out a nationwide, sustained advertising and education program to educate smokers and nonsmokers of all ages about the comparative disease risks of low and ultra low tar cigarettes and the disease risks associated with exposure to secondhand smoke.

2. The American Legacy Foundation shall be permitted to hold at its discretion a portion of each year's payments from Defendants in reserve and manage such funds for future use for the purposes set out in this Final Judgment and Order.

3. Nothing herein shall give rise to any right of action by any Defendant, Covered Person or Entity or third party against the American Legacy Foundation based on any alleged violation of the terms of the Master Settlement Agreement or the terms of this Final Judgment and Order.

D. Youth Smoking Reduction Targets and Penalties

Defendant Cigarette Manufacturers shall be liable to pay additional money to fund the programs specified in Section IV.B and IV.C of this Final Judgment and Order if percentage reductions in Youth smoking rates are not achieved within specified time frames after the date of this Final Judgment and Order, as follows:

1. Targets

   a. By 2013 each Defendant Cigarette Manufacturer is required to reduce the share of Youth age 12 to 20 who smoke its cigarette products by 42% from the 2003 baseline level as follows:

      (i) By the end of 2007, the share of Youth age 12 to 20 smoking each Defendant Cigarette Manufacturers' products must fall by 6% from 2003 levels.

      (ii) By the end of 2008, the share of Youth age 12 to 20 smoking each Defendant Cigarette Manufacturers' products must fall by 12% from 2003 levels.

      (iii) By the end of 2009, the share of Youth age 12 to 20 smoking each Defendant Cigarette Manufacturers' products must fall by 18% from 2003 levels.

(iv) By the end of 2010, the share of Youth age 12 to 20 smoking each Defendant Cigarette Manufacturers' products must fall by 24% from 2003 levels.

(v) By the end of 2011, the share of Youth age 12 to 20 smoking each Defendant Cigarette Manufacturers' products must fall by 30% from 2003 levels.

(vi) By the end of 2012, the share of Youth age 12 to 20 smoking each Defendant Cigarette Manufacturers' products must fall by 36% from 2003 levels.

(vii) By the end of 2013, the share of Youth age 12 to 20 smoking each Defendant Cigarette Manufacturers' products must fall by 42% from 2003 levels.

(viii) The targeted reduction will remain at 42% below 2003 levels from 2014 onwards.

b. An individual Youth age 12 to 20 will be considered to have smoked a specific Defendant Cigarette Manufacturer's product if they have, on average, smoked at least one cigarette per day during the past 30 days and identified that specific Defendant Cigarette Manufacturer's brand as their most frequently consumed brand, as reported in the National Survey on Drug Use and Health (NSDUH). Whether a Youth has smoked on average one cigarette per day is computed by multiplying the number of days a Youth smoked in the past 30 days as reported in NSDUH times the

number of cigarettes smoked per day as reported in the NSDUH and then dividing the product of that calculation by 30.

c. The percentage of Youth age 12 to 20 who smoked each brand manufactured by a Defendant Cigarette Manufacturer shall be combined to determine the total percentage of Youth age 12 to 20 smoking that Defendant Cigarette Manufacturer's cigarette products.

d. The targeted reductions in Youth smoking, and the assessments for missing those targets, will apply to Youth ages 12 to 20. This age range is chosen based on the Court's finding of liability, including the particular finding that Defendants have fraudulently denied that their marketing affects smoking behavior, including initiation (which happens primarily in adolescence), and have fraudulently promised the public that they do not market to young people including those under 21, while continuing to market to those under 21 in order to sustain and increase the market for cigarettes.

2. Assessments

a. If a manufacturer misses its target (i.e., if the percentage of Youth smoking its products declines by less than the targets presented in Section IV.D.1), then that Defendant Cigarette Manufacturer will pay an assessment.

b. The total assessment for each Defendant Cigarette Manufacturer is the product of the assessment per Youth smoker times the number of Youth

age 12 to 20 by which that Defendant Cigarette Manufacturer missed its target.

3. Assessment Per Youth Smoker

   a. The assessment in 2007 will be $3,000 for every Youth age 12 to 20 by which a Defendant Cigarette Manufacturer misses its target.

   b. For each year after 2007 the assessment per Youth age 12 to 20 will be equal to the assessment amount from the preceding year increased by the rate of inflation as measured by the percentage increase in the Consumer Price Index.

4. Number of Youth by Which Targets Are Missed

   a. The number of Youth age 12 to 20 by which a Defendant Cigarette Manufacturer misses its target shall be computed in two steps.

   b. First, the IO shall compute the percentage of Youth age 12 to 20 smoking a Defendant Cigarette Manufacturer's cigarette products in excess of the target percentage for that Defendant Cigarette Manufacturer (the "excess Youth smoker percentage").

   c. Second, the IO shall multiply the excess Youth smoker percentage times the size of the total Youth population. The size of the total United States population for Youth age 12 to 20 shall be measured using population estimates from the United States Census Bureau.

5. Double Counting Adjustment

   a. In computing the assessment in years starting from the second year in

which assessments are levied, the assessment amount is only for *new* misses from the target, or the net change in the stock of Youth smokers of each manufacturer's cigarette brands. For example, suppose that in 2008 a Defendant Cigarette Manufacturer missed its target by 1 million Youth smokers. Suppose that in 2009 it again missed by 1 million Youth smokers. Finally, suppose that 20% of that Defendant Cigarette Manufacturer's Youth smokers in 2008 were 20 year olds. This implies that the 1 million by which the target is missed in 2009 includes 800,000 of those by which the target was previously missed, plus 200,000 new misses (to replace the 200,000 who became 21 years old). So the assessment would only be applied on the 200,000 new misses in the year 2009.

6. Notification and Challenges

a. For each Defendant Cigarette Manufacturer, the IO shall set the target Youth smoking percentages and notify the parties and the District Court of those target Youth smoking percentages by December 1 of the year preceding the year in which the target must be met. For example, by December 1, 2006, the IO shall set target Youth smoking percentages for each Defendant Cigarette Manufacturer and notify the manufacturers of the targets for 2007.

b. For each Defendant Cigarette Manufacturer, the IO shall calculate and notify the parties and District Court of the actual Youth smoking rates for

a given target year and the amount of any assessments by January 31 of the second year following each target year. For example, by January 31, 2009, the IO shall calculate and notify the parties and District Court of the actual Youth smoking rates and the amount of any assessments for target year 2007.

c. If any party contests the IO's calculation of the actual Youth smoking rates and the amount of any assessment, the party shall provide written notification to all other parties and the IO of its objection to the calculation within ten days of receipt of the IO's calculation. If the parties and the IO are unable to resolve disagreements as to the calculation within 14 days of the time that the objecting party provides notification of its objection to the IO's calculation, the parties and the IO shall notify the Independent Hearing Officer ("IHO") of the objection. The objection shall be resolved pursuant to the procedures set out below in Sections VI.E.3 and VI.F of this Final Judgment and Order.

7. Assessments shall be paid by April 15 of the year in which the IO calculates the assessment to be charged. Assessments shall be paid as follows: 80% to the Cessation Administrative Organization to supplement funding for the National Smoking Cessation Quitline Network provided for in Section IV.B of this Final Judgment and Order and 20% to the American Legacy Foundation to supplement funding for its activities provided for in Section IV.C of this Final Judgment and Order. All provisions of Sections IV.B and IV.C of this Final

Judgment and Order will apply to the use of assessment funds and rights of Defendants and third parties specified in those Sections.

E. Corrective Communications

1. Consistent with the Court's finding of liability, each Defendant shall be required to make corrective communications concerning the adverse health effects of smoking; the addictiveness of smoking and nicotine; "low tar" cigarettes; the adverse health effects of exposure to secondhand smoke (also known as environmental tobacco smoke, or ETS); and the impact of tobacco marketing on Youth. Initial versions of those affirmative statements are attached at Attachment A. The Court recognizes that variations of the ordered affirmative communications may be necessary and appropriate to account for the varied fora and formats ordered..

2. All corrective communications shall be placed in a prominent position on any publicly-accessible website of any Defendant for the duration of this Final Judgment and Order, including the following websites (and/or any other web address that provides access to Defendants' corporate website or any successor website, and the Internet Document Websites created or maintained pursuant to Section IV.F):

a. www.pmusa.com

b. www.altria.com

c. www.rjrt.com (including www.bw.com)

d. www.lorillard.com

e. www.bat.com

f. www.liggettgroup.com

3. The IO shall have authority to retain appropriate consultants to assist in the development, design, coordination, and execution of the affirmative communications as ordered herein, in order to ensure scientific accuracy, and to ensure maximum exposure and comprehension by smokers and the general public. The corrective communications shall also be made in the following fora:

a. Using their existing (or future acquired or improved) technology, Defendant Cigarette Manufacturers shall affix to cigarette packaging, either to the outside of or within the outer cellophane wrapping, an "onsert" containing the affirmative statements, in the same manner as certain Defendant Cigarette Manufacturers, including Philip Morris and Brown & Williamson, have utilized package onserts in the past. Two corrective communications, with explanatory information, shall be placed in package onserts, to be included with each pack of Defendant Cigarette Manufacturers' cigarettes shipped for retail distribution in the United States during the first two weeks of every February, April, June, August, October and December ("installments"), beginning no more than four months after the date of this Final Judgment and Order and continuing for two years. The corrective communications placed in each installment of package onserts shall change, as determined by the IO. The IO shall retain experts with the appropriate scientific expertise to draft the explanatory information for use in each package onsert. The IO will also retain appropriate consultants to design the format for package onserts to assure

maximum exposure and comprehension by cigarette smokers. Each onsert design shall be provided to Defendant Cigarette Manufacturers two months before it is to be included with packs shipped for retail distribution.

b. Each of the 12 onserts created pursuant to Section IV.E.3.a of this Final Judgment and Order shall also be formatted as a brochure by appropriate consultants retained by the IO for distribution by direct mail and sent by Defendant Cigarette Manufacturers to every adult smoker in the Direct Mail Marketing Database maintained by any Defendant Cigarette Manufacturer. Each brochure shall be mailed during the two week period following the periods when package onserts are required pursuant to Section IV.E.3. The formatted statements shall be mailed without any additional documents or material.

c. Each of the 12 bi-monthly onserts created pursuant to Section IV.E.3.a of this Final Judgment and Order shall also be designed by appropriate consultants retained by the IO for Countertop Display and Header Display at retail point-of-sale. Each Defendant Cigarette Manufacturer that utilizes a Retail Merchandising Program shall require retailers who participate in the program to display each bi-monthly Countertop Display in a position of prominent visibility for the entire two month period, until it is replaced by the subsequent bi-monthly Countertop Display during the 24 month duration of this requirement. Each Defendant Cigarette Manufacturer that

utilizes a Retail Merchandising Program shall require retailers who participate in the program to display each Header Display in an equivalent position with any brand advertising header for the entire period on the same schedule, whether monthly or quarterly, that any brand advertising header is utilized. The Header Display shall be at least of equivalent size as any brand advertising header or headers provided by Defendant Cigarette Manufacturers. Each Defendant Cigarette Manufacturer shall suspend from its Retail Merchandising Program for a period of one year any retailer that fails to comply with this provision.

d. Each Defendant except American shall cause a list of each of the corrective statements identified in Section IV.E.4 of this agreement to appear as a full page advertisement in the first section of the Sunday edition of each of the following newspapers: Atlanta Journal-Constitution. Boston Globe, Boston Herald, Charlotte Observer, Chicago Sun Times, Chicago Tribune, Dallas Morning News, Florida Times Union, Fresno Bee, Ft. Worth Star-Telegram, Houston Chronicle, Los Angleles Times, Miami Herald, New York Daily News, New York Post, New York Sun, New York Times, Orlando Sentinel, Palm Beach Post, Philadelphia Inquirer, Richmond Times-Dispatch, Sacramento Bee, San Diego Union-Tribune, San Francisco Chronicle, St. Petersburg Times, Tallahassee Democrat, USA Today, Washington Post, LA Eastern Group Publications, San Francisco La Oferta Review/El Vistaz-Combo, NAHP, Chicago

Lawndale Group News, NAHP, Houston – Que Onda! Statements published in Spanish-language newspapers shall appear in Spanish. The statements shall identify the Defendant making the corrective communications and state that the Defendant "admits the following." Corrective communications shall otherwise appear exactly as contained in Attachment B to this Final Judgment and Order or otherwise required by the IO, without any additional text or explanation. Full page advertisements shall be placed by Defendants on the following schedule:

(i) Altria: the Sunday edition on the 8th Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 8th Friday following the date of this Final Judgment and Order.

(ii) BATCo: the Sunday edition on the 12th Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 12th Friday following the date of this Final Judgment and Order.

(iii) B&W: the Sunday edition on the 16th Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 16th Friday following the date of this Final Judgment and Order.

(iv) CTR: the Sunday edition on the 20th Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 20th Friday following the date of this Final Judgment and Order.

(v) Liggett: the Sunday edition on the 24th Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 24th Friday following the date of this Final Judgment and Order.

(vi) Lorillard: the Sunday edition on the 28th Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 28th Friday following the date of this Final Judgment and Order.

(vii) Philip Morris: the Sunday edition on the 32nd Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 32nd Friday following the date of this Final Judgment and Order.

(viii) R. J. Reynolds: the Sunday edition on the 36th Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 36th Friday following the date of this Final Judgment and Order.

(ix) TI: the Sunday edition on the 40th Sunday following the date of this Final Judgment and Order, except that for any newspaper that does not have a Sunday edition at the time that publication of the corrective statements is required, the corrective statements shall be published in the first section of the Friday edition on the 40th Friday following the date of this Final Judgment and Order.

F. Document Disclosure

1. Defendants Philip Morris, R.J. Reynolds, Lorillard, Brown & Williamson, CTR, and TI will maintain Internet Document Websites until June 30, 2030 at their expense. These Defendants shall maintain on their Internet Document Websites the documents and bibliographic information that currently appear on their respective Internet Document Websites as well as the additional documents and bibliographic information described below. These Defendants shall provide links to their Internet Document Websites from any and all publicly-accessible company websites.

2. Defendants BATCo and Liggett shall create and maintain at their expense Internet Document Websites until June 30, 2030. The BATCo and Liggett Internet Document Websites shall be created and publicly accessible no later than 60 days from the date of this Final Judgment and Order. BATCo and Liggett shall provide links to their Internet Document Websites from any and all publicly-accessible company websites.

3. Defendants shall add documents and bibliographic data to the websites as follows:

a. Defendants shall add the following additional documents: (1) all documents produced to the United States in this action; (2) all documents produced on or after the date of this Final Judgment and Order in any court or administrative action in the United States concerning smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous cigarette research; (3) all transcripts of depositions and letter of request testimony (with corresponding exhibits if not already on the website) given by any of their current or former employees, officers, directors, corporate designees, attorneys or agents, in this action or in any court or administrative action in the United States concerning smoking and health, marketing, addiction, low-tar or low-nicotine cigarettes, or less hazardous cigarette research; such transcripts shall be in machine-readable text if received or available from the court reporter; and (4) Disaggregated Marketing Data, including Disaggregated Expenditure Data and Disaggregated Sales Data (see Section IV.F.7, infra). Philip Morris shall provide on its website all such documents produced by, pertaining to, or concerning Altria.

b. Defendants shall add these additional documents (and data newly required by this Final Judgment and Order) to their respective Internet Document Websites within 45 days of the date of production, in the case of documents; within 45 days of receipt of the transcript, in the case of depositions and letter of request testimony; within 45 days of the effective

date of this Final Judgment and Order in the case of existing Disaggregated Marketing Data; and within 45 days of the end of each calendar year for Disaggregated Marketing Data required to be disclosed in the future (see Section IV.F.7, infra). These requirements are subject to Section IV.F.8 concerning documents under court order or ruling.

c. Each Internet Document Website shall provide, and be searchable by, the following bibliographic fields for all documents (no matter whether images are provided or are withheld on grounds of privilege or confidentiality):

(i) Document ID

(ii) Master ID

(iii) Other Number

(iv) Document Date

(v) Primary Type

(vi) Other Type

(vii) Person Attending

(viii) Person Noted

(ix) Person Author

(x) Person Recipient

(xi) Person Copied

(xii) Person Mentioned

(xiii) Organization Author

(xiv) Organization Recipient

(xv) Organization Copied

(xvi) Organization Mentioned

(xvii) Organization Attending

(xviii) Organization Noted

(xix) Physical Attachment 1

(xx) Physical Attachment 2

(xxi) Characteristics

(xxii) File Name

(xxiii) Site

(xxiv) Area

(xxv) Verbatim Title

(xxvi) Old Brand

(xxvii) Primary Brand

(xxviii) Mentioned Brand

(xxix) Page Count

(xxx) Live hyperlink to document image (except where image is withheld)

(xxxi) Court or administrative action in which document was produced or transcript taken, including case title(s), action number(s), court(s) or administrative body(ies)

(xxxii) Date on which document was produced or transcript was received

(xxxiii) Date hard copy was produced to Minnesota Depository

(xxxiv) Box number in which hard copy was produced to Minnesota Depository

In addition, defendant BATCo's bibliographic fields shall include the File Number, File Owner, and File User fields that it used in this action, and its website shall identify the Folder Number prefixes.

d. The Internet Document Websites shall also provide, and be searchable by, the above fields for documents withheld from the website on grounds of privilege ("the privilege log"), and for documents withheld from the website on grounds that they contain trade secret information ("the confidential document index"). Each Internet Document Website's privilege log shall also provide fields stating the basis for the privilege assertion with sufficient detail to allow an opposing party, the IO, the IHO, or the Court to assess the soundness of the assertion; and, similar to Order #51, ¶ III.G.9 in this action, a statement of whether the claimed privilege has ever been (i) expressly waived, or (ii) ruled waived, invalid, inapplicable or unenforceable for any reason by a court, with a specification of the case title(s), action number(s), court(s), date(s) of waiver or decision, and Document ID(s) for such waivers, orders and decisions. Each Internet Document Website shall provide a copy of all

such waivers, orders and decisions (and underlying judicial materials such as magistrate judge reports and recommendations). Defendants may withhold the title of documents withheld on grounds of privilege if the document title, without reference to the document's contents, reveals privileged information, with the restriction that the title must be provided where a Defendant has previously waived privilege over the document title, e.g., pursuant to Order #75, ¶ 8 in this action.

e. Each Internet Document Website shall provide a glossary that identifies, and is searchable by, the persons referred to in its privilege log and its confidential document index, by name and relationship to the parties in the relevant actions.

f. Each Internet Document Website shall provide its bibliographic data index, privilege log, confidential document index, and glossary in a format suitable for downloading (e.g., comma separated value (CSV) file, compressed in a ZIP or similar format). In addition, monthly update files shall be provided in a format suitable for downloading, and shall be maintained on the website for 12 months.

5. Defendants Philip Morris, R.J. Reynolds, Lorillard, Brown & Williamson, CTR, TI, BATCo, and Liggett shall, at their expense, produce documents to the Minnesota Depository created in Minnesota v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct.), or its successor, as follows:

a. These defendants shall produce to the Minnesota Depository hard copies of all documents described in Section IV.F.3.a.

b. These documents shall be produced to the Minnesota Depository within 30 days of being produced in the pertinent litigation or administrative proceeding (or received from the court reporter). This requirement is subject to Section IV.F.8 below concerning documents under court order or ruling.

c. Each production of documents to the Minnesota Depository shall include an index of the documents produced in that production, with the fields specified in Section IV.B.3.c, in both hard copy and electronic form.

d. Defendants shall continue to fund and produce documents to the Minnesota Depository until June 30, 2030.

6. A Defendant may redact from a document placed on its Internet Document Website or produced to the Minnesota Depository individual Social Security numbers, home addresses, and home telephone numbers. Such redactions shall indicate that confidential personal information has been redacted. Wherever less than the entirety of a document is subject to a claim of privilege or trade secret pursuant to Section IV.F.8 below, Defendants shall produce the document in redacted form on their Internet Document Website and to the Minnesota Depository. Such redactions shall indicate that privileged or trade secret information, as pertinent, has been redacted.

7. Disclosure of Disaggregated Marketing Data.

a. Each Defendant Cigarette Manufacturer shall be required to disclose all Disaggregated Marketing Data on its Internet document website.

b. All Disaggregated Marketing Data for the period 1971-2004 shall be placed on each Defendant Cigarette Manufacturer's respective Internet document website within 45 days of the effective date of this Final Judgment and Order.

c. Disaggregated Marketing Data for 2005 shall be placed on each Defendant Cigarette Manufacturer's respective Internet document website by the later of February 14, 2006 or 45 days from the effective date of this Final Judgment and Order.

d. Disaggregated Marketing Data for subsequent years (2006-2029) shall be placed on each Defendant Cigarette Manufacturer's Internet Document website annually by February 14 of each following year. For example, Disaggregated Marketing Data for 2006 shall be placed on each Defendant Cigarette Manufacturer's respective Internet document website no later than February 14, 2007.

e. Disaggregated Marketing Data shall be accessible via a direct link from the entry page, or home page, of each Defendant's respective Internet document website.

f. Disaggregated Marketing Data shall be maintained in the databases and formats maintained by Defendants, and all reports generated from such

Disaggregated Marketing Data shall be made available on each Defendant Cigarette Manufacturer's respective Internet document website.

g. In addition, each year's Disaggregated Marketing Data shall be separately maintained in a format suitable for downloading (e.g., comma separated value (CSV) file, compressed in a ZIP or similar format). All data fields shall be specified.

8. This Final Judgment and Order does not require any Defendant to place on its Internet Document Website or in the Minnesota Depository documents that: (1) it continues to claim to be privileged or a trade secret in the document's entirety, or (2) continue to be subject in the document's entirety to any protective order, sealing order or other order or ruling that prevents or limits the pertinent Defendant from disclosing such documents. As in Order #36, a "trade secret" is defined as information, including a formula, pattern, compilation, program, device, method, technique or process that (a) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure and use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. However, the foregoing exceptions shall not apply to documents which a Defendant continues to claim to be privileged but which this Court ordered produced in this action; and shall not apply to documents which a Defendant continues to claim to be trade secret or contain confidential or proprietary business information, or which continue to be subject to any protective order, sealing order or other order or ruling that prevents or limits the pertinent Defendant from disclosing such documents, if this Court overruled such

assertions and/or the pertinent Defendant did not make such assertions to prevent the documents from being used in open court during this action.

9. The foregoing provision shall not limit the right of the IO, IHO, the United States Department of Justice or the District Court to inspect and copy any of Defendants' documents pursuant to any of the provisions of this Final Judgment and Order, including documents that a Defendant claims to contain a trade secret or proprietary business information, or continue to be subject to any protective order, sealing order or other order or ruling that prevents or limits a Defendant from disclosing such documents; except that this provision shall not apply to any document over which a Defendant maintains a legitimate claim of privilege. Such documents may be reviewed only by the Independent Hearing Officer or the District Court in camera.

10. Because the economic value of many trade secrets substantially declines with the passage of time, Defendants shall review all trade secret assertions every three years to determine whether they still satisfy the definition of trade secret in Section IV.F.8. The first review shall be complete within 1 year of this Final Judgment and Order.

G. Review of Business Policies and Practices

1. The IO shall review the business policies, practices and operations of each Defendant other than CTR and TI to recommend procedures and measures that will facilitate or otherwise assist in accomplishing the remedial purposes of the Final Judgment and Order and/or relief, including but not limited to:

   a. Eliminating economic incentives for defendants to sell cigarettes to Youth.

b. Changing compensation and promotion policies for managers and executives to produce outcomes inconsistent with misconduct.

c. Requiring subcontracting of certain research to independent third parties monitored by the Court, in the event that the IO finds that research activities are being undertaken and/or promoted for purposes prohibited by Section V of this Final Judgment and Order.

d. Requiring Defendants to divest intact their research and development, current product development activities, and all other relevant material regarding less hazardous cigarettes so that less hazardous cigarettes can be brought to the marketplace.

e. Requiring the institution of programs to educate managers in such a way to address bias in decision making.

f. Creating internal mechanisms for employees, agents and contractors to report misconduct without fear of retribution.

g. Changing oversight and reporting arrangements to produce outcomes inconsistent with misconduct.

2. The IO shall conclude his or her review and make recommendations within 180 days of the Final Judgment and Order. Any recommendations shall be made pursuant to the provisions governing the filing of a complaint or Final Order by the IO in Section VI of this Final Judgment and Order.

3. The IO shall monitor Defendants' business policies, practices and operations following the conclusion of the initial review and presentation of recommendations and when appropriate shall make additional recommendations.

V. Prohibited Practices

All Defendants, Covered Persons and Entities are permanently enjoined from:

1. Committing any act of racketeering, as defined in 18 U.S.C. § 1961(1) relating in any way to the manufacturing, marketing, promotion, health consequences or sale of cigarettes in the United States.

2. Participating in any way, directly or indirectly, in the management and/or control of any of the affairs of CTR, TI or The Center for Indoor Air Research ("CIAR"), or any successor entities of CTR, TI or CIAR, or other entity affiliated with CTR, TI or CIAR, known to the Defendant, Covered Person or Entity to be engaged in any act of racketeering, and from having any dealings about any matter that relates directly or indirectly to the management and/or control of CTR, TI or CIAR or any successor or affiliated entities known to them to be engaged in any act of racketeering; and from reconstituting the form or function of CTR, TI or CIAR, except that the prohibition against reconstituting the form or function of TI shall not prohibit the Defendants from engaging in lobbying activity that is otherwise permissible.

3. Making, or causing to be made in any way, any material false, misleading or deceptive statement or representation, or engaging in any public relations or marketing endeavor that misrepresents or suppresses information concerning cigarettes that is disseminated to the United States public. Such "material" statements include, but are not limited to, any matter that: (1) involves health, safety, or other areas with which a reasonable consumer of cigarettes would

be concerned, (2) a reasonable consumer would attach importance to its existence or non-existence in determining whether to purchase or smoke cigarettes, or (3) the Defendants, Covered Person or Entity making the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining whether to purchase cigarettes or to smoke cigarettes, even if a reasonable person would not so regard it. Consistent with the Court's finding of liability on the part of the Defendants, in addition to the general prohibitions set out above, Defendants are specifically prohibited from:

a. Distorting or misrepresenting any of the conclusions reached in any of the published Reports of the Surgeon General of the United States.

b. Upon publication of any Report of the Surgeon General of the United States on the Health Consequences of Smoking after the effective date of the Final Judgment and Order and for its duration, Defendants are prohibited from distorting or misrepresenting any of the conclusions reached in such Report of the Surgeon General as of its date of publication.

c. Failing to publicly disclose any information concerning an actual or potential health or safety risk with which a reasonable consumer of cigarettes would be concerned or attach importance to its existence or non-existence in determining whether to purchase or smoke cigarettes.

4. Conveying any express or implied health message or health descriptor for any cigarette brand in the brand name or on any packaging, advertising or other promotional, informational or other material. Forbidden health descriptors include the words "light," "ultra

light," "mild," "natural," and any other descriptors which reasonably could be expected to result in a consumer's believing that the cigarette brand may result in a lower risk of disease or is less hazardous than other cigarettes. Defendants are also prohibited from representing directly, indirectly or by implication, in advertising, promotional, informational or other material, public statements or by any other means, that low-tar and/or low-nicotine cigarettes may result in a lower risk of disease or are less hazardous than other cigarettes.

5. Engaging in any marketing activities which the IO finds have the effect of marketing cigarettes in a manner appealing to Youth in the United States. In addition, beginning on the date of this Final Judgment and Order:

a. No Defendant shall utilize any Price Promotion in the marketing of the top five cigarette brands smoked by Youth aged 12 to 20 as determined by the NSDUH. Defendants shall have 60 days from the issuance of a new NSDUH report to cease any Price Promotions in the marketing of any cigarette brands which enter the top five youth brands in that NSDUH report.

b. No Defendant shall be permitted to market, manufacture or distribute cigarettes in packs containing fewer than 20 cigarettes ("kiddie packs"), whether distribution is to wholesalers, retailers or any other purchaser or distributor.

c. No Defendant may engage in any Motor Sports Brand Name Sponsorship that results in exposure, by any means, of a brand name sold in the United States, whether the exposure is intended by the Defendant or not. This

restriction applies to Brand Name Sponsorships of events held in the United States and events held internationally, if the sponsorship results in exposure in the United States by any means, of a brand name sold in the United States, whether the exposure is intended by the Defendant or not. All Defendants must take commercially reasonable steps against third party activity that results in the brand name exposure described in this paragraph.

d. No Defendant may market, distribute, or offer for sale or distribution in the United States any cigarette or any component part thereof (including but not limited to the tobacco, paper, or filter), which contains a constituent (including a smoke constituent) or additive that produces a natural or artificial flavor (other than tobacco or menthol) which is a Distinguishing Flavor of the tobacco product or tobacco smoke.

6. From obstructing or otherwise interfering with the activities and duties of the court-appointed officers and their supporting personnel described in Section VI below, with the entities identified in Section IV above to administer the cessation and education programs, or with the purposes of this Final Judgment and Order.

VI. Compliance and Enforcement Procedures

A. Selection of Court Appointed Officers and Qualifications

1. The District Court shall appoint an Independent Investigations Officer ("IO") and an Independent Hearing Officer ("IHO"), described in Section VI.C and D below. The United States shall propose to the District Court three persons for each open position within 30 days of

the date of this Final Judgment and Order. The District Court shall consider the persons suggested by the United States but shall not be required to select from those who are proposed.

2. If a vacancy in either of the court-appointed positions occurs, the District Court shall notify the parties of the vacancy and the procedures set forth above in Section VI.A(1) shall apply to select a replacement.

3. The court-appointed officers shall be highly qualified attorneys with substantial judicial, government, or private sector experience and be free of any conflict of interest.

4. The IO (and any attorneys on his or her staff) shall be subject to the D.C. Rules of Professional Conduct, including their conflict of interest rules (Rules 1.7 to 1.11). The IHO shall be subject to the Code of Conduct for United States Judges to same the extent as a judge pro tempore (discussed in "Compliance with the Code of Conduct," Section B), including its conflict of interest rules (Canon 3C). The IHO's staff shall be subject to the Code of Conduct for Judicial Employees of the U.S. Judicial Conference, including its conflict of interest rules (Canon 3F).

B. Duration of Authority

The authority of the court-appointed officers referenced above shall continue throughout the period of enforcement of the Final Judgment and Order, or until further order of the District Court.

C. Authority of the Independent Investigations Officer

1. The court-appointed Independent Investigations Officer (hereinafter "IO") shall have the authority and duty to supervise the implementation of the court-ordered relief (hereinafter "relief"), including, but not limited to, the following:

a. To hire and/or retain personnel, including attorneys, investigators, accountants, consultants, experts, including but not limited to scientific or marketing experts, or any other personnel reasonably necessary to assist the IO in carrying out his or her duties and responsibilities pursuant to the Final Judgment and Order.

b. Pursuant to the procedures set forth below in Section VI.E, to investigate, bring charges and seek remedies and sanctions against any Defendant, Covered Person or Entity for any violation of the IO's Final Orders or any violation of the Final Judgment and Order, or obstructing or otherwise interfering with the court-appointed officers' execution of their duties and authority.

c. To investigate, bring charges and seek remedies and sanctions for any violation by any entity or person receiving funds pursuant to the Final Judgment and Order, of the Final Judgment and Order, or for any violation of the conditions placed on the use of the funds, or obstructing or otherwise interfering with the court-appointed officers' execution of their duties and authority.

d. To have complete and unfettered access to, and the right, upon reasonable notice to the person or entity involved, to inspect and/or copy any and all books, records, accounts, correspondence, files and other documents (including electronic documents), and to test or sample any tangible things in the possession, custody or control of any Defendant, Covered Person or

Entity, or any person receiving funds pursuant to the Final Judgment and Order; and shall have authority to enter upon any land, property, or other premises in the possession or control of any Defendant or any person receiving funds pursuant to the Final Judgment and Order for purposes of carrying out his or her responsibilities under the Final Judgment and Order. The IO shall have the authority to interview current or former directors, officers, agents (including attorneys), servants, representatives or employees of any Defendant, or of any entity or person receiving funds pursuant to this Final Judgment and Order. Upon reasonable notice, the IO may compel the sworn statement or oral deposition of any current director, officer, agent (including attorneys), servant, representative or employee of any Defendant, or of any entity or person receiving funds pursuant to the Final Judgment and Order.

e. The IO shall have the same subpoena power as a party to an action in the District Court, including 28 U.S.C. § 1783. The IO shall not have the right to take and compel the sworn statement or oral deposition or to subpoena any agent (including attorney), servant, representative or employee of the United States, or to inspect, copy or subpoena books, records, accounts, correspondence, files and other documents (including electronic documents) in the possession, custody or control of the United States.

f. To monitor advertising, other marketing practices and marketing transactions and statements of the Defendants disseminated to the public

in the United States, and, pursuant to the procedures set forth below in Section VI.E., to issue Final Orders prohibiting the continuation of any such advertising, other marketing practices, or statements, and/or to rescind any such marketing transactions which the IO determines are violative of any provision of the Final Judgment and Order or the relief specified herein; and where appropriate to seek sanctions for such conduct. The IO is not responsible for previewing or pre-clearing Defendants' advertising, marketing practices, marketing transactions, or statements disseminated to the public before they are made.

g. To attend any meeting of senior management or of directors of any Defendants.

h. To recommend removal of any officer, employee or other member of senior management of any Defendant who was found after due notice and an adjudicatory proceeding pursuant to Section VI.E, or by default, to have acted in concert with one or more named Defendants in committing a civil RICO violation, or the person was found, after due notice and an adjudicatory proceeding pursuant to Section VI.E, or by default, to have violated a provision of this Final Judgment and Order.

i. To review the operations of each entity receiving funds pursuant to Sections IV.B and IV.C of the Final Judgment and Order and to recommend procedures and measures that would facilitate or otherwise assist in accomplishing the purposes of the Final Judgment and Order.

j. To retain an independent auditor or auditors to perform audits, on reasonable notice to the person or entity to be audited, upon the books and records of any Defendant and any entity and person funded pursuant to the Final Judgment and Order except the United States, to assist the IO in carrying out his or her responsibilities under the Final Judgment and Order.

k. To request, but not require, the United States Department of Justice to provide legal assistance in the execution of the IO's duties and responsibilities, and to refer any matter to the United States Department of Justice for appropriate action.

l. To take any appropriate measure, including initiating or defending a lawsuit, to enforce Sections VI.C.1.d and VI.C.1.e above.

m. To recommend sanctions against any Defendant, Covered Person or Entity for any violation of this Final Judgment and Order or to impose sanctions as part of any Final Order. Sanctions may include fines, which may but need not be imposed as a daily fine for each day until the Defendant, Covered Person or Entity comes into full compliance with the IO's Final Order described above. There shall be no limit to a fine, so long as it is not grossly disproportionate to the violations addressed, except that where penalties for violations are specifically set out in Section IV.B and IV.D, the specified penalties shall apply.

2. Every four months, the IO shall submit to the District Court and all the parties a written status report documenting the IO's activities and the progress being made towards implementing the Final Judgment and Order.

3. The public shall have access to the IO's written status reports, except that the IO may submit portions of his or status reports under seal where appropriate.

4. The IO shall have the authority, with notice to the parties, to apply to the District Court to take any and all other actions that are necessary and proper to perform his or her responsibilities under the Final Judgment and Order.

D. Authority of the Independent Hearing Officer

1. The Independent Hearing Officer ("IHO") shall have the authority to adjudicate, pursuant to the procedures set forth in Section VI.E. below, any complaint brought by the IO or Final Order addressing an alleged violation of the Final Judgment and Order, or any dispute arising under or related to any of the IO's recommendations made pursuant to Sections VI.C.1.h or VI.C.1.i.

2. The IHO shall have the authority to hire and/or retain personnel as reasonably necessary to assist the IHO in carrying out his or her duties and responsibilities pursuant to the Final Judgment and Order.

E. Procedural Rules

1. Notice of Intent to File Complaint or Final Order Concerning a Defendant, Covered Person or Entity

   a. Prior to filing a written complaint or Final Order, the IO shall give pre-filing written notice as set forth below. The IO shall provide the

Defendant, Covered Person or Entity (and the United States Liaison) written notice of his or her intent to file a written complaint alleging that a Defendant, Covered Person or Entity has (1) violated any provision of the Final Judgment and Order, or (2) failed to implement a recommendation made pursuant to Section VI.C.1.h. The IO shall also provide the Defendant, Covered Person or Entity (and the United States Liaison) written notice of his or her intent to issue a Final Order prohibiting or rescinding any matter proscribed under Section VI.C.1.f above. The pre-filing notice will specify any sanction that the IO intends to seek in the written complaint or Final Order. No pre-filing notice is required if the IO determines that the claimed violation involves a willful or intentional violation of the Final Judgment and Order.

b. The Defendant, Covered Person or Entity shall have fourteen (14) days from service of the pre-filing notice to remedy or correct all of the alleged defects.

c. Upon expiration of the 14-day period, if the IO concludes, in his or her sole discretion, that the Defendant, Covered Person or Entity has failed to take satisfactory action to remedy the defects specified in the IO's pre-filing Notice, the IO shall promptly serve upon the Defendant, Covered Person or Entity a written complaint alleging a violation of the Final Judgment and Order or failure to implement a recommendation made pursuant to Section VI.C.1.h, or a written Final Order prohibiting or

rescinding specified conduct pursuant to Section VI.C.1.f (and serve a copy upon the United States Liaison). Any written complaint or Final Order shall specify any fine or sanction that the IO seeks. Any fine or sanction shall not be grossly disproportionate to the violations addressed.

d. If upon expiration of the 14-day period, the IO concludes, in his or her sole discretion, that the Covered Person or Entity has taken satisfactory action to remedy the defects specified in the IO's Notice, the IO shall promptly serve upon the Defendant, Covered Person or Entity and the United States Liaison notice of the IO's conclusion. In that event, the United States may seek any relief it believes is appropriate from the IHO with notice to affected parties. Nothing in these procedural rules shall preclude the United States from exercising any enforcement action it deems necessary to effectuate the terms of the Final Judgment and Order.

2. Notice of Intent to File Complaint Against Entity Receiving Funding Pursuant to Section IV.B or IV.C for Failure to Implement a Recommendation Pursuant to Section VI.C.1.i

a. Prior to filing a written complaint alleging that an entity receiving funds pursuant to Section IV.B or IV.C has failed to implement a recommendation made pursuant to Section VI.C.1.i, the IO shall provide the entity with written notice of his or her intent to take such action and a brief explanation of the basis for such action (and shall serve a copy upon the United States Liaison).

b. An entity receiving funding pursuant to Section IV.B or IV.C shall have twenty-one (21) days from service of such written notice of the IO's intent to remedy or correct the alleged failure to implement a recommendation set forth in said notice.

c. Upon expiration of the 21-day period, if the IO concludes, in his or her sole discretion, that the entity receiving funding pursuant to Section IV.B or IV.C has failed to remedy or correct the alleged failure to implement the recommendation made pursuant to Section VI.C.1.i, the IO shall promptly serve upon the entity receiving funding pursuant to Section IV.B or IV.C a written complaint alleging failure to implement a recommendation made pursuant to Section VI.C.1.i (and serve a copy upon the United States Liaison).

d. If upon expiration of the 21-day period, the IO concludes, in his or her sole discretion, that the entity receiving funding pursuant to Section IV.B or IV.C has taken or proposed satisfactory action to remedy the defects specified in the IO's Notice, the IO shall promptly serve upon the entity receiving funding pursuant to Section IV.B or IV.C (and the United States Liaison) notice of the IO's conclusion.

3. The charged Defendant, Covered Person or Entity, or entity receiving funding pursuant to Section IV.B or IV.C shall have 14 days to submit a written response to the IO's written complaint or Final Order. Failure to file a timely response shall constitute waiver of the right to respond and shall result in the application of sanctions pursuant to Section VI.E.6 below.

4. Hearing Procedures. When a charged Defendant, Covered Person or Entity or entity receiving funds pursuant to Section IV.B or IV.C contests an IO's written complaint or Final Order, the IHO shall conduct a hearing no later than 45 days following the response to the written complaint or Final Order. The following procedures shall be followed:

a. A fair and impartial hearing shall be conducted before the Independent Hearing Officer.

b. The charged Defendant, Covered Person or Entity or entity receiving funds pursuant to Section IV.B or IV.C is entitled to pre-hearing disclosure of the exhibits to be used at the hearing by the IO and statements of witnesses relevant to the charges in the possession of the IO; the IO is entitled to reciprocal disclosure of the same matters prior to the hearing.

c. The charged Defendant, Covered Person or Entity or entity receiving funds pursuant to Section IV.B or IV.C may be represented by counsel.

d. A hearing shall be conducted in a courtroom-like manner at a location designated by the IHO. If the hearing is an evidentiary hearing, the rules of evidence do not apply, and reliable hearsay, depositions and affidavits are admissible. Documents admitted in evidence shall be marked and made part of the record. Testimony in an evidentiary hearing shall be under oath. Questioning in an evidentiary hearing shall occur through direct and cross-examination. All hearings shall be transcribed by a certifed court reporter, and a transcript of the hearing shall be filed with the IHO for inclusion in the record. Objections and motions during a

hearing shall be made and ruled upon according to normal courtroom procedures in federal courts. Nothing herein shall prohibit the IHO from deciding contested matters by summary disposition on written or oral argument from the parties.

e. The IHO shall have the authority to issue subpoenas, with nationwide service of process pursuant to 18 U.S.C. § 1965(c), sua sponte or at the request of the charged Defendant, Covered Person or Entity or entity receiving funding under Section IV.B. or IV.C, from this Court under this case name and number to any person or entity, including non-parties, for the purpose of compelling testimony and requiring the production of books, papers, records or other tangible objects at hearings conducted by the IHO. The IO is authorized to issue subpoenas in connection with hearings before the IHO with nationwide service of process pursuant to 18 U.S.C. § 1965(c), for the same purposes. The Court specifically finds that in order to ensure the just and expedient enforcement of this Final Judgment and Order, good cause exists for granting to the IO and the IHO the foregoing authority to issue subpoenas pursuant to 18 U.S.C. § 1965(c).

f. The IHO may receive and consider, attaching such weight as he or she deems appropriate, the sworn testimony of any law enforcement officer regarding information given to a law enforcement agency by a reliable

confidential source of information. In no instance shall such officer be required to reveal the identity of the confidential source of information.

g. The IO bears the burden of proving by a preponderance of the evidence any alleged violation of the Final Judgment and Order, entitlement to a Final Order, or failure to implement a recommendation.

h. The IHO may require briefs and arguments on questions that arise during the hearing.

i. The IHO shall render a written decision within 45 days of the conclusion of the hearing and shall file and serve a copy on all parties, any affected Covered Person or Entity, any relevant entity receiving funding under Section IV.B or IV.C, and the IO. The IHO's decision shall be publicly accessible, except for any portions that are placed under seal. In his or her written decision, the IHO may impose an additional fine as a sanction above and beyond any sought or imposed by the IO pursuant to Section VI.C.1.m or VI.E.1.a. Fines shall not be grossly disproportionate to the violations addressed.

n. The IHO's written decision shall be final and binding on the parties, subject to review by the District Court as set forth below in Section VI.F.

5. Pleadings and Other Written Submissions. All pleadings regarding any matter before the IHO, including but not limited to written complaints, Final Orders, motions, and briefs, shall be filed with the District Court. The case caption in written submissions in matters before the IHO shall clearly indicate, directly beneath the case number, "[Referred to

Independent Hearing Officer]". Copies of all pleadings shall be served on opposing parties, the IO, and the United States Liaison.

6. Additional Procedural Rules. The IHO may issue additional procedural rules governing hearings and submissions before the IHO not inconsistent with any provision of the Final Judgment and Order.

F. District Court Review of Decisions of the Independent Hearing Officer and Appeals

1. The District Court shall have exclusive jurisdiction to review any final decision or Final Order of the IHO and shall apply the same standard of review applicable to final federal agency action under the Administrative Procedure Act. See 5 U.S.C. §§ 701, et seq.

2. Any charged Defendant, Covered Person or Entity, or entity receiving funding pursuant to Section IV.B or IV.C that is aggrieved by an adverse final decision or Final Order of the Independent Hearing Officer may take an appeal to the District Court from an adverse final decision or Final Order of the Independent Hearing Officer by filing a written notice of objection (with service to the parties involved in the hearing, the United States Liaison, the IO and the IHO) with the District Court within 10 days after the decision or order appealed from is entered. The IO or the United States may take an appeal to the District Court from any final decision or Final Order of the IHO by following the same procedure.

3. The District Court shall have the sole discretion to determine additional procedures governing such objections.

4. Any appeal or further review of a decision by the District Court regarding its review of a final decision or Final Order of the IHO shall be as permitted by law.

G. Funding of the Court-Appointed Officers and Related Costs

1. The Defendants shall bear the entire cost of the activities of the court-appointed officers described above and their staffs and any person acting on their behalf.

2. Once every three months the IO and the IHO shall file with the District Court (and serve on the United States Liaison and each Defendant's Compliance Officer described below in Section VI.I and J) an application for payment, including an itemized bill for their services and expenses with supporting material.

3. Each Defendant and the United States shall then have fourteen (14) days following receipt of the above application for payment in which to contest the bill before the District Court. The party contesting the bill has the burden of establishing that the challenged expense is unreasonable. The District Court may uphold, modify or reject the payment of the expense. If the District Court determines that a pattern of unreasonable challenges to expenses has developed, the District Court may limit the offending party's right to challenge expenditures. If no party has contested the expenditure upon expiration of the 14-day period, the expenditure (or any part that has not been contested) shall be paid by Defendants.

4. To provide for adequate funding of the enforcement of this Final Judgment and Order, the Defendants shall deposit $10,000,000 into an account subject to control of the IO within five days of the appointment of the IO and Defendants shall maintain at least $5,000,000 on deposit thereafter. The IO will thereafter be responsible, subject to the District Court's review set forth above, for allocating payments to all persons or entities entitled to compensation and payment.

H. Indemnification

The Defendants shall purchase a policy of insurance and/or bonds in an appropriate amount to protect the court-appointed officers and any person hired by or acting on their behalf from personal liability for any of their actions pursuant to the Final Judgment and Order. If such insurance is not available, or if the Defendants so elect, the Defendants shall indemnify the court-appointed officers, and any person hired by or acting on their behalf from personal liability (and costs incurred to defend against any claim of liability) for any of their actions taken pursuant to this Final Judgment and Order. In addition, the court-appointed officers, and any person hired by or acting on their behalf, shall enjoy whatever immunity from personal liability may exist under the law for court officers.

I. Immunity of Court-Appointed Officers from Subpoena

The court-appointed officers shall be immune from subpoena by any Defendant, Covered Person or Entity. The court-appointed officers shall not respond to any subpoenas or requests for information about the performance of their assigned duties action, or disclose such information voluntarily, without leave of the District Court.

J. Designation of Defendants' Compliance Officers

1. Each Defendant, except for CTR and TI, shall designate, within 30 days of entry of this Final Judgment and Order, an internal Compliance Officer who shall be an employee of the Defendant with responsibility for ensuring compliance with this Final Judgment and Order. The position of Defendant's Compliance Officer shall be maintained throughout the duration of the enforcement of the Final Judgment and Order, until further order of the District Court. If there is any change to the identity of a Defendant's Compliance Officer, the Defendant must file

a notice of the change with the District Court, with service on all parties, within 7 days of the change. Any vacancy in the position must be filled within 7 days.

2. Each Defendant's Compliance Officer shall supervise that Defendant's activities to ensure that the Defendant complies with this Final Judgment and Order.

3. Each Compliance Officer shall be responsible for performing the following activities:

a. Within 30 days after entry of this Final Judgment and Order, distributing a copy of the Final Judgment and Order to all officers, directors and senior managers of the respective Defendant.

b. Promptly distributing a copy of this Final Judgment and Order to any person who succeeds to a position described in Section VI.J.3.a above.

c. Ensuring that those persons designated in Section VI.J.3.a above are annually briefed on the meaning and requirements of this Final Judgment and Order.

d. Obtaining from each person designated in Section VI.J.3.a above an annual written, dated certification that he or she: (i) has read and agrees to abide by the terms of this Final Judgment and Order; and (ii) has been advised and understands that his or her failure to comply with this Final Judgment and Order may result in a fine, sanction, or finding of contempt of court.

e. Maintaining a record of all persons to whom a copy of this Final Judgment and Order has been distributed and from whom the certification described

in Section VI.J.3.a above has been obtained and providing the court-appointed IO and United States Liaison with a copy of the certifications.

f. Receiving periodic status reports, notices of alleged violations, filed complaints, Final Orders, applications for payments described above and any other communication from the court-appointed officers, the District Court and the United States concerning this Final Judgment and Order.

K. Designation of United States Liaison

1. Within 30 days of the entry of this Final Judgment and Order, the United States shall designate an attorney employed by the United States Department of Justice to be the Liaison with the District Court, the parties and the court-appointed officers regarding the enforcement of the Final Judgment and Order. The position of United States Liaison shall be maintained throughout the duration of the enforcement of the Final Judgment and Order, until further order of the District Court.

2. The United States Liaison shall be responsible for receiving copies of all periodic status reports, pre-filing notices of intent to issue written complaints and Final Orders, filed complaints, Final Orders, applications for payment described above and any other communication from the District Court, the court-appointed officers and the parties concerning this Final Judgment and Order and all other matters relating to the enforcement of the Final Judgment and Order.

L. Authority of the United States

1. The United States Department of Justice shall have the authority in its sole discretion to provide any assistance it deems appropriate to any of the court-appointed officers

and/or their staffs, or anyone acting on their behalf in carrying out their duties and responsibilities pursuant to the Final Judgment and Order.

2. The United States Department of Justice shall have the authority in its sole discretion to intervene or participate in any matter before the Independent Hearing Officer or the District Court or any appeal arising under or relating to the Final Judgment and Order.

3. The United States Department of Justice shall have the authority in its sole discretion to appeal any decision of the Independent Hearing Officer to the District Court and to take any appeal or further review from a decision of the District Court as permitted by law.

4. The United States Department of Justice shall have the authority to prosecute contempt for any violation of the Final Judgment and Order and any order of the District Court.

VII. Miscellaneous Provisions

A. No Third Party Rights

Nothing herein shall create or confer, or is intended to create or confer, any enforceable right, claim or benefit on the part of any person or entity other than on the parties hereto and the court-appointed officers established herein.

B. Future Actions

Nothing in this Final Judgment and Order shall preclude the United States, or any of its departments or agencies, from taking any appropriate action pursuant to any federal law or regulation, including but not limited to any criminal investigation or prosecution or civil action.

C. Cooperation

1. All Covered Persons and Entities and any entity and person receiving funds pursuant to the Final Judgment and Order shall cooperate fully with the court-appointed officers and their staffs and anyone acting on their behalf in the exercise of their duties and responsibilities pursuant to the Final Judgment and Order.

2. Whenever any party learns of any action or lawsuit in any other court that may involve a matter arising under or relating to this Final Judgment and Order, such party shall promptly notify the District Court, all other parties, and the IO of such action or lawsuit.

D. Transfer of Tobacco Brands or Businesses

No Defendant may sell or otherwise transfer or permit the sale or transfer of any of its cigarette brands, brand names, cigarette product formulas or cigarette businesses (other than a sale or transfer of cigarette brands or brand names to be sold, product formulas to be used, or cigarette businesses to be conducted, by the acquiror or transferee exclusively outside of the United States) to any person or entity unless (1) such person or entity is already a Defendant subject to this Final Judgment and Order, or (2) prior to the sale or acquisition, such person or entity (a) agrees to assume and be subrogated to the obligations contained in Section IV.D, IV.F, V and VI and to be subject to the Enforcement provisions of Section VI of this Final Judgment and Order with respect to such cigarette brands, brand names, cigarette product formulas or businesses; (b) applies to the District Court submitting to the jurisdiction of the District Court; and (c) receives an Order from the District Court subjecting such person or entity to the provisions of this Final Judgment and Order as of the date of the sale or transfer. The District Court will not enter such an Order, and the sale or transfer of any Defendants' cigarette brands,

brand names, cigarette product formulas or cigarette businesses (other than a sale or transfer of cigarette brands or brand names to be sold, product formulas to be used, or cigarette businesses to be conducted, by the acquiror or transferee exclusively outside of the United States) shall be prohibited, unless the District Court has first determined that such person or entity has the capability to comply with the obligations contained in Section IV of the Final Judgment and Order. The sale or transfer by a Defendant of any of its cigarette brands, brand names, cigarette product formulas or cigarette businesses shall not relieve the Defendant from its joint and several liability under this Final Judgment and Order.

E. Duration

1. This Final Judgment and Order shall remain in effect until further order of the District Court.

2. At the time of such further order of the District Court terminating this Final Judgment and Order, the United States may apply to the District Court for an extension of the terms of this Final Judgment and Order of up to five years as to any Defendant(s) that are subject to a finding or findings of a pattern of violations.

F. Future Claims and Criminal Actions

Defendants may not rely on the substance and/or existence of this Final Judgment and Order as a defense in civil actions. The substance and existence of this Final Judgment and Order or compliance with its terms is not a defense to any criminal prosecution against any Covered Entity or Person.

G. Authority of the District Court

Nothing in this Final Judgment and Order shall limit the inherent power and authority of the District Court.

Entered: _____

_____
Gladys Kessler
United States District Judge

ATTACHMENT A

CORRECTIVE COMMUNICATIONS

Affirmative Statement on Health Effects

SMOKING KILLS. Smoking has been scientifically proven to cause many diseases that cause enormous suffering and death, including lung cancer, heart disease, and strokes. Cigarette addiction leads approximately one half of cigarette smokers in America to die prematurely.

Smoking harms nearly every organ in your body and worsens your health in many ways. Cigarette addiction leads approximately one half of cigarette smokers in America to die prematurely, often from diseases that cause enormous suffering.

Smoking causes women to have greater difficulty becoming pregnant, causes pregnant women to have more complications during pregnancy, and increases the chance of premature birth, stillbirth, and infant mortality. Cigarette addiction leads approximately one half of cigarette smokers in America to die prematurely.

Affirmative Statements on Secondhand Smoke (ETS)

Exposure to secondhand smoke causes lung cancer, heart disease, and other serious health problems in nonsmokers. Simply separating smokers and nonsmokers in the same airspace does not provide adequate protection from the adverse health effects of exposure to secondhand smoke.

Children exposed to secondhand smoke have an increased rate of serious health problems, including asthma and otitis media (ear infections) and Sudden Infant Death Syndrome. Simply separating smokers and nonsmokers in the same airspace does not provide adequate protection from the adverse health effects of exposure to secondhand smoke.

Affirmative Statement on Addiction:

Cigarette smoking is addictive because cigarettes deliver nicotine, an addictive drug. Like crack cocaine, nicotine goes from the lungs to the brain within seconds after a puff.

Cigarette smoking is addictive because cigarettes deliver nicotine, an addictive drug. One main reason that it is so hard to quit smoking is that nicotine from cigarettes actually changes the brain to crave nicotine.

Because of nicotine, smoking is as addictive and difficult to quit as other addictive drugs, including heroin, cocaine, and alcohol.

Affirmative Statement on "Low Tar" Cigarettes

Cigarettes sold as "low tar and low nicotine," "light," or "ultra-light" are just as harmful to health as "regular," higher tar cigarettes.

Because nicotine is addictive, most "low tar" cigarette smokers smoke more intensely, take more puffs, smoke more cigarettes, or block the tiny ventilation holes in the filter, in order to get their required dose of nicotine.

Because of how they are made, smokers tend to inhale roughly the same amount of tar and nicotine from "low tar" cigarettes as they do from regular cigarettes. Smoking "low tar" cigarettes therefore does not reduce your risk of smoking-related disease.

The only way to reduce your risk of death and disease from smoking is to quit.

Corrective Statement on Youth Smoking

The vast majority of smokers begin smoking in middle or high school. Over seventy-five percent of smokers smoke their first cigarette before the age of 18. Most teenage smokers have the same symptoms of nicotine addiction as adult smokers, and want to quit smoking. The marketing of cigarettes is one of the reasons that adolescents and teenagers try smoking and become addicted to smoking.

Corrective Statement on the Effect of Marketing on Smoking Behavior

Cigarette marketing influences the smoking behavior of both young people and adults. Cigarette marketing is one of the reasons young people start and continue smoking. Among adults, cigarette marketing can encourage smokers to switch to "low tar" or "light" cigarettes, but "light" cigarettes are just as harmful to your health as regular, higher tar cigarettes. Cigarette marketing can also encourage smokers concerned about the health effects of smoking to continue smoking, rather than quitting smoking entirely.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY KANSAS DIVISION

CASE NO.: 02-2539-CM

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff ,

vs.

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

Defendants.

PLAINTIFF'S AMENDED COMPLAINT

Plaintiff MEDICAL SUPPLY CHAIN, INC. appears through its attorney, Bret D. Landrith, Esq., and submits the following amended complaint; adding a named defendant, JERRY A. GRUNDHOFER, the President and Chief Executive Officer of US BANCORP NA. The Plaintiff adds requests for declaratory relief and additional injunctive relief including supplemental state law based causes of action for Misappropriation Of Trade Secrets, Tortuous Interference With Prospective Contracts, Tortuous Interference With Contracts, Promissory Estoppel, Breach Of Contract, Fraudulent Misrepresentation, Violation Of Good

Faith And Fair Dealing. The Plaintiff adds requests for further equitable relief in the form of an urgent preliminary injunction preventing Defendant US BANCORP NA from denying the Plaintiff services, facilities and products of its financial institution under color of law through an abuse of Defendants' policing power under the US Patriot Act and against the public interest embodied in the Sherman, Clayton and Hobbs Acts prohibiting obstruction and barriers in entry to commerce. Additionally, MEDICAL SUPPLY CHAIN, INC. has amended its complaint to seek injunctive relief protecting its intellectual property and trade secrets from misappropriation under Kansas statute.

NATURE OF THE CASE

1. The Plaintiff Medical Supply Chain, Inc., (hereafter "MSCI") brings this action to seek temporary relief from the defendants US BANK, US BANCORP, NA, US BANCORP PIPER JAFFRAY, INC., JERRY A. GRUNDHOFER, ANDREW CESERE, BRIAN KABBES, LARS ANDERSON, SUSAN PAINE and UNKNOWN HEALTHCARE SUPPLIER'S (hereafter collectively referred as " Defendants") illegal acts, which have resulted in loss of property and detriment to the Plaintiff's business.

2. The Plaintiff MSCI has been harmed by the Defendants' conduct in furtherance of a common enterprise by Defendants' denial of services and facilities for hosting MSCI's escrow accounts. The Defendants with full confidential knowledge of MSCI's finances, business model, plan and proprietary business trade secrets obstructed and seek to delay MSCI's entry into commerce through the marketing of its healthcare supply chain intellectual property consisting of an educational healthcare certification program for training independent consultants and MSCI's entry into commerce through the marketing of its supply chain management and market making software. Defendant's

interference has affected MSCI's movement of these products into commerce to a severe degree.

3. Defendants own, control and broker shares of stock and bonds in healthcare industry companies MSCI has planned to compete with or rely on as suppliers. Defendants rely on the income from ownership in and services to healthcare industry companies and healthcare company officers that depend on profits derived from monopoly marketplace power. Defendants are suppliers of services to the healthcare industry and have combined to deny those services to MSCI.

4. The Plaintiff MSCI has been harmed by the Defendants' conduct in furtherance of a common enterprise as shown by Defendant employees' disclosure that the reason for Defendants' denial of services and facilities in the form of hosting escrow accounts is their required performance of duties policing accounts as federally chartered financial institutions under the federal statutory anti-money laundering requirements of the USA PATRIOT Act.

5. The Plaintiff MSCI responded to the Defendants' decision with communications to all levels of the Defendants' common enterprise explaining the reporting requirements of the US PATRIOT Act were not a burden on the escrow accounts, that the act did not apply to MSCI which was an established US BANCORP account holder and a corporation in existence for over two and a half years, currently in good standing with the Missouri Secretary of State and to which the Defendants have performed diligence on at the time it set up its corporate account under a federal tax id number and when its chief executive and sole officer opened his personal account. The Plaintiff MSCI informed the Defendants that they were in possession of the MSCI business plan, contract for certification, corporate report, certification of good standing from the Missouri Department of Revenue and a personal credit application of the chief executive

and founder, Samuel Lipari for a line of credit based on the nonrefundable portion of each certification account. MSCI informed Defendants that it had a 14 page financial application for each of the certification candidates, that all were US citizens and had provided releases for credit, financial and criminal background checks and that the funds would be wired from their personal financial institutions. The Defendants refused to reverse their denial of services and facilities in refusing to host MSCI's escrow accounts.

6. The Plaintiff MSCI on October 15th, 2002 repeated the inapplicability of the US PATRIOT Act and the failure to provide a valid or truthful reason by the Defendants for their denial of services and facilities in refusing to host MSCI's escrow accounts. The Plaintiff MSCI pointed out the inherent need to build candidate trust in MSCI exhibited by seeking the establishment of escrow accounts and that suddenly revoking US BANK as the trust entity would jeopardize the ten best independent representatives they had chosen at considerable time and expense out of hundreds of applicants. The Plaintiff MSCI explained that it was now trapped in a relationship with US Bank and could not seek escrow accounts at another bank without compounding the misunderstanding that USA PATRIOT Act requirements prevented MSCI from being entitled to escrow account services. The Plaintiff MSCI called attention to the Defendants knowledge of the magnitude of injury their obstruction and delay of MSCI's entry into commerce including the loss of hundreds of millions of dollars of revenue MSCI was depending on from its independent representatives. The Plaintiff MSCI called attention to the illegal business practices rife in the healthcare supply market space MSCI was committed to entering and reforming and that the Defendants had relationships, substantial investments in and revenue from established entities in the healthcare market, including substantial trust accounts from healthcare entities. The Plaintiff MSCI pointed out the conflict

of interest imputed by Defendants denial of service and facilities in failing to provide the escrow accounts. The Plaintiff MSCI entreated the Defendants to help in remediating damages by establishing escrow accounts for only the 10 candidates MSCI had relied upon the US Bank escrow account contract approved by the Defendants and sent 5 out before receiving notice of denial of service by the Defendants. Defendants again refused to provide escrow account services to MSCI.

7. The Plaintiff MSCI now seeks declaratory relief based on the injury suffered as a result of conduct prohibited by federal and state law and urgent injunctive relief because it continues to suffer as a result of Defendants' illegal conduct against it while MSCI attempts to remediate its injury.

8. The Plaintiff MSCI seeks urgent injunctive relief on the basis it continues to be in jeopordy of the Defendants abuse of their police power and authority under the USA PATRIOT Act in the form of false clandestine reporting that will harm MSCI as it attempts to capitalize its entry into commerce.

9. The Plaintiff MSCI seeks urgent injunctive relief on behalf of similarly situated companies without legal resources that might be discriminated against in banking services because of the ethnic or national origin of their corporate officers based on the pretextual use of USA PATRIOT Act reporting duties.

10. The Plaintiff MSCI seeks urgent injunctive relief to prevent the further harm by Defendants of MSCI's business associates and customers which are healthcare systems consisting of hospitals and long term care facilities who are dependent on a neutral electronic market place and supply mangement provider to enter a market in which they are being held hostage by corrupt healthcare product suppliers limiting their access to critical medical devices, pharmacuticals and material at the cost of human lives and countless unnecessary permanent bodily injuries. The healthsystems and hospital relying on a neutral electronic

marketplace to replace their current dependency on Group Purchasing Organizations utilizing anticompetitive business practices including kickbacks, equity exchanges of healthcare supplier corporate stock, tying and exclusive contracting are unable to jeapordize their patients and businesses out of a fear of retalliation from these distributors.

11. The Plaintiff MSCI seeks urgent injunctive relief to prevent the further harm by Defendants to MSCI through harming MSCI's business associates and customers which are information technology partners who have made significant investments, even to the point of millions of dollars in research and development in their own corporations, partially in reliance on becoming a vendor of high end supply chain strategic management services and human resources mangement services, respectively to the healthcare industry.

JURISDICTION AND VENUE

12. This Court has jurisdiction over the subject matter of the present injunctive relief sought based on federal statutes giving rise to federal civil causes of action and supplemental state law based claims for damages. The contract initiating the relationship between the parties was executed between US Bancorp and MSCI at the US Bank Office at 5730 SW 21st Street, Topeka, KS., therefore venue in this court is proper.

13. This Complaint is filed and these proceedings are instituted under the provisions of the Sherman Act and the Clayton Act.

14. This Court has jurisdiction over complaints based on Hobbs Act, The USA PATRIOT Act.

15. Jurisdiction for Medical Supply Chain, Inc. to commence this action for injunctive relief is conferred by the Clayton Act, 15 U.S.C. §§ 13 and 26 and K.S.A. 60-3321. Misappropriation of trade secret; injunctive or other protective relief

16. US BANCORP NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered in Minnesota and doing business in Kansas and other states through its wholly owned subsidiaries US BANK, PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC and US BANCORP PIPER JAFFRAY and its employees and agents: JERRY A. GRUNDHOFER ,ANDREW CESERE, SUSAN PAINE, LARS ANDERSON, BRIAN KABBES and through its ownership interest or underwriting relationship in UNKNOWN HEALTHCARE SUPPLIER.

17. The violations alleged herein have a substantial effect on interstate commerce.

18. Kansas substantive law permits an injured party to have civil remedies for criminal acts *Smith v. Welch* 265 Kan. 868.

PARTIES

PLAINTIFF:

MEDICAL SUPPLY CHAIN INC.

19. Plaintiff MSCI or MEDICAL SUPPLY CHAIN, INC., is a registered Missouri Corporation in good standing with corporate headquarters at 1300 NW Jefferson Court, Blue Springs, MO. MSCI sought to obtain escrow account services for tuition from candidates for a year long healthcare supply strategist certification program, similar to bank escrow account arrangements for tuition from students enrolled in other Missouri technical and university education programs. MSCI was forced to develop its own educational program when over a period of several years it could not convince leading US universities to offer substantial course work concerning healthcare logistics and the entire healthcare supply chain. With the exception of limited courses provided with the assistance of MSCI's associate industry experts available at Arizona State University, Wharton School of

Business and Harvard School of Business, MSCI could not find the external training it required for its independent representatives so it was forced at great expense to create a healthcare supply chain strategist certitication program which it made available to qualified consultants in healthcare and information technology with a tuition of $5000.00 for the first week of intensive introduction and orientation and $ 25,000.00 for the remaining year of instruction and healtcare supply chain practicum. These funds were to be held in individual escrow accounts at US BANCORP NA.

DEFENDANTS:

US BANCORP NA

20. Defendant US BANCORP, NA is a Bank Holding Corporation headquartered at U.S. Bancorp Center 800 Nicollet Mall , Minneapolis, MN 55402. Defendant US BANCORP, NA merged with Firststar Bank to operate banks in several states under the name US Bank. US BANCORP, NA is the parent company of the employees and subsidiaries named as Defendants. US BANCORP, NA is thought to be invested in and have maintained accounts and provided services for Defendant UNKNOWN HEALTHCARE PROVIDER. At all times during this matter, US BANCORP NA provided information about its involvement in healthcare industry companies to all employees throughout its subsidiaries through daily updates on its corporate intranet, web site and media broadcasts in addition to newsletters,employee investment account solicitations and corporate publications.

US BANK NA

21. Defendant US BANK, NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered at U.S. Bancorp Center 800 Nicollet Mall , Minneapolis, MN 55402.

PRIVATE CLIENT GROUP, CORPORATE TRUST,INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC

22. Defendant PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC. (hereafter "defendant LLC entity") is a trust subsidiary of US BANCORP NA. , headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402 doing business in several states with an office at one US Bank Plaza, St. Louis, MO and at all times relevant to this matter was the entity responsible for setting up escrow accounts for MSCI. The defendant LLC entity was represented to be independent and free standing by its Vice President Brian Kabbes.

23. Defendant LLC entity is the division of US BANCORP NA responsible for escrow accounts and trust accounts of hospitals and healthcare systems under contract with Group Purchasing Organizations responsible for limiting or obstructing market access

US BANCORP PIPER JAFFRAY, INC.

24. Defendant US BANCORP PIPER JAFFRAY, INC. is the investment banking subsidiary of US BANCORP NA. US BANCORP PIPER JAFFRAY, INC. does business in Kansas through its investment banking offices and licensed and registered securities brokers. Defendant US BANCORP PIPER JAFFRAY, INC corporate headquarters are at U.S. Bancorp Center 800 Nicollet Mall Suite 800 Minneapolis, MN 55402.

25. Defendant US BANCORP PIPER JAFFRAY, INC. has had underwriting and investment relationships with healthcare suppliers, including biotechnology producers and medical device manufacturers. Defendant US BANCORP PIPER JAFFRAY, INC. has investments in, underwritten and promoted the capitalization of biotechnology producers, including Omnicell, Inc. [i] and medical device manufacturers including Aspect Medical Systems, Inc. [ii] of Newton, MA, that

have engaged in anti competitive “sole” or “single source” contracts with health systems including Health Services Corporation of America of Cape Girardeau, MO that plea bargained a conclusion to a federal fraud investigation in 1997 [iii] and Group Purchasing Organizations held responsible for preventing competitive access to suppliers and creating unnecessary increases in healthcare supply costs [iv] including AmeriNet, Inc.[v] of St. Louis, MO., Healthtrust Purchasing Group .[vi]

26. Defendant US BANCORP PIPER JAFFRAY, INC. has underwriting and investment relationships with healthcare Group Purchasing Organizations including Novation, Inc., a healthcare GPO currently the subject of Federal Trade Commission and General Accounting Office investigations into whether it holds too much control in the market for hospital supplies.[vii] Defendant US BANCORP PIPER JAFFRAY, INC. has underwriting, promotional and investment relationships with Neoforma, Inc. an internet supply chain software and electronic marketplace similar to MSCI but which is 60% owned by the above mentioned Novation, Inc. (UHA and VHA owned shares combined as of 8/9/02) and limits supplier access. Novation used tens of millions of dollars it held in custody and trust for its hospital customers to purchase the equities in the publicly traded, money-loosing electronic commerce company, Neoforma Inc,[viii]

27. Defendant US BANCORP PIPER JAFFRAY became attracted to the profit opportunity in internet delivery of medical supplies to hospital health systems approximately 5 years after Sam Lipari started developing software to order and track medical supplies from pc computers dialing up internet connections and

exchanging data with hospital mainframe computers. In February of 2000, US BANCORP PIPER JAFFRAY released a study it had commissioned that concluded similarly to Sam Lipari's analysis that 13% of what US BANCORP PIPER JAFFRAY then estimated to be $83 billion dollars spent annually could be eliminated if supplies were purchased through the internet. US BANCORP PIPER JAFFRAY's Senior Analyst Daren Marhula estimated $23 billion of the total spent on medical supplies is pure process and procurement costs, and about half of this cost could be eliminated by ordering supplies over the Internet. Roughly half of hospital supplies, for instance, are for routine purposes, such as office, janitorial and medical items that can easily be purchased through the Internet. However, US BANCORP PIPER JAFFRAY had failed to realize the implication of strategic management when the purchaser was able to utilize artificial intelligence to optimize purchase negotiations and quantity delivery throughout the complete supply chain and backed companies with business models incapable of creating the value and cost savings of Medical Supply Chain incorporated in the same year to provide a commercial platform for Sam Lipari's research and development work.

28. The defendant US BANCORP PIPER JAFFRAY invested in, underwrote and promoted companies providing internet or web based software to help healthcare systems mange their purchasing, including Embion, Inc. (which US BANCORP PIPER JAFFRAY raised 10 million dollars for)[ix] or Centromine, to improve their service delivery. Several did not make it to the IPO stage and US BANCORP PIPER JAFFRAY has difficulty maintaining the good will of its venture

fund investors.[x] Some companies made it to the public offering stage like Eclipsys Corp to have their shares promoted and marketed for 125 million dollars by US BANCORP PIPER JAFFRAY only to fall drastically in value like upon revelation of sharply lower financial expectations then investors had been lead to believe. Now US BANCORP PIPER JAFFRAY is embroiled in numerous investor law suits for irregularities in its promotion of IPO capitalization equity shares.

29. In both healthcare supplier and healthcare electronic commerce firms, the defendant US BANCORP PIPER JAFFRAY concentrates its investments in early stage firms that partner with existing dominant healthcare suppliers and distributors. US BANCORP PIPER JAFFRAY publicizes these relationships as it solicits and promotes investment in the venture funds US BANCORP PIPER JAFFRAY uses for their capitalization. US BANCORP PIPER JAFFRAY publicized a high profile merger Eclipsys Corp with the GPO controlled Neoforma to dominate the healthcare supply electronic marketplace[xi]. Later, the merger would terminate and Eclipsys Corp and Neoforma would announce a mutual alliance to dominate online healthcare supplies utilizing their existing dominant GPO partner; Novation.[xii]The existing dominant healthcare suppliers and distributors co-opt the business model development of the healthcare electronic commerce firms into channels to push a limited sub set of products whose suppliers are allied with the established partnering firms, creating only additional dimensions to the anticompetitive market. The technology for web based supply chain management merely becomes Internet storefront faces for existing monopolistic suppliers motivated to increase costs as they do in their traditional

GPO distribution channels. Whatever potential exists in the still nascent technologies of MSCI's potential competitors like MedCenterDirect.com[xiii] (initially given 30 million dollars in early stage capital) to provide widespread cost savings and obtain high rates of adoption is subordinated by the defendant US BANCORP PIPER JAFFRAY's use of anticompetitive business practices including sole source or exclusive dealing contracts, and vertical exchange of stock ownership with established dominant suppliers, distributors and their corporate officers to inflate the value of its equity funds and offerings.

UNKNOWN HEALTHCARE ENTITY

30. Defendant UNKNOWN HEALTHCARE ENTITY is believed to be a supplier or purchasing organization who has communicated with US Bancorp NA, its employees or its subsidiaries about MSCI for the purpose of obstructing or delaying MSCI's entry into commerce. Defendant UNKNOWN HEALTHCARE ENTITY and its corporate executives and directors are assisted by US BANCORP NA in obtaining ownership shares in companies Defendant UNKNOWN HEALTHCARE ENTITY allows to enter the healthcare supply chain marketplace.

INDIVIDUAL US BANCORP EMPLOYEES

31. Defendant JERRY A. GRUNDHOFER, the President and Chief Executive Officer of US BANCORP NA and at all times relevant to this action was the controlling officer of US BANCORP NA. Defendant JERRY A. GRUNDHOFER was in communication with MSCI regarding the action of US Bank trust department in St. Louis rejecting MSCI escrow accounts and MSCI's efforts to reverse or remidiate the decision. Defendant JERRY A. GRUNDHOFER directly supervised Defendant ANDREW CESERE. Defendant JERRY A.

GRUNDHOFER acquired Piper Jaffray and renamed the subsidiary US BANCORP PIPER JAFFRAY and oversaw the units anticompetitive business practices, including setting revenue goals and providing finincing and guarantees for US BANCORP PIPER JAFFRAY healthcare supplier and distribution integration and combination. Defendant JERRY A. GRUNDHOFER refused to review the decision to deny services and critical facilities to MSCI or to participate in a fact finding effort to clear up the problem without litigation.

32. Defendant ANDREW CESERE is identified as Vice Chairman of US Bancorp trust division by the US Bank website and at all times relevant to this action was a senior controlling officer of US BANCORP in communication with the US Bank trust department in St. Louis regarding the acceptance of MSCI escrow accounts and MSCI's efforts to reverse or remidiate the decision. Defendant ANDREW CESERE would not take calls or return them form Plaintiff MSCI. Defendant ANDREW CESERE directed LARS ANDERSON, SUSAN PAINE and BRIAN KABBES not to reverse their decision on MSCI and not to perform the required dilligence on MSCI to meet the standard of expectation of providing a professional service or their duties under the USA PATRIOT Act.

33. Defendant SUSAN PAINE is the supervisor for US BANK's St. Louis, MO corporate trust offfice. SUSAN PAINE was identified by Defendant Brian Kabbes as being present during a conference call where Plaintiff MSCI sought to reverse or remediate the damages from Defendants and in which Defendants expressed their disturbance that MSCI had contacted the corporate headquarters of US BANCORP NA about the problem with setting up escrow accounts.

34. Defendant LARS ANDERSON was identified to MSCI as the new customer acquistion manger for US BANK's St. Louis, MO corporate trust offfice by Defendant BRIAN KABBES. Defendant LARS ANDERSON stated he made the decision not to provide escrow account services to MSCI.

35. Defendant BRIAN KABBES identified himself as Vice President of Corporate Trusts for US BANK. Plaintiff MSCI was referred to Brian Kabbes for escrow account services by its neighborhood US BANK branch in Independence, MO and later when MSCI was again referred to Defendant BRIAN KABBES when MSCI sought to establish a Kansas escrow account after having difficulty with the St. Louis corporate Trust Department. Defendant BRIAN KABBES provided a review of Plaintiff MSCI's proposed escrow account agreement and suggested changes to meet US BANK's acceptance. Defendant BRIAN KABBES reviewed an approved the escrow account agreement with his name on it as escrow agent for US BANK , along with the changes to make it correct for transmittal to MSCI's ten known selected candidates with their certification contract. After the escrow agreements were sent to the candidates Defendant BRIAN KABBES contacted Sameul Lipari of MSCI to inform him US BANK would not host the escrow accounts because of the USA PATRIOT Act. Defendant BRIAN KABBES maintains the he and Samuel Lipari had not reached an oral contract for service and that reservation for additional approvals were part of earlier conversations.

STATEMENT OF FACTS

36. On or about 3/12/2002, and following 3 years of R&D Sam Lipari, President and CEO of Medical Supply Chain, Inc. (MSCI) began a process of selecting a corporate bank for the rollout of its healthcare supply chain empowerment program that produces significant benefits to healthcare and its patients. He sought input from associates and advisors concerning selection of

an appropriate national bank that would be capable of a full range of corporate banking services, including nation wide checking, escrow services, short and long term credit facilities, receivables financing and international clearing of transactions between thousands of health systems and their suppliers. Several national banks were evaluated but US BANCORP NA was selected because it also had an investment arm called US BANCORP PIPER JAFFRAY that had targeted healthcare customers and participated as underwriter and funds manager for pre IPO healthcare manufacturers and service providers and US BANCORP NA acted as underwriter for corporate bonds of healthcare companies.

37. On or about 4/15/02 Sam Lipari arranged for MSCI's corporate account to be opened at US BANK's SW Topeka branch. The account was opened in the name of Medical Supply Chain, Inc., using MSCI's federal tax I.D. number with a cashier's check in the name of MSCI's agent and drawn on Miner's State Bank of Frontenac Kansas for $7,500.00.

38. On or about 4/25/02 Sam Lipari opened a personal account in his name at US BANK's neighborhood branch at 3640 S. Noland Road, Independence, MO. Before opening the checking account, the US BANK employee reviewed Sam Lipari's account application and submitted Sam Lipari's personal data to Chex Systems, Inc. for a background check, evaluation and verification of eight years of his previous banking history at other banking institutions. Sam Lipari was approved for a personal checking account and an electronic debit card. Sam

Lipari initially used the personal account to pay expenses of MSCI with reimbursement from the corporation.

39. On 6/5/02 Sam Lipari contacted US BANCORP PIPER JAFFRAY'S Minneapolis headquarters to speak to Heath Lukatch, managing director of the US BANCORP PIPER JAFFRAY healthcare venture fund about MSCI being considered as a venture capital candidate. He was instructed to send an executive summary of his business plan via email. Sam Lipari sent the summary and financial projections for MSCI with a restriction on disclosure notice. US BANCORP PIPER JAFFRAY made no response to the receipt of the executive summary and financial projections from MSCI's business plan. Sam Lipari again telephoned the Minneapolis offices of the US BANCORP PIPER JAFFRAY venture fund managers and his calls were not taken and not returned. Sam Lipari also attempted to speak to a US BANCORP PIPER JAFFRAY venture fund manger in their San Francisco office but again, his calls were not taken or returned.

40. On 7/9/02 Sam Lipari and MSCI were visited by a Merger and Acquisitions attorney for another San Francisco venture capital firm and after extensive discussions with her at MSCI's Blue Springs, MO headquarters on the need to quickly enter the healthcare supply chain market and take advantage of the opportunity created by the healthcare industry's sudden willingness to reject the existing Group Purchasing Organizations, and after the New York Times had began uncovering corruption revelations in the market. However the discussions revealed the current condition of venture funding and IPO underwriting was very

troubling. At the time of these meetings the first news of WorldCom's debacle was breaking. MSCI's management felt with the exception of US BANCORP PIPER JAFFRAY, which concentrated its investments in healthcare, that much of the assets venture funds reported were in fact overvalued equities in telecom technology companies and that the collapse of WorldCom would further depress the venture capital markets.

41. The venture capital M&A attorney questioned Sam Lipari about the overtures of large companies seeking to acquire MSCI. Sam Lipari recounted the contacts made with Supply Solution, a Michigan based company focused on expanding integration in the healthcare industry, GoCoop/Avendra a Florida based company providing e-procurement/group purchasing in the hospitality industry and also wanted to integrate in the healthcare industry, both of which were seeking go to market partners in healthcare, and Cerner, a Kansas City healthcare company with enterprise resource planning software that is based on an older operating system, called EDI that is inferior to MSCI's web based services and poorly suited for electronic commerce. Cerner had bought out Mitch Cooper & Associates, a healthcare supply chain consulting company and seemed to be trying to acquire the capability to create an electronic healthcare marketplace. Sam Lipari told the VC attorney that MSCI would not compromise itself by being aligned with any existing healthcare supplier. MSCI has the solution and he did not want to be tainted with companies that support the high cost healthcare problem. He also recounted how start up healthcare electronic marketplace firms with technology similar to MSCI like Impact Health and

Medibuy had been bought up by GPOs for tens of millions of dollars, but that once they were no longer independent, their market potential was eliminated and the technology was used by GPO firms to deceive health systems into thinking their GPO partner was attempting to increase its economic efficiency when in fact they continued to restrict trade in support of monopolizing markets.

42. MSCI resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and supply chain management technology. MSCI settled on a plan that would utilize the value of its healthcare supply chain intellectual property and offer a comprehensive year long education and healthcare supply chain certification program to independent representatives.

43. This plan would put representatives in the field nationwide that possess the knowledge and skills to relate to all levels of management in healthcare systems and assist in the adoption of MSCI's supply chain empowerment program. The independent representatives would pay for their certification and fund their own marketing and sales operations, consistent with distribution systems that rely on independent manufacturer's representatives. Since MSCI's web services were new to the market, Sam Lipari decided that it would be critical for the certification fee to be held in escrow until the candidates had a chance to meet MSCI's certification team and have a chance to see if they would succeed in mastering healthcare supply chain empowerment knowledge. After a week long intensive seminar, the candidates would have the opportunity to decide whether or not to commit to the certification program and MSCI would have the opportunity to reject any candidates it felt would not succeed in the program.

44. MSCI developed a curriculum and contracted with the industry's foremost logistics and supply chain experts to provide instruction during the weeklong seminar and assist and advice candidates throughout the certification process. MSCI made arrangements to include information and presenters from companies with expertise in financial analysis of healthcare purchasing, including strategic sourcing and human resource evaluations so that the representatives would be able to represent products and technology services outside of MSCI's capabilities that would complement MSCI's supply chain empowerment program in allowing a health system/hospital to break free of its GPO supplier.

45. Beginning 8/1/02 MSCI advertised nationwide to recruit experienced account executives and sales professionals and processed hundreds of applicants with detailed evaluation of resumes, job history and financial disclosure applications. For the first of what were to be quarterly classes, MSCI selected 15 candidates that had the potential to succeed as independent representatives for its services. After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification class starting the first week of December/02. During this same time, MSCI was preparing the escrow account system that the candidates would utilize.

46. On or about 10/1/02 MSCI contacted Chris Walden of the Noland Road, Independence MO branch of US BANK for direction on escrow accounts and commercial banking services. MSCI was referred to Becky Hainje a US BANCORP "Private Banker" and on or about 10/3/02 Becky Hainje contacted

Sam Lipari and told him she would arrange to put him in contact with the persons in different departments of US BANK that could provide MSCI the services MSCI requested and needed. She connected MSCI with Brian Kabbes in St. Louis who was responsible for US BANK commercial trust accounts in Missouri and Kansas. She also connected MSCI with Douglas Lewis, responsible for commercial loans in the Noland Road office.

47. Sam Lipari described MSCI's need for escrow accounts to Brian Kabbes and emailed him an escrow contract that MSCI counsel had prepared for its candidates. Brian Kabbes asked questions about the candidates, the certification program and how many candidates had been selected so far. Sam Lipari negotiated with Brian Kabbes to reduce the escrow fee per account since all escrow accounts would be identical, and US BANK had refused to have the funds in a single account. Brian Kabbes agreed to lower the fee for US BANKS escrow agent services from the normal of $1,500 to $600 per account and no hidden or additional transaction or dispersement fees.

48. After reviewing the escrow contract, on or about 10/5/02 Brian Kabbes communicated to Sam Lipari that the language of paragraph 10 "Security Interests" should be changed so that a security interest for US BANK could be created in the $5,000 portion of the escrow that became MSCI's property the moment a candidate submitted their certification funds into escrow. MSCI altered its escrow contract to conform to Brian Kabbes' s suggestion and on or about 10/7/02 emailed the changes to Brian Kabbes. Brian Kabbes and US Bank were

identified as the escrow agent in the escrow agreement and Brian Kabbes' address was included in the body of the agreement.

49. On or about 10/8/02 Sam Lipari spoke again to Becky Hainje about MSCI's need for a business line of credit based on the MSCI portion of the escrow assets. Becky Hainje said she had talked to Brian Kabbes and he had told her there would be no problems with the escrow accounts, that they were a "slam dunk." She suggested Sam Lipari call Doug Lewis and make an appointment to apply for the line of credit, which was based on the escrow account assets.

50. On or about 10/9/02 Brian Kabbes called to request an additional change in the escrow contract. He supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US BANK TRUST DEPARTMENT. MSCI agreed to the additional change and modified the investment instructions exactly as Brian Kabbes instructed. MSCI also ask if there were any other changes needed before MSCI sent the contracts out to its certification candidates. Brian Kabbes said there would be no other changes and asked why MSCI was sending the candidates the escrow contract. MSCI explained that the contracts were going out with the certification program agreement so candidates would have a chance to review the information before their November 1st deadline, which required their funds to be in the US BANK escrow accounts. Brian Kabbes acknowledged the explanation and agreed to look over the release document MSCI developed that candidates would execute following the weeklong evaluation seminar to be held the first week of December.

51. During this conversation, Brian Kabbes also requested MSCI's current corporate good standing documentation from the Missouri Secretary of State's Office. MSCI agreed to send him the reinstatement and tax clearance documents on Friday 10/11/02 and that Sam Lipari was meeting with Doug Lewis on the afternoon of Thursday 10/10/02 to set up the credit facility using the escrow accounts as security. Sam Lipari told Brian Kabbes he would have Doug Lewis send the requested information to Brian Kabbes on 10/11/02. Brian Kabbes made no statement that US BANK had yet to approve MSCI 's escrow accounts and sought no additional information.

52. On or about Thursday 10/10/02, Sam Lipari delivered the MSCI business plan and associate program to Douglas Lewis, at the US BANK, Noland road office to apply for the agreed upon commercial line of credit based on the portion of the escrow accounts MSCI would retain. The business plan and associate program booklets each had cover pages giving notice of restricted use and that MSCI protected the confidential business trade secret and intellectual property contained in them. A letter of introduction also stated the contents were protected and restricted disclosure and possession of the materials. Two more folders contained the good standing documentation Brian Kabbes requested and the associate program contracts that were sent to the candidates. Doug Lewis asked how many candidates MSCI had and Sam Lipari reached into his brief case and held up the ten folders of applicants who had committed to sending in their funds by November 1st and five others who were in the final stages. Sam Lipari further explained that he planned to start a new certification group each quarter. Sam

Lipari was given a loan application and agreed to and did return the application the next day.

53. On or about Tuesday 10/15/02 Brian Kabbes called Sam Lipari and informed him that US BANK had turned down the escrow accounts because of the USA Patriot Act. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for MSCI. Sam Lipari was shocked and stunned and handed away the phone, where Brian Kabbes repeated again The Patriot Act as the reason the accounts were denied.

54. Later that morning Sam Lipari called Becky Hainje and asked if she could see what happened. Sam Lipari explained that MSCI was counting on the escrow accounts and that the line of credit depended on them too. He said he could not believe the USA Patriot Act could be a reason that applied to MSCI. She said she would call and see what happened. Becky Hainje called back and left a taped recording on the MSCI answering system and listed the reasons Brian Kabbes told her. She said the reasons were the lack of a “relationship with the Bank... that the principals involved with the business were people unknown to the bank, but the main reason is to know your customer "Patriot Act" that was enacted after 9/11, and which we could not really give all the correct answers on the source and flow of money.

55. On or about 10/15/02 MSCI found ANDREW CESERE was the head of US BANCORP trust department on the US BANK web site and at 4 p.m. called his secretary Barb in Minneapolis. He was unavailable so MSCI asked her to

leave instructions for him to call Sam Lipari about MSCI's corporate escrow account rejection at 9 a.m. the following morning. Barb asked for more details concerning the problem. She said Mr. Cesere had a morning meeting but she would get the message to him. At 4:30 p.m. she called back and asked for additional information and the names of the people MSCI had dealt with so that Mr. Cesere could inquire about the problem.

56. At 9 a.m. the following morning on or about 10/16/02 Ed Higgens called, leaving a tape-recorded message on MSCI's answering system identifying him as the executive vice president of Midwest trusts for US BANK.

Sam Lipari, believing that the USA Patriot Act had probably been used to reject the escrow accounts because of his family sir name which is also the name of a small group of Islands in the Mediterranean Sea and which ends in "ari" like many Moslem sir names of people of Arabic descent, activated a tape recorder with a built in microphone and called Mr. Higgens back on the speaker phone. Each subsequent call to US Bank in which Sam Lipari participated was also recorded by him to document what he suspected was discrimination based on his national origin or ethnic descent.

57. Ed Higgins listened to Sam Lipari after stating he was an attorney and how long he had been working in trust banking, agreed with him that he saw no reason why the USA Patriot Act would apply to MSCI. Sam Lipari explained that MSCI needed additional US BANK services including credit facilities, receivables financing and clearing and settlement services for approximately 90 million worth

of transactions in the first year of operations. He said he would check into the matter and call Sam Lipari back later that day.

58. Instead Brian Kabbes called back with Lars Anderson who he identified as head of corporate trust new business development person and Susan Paine who he said he reported to, both on the line with him. MSCI explained that at the time of his previous call, it was not realized that the escrow account contracts that US BANK had approved had already been sent out to the candidates in reliance on US BANKS agreement to host the escrow accounts.

59. Lars Anderson expressed some irritation that MSCI had contacted the head of the trust unit about the rejection of escrow accounts. Lars Anderson said the bank had never been on board and it was not a done deal. Brian Kabbes denied that there had been an agreement; he said he had twice told Sam Lipari. Lars Anderson said that there had never been a signed off agreement to provide the service and that there had never been any bid for it. MSCI contradicted that and said the price for the service had been quoted by Brian Kabbes and after negotiating, a specific amount had been agreed upon. Sam Lipari also told them Brian Kabbes provided and requested changes to the escrow and that Brian Kabbes had told Becky Hainje it was a “slam dunk.”

60. During the call MSCI attempted several times to work out any misunderstandings and set up at least the 10 accounts MSCI had relied on US BANK for and that US BANK had known about and that MSCI was now in danger of being irreparably harmed. MSCI stated that the Patriot Act did not apply and that MSCI was in actuality an established US BANK customer and that MSCI had

been in a trust relationship with US BANK and the bank even had its business plan and information about its proprietary business model. Brian Kabbes said that the trust department was a stand-alone unit and had its own criteria for accepting customers. US BANK refused to reverse its decision.

61. MSCI pointed out that it had not received a true reason for denial of the accounts and that the reason given was a pretext at best. Viewing US BANK's actions, MSCI stated they could only be explained by a conflict of interest due to US BANCORP's existing healthcare investments and involvement.

MSCI felt extremely disturbed by the apparent out come of this situation, there was not enough time to establish a new banking relationship with another nationally recognized Bank and MSCI would loose substantial momentum. MSCI had spent several months building up to roll out it's supply chain empowerment program and felt to change a trust relationship in the middle will be devastating to it's entry to market. MSCI researched over 300 resumes only to find 30 that appeared to be qualified.

62. On or about 10/17/02 Sam Lipari telephoned Douglas Lewis and told him what had happened. Doug said he had sent Brian Kabbes the good standing documentation but not the business plan and associate program. Sam Lipari instructed him not to send the business plan and associate program materials to the corporate trust office of US BANK in St. Louis. He told Douglas Lewis that MSCI would be litigating over the escrow decision and planned to renew its application for a line of credit once it had the situation straightened out. Sam Lipari suggested he might find another bank but Douglas Lewis said that would

make the line of credit difficult. Sam Lipari further instructed Douglas Lewis to hold on to the materials and keep anyone else from having access to them. Douglas Lewis agreed and stated he would keep the business plan materials safe.

63. On or about 10/18/02 MSCI drafted a letter and sent it to Jerry A. Grundhofer, the President and Chief Executive Officer of US BANCORP NA with a copy being sent to Andrew Cesere, explaining the staggering damages US BANCORP would be liable for in imminent litigation due to the refusal to provide escrow accounts to MSCI. MSCI suggested an alternative of fact finding depositions to take place in St. Louis, MO before the end of the day Tuesday 10/22/02, believing US BANK to be misinformed about the USA Patriot Act and any reason for denying the escrow accounts.

64. US BANCORP Trust Department corporate counsel replied Friday 10/18/02 via fax and priority delivery with a letter denying US BANCORP NA was in contract with MSCI and that if any law suit is filed to address service for the trust department to her at her office.

65. MSCI called the trust department counsel Monday10/21/02 to ask for service addresses of the other named entities and employees. She said the same address would be good for all and then proceeded to ask what the causes of action were. MSCI explained that it was chiefly an antitrust action based on the Sherman, Clayton and Hobbs Act and that causes of action under the USA Patriot Act were also a basis for the suit. She was surprised MSCI was told the USA Patriot Act had been given as the reason for the denial of escrow account

service but reiterated that there was no contract in her view and she saw no basis for the other causes of action. MSCI stated that it would fax the complaint to her at the time the action was filed at the end of business Thursday 10/24/02, but they were still waiting for Mr. Gunderson to select the alternative of mutual fact finding to promote a resolution of the matter without litigation. She stated that the depositions would not lead to any meaningful explanation, that we had her letter explaining US BANK's reason for denying the escrow accounts and that the bank reserved the right to choose whom it served. MSCI reminded her that US BANCORP had extensive investments in healthcare and that choosing not to provide a service to a competitor is actionable under antitrust law.

66. She warned MSCI not to contact anyone at US BANK and said if MSCI filed an action against US BANCORP NA, she would send a letter to the judge in advance of her answer to our complaint saying we had *ex parte* communications. MSCI stated that it had not had any communications with US BANK employees since receiving her reply on Friday 10/18/02. However, MSCI was an account holder at US BANK and would continue to have communications with US BANK regarding its other bank business. MSCI reminded her that US BANCORP had extensive investments in healthcare distributors and that choosing not to provide a service to a competitor is actionable under antitrust law.

67. MSCI contacted an attorney, familiar with the healthcare supply chain research and development done by Sam Lipari at the law firm of Shook Hardy and Bacon and asked if his firm could act as escrow agent for accounts to be set

up in US BANK. He said the bank is better prepared to provide escrow services and declined to act as escrow agent.

68. On Thursday 10/24/02 MSCI filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees. MSCI counsel contacted US BANK counsel Kristin Strong to clarify the clerk of the court's questioning of service and to attempt to schedule a hearing. Ms. Strong said she would call the following morning Friday 10/25/02 to answer the question about service. She did not call and took the day off. MSCI counsel called her on Monday morning 10/28/02 at which time she said the case had been transferred to outside counsel and gave the phone number to MSCI.

69. On or about 10/28/02 MSCI contacted US BANCORP's retained counsel and explained that there were questions about service and that MSCI was seeking to schedule a hearing that week for its requested relief to stop the harm it was suffering and to avoid a terminal outcome for the company. US BANCORP's counsel said he had to travel and was unsure of his schedule but by the next day he might know of a time he could make a hearing. Without hearing from the opposing counsel, MSCI became concerned and sent an email on or about 10/29/02 suggesting portions of the injunctive relief it seemed likely the two parties could agree on and explaining the harm it was suffering and what delaying the relief beyond critical dates would inflict on MSCI, its associates and customers.

70. The email explained the losses as follows: the damages of failing to receive the $350,000 to $450,000 it depended on November 1st and the resulting

effects of that delay on its projected financials including lost profit of $51,795,005.00, lost increase in average valuation of $155,385,015.00, Candidate lost revenue of $15,499,788.00. The email explained that these injuries would be far greater if a December 1st deadline is missed. However, if the company does not recover from US BANK's denial of the escrow accounts the total third year losses of the company would be as follows: lost profits $51,795,005.00, loss of increased company avg. valuation of $155,385,015.00, Candidate lost revenue of $15,499,788.00 and Customer losses of $697,486,200.00.

71. On or about Wednesday 10/30/02, US BANCORP's counsel sent a letter to the court dismissive of MSCI's complaint and stating that it would oppose all requested relief.

72. On or about Thursday 10/31/02, MSCI called US BANCORP's counsel explaining the necessity of the relief sought and specifically the relief requested under paragraph 66 seeking to stop US BANK from reporting negative information about MSCI under the USA PATRIOT Act. US BANCORP's counsel reiterated his belief MSCI needed to find another bank and that no liability existed. MSCI's counsel explained that Sam Lipari will not risk a hundred million dollar company that requires high level banking services to future damage from a secret USA Patriot Act report that has misinformation in it and would create a black mark preventing them from ever being able to do any business. US BANCORP's counsel said it would not agree to even just the relief sought in paragraph 66. MSCI asked US BANCORP's counsel if his firm would act as an

escrow agent for accounts to be deposited in US BANK, since Shook Hardy and Bacon had declined to do so. US BANCORP's counsel refused to do so stating that US BANK did not owe any duty to MSCI.

73. Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by Sam Lipari in 1995 was appropriated by HSCA and MEDECON through exploitation of a confidential business relationship and then taken later by many other GPOs; on or about 11/6/02 Sam Lipari visited US Bank, Noland road branch to retrieve the documents left by him following the meeting with Doug Lewis on 10/10/02. Doug Lewis gave the documents back to Sam Lipari. Sam Lipari specifically ask if the documents were copied or faxed and Doug Lewis said he put all of the information in his analysis and Sam Lipari left the bank. Upon returning to MSCI's office Sam Lipari Inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents. There are tractor marks from a copy or fax machine on the back of all the pages. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied. There were no marks on the back of these documents.

74. MSCI is now fearful of where these documents were sent or who has reviewed them. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms and financials including 5 year details, 5 year

condensed and break even analysis. Sam Lipari is fearful this information will fall into the wrong hands further blocking or eliminating entry to market.

75. On or about 11/7/02 Sam Lipari received a complimentary D&B report dated 10/31/02 on MSCI. The report indicated MSCI started in 2000 and has a clear credit history and a strong financial condition.

CAUSES OF ACTION

COUNT I: VIOLATIONS OF THE SHERMAN ANTITRUST ACT

76. Plaintiff re-alleges paragraphs 1-75 above.

77. Defendants have violated Section 1of the Sherman Anti Trust Act prohibition against combination or conspiracy, in restraint of commerce.

78. Defendants are a vertically integrated commercial banking, private banking, trust and investment banking concern with investment and underwriting trade concentrated in the healthcare supplier market. In this specific market of companies supplying new products, services and technology, new entrants are dependant on the approval and endorsement of the Defendants to healthcare supply distributors dominated by Healthcare Group Purchasing Organizations or GPO's due to the Defendants' monopoly power.

79. Defendants are believed to be the largest holder of healthcare supplier equity issues through their direct investments and the investments of funds they manage. Defendants are believed to be the largest promoters of healthcare supplier stock issues and provide the largest amount of industry analysis for investor evaluation of healthcare supplier stock issues. On information and belief, US BANCORP NA, US BANK, PRIVATE CLIENT GROUP, CORPORATE

TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC and US BANCORP PIPER are alter egos of each other in that they now and at all relevant times (a) held themselves out to the public as a single, integrated, full-service, professional business enterprise; (b) completely dominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics; (c) failed to observe corporate formalities; (d) and used and commingled the assets, facilities, employees, and business opportunities of each other, as if those assets, facilities, employees, and business opportunities were their own -- all to such an extent that any adherence to the fiction of the separate existence of any of these defendants distinct from the others would be inequitable, would permit egregious wrongdoers to abuse a corporate, limited liability corporation, and/or similar privilege of limited liability, if any, and would promote injustice by allowing these defendants to evade liability or veil assets that should be attachable.

80. Defendants' predatory practices in the capitalization of healthcare suppliers have been found to be in violation of regulatory statutes. In June of 2002, US BANCORP PIPER JAFFRAY was censured and fined $250,000.00 by the National Association of Securities Dealers for threatening to deny Antigenetics, Inc. a critical service of analyst coverage if it did not select US BANCORP PIPER JAFFRAY as a lead underwriter for a second issuing of stock.[xiv]

81. US BANCORP has participated in underwriting syndicates for 131 IPO's worth nearly 10 billion dollars since January 1999. [xv]US BANCORP is named as

a defendant in shareholder law suits investigating US BANCORP's role in a scheme to allocate equity shares of Commerce One to particular customers on the condition that these customers would then buy additional equity shares in the securities markets at agreed upon times to create a false increase in the prices of Commerce One shares.[xvi] Commerce One is an electronic marketplace technology company providing supply chain management services in the business to business market and specifically through Medibuy in a "strategic relationship" to provide these services to healthcare facilities. Medibuy is a partner of the largest GPO which is also the main subject of federal healthcare supply marketplace inquiry, Premier, Inc. Medibuy is also the exclusive e-commerce supplier for HCA.

82. The Defendants maintain control over the day-to-day operations of healthcare supplier companies they invest in or provide services for. [xvii] This control extends to interlocking directors when Defendants place corporate officers of US BANCORP NA on the boards of the healthcare supplier corporations that the Defendants have participated with in creating anti competitive sole source supplier contracts with healthcare GPO's that are "agreements whose nature and necessary effect are so plainly anticompetitive . . . no elaborate study of the industry is needed to establish their illegality-they are 'illegal per se.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct.1355, 1365, 55 L. Ed. 2d 637 (1978).

83. The Defendants use the creation of anticompetitive sole source contracts between their client healthcare suppliers and healthcare GPO's the Defendants

have developed to promote and inflate the value of equity shares they are marketing.

The Defendants operate a conspiracy among their subsidiaries and parent companies and through their employees as “Persons” engaged in combination with healthcare GPO’s including UNKOWN HEALTHCARE SUPPLIER for the purpose of restraining commerce. On information and belief, Defendants, in agreement, concert, and conspiracy with each other, directly or indirectly initiated, directed, participated in, aided and abetted, furthered, otherwise caused, and/or concealed the anticompetitive denial of services and critical facilities, or related events, for the purpose of preserving their directorships and/or other positions with US BANCORP NA, keeping their contracts with US BANCORP NA, their income, compensation, and fringe benefits, supporting the value of their US BANCORP NA securities, and/or concealing their participation in and liability for anticompetitive activities.

84. The Defendants prevented MSCI from establishing escrow accounts it was intending to use as a unique banking service with special escrow account agreements reviewed and approved by the Defendants to finance MSCI’s entry into to commerce in competition to reduce prices and increase manufacturers of healthcare devices and other healthcare suppliers access to markets in competition with sole source healthcare suppliers and healthcare GPO’s.

85. The escrow account contracts are novel and could not be duplicated at another bank in the short time between the Defendants surprise announcement that they were not going to host the accounts, breaching their contract or duty to

MSCI based falsely on the USA Patriot Act, and the deadlines MSCI was in reliance on for receipt of funds. The escrow accounts developed between MSCI and US BANK, along with the line of credit tying arrangement based on the contract guaranteed portion were “unique and unusual financing terms which are unavailable from competing financial institutions.” If other financial institutions have the required presence of bank branches and familiarity with MSCI candidates in several states, along with commercial trust departments capable of acting as escrow agent for accounts that provide fractional secured interests for a bank commercial loan line of credit, they were not present with the capability of putting the arrangement together in Blue Springs or Independence MO. Sam Lipari turned to US BANK for the escrow accounts after evaluating and visiting other banks within driving range of his Blue Springs office. US BANK’s branch office on Noland Rd. in Independence, MO was able to perform this custom financial service and proceeded to do so with a regional US BANK commercial trust office in St. Louis pooling resources for a multi state district. Once US BANK decided to withdraw the service, there was no financial institution MSCI could turn to that was capable of meeting its requirements in the few days remaining in which to get out the escrow contracts to the candidates for their examination in advance of the November 1st deadline. If US BANK had made its reversal earlier; there still was no competing national financial institution capable of providing such a complex custom service without having a pre-established banking relationship. US BANCORP NA was a financial institution lending upon a unique, novel or custom escrow financial instrument in the commercial money market

with sufficient economic power to give rise to a claim under the Sherman Act as contemplated in *United States Steel Corporation v. Fortner Enterprises, Inc.*, 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977).

86. Defendants through their financial institutions act as a supplier of financial services to companies in the healthcare industry. Defendants own and control other supplier companies including medical device manufacturers, biotechnology producers, healthcare distributors and health system end users. Defendants have conspired with, aided and abetted and participated in the financing of efforts to limit or prevent competition in healthcare supply. Defendants have prevented MSCI from entering the healthcare supply market by refusing to act as a supplier of escrow accounts at any price to MSCI. Such conduct constitutes a contract, combination or conspiracy in restraint of trade in *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

87. The Defendants have acted in furtherance of the combine's conspiracy to deny MSCI access to services and essential facilities through a refusal to deal, denial of services, boycott or withholding of critical facilities which is conducted "to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both," *DeFilippo v. Ford Motor Co.,* 516 F.2d 1313, 1318 (3d Cir.) (citations omitted), cert. denied, 423U.S. 912, 96 S. Ct. 216, 46 L. Ed. 2d 141 (1975), and is a per se violations of § 1.

88. Defendants through their financial institutions have discriminated against MSCI in provision of services and facilities in the form of the five escrow accounts MSCI had mailed out contracts for and the five escrow accounts for

candidates committing to payment of funds by November 1st which MSCI was in the process of sending contracts to and the future escrow accounts for its ongoing future quarterly medical supply chain strategist certification programs.

89. The public is being severely injured by the Defendants actions in restraint of trade through their combination or conspiracy, in restraint of commerce

90. MSCI has been severely injured and is in danger of further injury resulting from the Defendants actions in restraint of trade through their combination or conspiracy, in restraint of commerce. MSCI is now unable to meet its obligations, and risks damage to its corporate credit rating. MSCI is unable to procure an escrow agent to substitute for US BANK. MSCI is unable to meet its commitments to independent representatives that MSCI depended on to enter commerce. MSCI is unable to produce revenue without independent consultants who have begun its very expensive certification program. MSCI's good will with its associates and customers has been harmed by not meeting its scheduled entry to market.

91. Defendants have violated Section 2 of the Sherman Anti Trust Act prohibition against combining or conspiring with any other person or persons, to monopolize or attempt to monopolize any part of the trade or commerce.

92. Defendants 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 MSCI the escrow accounts it required to capitalize its entry into commerce through extortion under

the color of official right-The USA Patriot Act, fraudulently invoked to tortuously Interfere with MSCI's contracts and prospective contracts.

93. Defendants utilize their monopoly power to foreclose competition and gain a competitive advantage for their client and associate companies, in which they have invested millions of dollars and on whose behalf and acting as a combination, they have attempted to destroy MSCI, a potential competitor in violation of 15 U.S.C.S. § 2.

94. The Defendants' vertical integration is part of a calculated scheme to gain control over the 1.3 trillion dollar healthcare supplier and distribution segment of the healthcare industry and to restrain or suppress competition, rather than an expansion to meet the legitimate business needs of US BANCORP's customers, exhibiting the requisite specific intent needed to show a violation of 15 U.S.C.S. § 2.

95. The Defendants as monopolists, or would be monopolists of the healthcare supplier/distribution marketplace engage in predatory tactics and dirty tricks including the above mentioned extortion of business customers seeking capitalization, "laddering" schemes to fraudulently inflate equity values of competitors they own interests in. Additionally, healthcare suppliers the Defendants invest in and promote engage in anticompetitive predatory sole source contract agreements with healthcare GPOs.

96. The Defendants through conspiracy and combination with healthcare suppliers and distributors have established monopoly power and have the power to control prices of healthcare supplies which they exercise in maintaining higher

prices through GPO distribution channels that are higher than those negotiated directly by hospitals, sometimes 25% higher according to the Government Accounting Office[xviii] and by excluding competition in violation of 15 U.S.C.S. § 2.

97. Anticompetitive effects have resulted from the Defendant's actions. New technologies have been prevented from entering the healthcare market to protect competitors with the capitalization provided by the actions of the Defendants to make kickback payments to GPOs in exchange for sole source contracts. This has resulted in the unavailability of superior products and services that would have been able to save lives and alleviate suffering in hospital patients

98. The public is being severely injured by the Defendants actions in restraint of trade through their combining or conspiring with any other person or persons, to monopolize or attempt to monopolize any part of the trade or commerce

99. MSCI has been severely injured and is in danger of further injury resulting from the Defendants actions in restraint of trade through their combining or conspiring with any other person or persons, to monopolize or attempt to monopolize any part of the trade or commerce.

COUNT II: VIOLATIONS OF CLAYTON ANTITRUST ACT

100. Plaintiff re-alleges paragraphs 1 through 99 above.

101. Defendants have denied MSCI escrow account services, a critical facility in violation of the Robinson-Patman Act against discrimination in price, services, or facilities; 15 U.S.C. § 13 of the Clayton Antitrust Act.

102. Defendants provide financial services and facilities to existing healthcare supply market participants on the basis of those participants maintaining

exclusive dealing arrangements. The Defendants exclusive dealing criteria is directly applied where Defendants make contracts and provide investment and financing to healthcare supplier companies the Defendants proclaim and publicize as entering into and maintaining sole source or single source contracts with distributors and end user health systems. The Defendants publicize this information to solicit subscription of stocks they underwrite and to obtain additional investors. As a direct and proximate result of the Defendants' pervasive conspiracy to restrain trade in healthcare supplies, against the interests of shareholders, potential investors, and the integrity of the securities market, as set forth fully above, Plaintiffs have suffered injury and damages in the capitalization of their entry into market.

103. The Defendants exclusive dealing criteria is indirectly applied where Defendants make contracts and provide investment and financing to healthcare supplier companies on the basis of collusion derived profits. The Defendants have prevented MSCI from entering the healthcare supplier/distribution market by refusing to act as a supplier of financial services and facilities in the form of escrow accounts in violation of the Robinson-Patman Act.

104. The Defendants have denied MSCI equal access to these financial services on the basis of tying financial services to healthcare supplier and distribution customers participating in market limitation and denial of access.

105. Defendants through their financial institutions have discriminated against MSCI in provision of services and facilities in the form of the five escrow accounts MSCI had mailed out contracts for and the five escrow accounts for

candidates committing to payment of funds by November 1st which MSCI was in the process of sending contracts to and the future escrow accounts for its ongoing future quarterly medical supply chain strategist certification program.

106. Defendants provide financial services and facilities to existing healthcare supplier market participants. Defendants own, control or have a participatory interest in healthcare supplier market participants that they provide financial services and facilities to. Defendants have prevented MSCI from entering the healthcare supply market by refusing to act as a supplier of financial services and facilities in the form of escrow accounts. Such conduct constitutes a *per se* violation of 15 U.S.C. § 13.

107. The public is being severely injured by the Defendants actions in restraint of trade.

108. MSCI has been severely injured and is in danger of further injury resulting from the Defendants actions in restraint of trade.

109. MSCI is a corporation entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the Defendants, against threatened loss or damage by a violation of the antitrust laws, including sections 13 of this title. MSCI is likely to prevail on one or all of its claims against the Defendants. The danger of irreparable loss or damage to MSCI is immediate. There is a substantial threat that MSCI will suffer irreparable injury in the absence of preliminary relief; the likely injury to MSCI is greater than that likely to be suffered by the Defendants; and entry of the preliminary injunction would not disserve the public interest. *Lucero v. Operation Rescue of Birmingham*, 954

F.2d 624, 627 (11th Cir. 1992), *reh'g denied*, 961 F.2d 224 (1992). Where, as here, the plaintiff advances anti-trust claims, preliminary relief is specifically authorized by 15 U.S.C. § 26.

COUNT III: VIOLATIONS OF THE HOBBS ACT AGAINST RACKETEERING

110. Plaintiff re-alleges paragraphs 1 through 109 above.

111. Defendants violated The Hobbs Act prohibition against racketeering by preventing MSCI's entry into commerce under color of official right in violation of 18 U.S.C. 1951(b)(2).

112. Defendants committed an unusual act for banks by denial of service and facilities for plaintiff MSCI's escrow accounts in bad faith or nonperformance of their duty as financial institutions and employees. Defendants "under color of official right" through invocation of the USA PATRIOT Act deny and threaten MSCI's access to service at any national bank that MSCI, its customers or associates require to conduct their business, effecting the unjust enrichment of the Defendants and their related healthcare suppliers and distributors combine, preventing MSCI's services from entering into commerce in violation of The Hobbs Act, 18 U.S.C. 1951(b)(2).

113. Defendants are extensively invested in selected healthcare suppliers. The profits of these healthcare companies are dependent on a current market where competition in pricing is severely curtailed. Defendants' US BANCORP NA profit has not increased proportionately to its acquisition of banks and traditional commercial banking business. Defendants are consequentially dependant on revenue from their private banking, trust and investment banking divisions which

are disproportionately concentrated in healthcare suppliers engaging in anticompetitive business practices.

114. Defendants' US BANCORP NA , despite the patriotic appellation "US BANK" in red white and blue signage that it places on its newly acquired Kansas and Missouri banks, is unlike a traditional American bank in that Defendants US BANCORP NA functions like an Asian bank interlinked in an industry group combine, acting against the combine's industry competitors and aiding the combine's allies. In Japan a similar industry group would be called a "Keiretsu"[xix] or in Korea a "Chaebol." The Defendants' vertically integrated monopoly acting in consort with their healthcare suppliers and distributors combine in efforts to prevent MSCI from entering into commerce through the misuse of the USA Patriot Act are extorting property from MSCI, its associates and customers.

115. The Defendants did not do the investigation of MSCI they claimed was required under the USA PATRIOT Act and sought to harm MSCI out of an undisclosed profit incentive. In using the USA PATRIOT Act the Defendants are using force or in the alternative acting under color of law in taking property from MSCI its associates and customers.

116. This bad faith performance of its regulator imposed and customer expected duty was made self evident by the Defendants' St. Louis Trust Department telling MSCI that it "did not understand why MSCI went to them and not MSCI's local bank" without even realizing MSCI was already an established US BANCORP NA client customer with a corporate checking account and a

pending corporate credit application, or that MSCI's chief executive was an established checking account holder.

117. Plaintiff MSCI has accepted voluntarily that it will be delayed, suffer lost profits, injury to its associates and loose some or all of the ten best candidates for bringing its electronic marketplace and supply chain management software services to commerce. The Defendants have the power to label MSCI as a money laundering suspect or to do their normal duty of diligence and discover MSCI, its candidates and associates are upstanding citizens with documented funds. MSCI may reluctantly have no choice but to wait until the Defendants' healthcare suppliers and distributors develop a strategy to counter MSCI's neutral electronic marketplace and cost reducing supply chain management software before the Defendants allow MSCI the escrow accounts it needs to enter the healthcare supply marketplace.

118. MSCI's chief executive prudently fears that bad faith reporting under the USA PATRIOT Act by the Defendants to enrich their vertically integrated combine will prevent MSCI from going to other financial institutions and opening escrow accounts or obtaining other banking services, including the clearing and settlement of over 90 million dollars in annual healthcare supply transactions, foreign exchange conversion and purchasing finance, all of which are far more sensitive and subject to greater anti-money laundering scrutiny under know your customer laws and the USA Patriot Act.

119. The Defendants have opposed MSCI's requested injunctive relief which would have temporarily ordered US BANCORP NA and its employees to stop

secretly reporting negative information against MSCI under the USA Patriot Act until adequate training and the required compliance officers were in place. The Defendants have not denied exercising the USA Patriot Act against MSCI.

120. The Defendants' unprofessional conduct and lack of truthful disclosure about USA PATRIOT Act based conduct continues to threaten the Plaintiff MSCI, its associates and customers through actions that may trigger similar surprise denials of critical banking services at other financial institutions.

121. The Public has been harmed by the Defendants extortion of MSCI that has obstructed or delayed MSCI's entry into commerce and the resulting cost savings and increased availability of beneficial healthcare technologies. Over 2000 hospitals nation-wide are endangered by the current anticompetitive market for healthcare supplies and are harmed by the Defendants continued prevention of MSCI from entering commerce. Public access to healthcare will be harmfully cut back if more hospitals are closed because they are unable to realize the 20% cost reduction provided through MSCI's system.

COUNT IV : FAILURE TO PROPERLY TRAIN EMPLOYEES ON USA PATRIOT ACT OR PROVIDE A COMPLIANCE OFFICER

122. Plaintiff re-alleges paragraphs 1 through 121 above.

123. Defendants US BANCORP NA, US BANK; PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., failed to provide training or adequate training to its employees or to designate a USA PATRIOT Act compliance officer in each of its financial institutions as required under Section 352 of USA Patriot Act. Without training, employees of US BANCORP denied MSCI, a known domestic

corporation in good standing with its Secretary of State and State Department of Revenue an escrow account service even though it was not an activity that was regulated under Section 312 effective July 23, 2002.

124. Without having adequately trained employees and a USA PATRIOT Act mandated compliance officer in each of their financial institutions, the Defendants continue to endanger the plaintiff MSCI, its associates and customers with wrongful denial of services and facilities of US BANCORP NA where MSCI has its accounts or at other national and state banks where MSCI and its associates may be harmed through denied services based on erroneous reporting by the Defendants.

COUNT V: MISUSE OF AUTHORITY AND EXCESSIVE USE OF FORCE AS ENFORCEMENT OFFICERS UNDER THE USA PATRIOT ACT

125. Plaintiff re-alleges paragraphs 1 through 124 above.

126. The Defendants BRIAN KABBES, LARS ANDERSON and SUSAN PAINE, under knowing direction of Defendants ANDREW CESERE and JERRY A. GRUNDHOFER, repeatedly used the USA Patriot Act to deny services of US BANK, PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC. and US BANCORP NA to MSCI, causing the loss of MSCI property. The Defendants, despite their regulated status as financial institutions and corporate officers of financial institutions responsible for providing a professional service; denied MSCI, a known domestic corporation in good standing with its Secretary of State and State Department of Revenue an escrow account service on the basis of increased reporting requirements for new accounts under the USA PATRIOT Act

even though The US Treasury Department had previously announced it was delaying the date account opening requirements become issued and effective and US BANCORP was under no reporting requirements for MSCI's escrow accounts.

127. The Defendants continue to endanger the plaintiff MSCI and its associates with wrongful denial of services and facilities of US Bancorp NA where MSCI has its accounts or at other national and state banks where MSCI may be denied services based on erroneous or bad faith reporting by the Defendants.

128. The Defendants continue to endanger the plaintiff MSCI its associates and customers with wrongful denial of services and facilities of national and state banks where MSCI may be denied services based on the Defendants unprofessional and bad faith denial of escrow accounts based on the US PATRIOT Act. The Defendants action prevents MSCI from escaping the denial of escrow accounts history and banking references in all new financial arrangements.

129. On October 22, 2002 MSCI approached an attorney of Shook, Hardy and Bacon for the purpose of acting as escrow agent in substitute accounts to be set up at a national bank. After asking why MSCI's existing bank did not provide the accounts, the attorney declined to act as escrow agent.

COUNT VI: VIOLATION OF CRIMINAL LAWS TO INFLUENCE PUBLIC POLICY UNDER SECTION 802 OF THE USA PATRIOT ACT

130. Plaintiff re-alleges paragraphs 1 through 129 above.

131. Defendants are preventing MSCI from entry into commerce to alleviate market collusion in healthcare supplies that has lead to injury and loss of life and

continues to threaten US citizens. This healthcare supply emergency has been the subject of US agency action and investigation. Members and committees of the US Congress have begun inquiry into the failure of the healthcare supply market place for the purposes of creating public policy regulating market participants. Defendants are preventing MSCI'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" if they "appear to be intended…to influence the policy of a government by intimidation or coercion," and if they "occur primarily within the territorial jurisdiction of the United States."

132. The Defendants continue to endanger the plaintiff MSCI, its associates and customers with illegal conduct that prevents them from or threatens to prevent them providing a market solution to this governmental healthcare policy issue.

Supplemental State Law Based Causes Of Action

COUNT VII: MISAPPROPRIATION OF TRADE SECRETS

133. Plaintiff re-alleges paragraphs 1-132 above.

134. The Defendants have misappropriated MSCI's business plan and associate program containing MSCI's trade secrets. The Defendants have made use of MSCI's trade secrets through unauthorized copying and transmittal.

135. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make copies and or fax their contents in violation of Sam Lipari's oral instructions to Douglas Lewis and the notice of

limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents. US BANK's exceeded its authorized use and copieded and or transmitted the above documents to the defendants PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., UNKNOWN HEALTHCARE SUPPLIER, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES.

136. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make a derivative analysis document containing MSCI's trade secret and or fax their contents in violation of Sam Lipari's oral instructions to Douglas Lewis and the notice of limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents. US BANK's exceeded its authorized use and cop ied and or transmitted the above documents to the defendants PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., UNKNOWN HEALTHCARE SUPPLIER, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES.

137. The defendants US BANCORP NA; US BANCORP PIPER JAFFRAY; PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC.; LARS ANDERSON; SUSAN PAINE and BRIAN KABBES acquired unconsented knowledge of MSCI's trade secrets and made use thereof.

138. The Defendants are attempting to settle litigation through payment of several million dollars for theft of customer information in an unrelated class action lawsuit giving rise to MSCI's heightened fears of being materially inured if its trade secrets are not recovered and their dissemination is not disclosed.

COUNT VIII: TORTUOUS INTERFERENCE WITH PROSPECTIVE CONTRACTS

139. Plaintiff re-alleges paragraphs 1-138 above.

140. The Defendants have committed Tortuous Interference With Prospective MSCI Contracts for independent representatives, business associates and health system customers.

141. The Defendants willfully and intentionally acted to prevent 15 prospective contractual relationships between MSCI and independent representatives.

142. The Defendants willfully and intentionally acted to prevent or interfere with the prospective contractual relationships between MSCI and business associates named in MSCI's business plan and associate agreement.

143. The Defendants willfully and intentionally acted to prevent or interfere with the prospective contractual relationships between MSCI and health system customers including hospitals.

144. The Defendants willfully and intentionally acted to prevent or interfere with the prospective contractual relationships between MSCI and the technology partners discussed in MSCI's business plan and associate agreement.

145. MSCI had a reasonable probability of entering into contracts with 15 independent representatives for the December 1st course, nine business associates, three technology partners and numerous hospital groups.

146. The Defendants decision to withdraw from acting as MSCI's escrow agent on October 15, and refusing to repair or reverse their decision was the proximate cause of MSCI's damages and loss.

147. The Defendants decision to withdraw from acting as MSCI's escrow agent on October 15, and refusing to repair or reverse their decision caused the actual loss of 350,000 to 450,000 dollars MSCI would have on deposit on November 1st, of which $50,000 to $75,000 would be available for securing credit and which the entire sum would be the property of MSCI by December 15th. MSCI depended on these funds to meet its contractual obligations.

COUNT IX: TORTUOUS INTERFERENCE WITH CONTRACTS

148. Plaintiff re-alleges paragraphs 1-147 above.

149. The Defendants have committed Tortuous Interference With MSCI Contracts for independent representatives, business associates and health system customers.

150. The Defendants willfully and intentionally acted to disrupt or interfere with 10 contractual relationships between MSCI and potential independent representatives.

151. The Defendants willfully and intentionally acted to disrupt or interfere with the contractual relationships between MSCI and business associates named in MSCI's business plan and associate agreement.

152. The Defendants willfully and intentionally acted to disrupt or interfere with the contractual relationships between MSCI and a human resource technology partner.

153. The Defendants willfully and intentionally acted to disrupt or interfere with the contractual relationships between MSCI and its landlord and utilities.

154. The Defendants decision to withdraw from acting as MSCI's escrow agent on October 15, and refusing to repair or reverse their decision was the proximate cause of MSCI's damages and loss.

155. The Defendants decision to withdraw from acting as MSCI's escrow agent on October 15, and refusing to repair or reverse their decision caused the actual loss of 350,000 to 450,000 dollars MSCI would have on deposit on November 1st, of which $50,000 to $75,000 would be available for securing credit and which the entire sum would be the property of MSCI by December 15th. MSCI depended on these funds to meet its contractual obligations.

COUNT X: BREACH OF CONTRACT

156. Plaintiff re-alleges paragraphs 1-155 above.

157. The Defendants breached their contract with MSCI to provide MSCI with a full range of business banking services, including corporate trust services and escrow agency to be performed lawfully and professionally with a "five star guarantee" of quality of service. This contract was executed in writing by the Defendants and MSCI when their respective agents opened the Medical Supply Chain Corporate checking account in Topeka, Kansas.

158. The Defendants breached their contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates. This contract was made over the phone at a distance of 300 miles between the defendant US BANK's St. Louis office and

MSCI a customer of US BANK's Noland Road Independence office in the regular course of business. No writing or other memorialization of this contract was referred to or contemplated at any time during its negotiation and formation by either the Defendants or MSCI.

159. The Defendant BRIAN KABBES and Sam Lipari came into formation of contract when both had agreed upon some or all of the terms including: the composition of the escrow form, the language limiting the liability of US BANK and the escrow agent, the language designating US BANK's compensation for its duties in any legal disputes arising between the parties, the directions for US BANK's investment of long term held funds, the directions for US BANK's investment of short term held funds, the selection of investment vehicles for both funds respectively, the name and address of BRIAN KABBES as escrow agent on the escrow form, the name and address of US BANK as escrow depository on the escrow form, the price term US BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.

160. The Defendants performed diligence to determine whether to accept the contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates. The Defendants required only one item to be rectified for approval; a current good standing status from the Missouri Secretary of State, which MSCI provided, satisfying their sole open element.

161. The Defendants approved MSCI's escrow form for delivery along with MSCI's associate contract to MSCI's independent representative candidates for their examination and submission for review to their personal legal counsel.

COUNT XI: PROMISSORY ESTOPPEL

162. Plaintiff re-alleges paragraphs 1-161 above.

163. The Defendants repudiated the existence of a binding oral contract to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its independent representative candidates. The Defendants refused to perform the services that their actions and communications reasonably lead MSCI to rely on when the Defendants were estopped from doing so by their promises.

164. The Defendants approved MSCI's escrow form for delivery along with MSCI's associate contract to MSCI's independent representative candidates and did other actions and made statements that caused MSCI with the full knowledge of the Defendants to rely on the Defendants' performance of the escrow agency and to host the accounts at US BANK.

165. MSCI relied on the Defendants conduct and statements to MSCI's detriment when Defendants refused to perform and host the escrow accounts and perform as escrow agents for MSCI. MSCI was harmed by the Defendants actions, resulting in the loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide

network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce.

COUNT XII: FRAUDULENT MISREPRESENTATION

166. Plaintiff re-alleges paragraphs 1-165 above.

167. The Defendants injured MSCI with a fraudulent misrepresentation material to their transaction of escrow agency and escrow account hosting with MSCI.

168. The Defendant BRIAN KABBES speaking as a Vice President of US BANK falsely represented to MSCI that US BANK and the commercial trust department would not perform as escrow agent or host MSCI's escrow accounts because of the "know your customer" diligence requirements of the USA Patriot Act had come into effect and made it impossible for the bank to perform this service for MSCI.

169. The defendants LARS ANDERSON and SUSAN PAINE made this fraudulent misrepresentation through the defendant BRIAN KABBES by directing him to give this reason to MSCI's chief executive, Sam Lipari.

170. The defendant ANDREW CESERE directed the defendants LARS ANDERSON, SUSAN PAINE and BRIAN KABBES not to retract this fraudulent misrepresentation when it had been questioned by MSCI and to maintain the misrepresentation in their capacity as managing speaking officers for US BANCORP NA, US BANK and LLC

171. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES caused this fraudulent misrepresentation to be communicated to Sam Lipari with the intention to induce MSCI to refrain from

enforcing US BANK's agreement to provide MSCI escrow agency services and escrow account hosting.

172. MSCI justifiably relied upon this fraudulent misrepresentation to not enforce US BANK's promise with the defendant BRIAN KABBES upon learning that US BANK was not going to provide the escrow services. MSCI justifiably relied upon this fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of US BANK's Commercial Trust department and instead contacted US BANCORP NA's ANDREW CESERE, to try and resolve the problem, unintentionally angering LARS ANDERSON and SUSAN PAINE.

173. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE BRIAN KABBES and PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., UNKOWN HEALTHCARE SUPPLIER, US BANCORP NA and US BANK caused this fraudulent misrepresentation to be communicated to MSCI with knowledge of its falsity or reckless disregard as to whether it was true or false to the point of not checking and realizing that the increased duties of the "know your customer" for new account holders had not been enacted. Or, the defendants caused this fraudulent misrepresentation to be communicated with reckless disregard as to whether it was true or false to the point of not checking and realizing MSCI and Sam Lipari were established existing customers of US BANK the increased duties of the "know your customer" did not apply to.

174. MSCI relied on the Defendants fraudulent misrepresentation to MSCI's detriment. MSCI was harmed by the Defendants actions, resulting in the loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce.

COUNT XIII: VIOLATION OF GOOD FAITH AND FAIR DEALING

175. Plaintiff re-alleges paragraphs 1-174 above.

176. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES were trust officers in a fiduciary relationship with MSCI that was established at the point BRIAN KABBES began working with Sam Lipari to draft MSCI's escrow form. As trust officers in a confidential relationship they had the duty of providing a professional service for MSCI in good faith performance of that duty including keeping abreast of the current status of federal account reporting regulations the duty of disclosure of obstacles to US BANK's ability to perform for MSCI the services it was seeking. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE, BRIAN KABBES, US BANCORP NA and PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., breached their duty of good faith performance when they failed to alert MSCI to the possibility US BANK would not perform the services MSCI was seeking.

177. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES breached their duty of good faith performance when they failed to apply the current status of the USA Patriot Act to MSCI's requirements.

178. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES breach their duty of good faith and fair dealing when they misuse the USA Patriot Act to injure MSCI.

179. MSCI was harmed by the Defendants breach of their duty of good faith and fair dealing, resulting in the loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce, and including the ability to obtain sensitive banking services required by the business model and future growth of MSCI.

PRESENT AND FUTURE INJURY

180. The actions taken by the Defendants have resulted in dramatic losses to MSCI its stakeholder, associates, suppliers and customers. As of 11/1/02 under traditional Robinson-Patman Act (Clayton Antitrust Act sec. 13) damages calculations, the Defendants have caused substantial short and long-term losses that are not recoverable due to MSCI's injury and delay in obtaining banking services. According to the formula utilized under a Robinson-Patman Act proceeding, the first 3 months losses are $15,000,000. In the alternative, MSCI

business plan losses are $300,000 to $450,000 in addition to the last three months of MSCI's 3-year financials, which combined, are $24,547,576.

181. As a direct result of MSCI's injury, its associates also are damaged due to the actions of the Defendants. Losses include an average of 40-60 hours per week participation in MSCI's evaluation and hiring practices; in addition to due diligence and market evaluation activities. Sustained losses of revenue for associate/representatives outlined in the last three months of MSCI's 3-year financials are $4,819,515.

182. As a direct result of MSCI's injury, its consultants and suppliers have been harmed by MSCI's inability to fulfill success agreements and service contracts due to the actions of the Defendants. MSCI consultants and suppliers have performed several hundred hours in services that are contractually due and MSCI is unable to perform as a result of the actions of the Defendants. These consultants and suppliers depend on MSCI to meet its obligations and the actions of the Defendants are preventing MSCI from doing so.

183. The direct result of MSCI injury and inability to perform its services to customers are the lost savings and additional revenue MSCI generates for its customers through its services. Losses to MSCI customers are directly due to the actions of the Defendants and are 20% of the total supplies spend health systems currently pay out annually. Sustained losses of revenue for MSCI health system customers outlined in the last three months of MSCI's 3-year financials are $13,759,800.

184. The above claims reflect the immediate losses suffered by MSCI its stakeholders, associates, suppliers and customers as of 11/1/02 excluding legal representation. To date MSCI and its counsel have performed over 378 hours in legal work on the antitrust based preliminary injunction remedy.

185. Failure to resolve this matter increases MSCI damages over time. Stakeholders, associates, suppliers and customers will also suffer far more in damages. MSCI will directly suffer $2,901,600 in revenue the 1st year, $27,366,576 in revenue the 2nd year and $74,798,940 in the 3rd year, as a combined total of $105,067,116.

186. Failure to resolve this matter increases the damages MSCI will suffer for injury to associate/representatives including in the 1st year $490,320, in the 2nd year $5,293,315, and in the 3rd year $14,779,788 as a total combined $20,563,423.

187. Failure to resolve this matter increases the damages MSCI will suffer over time, through harm to its suppliers which will suffer losses in the 1st year of $540,000, the 2nd year of $540,000 and in the 3rd year $540,000 as a total combined $1,620,000.

188. Failure to resolve this matter increases the damages MSCI's customers will suffer over time, including losses in the 1st year of $1,705,400, the 2nd year of $244,032,960 and the 3rd year of $697,486,200 as a total combined $943,224,560.

189. MSCI's customers are healthcare systems consisting of hospital groups. The actions of the Defendants to preserve an anticompetitive marketplace in

healthcare supplies keeps in jeapordy over 2000 of the nation's 6,500 hospitals. The resulting closings of some or most of these hospitals due to unsustainable supply costs will significantly harm public access to healthcare, increasing loss of life and unnecessary injury.

PRAYER FOR DECLARATORY RELIEF

190. Paragraphs 1 through 189 are incorporated herein by this reference as if fully pled herein.

191. As a direct result of the conduct of said defendants as set forth in Counts I, II, III and IV, V, VI, VII,VIII,IX,X,XI,XII, and XIII and herein, plaintiff has sustained actual damages in excess of $75,000.00. Such actual damages also include, but are not limited to, damages for injury to business associates, including suppliers,partners, independent representative candidates, prospective customers, other lost benefits, reasonable attorney's fees, expert fees, and costs.

192. Plaintiff's Sherman I & II and Clayton antitrust claims against the Defendants include claims against the noncorporate "Persons" in their individual and official capacities: JERRY A. GRUNDHOFER, ANDREW CESERE, BRIAN KABBES, LARS ANDERSON, and SUSAN PAINE for constructive knowledge of intentional denial of services and critical facilities to injur the Plaintiff and delay or obstruct its entry into commerce.

193. Because elements of malice, wantonness and oppression mingle in the conduct of the defendant County and its agents, plaintiff is entitled to recover damages against the County for violation of plaintiff's rights as claimed herein

and guaranteed under Title VII, the Civil Rights Act of 1991, the Kansas Act Against Discrimination, 42 U.S.C. § 1981,1981 (a) and 1981 (a)(b)(4).

PRAYER FOR URGENT INJUNCTIVE RELIEF

194. **WHEREFORE**, the Plaintiff respectfully prays for the following urgent injunctive prospective relief in exceptional circumstances including:

195. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants who are the subject of causes of action based in criminal law and to which the above Defendant persons and entities have varying degrees of culpability or liability ; obtain separate and independent counsel for any future civil claims seeking monetary damages for the purpose of avoiding conflicts of interest among commonly represented parties prohibited under Kansas law and which may jeopardize recovery under future resulting judgments.

196. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants cease reporting information related to MSCI under the USA PATRIOT Act or Anti Money Laundering laws until the Plaintiffs can exhaust administrative relief from the Defendants misconduct available through the US Office of the Comptroller of Currency.

197. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants disclose the names of bank or trust officers that performed any diligence duty regarding MSCI and the names of any AML or USA PATRIOT Act compliance officers consulted regarding MSCI's escrow accounts.

198. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide their employees adequate training regarding their duties and responsibilities enforcing the USA PATRIOT Act.

199. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide their employees adequate training regarding their duties and responsibilities avoiding antitrust prohibited conduct in their non traditional banking activity including investment banking , trusts and escrow services.

200. The Plaintiff seeks injunctive relief in the form of a court order mandating the corporate governance organ of above named Defendants review and audit their relationships with healthcare companies engaging in restrictive trade practices, including the assistance Defendants have provided in purchasing or selling healthcare supplier equity to healthcare companies or corporate officers engaging in restrictive trade practices.

201. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants including US BANCORP PIPER JAFFRAY be barred from publicizing a sole source, multi year or exclusive contract to provide healthcare supplies related to any company the Defendants own part of or control an interest in or to which the Defendants currently market investment opportunities, including venture fund and equity shares or anticipate marketing in the future.

202. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide escrow accounts for MSCI and its independent representative candidates and future banking services for reasonable fees, equal to the fees charged other corporate customers for similar services for the duration of the preliminary relief order.

203. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide escrow accounts and escrow agency for MSCI and its independent representative candidates and future banking services

for reasonable fees, equal to the fees charged other corporate customers for similar services for the duration of the preliminary relief order.

204. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide a letter stating the delay and resumption of banking services to MSCI's associates, customers, credit references and independent representative candidates.

205. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants correct any negative reporting made to government or industry agencies regarding MSCI.

206. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants reimburse the Plaintiff for all legal fees and costs related to obtaining injunctive relief under the Clayton Act.

207. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants pay interest on the Plaintiff's damages from the date a complaint for injunctive relief was first filed until any award is paid by the Defendants.

208. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants are restrained from copying, circulating, disclosing or transmitting MSCI's business information including trade secrets derived from MSCI's business plan or associate program amongst employees of US BANCORP NA and its subsidiaries or outside persons and entities.

209. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants participate in expedited discovery including depositions and document production related to the dissemination of MSCI's confidential business information and trade secrets.

210. The Plaintiff seeks injunctive relief in the form of a court order allowing the Plaintiff to assist a United States Marshal in searching the premises of the Defendants for evidence of their violations of Misappropriation of Trade Secrets.

REQUEST FOR ORAL HEARING

WHEREAS the above stated facts are true based on information and belief of the Plaintiff MSCI, attested to by its chief executive officer Samuel Lipari and in a previously filed affidavit of facts, the Plaintiff respectfully requests the above stated injunctive relief is granted. In the event that the Defendants oppose the granting of the above relief or challenge the truthfulness of the above stated facts, the Plaintiff requests the opportunity to supply the court evidence, expert testimony and memorandums in support of the contested facts and the appropriateness of the relief requested. Additionally, the Plaintiff requests an oral hearing on the evidence and memorandum filed in support of or opposing the above requested relief.

PRAYER

WHEREFORE, plaintiff prays for judgment against all defendants for actual damages in excess of $75,000.00; injunctive relief as indicated; costs, including all appropriate attorney's fees, expert fees and expenses allowed; and for such other and further relief as the Court may deem appropriate in law and equity.

Respectfully submitted,

_____
Bret D. Landrith
Attorney for Plaintiff

DESIGNATION OF PLACE OF TRIAL

Comes now plaintiff and designates Kansas City, Kansas as the place of trial.

_____
Bret D. Landrith

VERIFICATION

STATE OF KANSAS)
)
COUNTY OF WYANDOTTE)

I, Samuel Lipari, President of Medical Supply Chain, Inc., being of lawful age and being first duly sworn upon my oath, state that I am the Chief Executive Officer of the corporate plaintiff herein and that I have read the above and foregoing Second Amended Complaint and find the statements therein made to be true and correct to the best of my information, knowledge and belief.

_____ November___ 2002
Samuel K. Lipari
CEO
Medical Supply Chain, Inc.

JURY DEMAND

Plaintiffs renew their demand for a trial by jury on all issues so triable.

Respectfully submitted this 12th of November, 2002.

_____
Bret D. Landrith
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I caused a true and correct copy of the foregoing to be deposited in the U.S. mail, postage prepaid, on this 12th day of November, 2002 addressed to:

Patrick J. McLaughlin
Mark A. Olthoff
Attorneys for Defendants
Suite 1500
50 South Sixth Street
Minneapolis, MN 55402-1498

Fax 612-340-2643

Certified by,

_____
Bret D. Landrith
Kansas Supreme Court # 20380
Attorney for Plaintiff MSCI
P.O. Box 17-2137
Kansas City, KS 66117-0137
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1.620.231-7636
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[i] Omnicell, Inc. company press release dated August 07, 2001

[ii] July 27 /PRNewswire/ -- Aspect Medical Systems, Inc.

[iii] *HCA Acquires Hospital Chain* (Bloomberg) Oct. 16, 02

[iv] Omnicell, Inc. company press release dated June 17, 2002

[v] NEWTON, Mass., and ST. LOUIS, Mo., Sept. 14 /PRNewswire/ -- AmeriNet, Inc.,

[vi] The Exclusion of Competition for Hospital Sales Through GPOs, Prof. Elhauge June 25, 2002

[vii] *3 Medical Supply Companies Receive U.S. Agency Subpoenas*; Walsh, Mary; NY Times, Aug. 15, 2002

[viii] *2 Powerful Groups Hold Sway Over Buying at Many Hospitals*; Bogdanich, Walt; NY Times, Aug, 2002

[ix] *Internet Supply Management Firms Merge* Healthdatamanagement.com December 17, 1999

[x] US BANCORP NA web site homepage news article regarding falling values of venture funds including those of US BANCORP NA, dated Oct. 15,2002

[xi] Neoforma.com, Inc Press Release; March 30, 2000

> Neoforma.com, Inc. (NASDAQ: NEOF), Eclipsys Corporation (NASDAQ: ECLP) and HEALTH*vision*, Inc., today announced the signing of definitive agreements to merge and create a new company serving the e-healthcare business-to-business (B2B) marketplace. In conjunction with the agreements, Neoforma.com announced that it has signed an exclusive 10-year strategic agreement to provide e-commerce services for the 6,500 healthcare organizations participating in the purchasing programs of Novation, LLC, the world's largest buyer of medical supplies and the supply company of national healthcare alliances VHA Inc. and University HealthSystems Consortium (UHC).

[xii] Neoforma.com, Inc Press Release; May 25, 2000

> Neoforma.com, Inc. (NASDAQ: NEOF) today announced that it has reaffirmed its exclusive 10-year agreement to provide e-commerce procurement services for Novation. Neoforma.com also announced modifications to the structure and terms of its stock and warrant transactions with VHA Inc. and University HealthSystem Consortium (UHC), the national healthcare alliances that own Novation.
> In a related announcement, Neoforma.com, Eclipsys Corporation (NASDAQ: ECLP) and HEALTH*vision*, Inc. today jointly announced that they have agreed by mutual consent to terminate, effective immediately, their proposed mergers announced March 30, 2000. Instead, Neoforma.com, Eclipsys and HEALTH*vision* have entered into a strategic commercial relationship that will include a co-marketing and distribution arrangement between Neoforma.com and HEALTH*vision*. The arrangement includes the use of Eclipsys' eWebIT™ enterprise application integration (EAI) technology and professional services to enhance the integration of legacy applications with Neoforma.com's e-commerce platform.

[xiii] *MedCenterDirect.com Files for IPO* MedCenterDirect.com Press Release March 28, 2000

[xiv] *State Steps up Probe of Research at Piper Jaffray;* Meisner, Jeff; Puget Sound Business Journal Oct 21, 2002

[xv] IPOmonitor.com database

[xvi] *Commerce One Hit With A Securities Lawsuit*; Temple, James, San Francisco Business Times, June 22, 2001

[xvii] US BANCORP PIPER JAFFRAY Venture Fund web site April 2001

[xviii] *Hospitals Sometimes Loose Money by Using a Supply Buying Group*; Walsh, Meier; NY Times, April30, 2002

[xix] Federal Antitrust Law: Cases and Materials; Gifford, Raskind2nd Ed, 2002

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.	)

COMPLAINT

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel, Bret D. Landrith and makes the following complaint for federal antitrust and state contract related claims.

Outline of Petition

Jurisdiction
1. Subject Matter Jurisdiction
2. Personal Jurisdiction
3. Venue
4. Governing Law

Facts
1. Parties
    a. Plaintiff
    b. Defendants
    c. Coconspirators Not Named As Defendants In This Action
2. The Relative Markets
    a. The Nationwide Hospital Supply Market
    b. The Nationwide e-commerce Hospital Supply Market
    c. The Upstream Healthcare technology Company Capitalization Nationwide Market
3. Anticompetitive Activity in the Subject Relevant Markets
    a. The Harm To Buyers In The Market
        i. The Harm to Hospitals
        ii. The Harm To Healthcare Services Consumers
        iii. Loss of Healthcare Insurance
        iv. The Injury To Healthcare Insurance Plans
        v. The Loss Of Life From Decreased Access To Healthcare
    b. The Harm to Medical Supply
    c. The Need For Private Antitrust Enforcement
        i. The Limited Resources Of The US Department Of Justice

Conclusion
Demand For Trial By Jury
Designation Of Place Of Trial

JURISDICTION

1. **Subject Matter Jurisdiction**. This complaint is filed and this action instituted under Sections 4 and 15 of the Clayton Act (15 U.S.C. SS 14 and 26) to recover damages for injuries to plaintiff's business and property by reason of the violations by the defendants of Sections 1 and 2 of the Sherman Act (15 U.S.C. SS 1, 2), and to enjoin the defendants from continuing to commit such violations in the future and the Declaratory Judgment Act, 28 U.S.C. SS 2201 and 2202. Jurisdiction of this Court is proper under 15 U.S.C. SS 15 and 26, 28 U.S.C. SS 1331, 1332 and 1337, and the doctrine of pendent jurisdiction. The amount in controversy exceeds $75,000.00, exclusive of interest and costs.

2. The business and acts of the defendants described herein are conducted in, and affect commerce between and among, the various states of the United States and between the United States and foreign nations and their territories. The unlawful acts of the defendants alleged hereinafter have restrained interstate trade and commerce.

3. This complaint includes claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 196, et seq., a federal question with an amount in controversy exceeding $75,000.00, exclusive of interest and costs.

4. This complaint includes claims under The Uniting and Strengthening America by Providing Appropriate Tools Required to intercept and Obstruct Terrorism Act of 2001 (The USA PATRIOT Act) Pub. L. No. 107-56 (2001), a federal question with an amount in controversy exceeding $75,000.00, exclusive of interest and costs.

5. In connection with the acts alleged in this complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications and the facilities of interstate commercial carriers.

6. This complaint includes claims based on the existence of a written contract under Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq. involving a contract made in interstate commerce and affecting commerce among several states with an amount in controversy exceeding $75,000.00, exclusive of interest and costs.

7. **Personal Jurisdiction**. The court has personal jurisdiction over the parties who are in the territorial limits of the United States and who have sufficient contacts with the State of Missouri.

8. **Venue**. Many of the acts charged herein, occurred in substantial part in the District for Western Missouri and the District of Kansas. Defendants conducted other substantial business within this District and the plaintiff's corporate headquarters are within this district.

9. Governing Law. This court has jurisdiction over supplemental state law based claims arising from the common law of trusts, contracts and fiduciary duty under 28 U.S.C. § 1367. The Laws of the State of Missouri apply to the plaintiff's state law claims and govern their resolution.

FACTS

1. PARTIES

a. Plaintiff

10. Plaintiff Medical Supply Chain, Inc. (Medical Supply), is a Missouri Corporation with corporate headquarters at 1300 NW Jefferson Court, Blue Springs, MO 64015.

b. Defendants

11. Defendant Novation LLC. (Novation) is a company headquartered at 125 East John Carpenter Frwy Suite 1400 Irving, TX 75062.

12. Defendant Neoforma Inc. (Neoforma) NYSE Symbol NEOF, 3061 Zanker Road, San Jose, California 95134.

13. Defendant Robert J. Zollars is CEO of Neoforma, 3061 Zanker Road, San Jose, California 95134.

14. Defendant Volunteer Hospital Association of America, Inc. (VHA Inc.) is a corporation headquartered at 220 E. Las Colinas Blvd., Irving, TX 75039.

15. Curt Nonomaque, President and CEO, VHA Inc., 220 E. Las Colinas Blvd., Irving, TX 75039.

16. Defendant University Healthsystem Consortium (UHC) is a company headquartered at 2001 Spring Road, Suite 700 Oak Brook, Illinois 60523-1890.

17. Robert J. Baker, President and CEO of UHC, 2001 Spring Road, Suite 700 Oak Brook, Illinois 60523.

18. Defendant US Bancorp, NA (US Bancorp) NYSE symbol USB is a bank holding corporation headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.

19. Defendant US Bank, NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.

20. Defendant Jerry A. Grundhoffer, the President and Chief Executive Officer of US Bancorp. His offices are at 800 Nicollet Mall, Minneapolis, MN 55402. He is not a citizen of Missouri.

21. Defendant Andrew Cesere is Vice Chairman of US Bancorp trust division. His offices are at 800 Nicollet Mall, Minneapolis, MN 55402. He is not a citizen of Missouri.

22. Defendant Piper Jaffray Companies, (Piper Jaffray) NYSE symbol PJC is a company located at 800 Nicollet Mall, Minneapolis, MN 55402.

23. Defendant Andrew S. Duff, CEO of Piper Jaffray, 800 Nicollet Mall, Minneapolis, MN 55402. He is not a citizen of Missouri.

24. Shughart Thomson & Kilroy Watkins Boulware, P.C., (Shughart, Thomson & Kilroy) is a company located at 120 W. 12TH STE 1600, Kansas City MO 64105

c. Coconspirators Not Named As Defendants In This Action

25. Premier, Inc. (Premier) 12225 Camino Real, San Diego, CA 92130.

26. Global Health Exchange LLC (GHX), 11000 Westmoor Circle, Suite 400 Westminster, Colorado 80021.

27. General Electric Company, (GE) NYSE symbol GE, 3135 Easton Turnpike, Fairfield, CT 06828-0001.

28. GE Healthcare, global headquarters, Chalfont St. Giles, United Kingdom, USA headquarters, Technologies: Waukesha, Wisconsin.

29. General Electric Capital Business Asset Funding Corporation, (GE Capital), 3135 Easton Turnpike, Fairfield, CT 06828-0001.

30. GE Transportation Systems Global Signaling, L.L.C. (GE Transportation) 3135 Easton Turnpike, Fairfield, CT 06828-0001.

31. Jeffrey R. Immelt, CEO of GE and former president of (GE Healthcare) 3135 Easton Turnpike, Fairfield, CT 06828-0001.

32. Robert Betz, president of Robert Betz Associates, Inc.

2. THE RELATIVE MARKETS

a. The Nationwide Hospital Supply Market

33. The market for hospital supplies includes all products used in the provision of healthcare services at doctor's offices, clinics, nursing homes, hospitals and health systems made up of multiple hospitals and outpatient facilities, nationwide.

34. Hospital supplies include everything from consumable bandages, dressings and pharmaceuticals to facility supplies including linens, instruments, test equipment, cleaning supplies, food and permanently installed laboratory equipment and physical plant machinery.

35. Currently, the market for hospital supplies is 1.8 trillion dollars in expenditures annually.

36. Two hospital group purchasing organizations, Novation, Inc. and Premier Inc. which originated as cooperative buyer's agents for hospitals currently control which products are available to 70% of the nation's hospitals.

b. The Nationwide e-commerce Hospital Supply Market

37. The e-commerce market includes all the products in the range of hospital supplies described above when they are selected from on line catalogs or purchased through Internet and World Wide Web communications from an electronic marketplace.

38. The e-commerce market also includes supply chain management software used in healthcare to enhance the advantages of web based suppliers over traditionally distributed goods which adds value in the form of obtaining product information, aggregating comparable or substitutable products to maximize competition in pricing, bidding, ordering, shipping, fulfillment and logistics.

39. The use of artificial intelligence software by electronic marketplaces radically increases the efficiency and decreases the costs of products available through traditional distribution systems.

40. Originally there were over a hundred e-commerce electronic marketplaces for hospital supplies. Now there are just two, Neoforma, Inc. the web based supplier controlled by Novation and GHX, LLC a web based supplier controlled by Premier and other members in a joint venture of formerly competing hospital manufacturers and suppliers.

41. Medical Supply and its founder Samuel Lipari created the concept of an electronic marketplace for hospital supplies based on an insurance clearing house model in 1995 but has been prevented from entering the market independent from the control of Novation and Premier.

c. The Upstream Healthcare technology Company Capitalization Nationwide Market

42. The ability to finance research and development and to create working technological solutions is commonly shouldered by the entrepreneur, his family and friends until the technology can be demonstrated and its utility can be quantified.

43. Healthcare technology companies and supply chain management companies (throughout this complaint, supply chain management companies will refer to companies with software applications that manage hospital supplies in the healthcare industry) create products that can be used throughout the nation, meeting a universal demand and necessitate capitalization to reach that market quickly as opposed to attempting to grow from region to region as a bricks and mortar retail store or services industry business might. Failure of the healthcare technology or supply chain management company to meet the demand for its product results in competitors substituting other technological solutions and meeting the demand before the entrepreneur can pay the cost of his research and development or repay the sources of capital used in entering the market.

44. US Bancorp NA and Piper Jaffray concentrated 70% of their investment in healthcare and created a 150 million dollar healthcare technology venture fund to capitalize healthcare technology and supply chain management companies.

45. US Bancorp Piper Jaffray was the leading capital source for healthcare technology companies and for supply chain management software that could be adapted to healthcare.

46. US Bancorp Piper Jaffray also provided research to institutional investors and published coverage of publicly traded healthcare technology companies that gave it the power to dominate the early stage capitalization of privately owned healthcare technology companies and whether the company would be selected for an initial public offering, the largest capitalization event for an entrepreneur and whether a market would be made or demand exist for the shares of the offering once they were marketed.

3. ANTICOMPETITIVE ACTIVITY IN THE SUBJECT RELEVANT MARKETS

47. “Most health care costs are covered by third parties. And therefore, the actual user of health care is not the purchaser of health care. And there's no market forces involved with health care.” President George W. Bush, Second Presidential Debate, October 14, 2004

48. The hospital supply market is recognized to be anticompetitive See The Exclusion of Competition For Hospital Sales Through Group Purchasing Organizations June 25, 2002 by Harvard Law Professor Einer Elhauge and The US General Accounting Office report Pilot Study Suggests Large Buying Groups Do Not Always Offer Hospitals Lower Prices April 30, 2002

49. On 4/30/02 Elizabeth A. Weatherman, Managing Director Warburg Pincus, LLC and Vice Chair of the Medical Group of the National Venture Capital Association testified before the Senate that **"...companies subject to, or potentially subject to, anti-competitive practices by GPOs will not be funded by venture capital. As a result, many of these companies and their innovations will die, even if they offer a dramatic improvement over an existing solution."** [emphasis added]

50. She was called back on July16, 2003 because of the Judiciary's Antitrust Subcommittee concerns that GPO monopoly power and unethical conduct is still starving their healthcare technology competitors of capitalization.

51. US Bancorp Piper Jaffray was fined for acts of extortion against a healthcare technology company attempting to capitalize itself with another investment bank in the upstream relevant market of healthcare capitalization The article cited why the National Association of Securities Dealers fined Piper Jaffray but the conduct is also a Sherman 2 monopolization violation: "The NASD investigation found a Piper managing director, Scott Beardsley, threatened to discontinue coverage of Antigenics Inc., a biotech firm, if it did not select Piper as a lead underwriter for a planned secondary stock offering. As part of a settlement with the NASD, Piper was censured and fined $250,000 and Beardsley was censured and fined $50,000."

52. In August of 2000 Piper Jaffray proffered positive research to ThermaSense, a medical technology it was interested in providing investment-banking services to. Piper Jaffray won the business of the firm, and $3.8 million in investment banking fees. Such exchanges of positive research for investment banking business constitute "conflict of interest" by fair dealing standards.

53. Premier helped to set up American Pharmaceutical Partners in 1996, then steered hospital business to it. For this help and an initial $100 investment, Premier received American Pharmaceutical stock that was worth $46 million when the company went public in 2001. Premier also receives a percentage of the money that hospitals spend buying American Pharmaceutical's drugs. William J. Nydam, once an executive vice president of Premier, received stock options as an American Pharmaceutical director. He has since left

Premier, but his options were worth $1.2 million at the stock's initial offering price. Palmer Ford, who worked for Premier's venture capital unit, received an undisclosed number of American Pharmaceutical options for consulting work after he had left the buying group. Mary Williams Walsh, "When a Buyer for Hospitals Has a Stake in Drugs It Buys", NY Times March 26, 2002.

54. Two Medical Supply legal actions to enjoin the Defendants from causing the breach of contracts to capitalize Medical Supply's entry to market were described to the third Senate Judiciary hearing on the GPO problem because of the important public policy being defeated by antitrust violations against e-commerce suppliers:

> "[A] bank tied to an investment house that has seventy percent of its holdings in health care suppliers refused to provide the company with simple escrow services through a blatant misapplication of the USA Patriot Act. Most recently an international conglomerate that is a founder of GHX was willing to take a $15 million dollar loss on a real estate deal just to keep this company out of the market."

Testimony of Lynn James Everard, "Hospital Group Purchasing: Has the Market Become More Open to Competition?" United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Business and Consumer Rights July 16, 2003.

55. On 7/15/02 The NY Times reported the investigation of antitrust conduct of US Bancorp and Piper Jaffray's coconspirator Novation:

> "Premier and Novation are also being investigated by the Federal Trade Commission and the General Accounting Office, the investigative arm of Congress. The F.T.C. wants to know if the groups, which last year negotiated contracts worth more than $30 billion, are wielding too much control in the market for hospital supplies. The G.A.O. has already issued a preliminary report that questions whether the groups actually save hospitals money."

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

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

57. The US Attorney that obtained the criminal subpoenas was found dead in her home the day before the third senate subcommittee hearing in healthcare group purchasing organizations that took place September 14, 2004.

58. The claim that hospital group purchasing organizations save hospitals money or have ever saved money has been shown to be without a rational basis. See Defining and Measuring Product-Based Cost Savings in the Health Care Supply Chain by Lynn James Everard, (February, 2005): "An overwhelming 94 percent of respondents believe that their GPO saves them money," Everard reports. "Yet only 29% said they actually knew how much money their GPO had saved them – and 80 percent of those said they knew how much, because their GPO told them."

a. The Harm To Buyers In The Market

i. The Harm to Hospitals, Nursing Homes and Home Healthcare Services:

59. The combinations and or conspiracies of the defendants' Group Purchasing Enterprise produced adverse, anti-competitive effects by preventing the efficiency of competitive electronic commerce in the relevant United States hospital supply market resulting in excess charges from artificially inflated costs averaging 20% to 40% and in some goods excess charges of 50%, reducing the bottom line profit and loss statements of U.S. hospitals by an average of 5% and forcing over 2000 North American hospitals to operate at an unsustainable loss, endangering the nation's access to healthcare, increasing the cost of care and health insurance and forcing the closing and merging of treatment centers, resulting in needless suffering and death.

The Monopoly's artificial inflation of Hospital Supply Costs (Excluding Prescription Drugs):

60. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged $30,000,000,000.00 (thirty billion dollars) in 2002.

61. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged $32,200,000,000.00 (thirty two billion, two hundred million dollars) in 2003.

62. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged $34,500,000,000.00 (thirty four billion, five hundred million dollars) in 2004.

The Monopoly's artificial inflation of Nursing Home and Home Health Costs (Excluding Prescription Drugs):

63. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused nursing home and home health services to be overcharged $8,200,000,000.00 (eight billion, two hundred million dollars) in 2002.

64. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused nursing home and home health services to be overcharged $9,400,000,000.00 (nine billion, four hundred million dollars) in 2003.

65. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused nursing home and home health services to be overcharged $10,000,000,000.00 (ten billion dollars) in 2004.

The Monopoly's artificial inflation of Prescription Drugs:

66. The defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospital supply consumers to be overcharged $40,000,000,000.00 (forty billion dollars) in 2002.

67. The defendants in combinations or conspiracies with hospital suppliers, distributors and manufacturers caused hospital supply consumers to be overcharged $45,000,000,000.00 (forty five billion dollars) in 2003.

68. The defendants in combinations or conspiracies with hospital suppliers, distributors and manufacturers caused hospital supply consumers to be overcharged $50,100,000,000.00 (fifty billion, one hundred million dollars) in 2004.

ii. The Harm To Healthcare Services Consumers

69. A study released February 2, 2005 stated about half of bankruptcies filed in 2001 were because of medical bills, according to a study published Wednesday on the Health Affairs Web site, the Chicago Tribune reports (Rubin, Chicago Tribune, 2/2). For the study, researchers from Harvard Medical School and Harvard Law School surveyed 1,771 U.S. residents who filed for bankruptcy in 2001 and interviewed 931 of them (Abelson, New York Times, 2/2).

70. People interviewed had cases involving injury or illness, unpaid medical bills of more than $1,000 in the two years prior to filing for bankruptcy, loss of two weeks of work because of illness or injury or

mortgaging of a home to pay medical bills, the Los Angeles Times reports (Dickerson, Los Angeles Times, 2/2).

71. According to the study, 46.2% of people reporting bankruptcy in 2001 cited illness and medical bills as the cause the rate rose to 54.5% when births, deaths and gambling addictions were considered as factors, the AP/San Jose Mercury News reports (Jewell, AP/San Jose Mercury News, 2/2). The number of bankruptcies filed in the United States tripled between 1980 and 2001, to nearly 1.5 million couples and individuals. The number of medical-related bankruptcies increased twenty-threefold during that period, the study says (Los Angeles Times, 2/2).

iii. Loss of Healthcare Insurance

72. Approximately 81.8 million Americans -- one out of three people under 65 years of age -- were uninsured at some point of time during 2002-2003, according to a report released June 16, 2004 by the Health Consumer Organization Families USA.

73. The report, based mainly on Census Bureau data, showed that most of these uninsured individuals lacked coverage for lengthy periods of time: Almost two-thirds (65.3 percent) were uninsured for six months or more; and over half (50.6 percent) were uninsured for at least nine months.

74. Four out of five of the uninsured were in working families, according to the report. Of those working families, the report found that significant portions of the middle class were uninsured. For example, among people with incomes between 300 and 400 percent of the federal poverty level (between $55,980 and $74,640 in annual income for a family of four in 2003), more than one out of four were uninsured over the past two years.

75. Governor Sebelius indicated the stakes involved in being uninsured: "Tens of millions of Americans -- and hundreds of thousands of Kansans -- are regularly risking their health and financial security because the cost of health insurance is too often out of their reach," she said.

iv. The Injury To Healthcare Insurance Plans

Medicare

76. In 2002, the defendants in combination and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicare to be overcharged for hospital care $13,920,000,000.00 (thirteen billion, nine hundred twenty million dollars), caused Medicare to be overcharged for nursing home and

home health care $3,845,000,000.00 (three billion, eight hundred forty five million dollars) and caused Medicare to be overcharged for prescription drugs $5,663,000,000.00 (five billion, six hundred sixty three million dollars).

77. In 2003, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicare to be overcharged for hospital care $14,832,000,000.00 (fourteen billion, eight hundred thirty two million dollars), caused Medicare to be overcharged for nursing home and home health care $4,052,000,000.00 (four billion fifty two million) and caused Medicare to be overcharged for prescription drugs $6,272,000,000.00 (six billion, two hundred seventy two million dollars).

78. In 2004, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicare to be overcharged for hospital care $15,864,000,000.00 (fifteen billion, eight hundred sixty four million dollars), caused Medicare to be overcharged for nursing home and home health care $4,316,000,000.00 (four billion, three hundred sixteen million dollars) and caused Medicaid to be overcharged for prescription drugs $7,000,000,000.00 (seven billion dollars).

Private Insurance

79. In 2002, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Private Insurers to be overcharged for hospital care $12,710,000,000.00 (twelve billion seven hundred ten million dollars), caused Private Insurers to be overcharged for nursing home and home health care $3,488,000,000.00 (three billion, four hundred eighty eight million dollars) and caused Private Insurers to be overcharged for prescription drugs $30,742,000,000.00 (thirty billion seven hundred forty two million dollars).

80. In 2003, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused private insurers to be overcharged for hospital care $13,542,000,000.00 (thirteen billion, five hundred forty two million dollars), caused private insurers to be overcharged for nursing home and home health care $3,675,000,000.00 (three billion, six hundred seventy five million dollars) and caused private insurers to be overcharged for prescription drugs $34,048,000,000.00 (thirty four billion, forty eight million dollars)

81. In 2004, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused private insurers to be overcharged for hospital care $13,539,000,000.00 (thirteen

billion five hundred thirty nine million dollars), caused private insurers to be overcharged for nursing home and home health care $3,914,000,000.00 (three billion, nine hundred fourteen million dollars) and caused private insurers to be overcharged for prescription drugs $38,095,000,000.00 (thirty eight billion ninety five million dollars).

Medicaid

82. In 2002, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicaid to be overcharged for hospital care $3,631,000,000.00 (three billion, six hundred thirty one million dollars), caused Medicaid to be overcharged for nursing home and home health care $1,699,000,000.00 (one billion, six hundred ninety nine million dollars) and caused Medicaid to be overcharged for prescription drugs $4,045,000,000.00 (four billion forty five million dollars).

83. In 2003, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused private Medicaid to be overcharged for hospital care $3,869,000,000.00 (three billion, eight hundred sixty nine million dollars), caused Medicaid to be overcharged for nursing home and home health care $1,790,000,000.00 (one billion, seven hundred ninety million dollars) and caused Medicaid to be overcharged for prescription drugs $4,480,000,000.00 (four billion, four hundred eighty million dollars).

84. In 2004, the defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused Medicaid to be overcharged for hospital care $4,138,000,000.00 (four billion, one hundred thirty eight million dollars), caused Medicaid to be overcharged for nursing home and home health care $1,907,000,000.00 (one billion, nine hundred seven million dollars) and caused Medicaid to be overcharged for prescription drugs $5,000,000,000.00 (five billion dollars).

85. On January 26, 2005, Governor Blunt of Missouri was forced to propose removing thousands of people from Medicaid insurance. The state-federal program provides health care for the disabled, the blind, some elderly people and low-income families with children. Also cut would be adults who are considered medically unemployable but haven't yet qualified as disabled. Medically unemployable persons often rely on the special coverage while they await federal decisions on whether they are disabled. The governor would eliminate podiatry, dental care and rehabilitation services for adults. Also, some services would be subject to small co-payments and deductibles. In all, the state’s need to make Medicaid cuts would save

$626 million in state and federal funds. But even with the cuts, Blunt said, the $5.3 billion program would consume 26 percent of the total state budget.

v. The Loss Of Life From Decreased Access To Healthcare

86. The rise in healthcare costs of which hospital supply inflation is a significant contributing factor led to a reported 18,000 deaths a year in the USA resulting from 40 million Americans being uninsured in 2001. See "Study Blames 18,000 deaths in USA on Lack of Insurance", USA Today, May 23, 2002.

87. In 2002, the number of uninsured increased to 43.6 million Americans and without decreases in the mortality rates of untreated illnesses or observed improvements in public health systems, the number of deaths resulting from the lack of affordable health insurance was 19,962.

88. The following year, 2003, the number of uninsured Americans increased to 45 million, resulting in an expected 20,603 deaths resulting from the lack of affordable health insurance.

89. During the period of time in which Medical Supply has been foreclosed from competing in the market for healthcare supplies as a result of the actions of the defendants, at least 41, 206 Americans have died as a result of the increasing cost of hospitalization and medical care of which artificially inflated hospital supply costs are a significant contributing factor.

vi. The Harm to Medical Supply

90. The actions taken by the Defendants have resulted in dramatic losses to Medical Supply its stakeholders, associates, suppliers and customers. Under traditional Clayton Antitrust Act damages calculations, the Defendants have caused substantial short and long-term losses that are not recoverable due to Medical Supply's injury and delay in obtaining banking services. Medical Supply has directly suffered $2,901,600 in damages the 1st year, $27,366,576 in damages the 2nd year, $74,798,940 in damages the 3rd year plus forward financial damages in the fourth year of $140,443,9800 and $223,488,060 in the fifth year as a combined total of $468,099,156 and trebled are $1,404,297,468.

91. As a direct result of Medical Supply's injury, its associates also are damaged due to the actions of the Defendants. Losses include an average of 40-60 hours per week participation in Medical Supply's evaluation and hiring practices; in addition to due diligence and market evaluation activities. Losses of revenue for associates are $93,085,831 trebled are $279,257,493.

92. As a direct result of Medical Supply's injury, its consultants and suppliers have been harmed by Medical Supply's inability to fulfill success agreements and service contracts due to the actions of the Defendants. Medical Supply consultants and suppliers have performed several thousand hours in services that are contractually due and Medical Supply is unable to perform as a result of the actions of the Defendants. These consultants and suppliers depend on Medical Supply to meet its obligations and the actions of the Defendants are preventing Medical Supply from doing so.

93. The direct result of Medical Supply injury and inability to perform its services to customers are the lost savings and additional revenue Medical Supply generates for its customers through its services. Losses to Medical Supply customers are directly due to the actions of the Defendants and are 20% of the total supplies spend health systems currently pay out annually or $4,425,655,560 trebled are $13,276,966,680.

94. Medical Supply's customers are healthcare systems consisting of hospital groups. The actions of the Defendants to preserve an anticompetitive marketplace in healthcare supplies keep in jeopardy over 2000 of the nation's 5,700 hospitals. The resulting closings of some or most of these hospitals due to unsustainable supply costs will significantly harm public access to healthcare, increasing loss of life and unnecessary injury.

b. The Need For Private Antitrust Enforcement

95. At the close of the US Senate Judiciary Committee's Antitrust Subcommittee's hearing entitled "Hospital Group Purchasing: How to Maintain Innovation and Cost Savings" on Tuesday, September 14, 2004, the subcommittee's chair suggested that the 1.8 trillion dollar market's anti-competitive behavior might be better corrected with private antitrust litigation than with new legislation.

i. The Limited Resources Of The US Department Of Justice

96. Two US Attorneys that appeared connected to the criminal investigation of Novation, LLC have died and three more in the Ft Worth office of the US Department of Justice with antitrust expertise have been dismissed.

97. The Ft. Worth US Attorney's office has been at the epicenter of where civil antitrust actions by manufacturers foreclosed from group purchasing organization distribution systems have been litigated

and is believed to have been the center of effort behind the government's criminal investigation of hospital supply relationships.

98. On October 18, 2004 Leonard Senerote, A former U.S. Army Special Forces officer who was an expert in complex securities cases and an antitrust trial attorney, Michael Uhl and Michael Snipes, veteran prosecutors with expertise in white collar fraud and corruption were announced as separating from the Ft. Worth Office of the US Attorney.

ii. The Deaths of The FCA Attorneys

99. The Dallas Morning News described the office as already reeling from the unexpected deaths of criminal chief Shannon Ross [the source of the widespread criminal inquiry into medical supplies and False Claims Act violations against Medicare] and civil and False Claims Act litigator Thelma Louise Quince Colbert. Ms. Ross, who had been feeling ill, was found September in her home. Ms. Colbert accidentally drowned a month earlier in July.

100. Medical Supply does not believe there is currently an active criminal investigation of the supplier side of hospital Medicare false claims.

4. BACKGROUND

a. Procedural History

Medical Supply filed its first action for injunctive and declaratory relief in the U.S. District Court for the District of Kansas, *Medical Supply Chain, Inc. v. US Bancorp, NA et al* KS. Dist. Case No.: 02-2539

101. Medical Supply sought relief based on a complaint for an urgent Temporary Restraining Order filed 10/22/02 and amended 11/02/02 because the defendants were repudiating a contract (misusing the USA PATRIOT Act shown to be a false pretext) on 10/15/02 to provide escrow accounts required for the deposit of $350,000.00 raised from manufacturer rep candidates by Medical Supply. The denial of the TRO caused all funds to be lost on 12/1/02, including the company's last resources used to recruit the candidates and all funds invested in preparation of training.

102. Medical Supply's cause was controversial because it was an action to seek an injunction against breaking a contract to provide escrow accounts in furtherance of a boycott by US Bancorp and Piper Jaffray's coconspirator identified in the complaint as Novation, a healthcare group purchasing organization ("GPO") competitor of Medical Supply's in the hospital supply market. Also identified in the complaint

was Novation's captive e-commerce marketplace Neoforma, Inc. competing with Medical Supply on the web.

103. Medical Supply sought an interlocutory appeal on the denial of injunctive relief without a memorandum and order or findings of law and fact *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 02-3443. Medical Supply also sought interim pre-hearing relief in the Tenth Circuit. The pre-hearing relief was denied and the interlocutory appeal was dismissed as moot.

104. Medical Supply appealed the dismissal of its injunctive and declaratory relief action *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 03-3342. The Tenth Circuit upheld the trial court's dismissal without findings of law or fact and made a show cause order why Medical Supply and its counsel should not be sanctioned for a frivolous appeal.

105. Medical Supply answered the show cause order asserting the trial court had applied the incorrect legal standard and had misstated the USA PATRIOT Act. The Tenth Circuit found that Medical Supply had pled a conspiracy that included a separate legal entity, contradicting the trial court's ruling and the Tenth Circuit panel found that Medical Supply was correct in the existence of private rights of action under the USA PATRIOT Act. However, instead of correcting its ruling and ordering that Medical Supply was entitled to injunctive and declaratory relief, the Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal.

106. Medical Supply sought en banc rehearing of its appeal, giving notice that the panel's ruling had no preclusive effect for the parties regarding the future action for monetary damages in the Western District of Missouri. Neither the court nor opposing counsel contradicted Medical Supply's ripeness analysis. The court declined to rehear the case en banc and Medical Supply is now seeking Supreme Court review.

b. The Legal Basis For Now Ripe Monetary Damages Submitted to The Tenth Circuit

107. Now that Medical Supply has experienced all the injury it sought to avoid, it is required to bring its claims for monetary damages to a federal district court: "...if future damages are unascertainable, a cause of action for such damages does not accrue until they occur. *Zenith*, 401 U.S. at 339, 91 S. Ct. at 806." *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at FN4 (C.A.10 (Kan.), 1989). See also *Barnosky Oils Inc., v. Union Oil Co.,* 665 F.2d 74, 82 (6th Cir. 1981). US Bank was still attempting to perform the financing part of the contract after Medical Supply filed for its injunctive relief.

"If the initial refusal is not final, each time the victim seeks to deal with the violator and is rejected, a new cause of action accrues". See Pace Indus., 813 F.2d at 237-39; *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714-15 (11th Cir.1984)." *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at 933-4 (C.A.10 (Kan.), 1989).

108. Medical Supply also now has evidence the malicious suspicious activity report as a sham petition was filed to further the agreement to suppress competition. See, e.g., *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274-75 (5th Cir. 1991); *Korody-Colyer Corp. v. General Motors Corp; In re Relafen Antitrust Litigation* at pg. 6 (Mass., 2003). The amended pleading for now ripe monetary damages in Kansas District Court or a new-filed action in some other federal district court would suffer no issue preclusion on Sherman 1 or 2 claims. *Oltremari v. Kansas Social & Rehabilitative Service*, 871 F. Supp. 1331 (Kan., 1994). The failure of either the trial court or the appellate panel to address the meritorious appeal that the defendant's use of the USA PATRIOT Act was a sham petition is a Sherman 2 A violation not excepted by *Eastern RR v. Noerr.*, 365 U.S. 127, 141, 81 S.Ct. 523, 531, 5 L.Ed.2d 464 or maliciously under the USA PATRIOT Act private right of action completes the lack of preclusive effect of the appeal court decision.

5. THE HOSPITAL GROUP PURCHASING ENTERPRISE TO ARTIFICIALLY INFLATE PRICES

109. During October 22 thru October 24 in 1979, a little known hospital logistics industry organization called the Group Purchasing Group held a conference in Vacation Village, San Diego California. At that event a seven page document was circulated among representatives of cooperative hospital purchasing groups which originated as buying agents for hospitals that became the blueprint for nationwide fraudulent price collusion in hospital supplies.

110. The recipients of the document were officials in Sun Health, American Medical Systems, HSCA, Cardinal and other precursors to today's two dominant hospital group purchasing organizations (GPO's), Novation and Premier. Eventually the document recipients would become the key officials in the later group purchasing organizations Amerinet, Novation and Premier and in oligarch hospital supply manufacturers including Johnson & Johnson and Baxter.

111. The document itself was presented as the perfect "sales story." Ways to communicate to hospitals that group purchasing cooperatives were creating value for their members. However, the document was

instead employed as a blueprint for fraud. The membership "value" for hospitals being communicated was a deception about the cost of commodities sold through the cooperative.

112. The fraudulent scheme described a method for creating a false baseline for commodity pricing from an average of the purchase price of units of goods by kind taken from a broad sample of the goods as purchased in many hospitals in a variety of locations and in varying quantities. The data would then be used to create a manipulated average well above an easily obtainable volume discount.

113. The victim prospective hospital would also be subjected to the frightening prospects of price increases and shortages that would certainly befall hospitals that did not join the security of the purchasing cooperative.

114. The cooperative would then negotiate a "discounted" price below the false baseline and declare the difference as the "savings" to the hospital. The cooperatives derived the "savings" from manipulated baseline costs of goods distributed and therefore had to disconnect the savings expectations of their member hospitals from an easily comparable commodity price. This "savings" was delivered to the member hospitals in the form of periodic, usually quarterly refunds, rebates and dividends.

115. The secret document described the upward manipulation of their customers' expected costs as price "inflation." The scheme included steadily increasing the baselines used to assist members and prospective members to compare the cooperative's prices. This deception was described as "inflation based savings."

116. The cooperatives exploited the foreseeable effect of this delayed repayment to hospitals. Hospitals billed third party payers including the government's healthcare insurance funds Medicare, Medicaid and Champus the cooperative contract price or even the artificially inflated baseline price instead of the actual cost to the hospital once the delayed rebate was subtracted. The scheme depended upon the hospitals certifying to Medicare that the bills being presented for patient care conformed to the government's accounting safeguards, including the Medicare Antikickback act.

117. To co-opt administrative officials in hospitals, hospital groups and independent distribution networks, the cooperatives and later the dominant GPO's would encourage and facilitate maintaining two sets of books by issuing two different reports. One for the chief executive of the hospital or hospital group

that fully detailed the various refunds, rebates, dividends, cash and cash equivalent payments and another for the materials director showing the units purchased at the cooperative price.

118. The attendees that employed the perfect sales story were able to insert their cooperative between the hospital and its suppliers and extract a membership fee. The precursor group purchasing organizations effectively sold "rebates" rather than price efficiency to their members. The business model was profitable for the cooperatives but had the potential of becoming extremely profitable if competition could be consolidated and the increased control of hospital supply distribution could be used to extract fees from product manufacturers.

119. The firm of Robert Betz Associates was utilized during 1985-86 to obtain a regulatory safe harbor from the Federal Trade Commission and the Department of Justice from the Medicare Antikickback statute to give the appearance of legitimacy to the Vacation Village conference attendees practice of paying periodic refunds, rebates and dividends to member hospitals. Robert Betz was successful and as a direct result of his efforts, Department of Justice False Claims Act prosecutions have never since targeted the GPOs or their supplier cartel members.

120. Once some kickbacks in the form of administrative fees to cooperatives were officially allowed, the original Vacation Village conference attendees were able to use their illegally inflated revenue stream to acquire their law abiding hospital supply competitors and a frenzy of mergers and acquisitions resulted in two dominant group purchasing organizations, Premier and Novation, LLC that control 70% of the national market in hospital supplies.

121. Premier and Novation, LLC are required under the Antikickback safe harbor to disclose administrative fees in excess of 3% that are added to the cost of goods sold through their distribution networks. Premier and Novation, LLC have however expanded the fees charged member hospitals in the price of goods sold to include 12 to 15 separate "non administrative fees." The names of the fees charged include "marketing," "conversion" "stocking" "tracing" and other legitimate sounding supplemental costs and some overtly illegitimate fees including "channel fees" and "patronage fees", however all such charges are outside of the safe harbor.

122. Premier and Novation, LLC use their market power to extract fees from manufacturers to have their products distributed through the monopolized distribution networks. The dominant GPO's have

expanded the Vacation Village "inflation savings" scheme to include managing suppliers to the group purchasing organization with planned price increases. Premier and Novation, LLC choose market leaders, a manufacturer with the largest market share to be the sole providers of each line of products used by their thousands of member hospitals.

123. The market leader is encouraged to set an increased list price for each good distributed by the GPO and to plan periodic increases in the list price. Premier and Novation, LLC then give the market leader a long term exclusive contract designed to eliminate competition for the market of goods used by the member hospitals. The market leader is secretly charged sizable fees by Premier and Novation, LLC for having its products distributed through the group purchasing organization. The market leader's contract price to the member hospitals has been increased to include this fee to Premier and Novation, LLC and by design, the contract price always compares favorably to the manufacturer's list price to further the "savings" deception on GPO members.

124. The "inflation savings" scheme is perpetuated to this day by annual inflation forecasts created and distributed by Premier and Novation, LLC. The documents appear to be legitimate economic forecasts to aid hospital-purchasing directors and include macroeconomic analysis of economic conditions that have the potential to effect product prices. For those uninitiated into the secrets of the fraud, the long-term contracts with the hospital's GPO either Premier or Novation, LLC appear to have protected the hospital against the full effect of projected increases in the manufacturer's list prices.

125. The fraud however is easily verified. The economic forecasts of Novation LLC and Premier speak for themselves. The lists of products and services and the projected price changes invariably show price increases exceeding the annual inflation index rate for the contract protected hospital supply market leader manufacturers and below annual inflation index price changes for non-hospital supply specialty items, even declining prices in some markets with competition. To offset these glaringly obvious comparisons, Novation LLC and Premier make much use (misuse) of macro inflationary data to project increases in commodities they do not control.

126. As an example, Novation LLC's 2005 projections utilize temporary surges in products like farm produce from fuel cost increases in 2004 to creatively portray large increases in products not under contract providing cover for the fraudulently increased prices of the GPO's participating suppliers.

127. Novation LLC and Premier also utilize a broad range of antitrust prohibited devices to coerce their member hospitals into continuing to be subjected to the artificially inflated healthcare supply costs. Hospitals are deceived into upgrading their dues based memberships into "shareholder" status and a higher rate of refunds, rebates, dividends, cash and cash equivalent payments.

128. Because of this illegal product-tying scheme, hospitals are forced to buy products they would not have otherwise purchased, fearing they will lose their vested interests in what are in actuality fictitious or deceptive rebates and discounts.

129. The hospitals are not given meaningful data regarding the perceived "savings" and are prevented from realizing they are paying their own refunds out of inflated costs at either membership and share holder remuneration rates.

130. Hospitals and hospital groups that achieve shareholder status are deceived into thinking that they will lose an "investment" in the achieved shareholder status if they withdraw from the GPO. However, there is no retainable value in the shares of the GPO. Neither Novation LLC or Premier is publicly held and the "shares" are a Sherman Act prohibited tying device to prevent competition.

131. Another device to prevent competition in the hospital supply markets for Novation LLC and Premier members is the allocation of markets among participating suppliers and the GPO's themselves. As part of their membership agreements Novation LLC and Premier require hospitals to obtain typically 6% of a product from a supplier that is not the GPO's contracted market leader. Other contract requirements include participating in a smaller GPO to a limited share of the hospital's purchases so that no hospital or hospital group is supplied exclusively by Premier or Novation, LLC to deceive the hospitals into thinking they are not monopolized and to provide a much lower volume inferior choice.

132. The contracts utilized by Novation LLC and Premier reward hospitals and hospital groups for increasing the market shares of selected product lines sold through the GPO's. Hospital rebate, refund, dividend cash and cash substitute kickbacks are increased depending on how much use of the targeted products are increased.

133. Finally, Novation LLC and Premier employ contracts with harsh terms including severe discipline for hospitals and hospital groups that obtain products or services from competitive markets outside of the

GPO. The sanctions can include embargo of supplies, stiff financial penalties and probationary periods of adverse financial terms as penalties for participating in a competitive market.

a. The defendants' hospital group purchasing enterprise

134. Robert J. Baker, UHC, Curt Nonomaque and VHA distribute hospital supplies by corrupting administrators in health systems (hospitals, hospital groups and independent distribution networks) that support the provision of services or provide services to Medicare, Medicaid and Champus funded patients. UHC and VHA employ marketing schemes that provide remunerations to healthcare systems under contracts in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b.

135. Robert J. Baker, UHC, Curt Nonomaque and VHA encourage health systems to violate § 1320a-7b(b)(1) by receiving unlawful remunerations which are labeled as "rebates" and are paid periodically based on the products used by the health system and its loyalty to the terms of the anticompetitive exclusive agreement with the group purchasing organization, UHC, VHA or Premier which control 70% of the hospital supply market.

136. Robert J. Baker, UHC, Curt Nonomaque and VHA encourage their member hospitals to believe the group purchasing organizations are saving money by communicating the "value" of the rebates they are receiving as contrasted against the constantly increasing prices of hospital supplies allowed into UHC, VHA's distribution system.

137. The corrupting subtext of Robert J. Baker, UHC, Curt Nonomaque and VHA's marketing scheme is knowingly encouraging that third party payers, chiefly Medicare, Medicaid and Champus are billed for the artificially inflated list price, not the actual cost to the health system once the cash and cash substitute remunerations are factored in.

138. Robert J. Baker, UHC, Curt Nonomaque and VHA violate § 1320a-7b(b)(2) because they knowingly and willfully pay and offer to pay the unlawful remunerations. To provide cover for the spiraling prices in the product lists of chosen hospital suppliers who are protected from competition in UHC and VHA's captive market, Robert J. Baker, UHC, Curt Nonomaque and VHA generate flawed studies that extol the discount in the form of rebates as a savings over the monopoly "list" price for healthcare supplies.

139. The constant threat to the corrupt marketing scheme employed by UHC and VHA is access to real data from which to evaluate the actual costs imposed upon member hospitals by the artificially inflated distribution system, which would be destabilized by independent actions of participating hospitals and suppliers.

140. Robert J. Baker, UHC, Curt Nonomaque and VHA have protected against this destabilizing by forcing hospitals and suppliers into long-term anticompetitive exclusive dealing contracts that harshly penalize every violation. Out of a misguided fear of antitrust liability, the contracts typically assign market share limiting each health system to 95% of its purchasing through the dominant group purchasing organization and require a token share of products to be purchased through a "competing" group purchasing organization.

141. Robert J. Baker, UHC, Curt Nonomaque and VHA have also commanded loyalty among member health systems by making cash and cash substitute payments to health system board members and chief administrators in return for participation in the cost inflation scheme.

142. Many forms of the Defendants' cash and cash substitute payments to hospital administrators are concealed as "consulting contracts" and are not reported to Medicare, Medicaid or Champus or subtracted from the costs of hospital supplies transferred to third party payers.

143. Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC have made use of payments to a third party in which hospital CEO's are stakeholders in order to conceal the commercial bribe nature of the payments. An organization called the Healthcare Research and Development Institute (www.hrdi.com) has existed since the late 1990s. HRDI has approximately 35 members who are hospital CEOs (many are heavily involved in supporting GPOs). The Institute's clients are large manufacturers, publishers, and large consulting firms. Each client pays the Institute and the members of the Institute, who are also its shareholders, are paid out of the profits of the organization. For hospital CEOs to personally receive payments from companies that they do business with is a serious conflict of interest and a failure to fulfill their fiduciary responsibility.

144. UHC, VHA and Premier insist that the Antikickback Act provides a safe harbor for marketing programs offering discounts to health care providers and that its program was designed to take advantage of this safe harbor. See 42 U.S.C. § 1320a7b(b)(3)(A); 42 C.F.R. § 1001.952(h).

145. The rewards Robert J. Baker, UHC, Curt Nonomaque, VHA have given to health systems, hospital board members and purchasing managers have been paid in "cash or cash equivalents" and sometimes equity (stock shares) extorted from healthcare technology companies permitted to sell through the distribution system. This appears to be inconsistent with the group purchasing systems' safe harbor theory. See 42 C.F.R. § 1001.952(h)(5)(i) ("The term discount does not include – Cash payment or cash equivalents (except that rebates as defined in [42 C.F.R. § 1001.952(h)(4)] may be in the form of a check).").

146. Robert J. Baker, UHC, Curt Nonomaque and VHA also have protected their monopoly markets by forming a joint venture with each other, acquiring an electronic marketplace that could be co-opted as a false storefront for their illegal marketing scheme and finally by joining a joint venture created by the dominant suppliers with their competitor group purchasing organization, Premier.

147. UHC and VHA knowingly created an antitrust prohibited joint venture limited liability company called Novation, LLC for the purpose of unlawfully setting prices for hospital supplies sold through the formerly competing group purchasing organizations UHC and VHA's 2000 member hospitals.

148. Novation, LLC limited the suppliers whose products could have access to purchasing managers in the 2000 member hospitals. Novation, LLC used its power to determine which products were sold to the member hospitals not to command the best supplier pricing or fulfillment, but instead to guarantee that approved suppliers would participate in planned upward manipulation of list prices so that Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC could sell "discounts" or "rebates" to their member hospitals.

149. Robert J. Baker, UHC, Curt Nonomaque and VHA operated Novation LLC to control transactions between suppliers and member hospitals utilizing facsimile telephony (fax) and Electronic Data Interchange (EDI) ordering and fulfillment to keep track of hospital purchasing data and police supplier fulfillment and product pricing to ensure healthcare product prices were being continually manipulated upwards (artificially inflated).

150. When web based business to business electronic marketplaces showed the potential to dramatically increase hospital supply purchasing efficiency and lower hospital supply prices by facilitating direct communications between hospital groups and many competing product suppliers, Robert J. Baker,

UHC, Curt Nonomaque, VHA and Novation LLC actively prevented Neoforma.com, an electronic marketplace that enabled hospital supplies to be purchased on the web from having access UHC and VHA's member hospital market and from carrying the products of Novation's suppliers.

151. Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC's power to exclude entrants from their market with long term anticompetitive contracts and a centralizing price controlling joint venture, allowed Neoforma.com to be taken over in a scheme to utilize the new web based electronic marketplace as a mere "storefront" for the existing inefficient bricks and mortar group purchasing organization Novation LLC and therefore secure UHC and VHA's price inflation scheme.

152. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray And Andrew S. Duff participated in a syndicate to make a market in an initial offering of publicly traded shares for Neoforma, LLC and to manipulate the stock prices in an illicit "laddering" scheme of prearranged market purchases to deceive stock investors into buying the shares at rapidly increasing share prices. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff profited from this deceptive manipulation by receiving blocks of shares in Neoforma.com which they inflated in a "pump and dump scheme" through Piper Jaffray's false recommendations to institutional fund managers and individual investors in reports about the bright future for the company without disclosing the brokerage's conflict of interest and participation in the prior arranged scheme to keep Neoform.com from reaching its potential to increase hospital supply efficiency. Instead, the Defendants planned to suppress Neoforma.com's technology to preserve Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC's corrupt inefficiencies. US Bancorp and Piper Jaffray were fined and paid $32.5 million fine to settle these securities fraud charges brought by with the SEC, NASD, NYSE, NASAA, and the New York Attorney General for the fraudulent research.

153. In March, 2000, Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma into deceiving the board of directors of Eclipsys, a software application company with superior technology to Neoforma.com and a positive cash flow into merging with Neoforma.com based on a long term contract to pay Neoforma.com a quarterly payment for providing an electronic marketplace on the web that Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC could control.

154. Neoforma, Inc.'s acquisition of Eclipsys and its stream of income was a threat to US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray And Andrew S. Duff's substantial interests in the hospital supply and hospital supply in e-commerce markets. With Eclipsys, Robert Zollar had the potential to compete with GPO's and bypass US Bancorp and Piper Jaffray's ability to extort equity from new market entries trying to supply hospitals.

155. A negative analyst report on the merger by Piper Jaffray was used to control Robert Zollars and Neoforma, Inc. Investors did not understand that Novation LLC controlled what companies had access to thousands of hospitals and that Eclipsys superior technology was not as valuable to its directors as the ability to gain access to the monopolized hospital supply market. Investors expressed dismay concerning the Merger Agreement as follows:

> "Investors may be unsettled by combining Eclipsys' relatively high-margin software and services business with Neoforma's extremely low-margin online [business-to-business] exchange. Furthermore, ECLP shareholders are frustrated about the ownership split between [Neoforma] and [Eclipsys]. Neoforma and Eclipsys are getting 37% and 28% of the combined company, respectively."

156. Similarly, a March 30,2000 report issued by analyst Caren Taylor, of E-Offering entitled "Neoforma to Acquire Eclipsys and Healthvision - - What's Wrong With This Picture?" stated:

> "As we take a step back and look at the big picture, we think there is something fundamentally wrong with this deal. We understand that Neoforma has had a difficult time accessing the buyer market, and we had heard recently that the company might miss their earnings target this quarter. In addition, we are somewhat dismayed by the behavior of Eclipsys - - first its initiation of a takeover bid of Shared Medical Systems Corp., which was dropped as of today, and now this sudden agreement to be acquired by Neoforma.com. This has left us wondering about the underlying issues within the Eclipsys organization. We would certainly not want to be the owners of these two stocks."

157. The detriment to Eclipsys shareholders was also recognized in a March 30,2000 analyst report issued by Pacific Growth Equities, in which Eclipsys was lowered to a "Neutral" rating from its previous "Buy" rating. In a paragraph entitled "Terms are disappointing for Eclipsys shareholders", the report stated:

> "The terms of the deal call for Eclipsys to receive 1.34 shares of the new Company for each of its 37.5 million shares (50.25 million shares), Novation to receive 69.3 million shares, Healthvision (excluding the amounts attributable to Eclipsys and the VHA) to receive 0.444 shares for each share and Neoforma.com to control the rest for a total share count of 2 10 million shares. Because these companies are all valued very differently - a classic old economy and new economy merger - attributing relative value is tricky. However, Neoforma.com, a leader among the emerging online marketplaces, was essentially still in "show me" mode and had little revenue. On the other hand, Eclipsys was a profitable company with one of the strongest franchises at $250 million in revenue last year...[t]hus we believe with less than 25% in the new company, the terms of the transaction are disappointing for Eclipsys shareholders."

158. In addition, Eclipsys shareholders cannot rely on increased medical supply orders from the Novation agreement to fill in the gaps of the Merger Agreement. As explained in a March 30,2000 Reuters article, it is not clear how much revenue Neoforma can count on from the Novation arrangement. The article added mistakenly that with respect to the Novation deal, "Novation really can't prevent their hospital customers from buying wherever they want to buy"

159. Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC agreed to a plan where Eclipsys would instead partner with Neoforma, Inc. and preserve the Defendants' corrupt inefficiencies in exchange for a long term contract with quarterly payments of member hospital funds through Novation, LLC.

160. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray And Andrew S. Duff deceived purchasers of Neoforma.com's stock into thinking the firm's e-commerce technology would provide efficiency in the delivery of hospital supplies while knowing that no measurable difference in efficiency exists in the software technology EDI already employed by Novation LLC and the e-commerce html based software employed by Neoforma.com. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff knew the only advantage leading to efficiency e-commerce software had over EDI was in facilitating the competition that Novation LLC's control of Neoforma.com was designed to prevent.

161. US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray And Andrew S. Duff also benefited because 70% of their venture funds were invested in healthcare technology companies and in exchange for their participation in the UHC and VHA scheme to keep hospital supply costs inflated, Piper Jaffray's healthcare technology companies received long term exclusive and anticompetitive contracts with Novation, LLC. This allowed US Bancorp and Piper Jaffray to profit greatly from underwriting the healthcare technology and supply chain management companies' initial public offerings.

6. The Origin of Technology That Made GPO's Obsolete And Eliminated Two Distribution Levels Facilitating Automated Competitive Direct Purchasing In An Electronic Marketplace

162. On July 17, 1993 Physicians Management Group was founded to supply doctor's offices, clinics and nursing homes with discounted healthcare supplies at costs rivaling the volume purchasing enjoyed by hospitals. The founders recruited Samuel Lipari, who would later found the plaintiff Medical Supply for his expertise in mass merchandising, grocery and automotive distribution.

163. Samuel Lipari recognized that the volume pricing in even large group purchasing organizations failed to provide significant cost savings and Physicians Management Group was able to profit by splitting the savings its customers realized over volume pricing.

164. Samuel Lipari discovered that for every product line and from almost every vendor in the broad spectrum of hospital supplies from bedding, to pharmaceuticals, to instruments and even including food and janitorial supplies, the price of goods sold through hospital group purchasing organizations and even their contract suppliers and manufacturer's catalog price was substantially higher than the discounts he could obtain. Samuel Lipari found it easy to beat the "volume discounts" on even very small quantity purchases for widely dispersed customers with disproportionately high handling and transportation costs.

165. In order to increase Physicians Management Group's recognizable savings to aid its customers in evaluating value over products sourced from other vendors, Samuel Lipari innovated the use of separate fees for Physicians Management Group's management, storage and delivery of healthcare supplies to allow customers to directly compare unit costs with other purchasing organizations. This innovation was a great aid to small doctor's practices and rural nursing homes which were empowered to make purchasing decisions on a direct comparison of value in cost per unit of product with the nation's larger volume hospital supply organizations while having the logistics costs of managing contracts, fulfillment, storage and delivery separated out in observable fees that could be tracked and competitively evaluated. Physicians Management Group's logistics services could then be partially or completely substituted with more competitive local alternatives.

166. The demand for Physicians Management Group's business model as an alternative supplier grew faster than the fledgling company with no access to operating capital could sustain. The first 25 independent representatives who had self financed their representation, a practice common among manufacturer's representatives in the automotive and mass merchandizing industries brought in four million dollars in contracts within the first 90 days and Physicians Management Group began shipping products to their clients.

167. Physicians Management Group's hospital group purchasing organization (GPO) supplier was Health Services Corporation of America (HSCA). Despite being one of the largest GPOs at the time with the most volume from which to leverage lowest prices HSCA's contract prices for its member customers

were not as good as those Physicians Management Group obtained on purchases outside of the GPO. Even though Physicians Management Group was only fulfilling the requirements of small volume doctor's offices, clinics and nursing homes.

168. Without access to operating capital to sustain the high demand and growth, Physicians Management Group ceased operations and began returning all unshipped products to the appropriate manufacturer. Physicians Management Group Inc. filed for financial relief on October 15, 1996 and that relief was granted and the file closed on April 09, 1997.

169. On October 24, 1995 Samuel Lipari incorporated Medical Supply Management in the State of Missouri, a healthcare supplier that used technology to bundle services to assist hospitals, nursing homes, surgery centers and physician offices purchase track and pay for supplies again innovating and adopting the role suppliers in the vastly more competitive mass merchandizing industry create value for their customers reducing administrative and product costs.

170. The effect of bundling services to purchase track and pay for supplies, utilizing Samuel Lipari's proprietary software was a revolutionary value adding innovation radically increasing efficiency and reducing costs that rendered group purchasing organizations obsolete. Group purchasing organizations operating without supply chain management software were physically unable to manually offer these value adding services, even with their enormous administrative offices and staff. Hospitals, unlike retail stores where supplier management of purchasing, tracking and paying for supplies as a competition enhancing service to customers originated, do not have the primary function of selling products. When suppliers start to purchase, track and pay for supplies as an included service for hospitals, hospital staffing can concentrate on the primary value creating function of providing healthcare services. The savings realized became exponential.

171. Group purchasing organizations and suppliers began a refusal to deal strategy to foreclose the new supply chain technology from the market for hospital supplies. Although HSCA had indicated a willingness to provide Medical Supply Management a membership in its GPO as they had done earlier for Physicians Management Group, HSCA later breached the membership contract with Medical Supply Management, stating the GPO was getting too much pressure from several suppliers.

172. Medical Supply Management replaced HSCA with MedEcon as its GPO, and as a member of MedEcon, Medical Supply Management's clients were entitled to contract pricing according to MedEcon's Manufacturer Agreements to supplement direct purchasing negotiated by Medical Supply Management itself.

173. As a supplier for health systems (hospital chains, hospitals, clinics and nursing homes) Medical Supply Management was what the industry labels an "independent distribution network." However, unlike other suppliers in healthcare, Medical Supply Management did not make exclusive contracts with particular manufacturers extracting profit from the rebate or kick back payment for exclusive access to a market. Medical Supply Management's compensation was driven only by its performance in saving costs for its customers. Consequently, Samuel Lipari's software was engineered as a "clearing house" resembling an insurance claims processing center of the period where many active competitors utilize the center as a neutral utility. This was the first electronic marketplace in healthcare supplies and it was not based on the GPO model of extracting fees for anticompetitive advantage and monopolization. Later in 2001, the defendant US Bancorp and Piper Jaffray did a study authored by their senior analyst Daren Marhula and determined the model would save twenty three billion dollars a year over the current inefficient distribution system.

174. MedEcon like other GPO's had not invested in efficiency creating technologies like Medical Supply Management's supply chain management software due to the lack of competition in the market for hospital supplies. However, MedEcon enlisted Medical Supply Management transaction accounting and reporting data to police their suppliers' contract pricing compliance, giving birth to the current practice of GPOs to use electronic marketplace software to enforce anticompetitive minimum price maintenance in Sherman Act prohibited vertical price fixing between manufacturers, suppliers and vendors selling to hospitals through Neoforma, Inc. or GHX LLC's electronic marketplace.

175. Owen Healthcare, Inc., a wholly owned subsidiary of Cardinal Health, Inc., took a great interest in Medical Supply Management's business model. On the pretense of building a relationship with Medical Supply Management that would allow Samuel Lipari to sell Owen's lines of pharmaceuticals as an independent distribution network, Owen Healthcare obtained Medical Supply's business plan and proprietary information developed as of 1995.

176. Cardinal Health, Inc. utilized the information in the business plan describing the clearinghouse model and Robert Zollars, a Cardinal employee left Cardinal and later joined Neoforma, Inc. that had started up in 1996 to sell hospital supplies through the internet in an electronic marketplace.

177. A July 29, 1996 letter to Dennis M. Egan of Health Services Corporation of America (HSCA) described Medical Supply Management's use of the Web for customer ordering:

> "The Contract portfolio information MSM clients will receive from HSCA will be utilized as follows:
>
> The contract portfolios will reside on MSM server and will include all product data (Vendor, Product ID, Description, Unit of Measure, etc.). The product information (excluding pricing, terms and conditions) will be accessible on the World Wide Web and only after a client locates products on the World Wide Web, will the client then negotiate EDI with MSM server and MSM server provide pricing. Pricing will be provided via Internet through a (SS) link."

7. The Defendants Foreclosure of Competition In The Market For Hospital Supplies Through Exclusionary Contracts and Loyalty Agreements That Have The Same Exclusionary Effect

178. Novation and Neoforma create distribution agreements with incumbent and market leading device makers that amount to exclusionary agreements with hospitals given the arrangements between Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker and their member hospitals.

179. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker also enter into explicit exclusionary contracts with incumbent and market leading device manufacturers for a given product with which member hospitals are obliged to comply by agreement and/or coercive threats of expulsion or penalties for deviations.

180. Explicit exclusionary contracts are created when Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker forbid member hospitals from buying outside the cartel, either explicitly or by a practice of imposing penalties if they do.

181. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker exercise their power as exclusive purchasing agents for hospitals by declining to approve competing devices in a given product market,

effectively imposing sole source device contract on member hospitals even when they do not do so explicitly.

182. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker exclude suppliers by agreement by allowing member hospitals to buy from other hospital supply vendors including Medical Supply but only for product categories not covered by the defendants cartel.

183. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker create some exclusionary contracts that are not imposed on member hospitals. Instead these member hospitals are free to accept or reject those exclusionary contracts on a contract-by-contract basis. Even with these "voluntary" exclusionary contracts which often cover multiple products and manufacturers, impose retroactive penalties on deviation, and ban even considering rival products effectively bind member hospitals even when rivals for some products later offer a better and cheaper product.

184. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker in exchange for fees and commercial bribes from manufacturers also use incentives to join exclusionary contracts that anticompetitively exclude device rivals, harm consumers, and harm hospitals as a group.

185. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake get members to accept exclusionary contracts by co-opting hospital system directors and decision makers with cash and cash substitute payments often in the guise of consulting contracts, giving hospitals other compensating benefits, disfavoring hospitals who do not join the exclusionary scheme, and/or giving hospitals who do join a share of the supracompetitive profits earned from downstream consumers.

186. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake overtly illegal forms of exclusive dealing proceed through voluntary agreements with multiple willing hospital buyers even though the long run result is a reduction of competition harmful to the ultimate consumer and often to the hospital buyers themselves.

187. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake deceive governmental oversight by making anticompetitive agreements that do not require purchasing 100% from one manufacturer, but instead some other high percentage like 90 or 95%.

188. The defendants use a private brand through Novation, LLC called Novaplus. The Novaplus Pulse Oximetry Letter of Commitment (requiring 95% minimum of annual oximetry sensor purchases from Tyco-Nellcor, which had 88% of market); The defendants Novation Opportunity ® Spectrum I Portfolio Participation Agreement (requiring 95% minimum spanning 12 product categories; The Ethicon-Novation Commitment Document (offering different discounts for Novation hospitals buying 90 or 95% of sutures from Ethicon, which had 81% of suture market)

189. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake's exclusive dealing arrangements cause anticompetitive harm by raising costs for Medical Supply, other distributors, suppliers and manufacturers. The defendants accomplish their monopolization scheme by denying rivals the economies of scale they need to compete effectively.

190. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake create exclusive contracts by Volunteer Hospital Association and University Healthsystem Consortium's general terms of the Novation membership or the defendants' contracts for particular product areas also often require the hospital to use Novation as its sole purchasing agent for the covered product categories. In Novation's Opportunity ® Spectrum I Portfolio Participation Agreement it states "Participant declares Novation as its sole supply cost management company for the purchase of products in the OPPORTUNITY product categories. . . . Participant will purchase OPPORTUNITY ® products though Novation purchasing arrangements and will not purchase OPPORTUNITY products or any products that compete with OPPORTUNITY products though any other supply cost management company."

191. Some of Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake's hospital agreements provide that a

signing hospital cannot solicit rival bids, examine rival products, or even entertain rival proposals to prevent Medical Supply or other Web based suppliers from providing competing product pricing.

192. Novation's Opportunity ® Spectrum I Portfolio Participation Agreement states "Participant will not . . . participate in competitive product evaluations for OPPORTUNITY products." Novation's Opportunity ® Spectrum II Portfolio Participation Agreement (same); Supply Partner Terms of Participation Opportunity ® Spectrum I Portfolio states **"Health care organization agrees not to cause supply partner to incur defensive selling costs during the term of this Agreement (such as can be caused by entertaining proposals from other vendors or conducting product evaluations) . . ."** [emphasis added].

193. The defendants' Supply Partner Terms of Participation Opportunity ® Spectrum II Portfolio states the same. See, e.g., Letter from James Bradley of Stuart Cardiology Group to Jake Langer of Biotronik, Feb. 26, 2001 ("Hospital has entered into a GPO Novation contract, which provides only a single cardiac rhythm device vendor. The hospital is enforcing a 100% compliance to this vendor even though the actually contract states 95% compliance."

194. The defendants use contracts designed so that a hospital cannot consider rival products, to make it impossible for the hospital to obtain products outside of the agreement made with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake even though on paper, the market is not restrained for the remaining 5-10%. The defendants' agreements in practice rival devices are often 100% excluded from hospitals despite the nominal right to buy 5-10% from them.

195. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake conceal their exclusionary agreements by not requiring an absolute obligation to buy a high percentage from the favored supplier, but instead provide loyalty rebates if that high percentage is met. The Novaplus Pulse Oximetry Letter of Commitment (discount contingent on 95% compliance). Novation's Opportunity ® Spectrum I Portfolio Participation Agreement also stated the same.

196. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use loyalty rebates as a more

sophisticated penalty on noncompliance than that imposed under a traditional illegal exclusive agreement to restrain trade, and one that is far more enforceable to boot.

197. With loyalty rebates, Novation can unilaterally impose a penalty for noncompliance by just withholding the quarterly or annual rebate without even going to court, and can easily prove in court the amount of past rebates that must be returned. In this way courts become the defendants instrument of monopolization.

198. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use a termination penalty making the defendants' exclusive dealing agreements violate the Sherman Antitrust Act. The defendants add additional penalties that are more enforceable including loyalty rebates tat increase the exclusionary effect.

199. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use loyalty rebates that are conditional on the buyer taking all or a high percentage of its purchases from a favored supplier and amount to *de facto* exclusive dealing. IIIA Areeda & Hovenkamp, Antitrust Law ¶768B3, AT 151 (1996); XI Hovenkamp, Antitrust Law ¶1807, at 115-18 (1998).

200. The defendants' loyalty payments are used to inflate prices. (1) Here the rebates or discounts are conditioned on purchasing a high share of the buyer's purchases from the supplier. Thus, this is not a per item price cut that can be met by any equally efficient rival for any future purchases. Because the loyalty rebates are conditioned on getting a high share of the buyer's purchases, they leave rivals with access to only a lower share, which may not sustain economies of scale. When they do so, such loyalty rebates exclude rivals by worsening the rivals' efficiency.

201. (2) Once the hospital has committed to the arrangement, the rebates on all the hospital's past purchases are contingent on it meeting the loyalty threshold. Because loyalty commitments can last for five to seven years, a failure to comply can result not only in losing any rebate already earned in the current year but a demand for a return of all the rebates paid in all past years too. Novation's Opportunity ® Spectrum I Portfolio Participation Agreement states "all earned incentive payments received by the Participant will be subject to repayment if Participant fails to comply for the full [five-year] term of the OPPORTUNITY

portfolio" with a 95% purchase commitment and other requirements; Novation's Opportunity ® Spectrum II Portfolio Participation Agreement states the same.

202. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use the threat to reclaim all those rebates on past purchases to induce their member hospitals not to switch to making future purchases from a rival that is just as efficient and offering a lower price, effectively foreclosing Medical Supply from the market for hospital supplies.

203. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake's exclusionary programs cover multiple products and manufacturers rather than just one. Sometimes the defendants and a given incumbent manufacturer gives rebates or discounts on a whole product line if the buyer commits to making a high percentage of their purchases from that manufacturer through Novation or Neoforma for each product in the line. [Ethicon-Novation Commitment Document (offering highest discount for Novation hospitals that buy 95% of sutures and 85% of endomechanical products from Ethicon, which had 81% of suture market and 61% of endomechanical products]

204. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake even sometimes give rebates or discounts on menu of products from different manufacturers if the hospital commits to buying a high percentage of each product from the corresponding manufacturer on the menu. Novation's Opportunity ® Spectrum I Portfolio Participation Agreement employs a 95% purchase commitment applies for twelve product categories covering five different manufacturers, though with one manufacturer for each product category. Novation's Opportunity ® Spectrum II Portfolio Participation Agreement uses an 85-95% purchase commitment applying to 14 product categories covering 7 manufacturers.

205. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake's market foreclosure agreements applying to multiple products do not differ from a single product exclusive dealing arrangement, but only worsen the anticompetitive consequences. Through these programs, the defendants impose a penalty for a hospital or health system's failure to meet the threshold for any one product and in a multiple product

loyalty agreement includes withholding or reclaiming rebates not only for that product but for all the other products as well. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake can then exacerbate the penalty for noncompliance after the rebates have been earned.

206. The defendants have foreclosed competition in the market for hospital supplies so that even at the very beginning of a rebate period, Medical Supply could not compete by simply offering a price on one of the products that matches or beats the price the incumbent manufacturer and Novation or Neoforma is charging for that product net of the program discount.

207. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake use their tremendous market power of over 2000 hospitals and multiple product rebates or package discounts as an illegal tying agreement described in X Areeda, Elhauge & Hovenkamp, Antitrust Law ¶1758b, at 343-346 (1996).

208. The defendants' scheme is designed to keep a more efficient Web based vendor or suppliers from providing products to hospitals at lower prices than the cartel. For the hospital would have to take into account that even if it gets a better price from using the rival for that product, it loses the discount on all the other products in the program. The defendants' multi-product rebates are equivalent to sidepayments given to hospitals and health systems in exchange for agreeing to enhance the manufacturer selling through Novation and Neoforma's market power by excluding other sources in one product, with the sidepayments compensating these hospitals and health systems for the fact that this scheme increases the price they pay for the product whose market power was enhanced.

209. More generally, as noted above, even when a hospital does not formally make a multi-product commitment, Novation and Neoforma pressure or threaten with expulsion any member hospitals who do not comply with the commitment obligations made on any of the defendants' exclusionary agreements with incumbent manufacturers. Every single product exclusionary agreement of the defendants is effectively the same as a multi-product one and violates Sherman 1.

210. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake have inserted themselves between the manufacturer and consuming hospitals to extract fees from incumbent manufacturers. These fees or

commercial bribes are solicited by Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake and are partially forwarded to member hospitals and more efficiently to hospital decision makers for high share commitments that are not volume-based at all, and are in actuality not rebates or discounts but a system of graft.

211. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Bake and their officers with the assistance of US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have obtained cash and cash equivalents such as stock-options, warrants, or investment interests in the manufacturers favored by Novation and Neoforma's commitment programs.

212. The fees and bribes solicited by the defendants from favored manufacturers includes making monetary investments in the defendants' owned businesses including Neoforma, Inc., and giving Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff favorable business terms on other unrelated deals.

213. US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff also employed another tactic to extort funds from manufacturers and suppliers to enter the cartel. US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have hosted annual healthcare conferences where healthcare technology companies seeking capitalization were forced to pay US Bancorp Piper Jaffray for underwriting their public offerings and favorable analyst coverage marketed as "independent" research to create demand for their shares as a pre initial public offering investment for qualified investors and most importantly to obtain an introduction to Novation and Neoforma officials to be favored by Novation's commitment programs.

214. US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff were paid large sums for a private meeting with Novation officials or for a prospective healthcare technology company's membership in a GPO institute for evaluating technologies.

215. Manufacturers and suppliers are forced to pay Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake fixed amounts that are not linked to volume in the form of: (1) fees given to have products considered, (2) annual administration fees, (3) marketing or endorsement fees, and (4) licensing fees for use of the NovaPlus brand name.

216. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake arrange for selected manufacturers and suppliers to pay hospitals fixed fees that are not dependent on the volume of sales in exchange for their commitment to achieving the target market shares. The fact that the payments given for loyalty commitments often are not proportional to volume worsens the anti-competitive effects. The defendants' side-payments that are unrelated to sales volume are used because they are a more effective means of dividing monopoly profits created by seller-buyer collusion designed to enhance Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake's market power.

217. Sometimes Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake make agreements where the *de facto* exclusivity for any given product is granted not to one incumbent manufacturer or supplier, but to two of them. The defendants at times enforce a duopoly in some products to protect those manufacturers from competition by rivals and entrants. Regardless, the motive of the defendants is to restrict output and increase prices just as where the defendants enforce an absolute monopoly in a product or product line."

218. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Bake have offered to allow rival products from unfavored manufacturers and suppliers to be offered if they would agree to increase their prices dramatically to levels higher than that being charged by the incumbent manufacturers and suppliers who benefit from the exclusionary agreements. For example, Retractable Technologies reported that Novation finally said it would agree to use safer needle technology from Retractable Technologies, but only if it were sold under Novation's private label for a price 270% higher than Retractable wanted to charge. Thomas Shaw, "Examine the 'questionable' side of GPOs," Commentary, Dallas Business Journal (March 15,

1999) Mark Smith, "Innovative medical products: a clash of blood and money," Houston Chronicle (April 18, 1999).

8. The Monopolization Of The Hospital Supply Industry By The Defendants In Conspiracies And Combinations With Premier, GHX, LLC and Their Predecessor Corporations

219. On September 28, 1998, Richard A. Heard, Senior Vice President, Diversified Services obtained via subterfuge the business plan and model created by Samuel Lipari for Medical Supply Management for the Defendants using a false offer to buy out the company from Samuel Lipari.

220. On November 23 and 24th, 1998, the Defendants obtained a demonstration in Salt Lake City, Utah of Samuel Lipari's software that allowed purchases of hospital supply products to be purchased and managed via pc computers instead of the existing costly mainframes still used by the Defendants and their member hospitals and manufacturers to this day.

221. No agreement was finalized because with the demonstration and intellectual property obtained by the defendants through Richard A. Heard and Owen Health, a subsidiary of Cardinal which would later be part owned by the Defendant Novation, the Defendants had obtained the information they needed to prevent Medical Supply from obtaining capital to enter the marketplace by implementing their own electronic exchanges, diluting the value of Samuel Lipari's innovation with false substitutes that maintained the group purchasing organization enterprise of the Defendants to artificially inflate hospital supply costs.

222. In June 1999, MedAssets was formed, it acquired the two GPO's InSource and Axis Point Health Services and then Health Services Corporation of America (HSCA) that had provided supplies to Samuel Lipari's two earlier companies in May 2001.

223. On June 28, 1999, Neoforma, Inc. announced that it has elected Robert J. Zollars to the position of Chairman, President and Chief Executive Officer. He succeeds Jeff Kleck, Ph.D., co-founder of Neoforma. Zollars joins Neoforma from his position as an E.V.P. and Group President at Cardinal Health, Inc.

224. On March 7, 2000, Medibuy.com Inc. (Medibuy) a vendor of Internet-based health care supply purchasing software announced it was acquiring Premier Health Exchange LLC, the electronic commerce subsidiary of San Diego-based Premier Inc.

225. On September 1, 2000, Medibuy announced it was acquiring empactHealth.com, a Nashville, Tenn.-based purchasing Web portal started by hospital chain HCA--The Hospital Co. Shareholders of the

privately held empactHealth.com, including HCA, will receive approximately 23% of medibuy.com. HCA's ownership interest in medibuy.com will total approximately 16%. Under the agreement, San Diego-based medibuy.com will become the exclusive electronic commerce partner to HCA's 204 hospitals, as well as several members of HCA's group purchasing organization, including LifePoint Hospitals, Triad Hospitals and Health Management Associates.

226. On February 6, 2000, Empacthealth announced that Columbia/HCA Healthcare Corp. is pumping up to $40 million into empactHealth.com, which will charge hospitals and vendors a fee for ordering supplies online. Columbia/HCA, the nation's largest for-profit hospital company, will be the firm's first customer.

227. On March 30, 2000, EmpactHealth announced today that it has signed a founding partner agreement with Health Management Associates (HMA), the premier operator of acute care hospitals in the Southeast and Southwest areas of non-urban America. Under the terms of the agreement, HMA will exclusively implement and use empactHealth's empactBuy solution for the online requisitioning, ordering and purchasing of all medical and non-medical supplies and services for the company's 32 acute care hospitals, and any facilities HMA adds in the future. HMA will also become a founding partner and an equity shareholder in empactHealth.

228. In the same announcement empactHealth stated it is a leading healthcare e-procurement company that synchronizes the business processes of healthcare buyers and suppliers to reduce costs and increase efficiency at both ends of the healthcare supply chain. The company has already signed a large critical mass of committed buyers, including more than 240 Columbia/HCA and Health Management Associates facilities that will use empactBuy, exclusively, as their e-procurement solution. In addition, empactHealth has commitments from Johnson & Johnson, Baxter, and Medline and a number of other suppliers to integrate their ERP business processes with empactSupply. empactHealth offers healthcare-specific e-procurement solutions based on foundation technology from Commerce One and adds valuable functions such as business intelligence, contract management, and inventory management. The company is Nashville-based and privately funded.

229. On March 29, 2000, Global Healthcare Exchange (GHX) was founded as a Limited Liability Company or a trust by five major healthcare manufacturing competitors: Johnson & Johnson Health Care

Systems; GE Medical Systems; Baxter Healthcare Corp.; Medtronic USA, Inc. and Abbott Exchange, Inc. Much of the capitalization came from GE, the parent company of GE Medical. The name was also copied from GE's existing internet marketplace for hospital supplies Global Exchange and was part of a plan created by Jeffrey Immelt, then GE Medical president and now CEO of GE to prevent competition from electronic marketplaces that were independent from the manufacturers ability to control hospital supply distribution with kickbacks and commercial bribes.

230. On March 30, 2000 Neoforma announced the merger with Eclipsys Corporation (NASDAQ: ECLP) and HEALTHvision, Inc. In conjunction with the agreements, Neoforma.com announced that it has signed an exclusive 10-year strategic agreement to provide e-commerce services for the 6,500 healthcare organizations participating in the purchasing programs of Novation, LLC, the world's largest buyer of medical supplies and the supply company of national healthcare alliances VHA Inc. and University HealthSystems Consortium (UHC). The companies later decided not to merge and instead to form a combination to jointly control the market for hospital supplies in e-commerce among Novation, LLC's customers.

231. On March 31, 2000 The New Healthcare Exchange was formed as a consortium of four of the US largest health care distributors, which include AmeriSource Health, Cardinal Health, Fisher Scientific International; and McKesson HBOC.

232. On May 25, 2000 Neoforma announced that it has reaffirmed its exclusive 10-year agreement to provide e-commerce procurement services for Novation. Neoforma.com also announced modifications to the structure and terms of its stock and warrant transactions with VHA Inc. and University HealthSystem Consortium (UHC), the national healthcare alliances that own Novation. Much of the public offering was subscribed to or purchased by Novation with funds owned by UHC and VHA member hospitals and without their knowledge and approval. The capitalization of Neoforma as a direct consequence rose to 1.2 billion dollars.

233. Neoforma also announced on May 25, 2000 that Eclipsys Corporation and HEALTHvision, Inc. agreed by mutual consent to terminate, effective immediately, their proposed mergers announced March 30, 2000. Instead, Neoforma.com, Eclipsys and HEALTHvision have entered into a strategic commercial relationship that will include a co-marketing and distribution arrangement between Neoforma.com and

HEALTHvision. The arrangement includes the use of Eclipsys' eWebIT™ enterprise application integration (EAI) technology and professional services to enhance the integration of legacy applications with Neoforma.com's e-commerce platform.

234. Under the terms of the modified Novation agreements, VHA will receive 46.3 million shares, representing approximately 36% of Neoforma.com, and UHC will receive 11.3 million shares, representing approximately 9% of Neoforma.com. In addition, under new warrants to be issued to VHA and UHC, VHA and UHC will have the opportunity to earn up to 30.8 million and 7.5 million additional Neoforma.com shares, respectively, over a four-year period by meeting certain performance targets. These targets are based upon the historical purchasing volume of VHA- and UHC-member healthcare organizations that sign up to use Neoforma.com's e-commerce exchange. The targets increase annually to total healthcare organizations representing approximately $22 billion of combined purchasing volume at the end of the fourth year. The warrants will have a strike price of $0.01. On a pro forma basis, including shares issuable upon the exercise of Neoforma.com's existing options and warrants, and VHA and UHC earning all of the shares underlying the performance-based warrants, Neoforma.com would have approximately 175 million shares outstanding.

235. The May 25, 2000 announcement also revealed the interlocking directors used by the Defendants to restrain trade in hospital supplies. In connection with the new agreements, two of the seven seats on the Neoforma.com Board of Directors will be filled by VHA designees after closing of the transaction. Subject to certain exceptions, VHA has agreed to vote any Neoforma.com shares it owns in excess of 20% of outstanding Neoforma.com stock in the same proportion as all other stockholders. Subject to certain exceptions, UHC has agreed to vote any Neoforma.com shares it owns in excess of 9% of outstanding Neoforma.com stock in the same proportion as all other stockholders. VHA and UHC have also agreed to certain other restrictions on acquisitions and transfers of Neoforma.com stock.

236. Mark McKenna, Novation's president, said, "We are excited about the advantages and value that our relationship with Neoforma.com offers our members in managing their supply expenses and inventories. We have already made significant progress in our relationship with Neoforma.com, including the establishment of supplier and buyer relationship management teams and a targeted implementation strategy. We anticipate members will be able to begin conducting purchase transactions as early as the third

quarter of this year."

237. Curt Nonomaque, VHA executive vice president, noted, "We believe the increased efficiencies, reduced costs and ease-of-use features that Neoforma.com's B2B technology provides will significantly benefit both Novation's member organizations as well as other health care providers. In addition, VHA is creating a separate cooperative pool and will distribute Neoforma.com stock to our members in proportion to their dollar volume of purchases through Neoforma to further align incentives. In addition, the new strategic partnership involving Neoforma.com, HEALTHvision and Eclipsys offers additional benefits for healthcare organizations seeking to integrate and use Internet technology. These agreements build on existing customer relationships with HEALTHvision and Eclipsys that provide the Web-based solutions that enable hospitals to connect with their physicians and communities."

238. Edward Schwartz, executive vice president at UHC, indicated, "We're pleased that the relationship with Neoforma.com is moving forward and that UHC's members will be able to gain value from it. We're also excited to announce that the first organization to sign up for the exchange through Novation is a UHC member, the Medical College of Virginia Hospitals in Richmond, Virginia."

239. Scott Decker, HEALTHvision chief executive officer, said, "We're pleased that through our relationships with Neoforma.com and Eclipsys we will be able to offer customers a comprehensive e-Health solution. HEALTHvision's customers will be able to quickly take advantage of Neoforma.com's expertise in supply chain management because Neoforma.com's contributions will nicely complement our existing services. HEALTHvision currently provides Web-based services to more than 1,200 hospitals, and the potential addition of e-commerce capabilities has already generated a great deal of interest and demand."

240. According to Zollars, the agreement with Novation creates immediate potential scale for Neoforma.com's e-commerce platform, as Novation represents more than 30% of U.S. procurement in healthcare with a membership that includes many of the nation's largest and most respected healthcare organizations and physicians. Novation also brings an existing base of relationships with a wide range of healthcare suppliers, essential to the success of an e-commerce offering. Novation plans to be active in recruiting other suppliers to the Neoforma.com marketplace. Novation already provides its alliance members with highly regarded and utilized Web-enabled tools, including an online catalog, Web-based

tools for cross-referencing and standardization.

241. On September 01, 2000, Medibuy announced that shareholders of the privately held empactHealth.com, including HCA, will receive approximately 23% of medibuy.com. HCA's ownership interest in medibuy.com will total approximately 16%. Under the agreement, San Diego-based medibuy.com will become the exclusive electronic commerce partner to HCA's 204 hospitals, as well as several members of HCA's group purchasing organization, including LifePoint Hospitals, Triad Hospitals and Health Management Associates. medibuy.com will integrate empactHealth.com's technology into its products and services.

242. On April 2001 Broadlane an electronic marketplace that comprises Tenet Healthcare Corp., Community Health Systems, Kaiser Permanente, Iasis Healthcare, Paracelsus Healthcare, Cleveland Clinic Foundation, Universal Health Services, Intermountain Health Care and Continuum Health Partners is formed.

243. On March 26, 2001 Medibuy and Premier announced the launch of Premier Exchange, an Internet portal providing electronic commerce services to Premier's 1,850 alliance members. San Diego-based Premier is a purchasing coalition for health care organizations. Medibuy, also in San Diego, is an electronic procurement vendor offering online supply ordering and management. Medibuy earlier this year acquired Premier's start-up online supply division.

244. On April 30, 2001 HealthNexis is created. Formerly the New Health Exchange, was founded in April 2000 by four of the nation's largest healthcare companies: AmeriSource Health Corporation (NYSE: AAS), Cardinal Health, Inc. (NYSE: CAH), Fisher Scientific International, Inc. (NYSE: FSH), and McKesson HBOC, Inc. (NYSE: MCK).

245. On November 26, 2001 Global Healthcare Exchange and Health Nexis announced they will combine their operations into a single Internet-based exchange, according to the organizations. Supplier members of both organizations will be connected to GHX's 70 integrated delivery networks (IDNs), which currently represent approximately 600 hospitals. The combined entity will operate as Global Healthcare Exchange LLC and will be headquartered in Westminster, Colorado. The merger announcement follows recent GHX alliances with Neoforma Inc. and AmeriNet Inc. Says GHX president Mike Mahoney, "Connectivity, participation, and cooperation among all members of the supply chain is critical for e-

commerce to reach its full potential. HealthNexis and its membership of leading healthcare companies provide considerable e-commerce technology solutions and supply chain expertise. This combination reinforces GHX's commitment to building an open and neutral healthcare exchange to drive supply chain savings."

246. On October 09, 2002 Global Healthcare Exchange, LLC (GHX) and Neoforma, Inc. announced they have signed a definitive agreement to create the first comprehensive, integrated supply chain solution for the healthcare industry. Neoforma and GHX expect the strategic alliance to accelerate the adoption of e-commerce by hospitals and suppliers, accelerating supply chain cost savings. The agreement enables Neoforma's hospital customers, including the 514 hospitals currently contracted to use the Neoforma-powered Marketplace@Novation™, to transact business with GHX's growing network of healthcare supplier members through the integrated solution, without the added cost of implementing and maintaining separate Internet connections. GHX's connected suppliers will be able to sell their products to Neoforma's current and future hospital customers through one Internet-based exchange, reducing implementation costs and simplifying the e-commerce strategy for these suppliers. GHX has signed more than 100 leading supplier members.

247. On December 11, 2002 Global Healthcare Exchange, LLC (GHX) and Medibuy, Inc. announced they have signed a definitive agreement to merge their two companies. The new company will be called Global Healthcare Exchange, LLC (GHX). Owned by many of the world’s largest healthcare suppliers and providers, GHX and Medibuy will combine their respective Internet-based trading exchanges to create the largest single exchange in healthcare. More than 1400 hospitals and other healthcare facilities and 100 suppliers have already selected GHX or Medibuy as their preferred solution for purchasing healthcare products and supplies. Through this merger, the newly created exchange will provide a means for all participants in the healthcare supply chain, including provider organizations, manufacturers, group purchasing organizations (GPOs) and distributors, to benefit from improved efficiencies, cost reductions, process automation, and the adoption of industry standards.

248. The same December 11, 2002 announcement described the owners of GHX: “Originally founded in March 2000 by five major healthcare manufacturers: Johnson & Johnson Health Care Systems; GE Medical Systems; Baxter Healthcare Corp.; Medtronic USA, Inc.; Abbott Exchange, Inc., GHX has since

realized its vision of being owned by representatives of the entire supply chain, including manufacturers, distributors, providers and group purchasing organizations. In addition to the founders, the original equity owners included: Siemens; Becton, Dickinson & Co.; Boston Scientific Corp., Tyco Healthcare Group, LP; Guidant Corp.; C.R. Bard, Inc.; B Braun Medical Inc. In December 2001, GHX combined business operations with the distributor-created exchange, HealthNexis, adding AmerisourceBergen Corp.; Cardinal Health, Inc.; Fisher Scientific International, Inc.; and McKesson Corp. to its list of owners. A year later, a merger with Medibuy Inc. rounded out the current ownership roster with the addition of Premier, Inc., one of the nation's largest group purchasing organizations, and HCA, a national integrated delivery network (IDN).

249. While adopting Medical Supply's neutral marketplace concept, the same announcement reveals that GHX still maintains and is an instrument for enforcing the Defendant Novation and the unnamed coconspirator Premier's anticompetitive pricing achieved through contracts that horizontally and vertically fix prices:

250. "How does GHX benefit group purchasing organizations (GPOs)? GPOs are working with GHX to develop integrated contract management and other e-commerce services that enable their hospital members to more easily and efficiently **purchase contracted products at the *agreed upon price*.**" [Emphasis added]

251. On April 11, 2003, GHX, MedAssets HSCA announced that they have formed a Strategic Alliance. Global Healthcare Exchange and MedAssets HSCA, the St. Louis-based group purchasing organization, announced they have formed a strategic alliance they say will make e-commerce services available to more than 16,000 healthcare providers. Under the terms of the agreement, MedAssets has selected GHX as an integrated e-commerce solution for members of its GPO. As a result, MedAssets members will be able to purchase products via GHX's Internet-based trading exchange using pricing data contained in the CDQuick E-Catalog, supplemented by the accurate product data in the GHX AllSource catalog.

EVENTS

252. On or about 3/12/2002, and following 3 years of R&D Samuel Lipari, President and CEO of Medical Supply Chain, Inc. (Medical Supply) began a process of selecting a corporate bank for the rollout

of its healthcare supply chain empowerment program that produces significant benefits to healthcare and its patients. He sought input from associates and advisors concerning selection of an appropriate national bank that would be capable of a full range of corporate banking services, including nation wide checking, escrow services, short and long term credit facilities, receivables financing and international clearing of transactions between thousands of health systems and their suppliers. Several national banks were evaluated but US Bancorp NA was selected because it also had an investment banking relationship with Piper Jaffray. Piper Jaffray had targeted healthcare customers and participated as underwriter and funds manager for pre IPO healthcare manufacturers and service providers and US Bancorp NA acted as underwriter for corporate bonds of healthcare companies.

253. On or about 4/15/02 Samuel Lipari arranged for Medical Supply's corporate account to be opened at US Bank's SW Topeka branch. The account was opened in the name of Medical Supply Chain, Inc., using Medical Supply's federal tax I.D. number with a cashier's check in the name of Medical Supply's agent and drawn on Miner's State Bank of Frontenac Kansas for $7,500.00.

254. On or about 4/25/02 Samuel Lipari opened a personal account in his name at US Bank's neighborhood branch at 3640 S. Noland Road, Independence, MO. Before opening the checking account, the US Bank employee reviewed Samuel Lipari's account application and submitted Samuel Lipari's personal data to Chex Systems, Inc. for a background check, evaluation and verification of eight years of his previous banking history at other banking institutions. Samuel Lipari was approved for a personal checking account and an electronic debit card. Samuel Lipari initially used the personal account to pay expenses of Medical Supply with reimbursement from the corporation.

1. Andrew S. Duff And Piper Jaffray's Concerted Refusal To Deal

255. On 6/5/02 Samuel Lipari contacted Piper Jaffray's Minneapolis headquarters to speak to Heath Lukatch, managing director of the Piper Jaffray healthcare venture fund about Medical Supply being considered as a venture capital candidate. He was instructed to send an executive summary of his business plan via email. Samuel Lipari sent the summary and financial projections for Medical Supply with a restriction on disclosure notice. Piper Jaffray made no response to the receipt of the executive summary and financial projections from Medical Supply's business plan. Samuel Lipari again telephoned the Minneapolis offices of the Piper Jaffray venture fund managers and his calls were not taken and not

returned. Samuel Lipari also attempted to speak to a Piper Jaffray venture fund manger in their San Francisco office but again, his calls were not taken or returned.

256. On 7/9/02 Samuel Lipari and Medical Supply were visited by a Merger and Acquisitions attorney for another San Francisco venture capital firm and after extensive discussions with her at Medical Supply's Blue Springs, MO headquarters on the need to quickly enter the healthcare supply chain market and take advantage of the opportunity created by the healthcare industry's sudden willingness to reject the existing Group Purchasing Organizations, and after the New York Times had began uncovering corruption revelations in the market. However the discussions revealed the current condition of venture funding and IPO underwriting was very troubling. At the time of these meetings the first news of WorldCom's debacle was breaking. Medical Supply's management felt with the exception of Piper Jaffray, which concentrated its investments in healthcare, that much of the assets venture funds reported were in fact overvalued equities in telecom technology companies and that the collapse of WorldCom would further depress the venture capital markets.

257. The venture capital M&A attorney questioned Samuel Lipari about the overtures of large companies seeking to acquire Medical Supply. Samuel Lipari recounted the contacts made with Supply Solution, a Michigan based company focused on expanding integration in the healthcare industry, GoCoop/Avendra a Florida based company providing e-procurement/group purchasing in the hospitality industry and also wanted to integrate in the healthcare industry, both of which were seeking go to market partners in healthcare, Owen Healthcare the pharmaceutical distribution subsidiary acting for Cardinal and Cerner, a Kansas City healthcare company with enterprise resource planning software that is based on an older operating system, called EDI that is inferior to Medical Supply's web based services and poorly suited for electronic commerce.

258. Cerner had bought out Mitch Cooper & Associates, a healthcare supply chain consulting company and seemed to be trying to acquire the capability to create an electronic healthcare marketplace.

259. Samuel Lipari told the VC attorney that Medical Supply would not compromise itself by being aligned with any existing healthcare supplier. Medical Supply has the solution and he did not want to be tainted with companies that support the high cost healthcare problem. He also recounted how start up healthcare electronic marketplace firms with technology similar to Medical Supply like Empacthealth and

Medibuy had been bought up by GPOs for tens of millions of dollars, but that once they were no longer independent, their market potential was eliminated and the technology was used by GPO firms to deceive health systems into thinking their GPO partner was attempting to increase its economic efficiency when in fact they continued to restrict trade in support of monopolizing markets.

260. Medical Supply resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and supply chain management technology. Medical Supply settled on a plan that would utilize the value of its healthcare supply chain intellectual property and offer a comprehensive year long education and healthcare supply chain certification program to independent representatives.

261. This plan would put representatives in the field nationwide that possess the knowledge and skills to relate to all levels of management in healthcare systems and assist in the adoption of Medical Supply's supply chain empowerment program. The independent representatives would pay for their certification and fund their own marketing and sales operations, consistent with distribution systems that rely on independent manufacturer's representatives. Since Medical Supply's web services were new to the market, Samuel Lipari decided that it would be critical for the certification fee to be held in escrow until the candidates had a chance to meet Medical Supply's certification team and have a chance to see if they would succeed in mastering healthcare supply chain empowerment knowledge. After a week long intensive seminar, the candidates would have the opportunity to decide whether or not to commit to the certification program and Medical Supply would have the opportunity to reject any candidates it felt would not succeed in the program.

262. Medical Supply developed a curriculum and contracted with the industry's foremost logistics and supply chain experts to provide instruction during the weeklong seminar and assist and advise candidates throughout the certification process. Medical Supply made arrangements to include information and presenters from companies with expertise in financial analysis of healthcare purchasing, including strategic sourcing and human resource evaluations so that the representatives would be able to represent products and technology services outside of Medical Supply's capabilities that would complement Medical Supply's supply chain empowerment program in allowing a health system/hospital to break free of its GPO supplier.

263. Beginning 8/1/02 Medical Supply advertised nationwide to recruit experienced account executives and sales professionals and processed hundreds of applicants with detailed evaluation of resumes, job

history and financial disclosure applications. For the first of what were to be quarterly classes, Medical Supply selected 15 candidates that had the potential to succeed as independent representatives for its services. After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification class starting the first week of December/02. During this same time, Medical Supply was preparing the escrow account system that the candidates would utilize.

2. US Bank's Concerted Refusal To Deal

264. On or about 10/1/02 Medical Supply contacted Chris Walden of the Noland Road, Independence MO branch of US Bank for direction on escrow accounts and commercial banking services. Medical Supply was referred to Becky Hainje a US BANCORP "Private Banker" and on or about 10/3/02 Becky Hainje contacted Samuel Lipari and told him she would arrange to put him in contact with the persons in different departments of US Bank that could provide Medical Supply the services Medical Supply requested and needed. She connected Medical Supply with Brian Kabbes in St. Louis who was responsible for US Bank commercial trust accounts in Missouri and Kansas. She also connected Medical Supply with Douglas Lewis, responsible for commercial loans in the Noland Road office.

265. Samuel Lipari described Medical Supply's need for escrow accounts to Brian Kabbes and emailed him an escrow contract that Medical Supply counsel had prepared for its candidates. Brian Kabbes asked questions about the candidates, the certification program and how many candidates had been selected so far. Samuel Lipari negotiated with Brian Kabbes to reduce the escrow fee per account since all escrow accounts would be identical, and US Bank had refused to have the funds in a single account. Brian Kabbes agreed to lower the fee for US Bank's escrow agent services from the normal of $1,500 to $600 per account and no hidden or additional transaction or disbursement fees.

266. After reviewing the escrow contract, on or about 10/5/02 Brian Kabbes communicated to Samuel Lipari that the language of paragraph 10 "Security Interests" should be changed so that a security interest for US Bank could be created in the $5,000 portion of the escrow that became Medical Supply's property the moment a candidate submitted their certification funds into escrow. Medical Supply altered its escrow contract to conform to Brian Kabbes' s suggestion and on or about 10/7/02 emailed the changes to Brian Kabbes. Brian Kabbes and US Bank were identified as the escrow agent in the escrow agreement and Brian Kabbes' address was included in the body of the agreement.

267. On or about 10/8/02 Samuel Lipari spoke again to Becky Hainje about Medical Supply's need for a business line of credit based on the Medical Supply portion of the escrow assets. Becky Hainje said she had talked to Brian Kabbes and he had told her there would be no problems with the escrow accounts, that they were a "slam dunk." She suggested Samuel Lipari call Doug Lewis and make an appointment to apply for the line of credit, which was based on the escrow account assets.

268. On or about 10/9/02 Brian Kabbes called to request an additional change in the escrow contract. He supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US Bank Trust Department. Medical Supply agreed to the additional change and modified the investment instructions exactly as Brian Kabbes instructed. Medical Supply also ask if there were any other changes needed before Medical Supply sent the contracts out to its certification candidates. Brian Kabbes said there would be no other changes and asked why Medical Supply was sending the candidates the escrow contract. Medical Supply explained that the contracts were going out with the certification program agreement so candidates would have a chance to review the information before their November 1st deadline, which required their funds to be in the US Bank escrow accounts. Brian Kabbes acknowledged the explanation and agreed to look over the release document Medical Supply developed that candidates would execute following the weeklong evaluation seminar to be held the first week of December.

269. During this conversation, Brian Kabbes also requested Medical Supply's current corporate good standing documentation from the Missouri Secretary of State's Office. Medical Supply agreed to send him the reinstatement and tax clearance documents on Friday 10/11/02 and that Samuel Lipari was meeting with Doug Lewis on the afternoon of Thursday 10/10/02 to set up the credit facility using the escrow accounts as security. Samuel Lipari told Brian Kabbes he would have Doug Lewis send the requested information to Brian Kabbes on 10/11/02. Brian Kabbes made no statement that US Bank had yet to approve Medical Supply 's escrow accounts and sought no additional information.

270. On or about Thursday 10/10/02, Samuel Lipari delivered the Medical Supply business plan and associate program to Douglas Lewis, at the US Bank, Noland road office to apply for the agreed upon commercial line of credit based on the portion of the escrow accounts Medical Supply would retain.

271. The business plan and associate program booklets each had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained in them.

272. A letter of introduction also stated the contents were protected and restricted disclosure and possession of the materials. Two more folders contained the good standing documentation Brian Kabbes requested and the associate program contracts that were sent to the candidates.

273. Doug Lewis asked how many candidates Medical Supply had and Samuel Lipari reached into his brief case and held up the ten folders of applicants who had committed to sending in their funds by November 1st and five others who were in the final stages.

274. Samuel Lipari further explained that he planned to start a new certification group each quarter. Samuel Lipari was given a loan application and agreed to and did return the application the next day.

275. On or about Tuesday 10/15/02 Brian Kabbes called Samuel Lipari and informed him that US Bank had turned down the escrow accounts because of the USA PATRIOT Act. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for Medical Supply.

276. Samuel Lipari was shocked and stunned and handed away the phone, where Brian Kabbes repeated again The Patriot Act as the reason the accounts were denied.

277. Later that morning Samuel Lipari called Becky Hainje and asked if she could see what happened. Samuel Lipari explained that Medical Supply was counting on the escrow accounts and that the line of credit depended on them too. He said he could not believe the USA PATRIOT Act could be a reason that applied to Medical Supply. She said she would call and see what happened.

278. Becky Hainje called back and left a taped recording on the Medical Supply answering system and listed the reasons Brian Kabbes told her. She said the reasons were the lack of a “relationship with the Bank... that the principals involved with the business were people unknown to the bank, but the main reason is to know your customer "Patriot Act" that was enacted after 9/11, and which we could not really give all the correct answers on the source and flow of money.

3. US Bancorp, Andrew Cesere and Jerry Grundhoffer’s Concerted Refusal To Deal

279. On or about 10/15/02 Medical Supply found Andrew Cesere was the head of US Bancorp trust department on the US Bank web site and at 4 p.m. called his secretary Barb in Minneapolis. He was unavailable so Medical Supply asked her to leave instructions for him to call Samuel Lipari about Medical Supply's corporate escrow account rejection at 9 a.m. the following morning.

280. Barb asked for more details concerning the problem. She said Mr. Cesere had a morning meeting but she would get the message to him. At 4:30 p.m. she called back and asked for additional information and the names of the people Medical Supply had dealt with so that Mr. Cesere could inquire about the problem.

281. At 9 a.m. the following morning on or about 10/16/02 Ed Higgins called, leaving a tape-recorded message on Medical Supply's answering system identifying him as the executive vice president of Midwest trusts for US Bank. Samuel Lipari, believing that the USA Patriot Act had probably been used to reject the escrow accounts because of his family sir name which is also the name of a small group of Islands in the Mediterranean Sea and which ends in "ari" like many Moslem sir names of people of Arabic descent, activated a tape recorder with a built in microphone and called Mr. Higgins back on the speaker phone.

282. Each subsequent call to US Bank in which Samuel Lipari participated was also recorded by him to document what he suspected was discrimination based on his national origin or ethnic descent.

283. Ed Higgins listened to Samuel Lipari after stating he was an attorney and how long he had been working in trust banking, agreed with him that he saw no reason why the USA Patriot Act would apply to Medical Supply.

284. Samuel Lipari explained that Medical Supply needed additional US Bank services including credit facilities, receivables financing and clearing and settlement services for approximately 90 million worth of transactions in the first year of operations. He said he would check into the matter and call Samuel Lipari back later that day.

285. Instead of Ed Higgins, Brian Kabbes called back with Lars Anderson who he identified as head of corporate trust new business development person and Susan Paine who he said he reported to, both on the line with him. Medical Supply explained that at the time of his previous call, it was not realized that the escrow account contracts that US Bank had approved had already been sent out to the candidates in reliance on US Bank's agreement to host the escrow accounts.

286. Lars Anderson expressed some irritation that Medical Supply had contacted the head of the trust unit about the rejection of escrow accounts. Lars Anderson said the bank had never been on board and it was not a done deal. Brian Kabbes denied that there had been an agreement; he said he had twice told Samuel Lipari.

287. Lars Anderson said that there had never been a signed off agreement to provide the service and that there had never been any bid for it. Medical Supply contradicted that and said the price for the service had been quoted by Brian Kabbes and after negotiating, a specific amount had been agreed upon.

288. Samuel Lipari also told them Brian Kabbes provided and requested changes to the escrow and that Brian Kabbes had told Becky Hainje it was a "slam dunk."

289. During the call Medical Supply attempted several times to work out any misunderstandings and set up at least the 10 accounts Medical Supply had relied on US Bank for and that US Bank had known about and that Medical Supply was now in danger of being irreparably harmed.

290. Medical Supply stated that the Patriot Act did not apply and that Medical Supply was in actuality an established US Bank customer and that Medical Supply had been in a trust relationship with US Bank and the bank even had its business plan and information about its proprietary business model.

291. Brian Kabbes said that the trust department was a "stand-alone unit" and had its own criteria for accepting customers. US Bank refused to reverse its decision.

292. Medical Supply pointed out that it had not received a true reason for denial of the accounts and that the reason given was a pretext at best.

293. Viewing US Bank's actions, Medical Supply stated they could only be explained by a conflict of interest due to US Bancorp's existing healthcare investments and involvement. Medical Supply felt extremely disturbed by the apparent out come of this situation, there was not enough time to establish a new banking relationship with another nationally recognized Bank and Medical Supply would loose substantial momentum.

294. Medical Supply had spent several months building up to roll out it's supply chain empowerment program and felt to change a trust relationship in the middle will be devastating to it's entry to market. Medical Supply researched over 300 resumes only to find 30 that appeared to be qualified.

295. On or about 10/17/02 Samuel Lipari telephoned Douglas Lewis and told him what had happened. Doug said he had sent Brian Kabbes the good standing documentation but not the business plan and associate program. Samuel Lipari instructed him not to send the business plan and associate program materials to the corporate trust office of US Bank in St. Louis because of previous losses of intellectual property from unauthorized business plan dissemination.

296. Samuel Lipari told Douglas Lewis that Medical Supply would be litigating over the escrow decision and planned to renew its application for a line of credit once it had the situation straightened out.

297. Samuel Lipari suggested he might find another bank but Douglas Lewis said that would make the line of credit difficult. Samuel Lipari further instructed Douglas Lewis to hold on to the materials and keep anyone else from having access to them. Douglas Lewis agreed and stated he would keep the business plan materials safe.

298. On or about 10/18/02 Medical Supply drafted a letter and sent it to Jerry A. Grundhoffer, the President and Chief Executive Officer of US Bancorp NA with a copy being sent to Andrew Cesere, explaining the staggering damages US Bancorp would be liable for in imminent litigation due to the refusal to provide escrow accounts to Medical Supply. Medical Supply suggested an alternative of fact finding depositions to take place in St. Louis, MO before the end of the day Tuesday 10/22/02, believing US Bank to be misinformed about the USA Patriot Act and any reason for denying the escrow accounts.

299. US Bancorp Trust Department corporate counsel, Kristen Strong replied Friday 10/18/02 via fax and priority delivery with a letter denying US Bancorp NA was in contract with Medical Supply and that if any law suit is filed to address service for the trust department to her at her office.

300. Medical Supply called the trust department counsel Monday10/21/02 to ask for service addresses of the other named entities and employees. Kristen Strong said the same address would be good for all and then proceeded to ask what the causes of action were. Medical Supply explained that it was chiefly an antitrust action based on the Sherman, Clayton and Hobbs Act and that causes of action under the USA Patriot Act were also a basis for the suit.

301. Kristen Strong was surprised Medical Supply was told the USA Patriot Act had been given as the reason for the denial of escrow account service but reiterated that there was no contract in her view and she saw no basis for the other causes of action. Medical Supply stated that it would fax the complaint to her at

the time the action was filed at the end of business Thursday 10/24/02, but they were still waiting for Mr. Gunderson to select the alternative of mutual fact finding to promote a resolution of the matter without litigation.

302. Kristen Strong stated that the depositions would not lead to any meaningful explanation, that Medical Supply had her letter explaining US Bank's reason for denying the escrow accounts and that the bank reserved the right to choose whom it served.

303. Medical Supply reminded her that US Bancorp had extensive investments in healthcare and that choosing not to provide a service to a competitor is actionable under antitrust law.

304. Kristen Strong warned Medical Supply Not To Contact Anyone At US Bank And Said If Medical Supply filed an action against US Bancorp NA, she would send a letter to the judge in advance of her answer to our complaint saying we had *ex parte* communications.

305. Medical Supply stated that it had not had any communications with US Bank employees since receiving her reply on Friday 10/18/02. However, Medical Supply was an account holder at US Bank and would continue to have communications with US Bank regarding its other bank business.

306. Medical Supply reminded her that US Bancorp had extensive investments in healthcare distributors and that choosing not to provide a service to a competitor is actionable under antitrust law.

307. Medical Supply contacted an attorney, familiar with the healthcare supply chain research and development done by Samuel Lipari at the law firm of Shook Hardy and Bacon and asked if his firm could act as escrow agent for accounts to be set up in US Bank. He said the bank is better prepared to provide escrow services, fearing the liabilities and risks for an escrow agent where the USA PATRIOT Act had been invoked and declined to act as escrow agent.

308. On Thursday 10/24/02 Medical Supply filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees. Medical Supply counsel contacted US Bank counsel Kristin Strong to clarify the clerk of the court's questioning of service and to attempt to schedule a hearing. Ms. Strong said she would call the following morning Friday 10/25/02 to answer the question about service. She did not call and took the day off. Medical Supply counsel called her on Monday morning 10/28/02 at which time she said the case had been transferred to outside counsel and gave the phone number to Medical Supply.

309. On or about 10/28/02 Medical Supply contacted US Bancorp's retained counsel and explained that there were questions about service and that Medical Supply was seeking to schedule a hearing that week for its requested relief to stop the harm it was suffering and to avoid a terminal outcome for the company. US Bancorp's counsel said he had to travel and was unsure of his schedule but by the next day he might know of a time he could make a hearing. Without hearing from the opposing counsel, Medical Supply became concerned and sent an email on or about 10/29/02 suggesting portions of the injunctive relief it seemed likely the two parties could agree on and explaining the harm it was suffering and what delaying the relief beyond critical dates would inflict on Medical Supply, its associates and customers.

4. The Defendants' Acceptance of Liability For Medical Supply's Business Plan Damages

310. The email explained the losses as follows: the damages of failing to receive the $350,000 to $450,000 it depended on November 1st and the resulting effects of that delay on its projected financials including lost profit of $51,795,005.00, lost increase in average valuation of $155,385,015.00, Candidate lost revenue of $15,499,788.00.

311. The email explained that these injuries would be far greater if a December 1st deadline is missed. However, if the company does not recover from US Bank's denial of the escrow accounts the total third year losses of the company would be as follows: lost profits $51,795,005.00, loss of increased company avg. valuation of $155,385,015.00, Candidate lost revenue of $15,499,788.00 and Customer losses of $697,486,200.00.

312. On or about Wednesday 10/30/02, US Bancorp's counsel sent a letter to the court dismissive of Medical Supply's complaint and stating that it would oppose all requested relief.

313. On or about Thursday 10/31/02, Medical Supply called US Bancorp's counsel explaining the necessity of the relief sought and specifically the relief requested under paragraph 66 seeking to stop US Bank from reporting negative information about Medical Supply under the USA PATRIOT Act.

314. US Bancorp's counsel reiterated his belief Medical Supply needed to find another bank and that no liability existed. Medical Supply's counsel explained that Samuel Lipari will not risk a hundred million dollar company that requires high level banking services to future damage from a secret USA PATRIOT Act report that has misinformation in it and would create a black mark preventing them from ever being able to do any business.

315. US Bancorp's counsel said it would not agree to even just the relief sought in paragraph 66. Medical Supply asked US Bancorp's counsel if his firm would act as an escrow agent for accounts to be deposited in US Bank, since Shook Hardy and Bacon had declined to do so. US Bancorp's counsel refused to do so stating that US Bank did not owe any duty to Medical Supply.

5. The Defendants' Theft of Medical Supply's Intellectual Property

316. Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by Samuel Lipari in 1995 was appropriated by HSCA, Medecon and Cardinal Owen Healthcare through exploitation of a confidential business relationship and then taken later by many other GPOs.

317. On or about 11/6/02 Samuel Lipari visited US Bank, Noland road branch to retrieve the documents left by him following the meeting with Doug Lewis on 10/10/02. Doug Lewis gave the documents back to Samuel Lipari.

318. Samuel Lipari specifically ask if the documents were copied or faxed and Doug Lewis said he put all of the information in his analysis and Samuel Lipari left the bank. Upon returning to Medical Supply's office Samuel Lipari Inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents.

319. There were also tractor marks from a copy or fax machine on the back of the entire associate program and the business plan pages.

320. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied. There were no marks on the back of these documents.

321. Medical Supply became fearful of where these documents were sent and who has reviewed them. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms and financials including 5 year details, 5 year condensed and break even analysis.

322. Samuel Lipari became fearful this information would fall into the wrong hands further blocking or eliminating entry to market.

6. The Effects of the Plan To Financially Destroy Medical Supply

323. On or about 11/7/02 Samuel Lipari received a complimentary D&B report dated 10/31/02 on Medical Supply. The report indicated Medical Supply started in 2000 and has a clear credit history and a strong financial condition.

324. On November 18, 2002, Medical Supply obtained a TRO hearing on its request for preliminary injunctive relief. Medical Supply sought urgent preliminary injunctive relief from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting.

325. Medical Supply had second preliminary injunction hearing at12:00 p.m. on December 12, 2002. Medical Supply again sought urgent preliminary injunctive relief from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting, but was denied.

326. On December 17, 2002 Medical Supply filed a notice of interlocutory appeal to The Tenth Circuit Court of Appeals.

327. On June 16, 2003, the Kansas District Court dismissed Medical Supply's action for injunctive and declaratory relief.

328. After losing a motion for new trial, Medical Supply filed a timely notice for appeal on November 21, 2003.

329. On January 7th, 2004, the Tenth Circuit dismissed the interlocutory appeal as moot due to the superceding appeal of the action's dismissal.

7. US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer Realize Because Of The Prospective Injunctive Relief Action Their Antirust Liability To Medical Supply And The Requirement At Law That They Must Divest Piper Jaffray At A $750 Million Dollar Loss

330. Jerry Grundhoffer, the CEO of US Bancorp NA realized that his acquisition of Piper Jaffray in a scheme to exploit US Bank essential facilities as the eight largest national bank in America and use its deposits as a guarantor of capital in underwriting initial public offerings (IPO's) of healthcare technology and supply chain companies and to support those IPO's with Piper Jaffray's essential facility of providing investor research had made US Bank and US Bancorp NA liable under antitrust law for its injury to Medical Supply.

331. Jerry Grundhoffer attempted to sell Piper Jaffray first to Royal Bank of Canada and then to A.G. Edwards & Sons, Inc., seeking a purchase price $100 million dollars less than US Bancorp had acquired Piper Jaffray for.

332. In December of 2002 Samuel Lipari, CEO of Medical Supply communicated with Gordon M. Nixon and Irving Weiser of the Royal Bank of Canada (RBC) explaining Medical Supply's action against Piper Jaffray and offering to work with RBC if they decided to purchase Piper Jaffray in the hope that RBC would "prevent similar conflicts of interest from ever occurring and to ensure healthcare company securities are not marketed on the basis of illicit anticompetitive contracting advantages."

333. In December 2002 Samuel Lipari, CEO of Medical Supply contacted Robert L. Bagby and Douglas L. Kelly of A.G. Edwards & Sons, Inc. about the action against Piper Jaffray offering to work to resolve any claims:

> "We believe we will prevail in our antitrust and contract related claims. The portion of liability for these staggering damages that will be apportioned to US Bancorp Piper Jaffray INC causes us great concern for your company should it acquire Piper Jaffray. A.G. Edwards has responsible corporate governance standards in place and has long served its customers without reproach. I will be happy to work with you and your counsel to resolve Piper Jaffray's involvement in these anticompetitive acts."

334. Jerry Grundhoffer sought and obtained an agreement with Piper Jaffray's C level officers subrogating US Bancorp NA and US Bank's future antitrust judgment liability to Medical Supply from Jerry Grundhoffer to Piper Jaffray.

335. Having no other alternative and realizing that liability to Medical Supply in antitrust continued to accumulate as long as the two companies were commonly owned, US Bancorp announced on February 19th, 2003 that Piper Jaffray was being spun off or separated from US Bancorp NA.

336. On December 31st 2003, US Bancorp announced the completion of its spin off of Piper Jaffray, trading on the NYSE as an independent public offering January 2, 2004.

8. US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer Realize Because Of The Prospective Injunctive Relief Action Their Antirust Liability To Medical Supply And The Requirement At Law That They Must Divest Piper Jaffray At A $750 Million Dollar Loss

337. GE And GHX, LLC acted against their own short term profit interest and in knowing coordination with Neoforma, Inc. in an intentional effort to deprive Medical Supply in June 2003 of its contracted or bargained for capitalization of $350,000.00 to enter the market for hospital supplies, just as Neoforma, Inc. (Unknown Healthcare Entity) and US Bancorp, et al had through combination or conspiracy deprived Medical Supply of another $350,000.00 obtained through the contract for escrow accounts in November 2002.

338. The Defendants Foreclosure of Medical Supply's Attempt Following Attempt To Enter Into the Market For Hospital Supplies and Hospital Supplies in E-Commerce.

339. While seeking a new corporate headquarters for Medical Supply in May 2002 Mr. Lipari discovered an unused building in the same Blue Springs suburb of Kansas City, Missouri. The building had been purpose built to house information technology workers and had the infra structure including adequate communications connections and an electric plant for Medical Supply's servers.

340. GE Transportation acquired the building and its transferable lease when it bought the railroad signal company Harmon, Inc. and got rid of its employees. GE Transportation sought to escape the $5.4 million dollar liability of the remaining 7 year lease because of the $50,000.00 to $60,000.00 dollar a month payments and insurance on the building that had not been occupied for over 8 months with no sub lease offers. Previously the building had been under utilized while GE reduced Harmon's staff. The high monthly cost was making the subsidiary fail to meet GE's economic performance requirements and hurting the conglomerate's bottom line and share price.

341. On or about June 1st, 2002, Samuel Lipari, CEO of Medical Supply Chain, Inc. contacted the leasing agent Cohen & Essrey Property Management regarding a building located at 1600 N.E. Coronado Drive in Blue Springs, MO. The leasing agent indicated the building was already leased but that the lessee could and would like to sub-lease the building. The building was not occupied so Mr. Lipari made a verbal offer to sub-lease a portion of the building. The leasing agent declined his offer indicating the existing lessee would not accept anything less than leasing the entire building.

342. On or about April 1st, 2003 Mr. Lipari contacted the new leasing agent (B.A. Karbank & Company) in the event the new agent had different instructions regarding a sub-lease of the property located at 1600 N.E. Coronado Drive in Blue Springs, MO. The new leasing agent told him that GE was the lessee seeking to sub-lease the building due to their vacating the building after GE Transportation bought out of Harmon Industries. The building was still not occupied so again Mr. Lipari made a verbal offer to lease a portion of the building. The leasing agent declined his offer indicating GE Corporate Properties would not accept anything less than leasing the entire building.

343. On or about April 7th Mr. Lipari contacted GE and spoke with the GE property manager, George Frickie regarding Medical Supply's interest in sub-leasing the building. George Frickie indicated again that

GE would not be interested in sub-leasing a portion of the building but rather would be interested in leasing the entire building. Mr. Lipari requested the name of the owners and Mr. Frickie gave him the name and number of Barry Price with Cherokee Properties L.L.C. Mr. Lipari contacted Mr. Price, he was referred to Scott Asner who also had a substantial interest in the building. While speaking with Mr. Asner he provided Mr. Lipari the background and current details on the building lease with GE, terms and a price to purchase the building. The lease was transferable and GE was still obligated for 7-years out of a 10-year lease. Mr. Asner agreed to sell Medical Supply the building for the remaining balance of the GE 7-year lease ($5.4 million) and provided Mr. Lipari with a letter of intent to sell the building to Medical Supply.

344. On or about April 15th, Mr. Lipari contacted Mr. Frickie with GE Commercial Properties and indicated that he had an interest in purchasing the building. Mr. Lipari ask Mr. Frickie if GE had an interest in buying out the remainder of their lease so that Medical Supply could occupy the building following the purchase. Mr. Frickie offered GE's lease payments for the remainder of 2003 ($350,000) as a buy out offer.

345. On or about May 1st, 2003 Mr. Lipari tentatively contacted several local Banks, knowing that US Bank had threatened his company with a malicious USA PATRIOT Act report to keep Medical Supply from entering the hospital supply market where US bank was affiliated with Neoforma, an existing electronic marketplace for healthcare supplies. Mr. Lipari knew Medical Supply could not get a loan because of the threat and extortion, but knew he needed input from bankers familiar with the commercial real estate market in Blue Springs. Mr. Lipari felt Medical Supply could form a holding company to obtain the property without US Bank realizing he could enter the hospital supply market. Mr. Lipari spoke with Allen Lefko President of Grain Valley Bank, Pat Campbell branch manager of Gold's Bank and Randy Castle Senior Vice-President of Jacomo Bank. Each of the banks indicated a willingness to provide the mortgage because they felt the property was worth far more than the price offered by Cherokee Properties L.L.C., but the mortgage was too large for the regulatory size of their bank and they each suggested a national bank as an alternative. Due to US Bank's extortion and racketeering, including the pretext and very real threat of a malicious USA PATRIOT Act suspicious activity report (SAR) against Medical Supply since Mr. Lipari had tried to enter the hospital supply market in October of 2002, Mr. Lipari knew he was unable to solicit a national bank for the real estate loan.

346. On or about May 7th, Medical Supply contracted a financial consultant (Joan Mark) for advice on how to put a mortgage together to buy the building which has a 7-year revenue stream from GE in the amount of $5.4 million, the identical amount offered to purchase the building and for which Medical Supply had a letter of intent from the owner Cherokee Properties L.L.C. Mrs. Mark suggested Mr. Lipari propose a mortgage arrangement directly to George Frickie with GE Corporate. Mrs. Mark explained how a purchase of the $10 Million dollar property for $5.4 Million was a great deal for any mortgage lender. Mrs. Mark also explained if GE provided a $5.4 million dollar mortgage on a $10 million dollar property and eliminated a $5.4 million dollar lease obligation that GE would directly benefit from a $15 million dollar swing to their balance sheet.

347. Without realizing the existence of a combination and conspiracy between the Defendants, including the existence of a secret market allocating and tying agreement between Neoforma, Inc. and G.E and Premier's electronic market place, GHX, LLC. Samuel Lipari prepared an offer on the building for GE Transportation.

348. The afternoon of May 15th, Mr. Frickie responded, leaving a taped voicemail message and stating he had spoke with the business leaders at GE corporate and that they will accept Medical Supply's proposal.

> May 15th 2003-George Frickie
> "Bret, George Frickie, ah…. I know I sent you an email saying that my counsel way out ah…and I followed up with another email but I spoke to the business leaders and we will accept that transaction ah… let's start the paper work ah… if you want to do some drafting of lease termination or if you would like us to do that, give me a holler 203-431-4452."

349. The second e-mail Mr. Frickie referenced on the phone conversation explicitly stated that GE would accept Medical Supply's proposal and initialed the written acceptance in addition to the electronic signature file for the e-mail:

> From: Fricke, George (CORP) To: Bret Landrith Cc: Newell, Andrew (TRANS) ; Payne, Robert J (TRANS) ; Davis, Tom L (TRANS) ; Jakaitis, Gary (CORP)
> Sent: Thursday, May 15, 2003 6:05 PM
> Subject: RE: Lease buyout GE/Harmon building Bret, I would like to confirm our telephone conversation in that GE will accept your proposal to terminate the existing Lease. Robert Payne GE Counsel will start working on the document. He is out of the office until Monday 19th. GCF

350. On or about May 20th, 2003, Medical Supply was given a walk through of the property to inventory the buildings furniture and fixtures and discuss building maintenance and operational procedures. Tom Davis, the property manager for GE Transportation in Blue Springs and John Phillips, the GE

Transportation building maintenance engineer provided the three-hour walk through in addition to the building maintenance and operational procedures. John Philips also provided the blue prints of the building and allowed me to make copies. Mr. Lipari returned the original blue prints after he made copies. They both stated they were being dismissed from employment by GE since they would no longer be necessary.

351. On May 22nd, 2003 Mr. Lipari spoke with Doug McKay with GE Capital who had called earlier that week with regard to the mortgage outlined in Medical Supply's proposal. Doug asked that Mr. Lipari send our company information regarding the mortgage. Mr. Lipari indicated that he could meet him the following Tuesday because Medical Supply had a loan package for him that included its financials, the proposal that George Frickie and GE's business leaders accepted, the letter of intent from the owners and our Dunn &Bradstreet report showing Medical Supply's good credit and strong financial condition. Mr. Lipari gave the information to McKay and McKay indicated he needed to speak with GE Transportation to see how they wanted to handle the terms of the accepted proposal.

352. On or about June 2nd, 2003 Mr. Lipari called McKay to see how they were doing on closing and McKay indicated that the person he needed to speak with was at corporate and that he needed to speak with him before moving forward.

353. As the June 15, 2003 closing date approached, medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent George Frickie and email stating that a delay in closing would not effect the lease buyout of $350,000. Medical Supply's counsel later again called Mr. Frickie when he receive no response and Mr. Frickie became extremely angry and hung up the phone.

354. Medical Supply then proceeded to speak with GE's counsel Kate O'Leary to determine if the contract had been repudiated. Supporting statutes and the antitrust basis and damages implications were explained to Ms O'Leary.

355. Medical Supply gave GE a deadline to June 10th to clarify whether there had been a repudiation. Mrs. O'Leary later faxed a letter on the 10th requesting that Medical Supply not speak to anyone at GE and that any correspondence relating to this matter be directly to her. Medical Supply then emailed a letter stating that if no earnest money were deposited to indicate the contract was not being repudiated, Medical Supply would file on June 16th for antitrust and breach of contract.

356. George Fricke, property manager for The General Electric Company who Medical Supply had been told by Fricke and his agents, was the authority for the building at 1600 NE Coronado Dr. telephoned Medical Supply Chain's Missouri headquarters and placed a message on its answering machine stating he had been instructed by "business leaders" to accept Medical Supply's proposal and he was calling to do so. Then, George Fricke sent a written acceptance via e-mail with his initials added a signature at the end of the email message. No terms were disputed and the acceptance confirmed The General Electric Company would make its subsidiary GE Transportation LLC. pay $350,000 for the buy out of the lease and its GE Capital subsidiary provide the $6.4 million dollar mortgage and closing at 5.4% for twenty years with a first year moratorium on payments. In diversity actions, the Court applies the substantive law, including choice of law rules, that Kansas state courts would apply. See Moore v. Subaru of Am., 891 F.2d 1445, 1448 (10th Cir. 1989). Kansas courts apply the doctrine of lex loci contractus, which requires that the Court interpret the contract according to the law of the state in which the parties performed the last act necessary to form the contract. See Missouri Pac. R.R. Co. v. Kansas Gas and Elec. Co., 862 F.2d 796, 798 n.1 (10th Cir. 1988) (citing Simms v. Metropolitan Life Ins. Co., 9 Kan. App. 2d 640, 642-43, 685 P.2d 321 (1984)).

357. George Fricke's signed written acceptance referenced the proposal he had received from Medical Supply earlier that day. The set of documents then became an bilateral contract completed with the last act exchanging mutual promises (D.L. Peoples Group, Inc. v. Hawley, — So.2d — (2002 WL 63351, Ct. App., Fla., 2002) enforceable for the sale of the lease interest and the benefit of the bargain obtained by Medical Supply under its clear and complete terms meeting the writing requirements of a real estate purchase contract in Missouri and the writing and definiteness requirement of a credit agreement under Missouri statute RMS 432.045.2 .

358. The formation of an enforceable contract in a set of documents created in correspondence is well settled See Estate of Younge v. Huysmans, 127 N.H. 461, 465-66, 506 A.2d 282, 284-85 (1965). Since state law requires a writing, the e-mail acceptance and signature of George Fricke is valid and enforceable under 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, widely known as "E-SIGN." Section 101(a) of E-SIGN states that "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in

electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

359. Medical Supply had performed as required, introducing itself to the City of Blue Springs Economic Development, and committed to purchase the building from its owner in reliance on the contract with GE, GE Transportation made open partial performance of the contract by opening the building for a three hour briefing on the operation and maintenance of the building's complex systems. This briefing was made by GE Transportation's Blue Springs property manager and the building's maintenance engineer, both of whom told Medical Supply's CEO Samuel Lipari that they had been terminated and will be leaving employment with GE Transportation the following month because they were no longer needed.

360. GE Capital partially performed as required and made an appointment with Samuel Lipari in its Overland Park, Kansas office where Mr. Lipari took the building's blueprints furnished him by GE Transportation, the building's physical description and photo furnished by George Fricke of GE corporate and Medical Supply's corporate records for the loan.

361. The GE Capital loan officer Douglas McKay discussed the terms and questioned Mr. Lipari in detail about the lawsuit. Mr. Lipari explained why under the threat by US Bank of a malicious USA PATRIOT Act suspicious activity report, Medical Supply could not risk going to a bank until the lawsuit was settled. Douglas McKay agreed the USA PATRIOT Act had no valid relationship to Medical Supply's involvement with US Bank and stated he would obtain the additional requirements GE Capital required from George Fricke and GE Transportation. McKay indicated it could take longer to close but he would check into it.

362. Medical Supply communicated to its stakeholders, business associates, potential customers, and the owners of the building that it had obtained the financing and made commitments in reliance of GE's performance on the contract.

363. No letter similar to that which Mr. McKay had described was received from GE Capital by the June 15th contract deadline and no notice of rejection of credit has been received. George Fricke communicated by phone and e-mail that the GE Capital performance would be at arm's length but since the financing was the benefit bargained for by Medical Supply, this did not contradict the contract. When

doubts about GE' intent to honor the contract arose, counsel for GE, GE Transportation and GE Capital each refused to confirm the repudiation.

364. The proposal accepted by George Fricke on behalf of GE's business leaders contained the executive summary of Medical Supply's business plan, including an explanation of the antitrust lawsuit with US Bancorp, et al and the financial projections for Medical Supply's entry into market. Under Anuhco, Inc. v. Westinghouse Credit Corp., 883 S.W.2d 910 (Mo App 1994) GE is responsible for the expectation damages of the forward projections that it had accepted at the time it entered into contract with Medical Supply. Medical Supply is able to prove its projected profits with reasonable certainty. Lost future profits may be used as a method of calculating damage where no other reliable method of valuing the business is available, see Albrecht v. The Herald Co., 452 F.2d 124 at 129 (8th Cir. 1971) cited for this purpose by 10th Cir.

365. GE, the parent company of GE Transportation was a dominant medical device manufacturer and medical equipment and electrical equipment supplier to North American hospitals. GE ceased to be a manufacturer and became a distributor of parts, assemblies, products, systems and credit services to hospitals. GE established monopolies in many product lines for hospitals but feared other distributors would bypass GE and buy the same parts, assemblies, products, systems from foreign sources and sell them to North American hospitals at lower prices in competition with GE To prevent this, GE made alliances with the dominant distributors for hospitals called GPO's including the Defendant Novation, LLC because they were intended to be group purchasing cooperatives (organizations). GE and the other dominant manufacturers gave the management of these GPO's including the Defendant Novation, LLC kickbacks to prevent direct competition in distribution, preserve their loyalty and to protect the inflated prices. However, GE saw that the captive customers of these GPO's including the Defendant Novation, LLC were growing dissatisfied at the inefficiency and the failure to achieve group purchasing discounts. To protect against other market entrants, GE formed Global Health Exchange LLC. as an electronic market place promising online distribution at lower prices to hospitals. GE owns shares of stock in the privately held company and provided the initial capitalization. As an alliance of a handful of dominant manufacturers (now distributors) the actual goal was to preempt the fledgling e-commerce companies from entering the electronic distribution of hospital supplies.

366. G.E, had also formed its own electronic marketplace called Global exchange and continues to market hospital supply products over the internet from its corporate web site as a distributor of other manufacturers' hospital supply products.

367. GE found the technology of GHX, Inc. was inadequate to outperform new entrants and aligned itself with the Defendant Neoforma, Inc., the electronic marketplace co-opted by the dominant GPO's including the Defendant Novation, LLC in an alliance to exchange data among suppliers to enforce cost structures as inflated as those of the GPO's. GHX, LLC at the direction and approval of GE has retaliated against suppliers who endanger the marketplace with competitive prices. GHX, LLC. at the direction and approval of GE has excluded competitors including Retractable Technologies, Inc. and Masimo for failing to give kick backs to the cartel. Death and injury resulted from the failure of hospitals to obtain these medical devices.

368. GHX, LLC. at the direction and approval of GE in a conspiracy and combination with the Defendants has excluded Medical Supply Chain, Inc. from entering the market by not allowing Medical Supply to offer GE Capital Healthcare credit to its potential customers in April of 2002, and by refusing to offer US Bancorp Piper Jaffray services to Medical Supply in June 2002 in a conspiracy with the Defendants and by repudiating essential escrow contracts required by Medical Supply to capitalize its entry into market in October 2002. (US Bancorp has interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC.; the Defendant Novation and Premier. US Bancorp helped the Defendant Novation acquire control of the Defendant Neoforma and partner it with GHX LLC. creating a monopoly of over 80% of healthcare e-commerce).

369. GE at the direction of the Defendants including Neoforma and Novation LLC caused its subsidiary GE Transportation to repudiate the contract to buy the lease from Medical Supply, sacrificing $15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, LLC. and Neoforma. The market is worth 1.8 trillion dollars. GE acted on the tremendous windfall to preserve its monopoly. George Fricke is GE Corporate's property manager.

9. Piper Jaffray And Andrew S. Duff Realize Because Of The Prospective Injunctive Relief Action Their Antirust Liability To Medical Supply And The Requirement At Law That They Divest Their Healthcare Venture Fund, Losing $225,000,000.00 (255 Million Dollars) In Assets

370. The Defendants The Piper Jaffray Companies and Andrew S. Duff attempted to contract with the Defendant US Bancorp to guarantee the bank holding company's liability to Medical Supply but discovered it could not continue to incur liability to Medical Supply for participating in the scheme to monopolize the markets in hospital supplies and hospital supplies in e-commerce and announced it was withdrawing from the conspiracy and combination's scheme to monopolize the capitalization of healthcare technology and supply chain management companies.

371. On October 13, 2004, Piper Jaffray announced it was relinquishing its healthcare technology capitalization subsidiary, Piper Jaffray Ventures.

372. Founded in 1992, Piper Jaffray Ventures manages over $225 million in capital dedicated exclusively to funding innovative, emerging growth companies in the medical technology, biotechnology and healthcare services sectors. Through Piper Jaffray Ventures, The Piper Jaffray Companies actively participated in and held seats on the boards of directors of their client companies, facilitating the monopolization of the markets for hospital supplies and hospital supplies in e-commerce.

373. Through Piper Jaffray Ventures, The Piper Jaffray Companies was also able to extract fees for access to an extensive network of industry contacts including Novation, LLC, UHC, VHA and Neoforma.

374. The Piper Jaffray Companies also used Piper Jaffray Ventures to capitalize healthcare technology and supply chain management companies that became part of the Defendants' combination and conspiracy to restrain trade with US Bancorp NA.

10. Medical Supply Informs Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma that it has been unsuccessful in obtaining prospective injunctive and declaratory relief against their coconspirators Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer and that the conspirators are jointly and severally liable for the damages Medical Supply sought to avoid.

375. On December 14, 2004, Medical Supply served a demand letter Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma giving notice to these defendants of Medical Supply's claims against them. Medical Supply informed the defendants that it has been unsuccessful in obtaining prospective injunctive and declaratory relief against their coconspirators Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer and that the conspirators are jointly and severally liable for the damages Medical Supply sought to avoid.

11. Medical Supply is granted a Rehearing in Tenth Circuit. That Afternoon UHC and VHA Realize Because of Medical Supply's Demand Letter That They Are Required At Law To Divest

Neoforma and Both UHC and VHA Make an Emergency Announcement of An Agreement to Dispose of Neoforma at a $150,000,000.00 dollar loss.

376. On January 25th in an emergency late afternoon press announcement after hearing Medical Supply's Tenth Circuit decision would be reheard, Neoforma, Inc. stated:

> "Neoforma Hires Merrill to Mull Options
>
> Associated Press
> 01.11.2005, 04:52 PM
>
> Neoforma Inc., a provider of supply-chain management solutions for the health-care industry, on Tuesday said it hired Merrill Lynch & Co. as its financial adviser to help it explore options, including a sale or merger.
>
> Neoforma said that any transaction must be approved by VHA Inc. and the University HealthSystem Consortium - national health-care alliances which own a majority of the company's outstanding shares and own Neoforma's largest customer, the supply company Novation.
>
> The company said that there is no assurances that any transaction will occur."

Before Medical Supply's antitrust actions were brought, Neoforma and Robert Zollars boasted of the monopolization of the e-commerce market for hospital supplies accomplished by alliances with other monopolists including the Defendant Novation, LLC:

> CEO explains reasons why long-term investor should be looking at Neoforma Full article published: 12/20/2001 ROBERT J. ZOLLARS is Chairman and Chief Executive Officer of Neoforma, Inc.
>
> Mr. Zollars: To start with, Neoforma is a 2001 Internet success story, and we're the leader in healthcare B2B. Neoforma builds and operates Internet marketplaces that empower healthcare trading partners to optimize their supply chain. So simply put, we help hospitals buy their supplies more efficiently and more effectively.
>
> 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.

12. Novation, LLC realizes Because of Medical Supply's Demand Letter That Its Relationship With Neoforma and Its Long Term Anticompetitive Contract Are Illegal Antitrust prohibited Conduct Without Redeeming Value and Announces It Will Review Neoforma's Value Creation

377. Because of this impending legal action, Novation LLC has realized it has created no competition or efficiency enhancing value to the business of its two founders VHA Inc. and University HealthSystem Consortium. Novation subsequently notified Neoforma that it will review the value created by the electronic marketplace:

"Independent Consultants Engaged to Assess Neoforma's Offering to Novation

San Jose, CA - January 26, 2005 - I n connection with Neoforma, Inc.'s (NASDAQ: NEOF) decision to evaluate strategic alternatives, Neoforma, a leading provider of supply chain management solutions for the healthcare industry, and Novation, LLC, Neoforma's principal customer, each have engaged independent consultants to assess the technology, information, services and pricing provided by Neoforma to Novation and its owners, VHA Inc. and University HealthSystem Consortium (UHC), and their member hospitals under an exclusive outsourcing agreement. Neoforma announced on January 11, 2005 that it had retained Merrill Lynch & Co. as its financial advisor to assist the Company in evaluating strategic alternatives, including a possible sale or merger of the Company, to achieve greater stockholder value. VHA and UHC own 42.4% and 10.5%, respectively, of Neoforma's outstanding common stock.

The current 10-year exclusive outsourcing agreement, which was originally entered into in March 2000, 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. Since that time, Neoforma has documented significant value delivered by its offering to VHA and UHC hospitals. In 2004, approximately 280 VHA and UHC hospitals, representing a subset of Neoforma's customer base, documented approximately $100 million in value by using Neoforma's solutions to drive supply chain improvements within their organizations. Based on the value of its offering to Novation and to VHA and UHC hospitals, Neoforma believes that it is a valuable contributor to Novation, VHA and UHC maintaining their competitive position in the industry and to their hospitals' efforts to improve supply chain efficiency.

Neoforma believes that the current quarterly maximum payment from Novation is reasonable. Novation has advised the Company, however, that its assessment could result in a formal request to reduce the quarterly maximum payment.

Each of the consultants independently will assess the current technology, information, services and pricing that Neoforma develops and delivers under the outsourcing agreement. At this time, none of the parties to the outsourcing agreement have requested that the formal benchmarking process allowed under the terms of the agreement be undertaken; however, no assurances can be given that this process will not be requested by any of the parties at a later date. While the actual results of these assessments, which are expected to be completed within 45 days, or of any formal benchmarking process cannot be determined at this time, either process could have an impact on the structure and financial terms of the outsourcing agreement.

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. "

378. A February 18, 2005 article in the Los Angeles Times exposed Novation, LLC and its subsidiary Cardinal's (the descendent of Owen Health that stole Medical Supply's intellectual property in 1995) extreme opposite conduct of what could legitimize a joint venture between the former competitors VHA and UHC.

379. Los Angeles Times columnist Michael Hiltzik on Thursday profiled the experience of John Glaspy, professor of medicine at the University of California-Los Angeles Medical Center and medical director of UCLA's Bowyer Oncology Center, who attempted to reduce his university's $13 million annual bill for chemotherapy drugs. According to Hiltzik, the issue raises questions about whether the University of California system received the "best value from a contract" with purchasing groups Cardinal Health and Novation, and it "shed[s] a glimmer of light on a deal whose key terms ... are secret."

380. Changes to Medicare reimbursement rates for oncology medications adversely affected the budgets for the four community cancer clinics Glaspy runs, prompting him to seek information about the contract with Cardinal and Novation, which "presumably leveraged the vast buying power of the five UC medical centers to obtain enormous discounts," Hiltzik writes. According to Hiltzik, Glaspy made a "few phone calls" and discovered he could "beat the Cardinal/Novation price" on oncology medications by about $800,000 annually.

381. However, UC officials "told him to back off," and his discovery set off "months of conflict between UC headquarters and UCLA, where campus purchasing agents were sufficiently intrigued to wonder whether they could do better without Cardinal/Novation," Hiltzik writes. UC officials did not allow UCLA officials to see the contract terms but did tell the school that removing the oncology medications from the contract "would threaten discounts for the whole [UC] system," according to Hiltzik.

382. Eventually, UC allowed the clinics to purchase their own chemotherapy medications, matching savings found by Glaspy. Hiltzik writes that despite the resolution, the "question remains: Has the University of California been overpaying for all its chemo drugs for the last four years? ... And what about

the other pharmacy purchases at the five UC medical centers, which total about $200 million a year?" Michael Hiltzik “A Valuable Drug Discovery at UC” LA Times, February 18, 2005

383. Novation is a limited-liability corporation formed in 1998 by VHA Inc. and University HealthSystem Consortium and was the subject of Senate antitrust hearings in 2002, 2003 and 2004. 2,200 healthcare providers that are part of the Novation distribution system.

384. The Senate Judiciary antitrust subcommittee encouraged the two dominant GPOs, Premier and Novation, the largest GPO to voluntarily implement codes of conduct to stop their antitrust prohibited conduct of bundling, charging large administrative fees, sole- sourcing goods and demanding a high percentage of purchases before rebates kick in.

385. Several hospitals testified in the first hearings that they saved money when they withdrew from the purchasing groups, while medical suppliers have sued Novation over freezing them out of the market.

386. On August 24th, 2004, The Connecticut Attorney General Richard Blumenthal stated; "Novation has a position of very definite market dominance and potentially has misused that power to bundle products and force hospitals to buy supplies that perhaps they would not have done." Mary E. O’Leary,” Yale New Haven Executive has Ties to Company in Probe,” New Haven Register 08/24/2004.

387. Novation uses its dominance in the market to favor certain medical suppliers and stop competition by smaller manufacturers.

388. Manufacturers and suppliers make rebates and payments to Novation as industrial bribes and kickbacks that influence Novation’s decision to carry their products.

389. Novation has actively solicited and obtained rebates, bribes, kickbacks and equity in healthcare technology companies in exchange for distributing the products of manufacturers and suppliers.

390. Novation has required and obtained rebates, bribes, kickbacks and equity in healthcare technology companies before allowing products to be purchased by its member hospitals.

391. Novation and related companies including Neoforma, Inc. use ties and affiliations with hospital executives that receive payments and incentives personally for making decisions regarding their hospital’s participation in Novation’s system. The hospital executives are on “both sides of the sale transaction involving Novation and their hospital.”

392. Novation switched its practice of awarding anticompetitive contracts to the market leader when a subsidiary of Tyco was able to pay kickbacks and bribes greater than Ethicon, the current market leader in sutures. Tyco has been the subject of accounting fraud and securities investigations and CNN reported on February 8th, 2005 Tyco is being investigated in the UN Arms for food scandal where illegal kickbacks and bribes were utilized in the sale of Iraq's oil during the UN embargo.

393. On December 20, 2004, U.S. Surgical, a business unit of Tyco Healthcare, was awarded suture contracts by Novation. The long-term exclusive contracts run from April 1, 2005 through March 31, 2008. The contracts announcement stated VHA and UHC have the potential to purchase as much as $900 million in the eight product categories that make up Novation's complete wound closure and endomechanical offering.

394. The competing company Ethicon has approximately 90 percent of the suture market and bundles better discounts on sutures to its endomechanical product line. This time US Surgical (a division of Tyco) won both awards.

395. Novation provided a suture conversion calculator to validate for its members that they would save 20 – 25% using the new US Surgical contract. A hospital member of Novation used the aforementioned suture conversion calculator and found that their actual prices for sutures on the new contract are going to be 36% higher the previous contract, yet the hospital was told by Novation that they will realize the above stated savings (20-25% savings).

396. Novation fraudulently deceived its member hospitals into believing the new US Surgical suture contract would save them 20-25 percent. Instead of delivering savings, Novation and Tyco increased the list or book price for the sutures. The hospitals were given a fraudulent means to calculate their "savings" the suture conversion calculator that showed savings in the range of 20-25%. However, when the prices for Ethicon products, the sutures that had been used by the hospital were run through the same calculator, the hospital realized the new US Surgical contract prices were actually 36% higher.

13. Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma decide to continue to rely on Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer's corrupt scheme to influence the court

397. Only counsel for Neoforma, Inc., responded to Medical Supply's demand letter and the response merely a plea to delay action until the attorney could reach everyone after the Christmas holidays. The follow up response never came.

398. No Defendant repudiated its participation in the monopoly or made any overt declaration of withdraw from the conspiracy except for the announced divestitures stated above.

14. Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma's Utilization of Ongoing Sham Petitioning By Shughart, Thomson & Kilroy, Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer To Deprive Medical Supply of Counsel

399. On November 20, 2003, The former managing partner and Shughart Thomson & Kilroy shareholder acting as magistrate in Kansas District Court action *Bolden v. City of Topeka, et al,* Case No. 02-CV-2635, where the African American plaintiff was being represented by Medical Supply's counsel repeatedly told the plaintiff that he should sue his attorney for malpractice. The magistrate also stated Bolden would be better off representing himself. Bolden testified he was thankful to have his counsel, three previous ones had abandoned him after being intimidated and retaliated against by the City. Bolden's previous counsel still has not been located. Affidavits were furnished that many witnesses and process servers had been retaliated against, threatened with criminal prosecution if they testified in federal court and harassed. The magistrate also denied Bolden discovery in the action.

400. The transcript of the hearing which was also taped reveals that the magistrate was obsessed with legal malpractice insurance as a result of his firm's mishandling of Medical Supply's action against the US Bancorp defendants and Unknown Healthcare Supplier, amply documented in the record, and the aborted disclosures of the firm's malpractice liability insurance as the party in interest and guarantor of US Bancorp's certain antitrust losses.

401. During the *Bolden v. City of Topeka, et al* pretrial conference the former Shughart Thomson & Kilroy managing partner and shareholder acting as magistrate expressed his disturbance over "stealth lawsuits" where parties don't even know they are subject to them. While wholly inapplicable to Bolden's case where the City was liable for the officials regardless of whether they remained in the case, the subject of the deliberate pretext used to attack Medical Supply's counsel for his representation of Bolden, the magistrate is clearly troubled over the failure of his firm to consider its responsibilities to the identified coconspirators in *Medical Supply v. US Bancorp, et al.*

402. The attack on Medical Supply's counsel was overtly pretextual. The civil rights liability of the city for the conduct of its officers in their official capacity is based on law the magistrate well knew and in an unrelated pretrial order conference the following day accepted the voluntary stipulation of parties that all officials be voluntarily dismissed. The magistrate also stated that there was unlikely any difference in damages in a footnote to his report and recommendation.

403. The magistrate reiterated his criticism of Medical Supply's counsel in the Bolden v. City of Topeka, et al pretrial order conference report and recommendation, stating Bolden should consider representing himself if Medical Supply's counsel is the only attorney he can get. On December 3, 2003, the magistrate's report and recommendation was submitted as an attachment and the basis for an ethics complaint filed by the assistant city attorney Sherri Price against Medical Supply's counsel for his representation of Bolden. The Kansas Office of the Disciplinary Administrator investigated the complaint by having dinner with the magistrate. The magistrate used to be work for the office prior to starting at Shughart Thomson & Kilroy and continued to serve on various Kansas state ethics committees while a managing partner for at Shughart Thomson & Kilroy. Bolden was never contacted during the investigation and during the prosecution appeared only as a witness for Medical Supply's counsel.

404. The defendants US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff coordinated their defense of Medical Supply's action for injunctive and declaratory relief with the coconspirators Jeffrey R. Immelt, GE, GHX, GE Healthcare, GE Capital and GE Transportation who inconceivably attached the Medical Supply complaint and order to their 12(b)6 motion to dismiss in Medical Supply's separate action against Jeffrey R. Immelt, GE, GHX, GE Capital and GE Transportation. The former eighteen year Shughart Thomson & Kilroy shareholder acting as magistrate on the GE case denied Medical Supply discovery and the court did not even permit discovery when the dismissal attachments necessitated conversion of the GE motion to one for summary judgment.

405. On January 29, 2004, March 4, 2004, April 2, 2004 US Bancorp's counsel, Nicholas A.J. Vlietstra and Piper Jaffray's counsel Reed coordinated their appeal (10th C.C.A. 03-3342) with the GE defense. The GE defendants included the action against the US Bancorp defendants and Unknown Healthcare Provider as a related appellate case in (10th C.C.A. 04-3075) and used the US Bancorp order as a basis for a cross

appeal (10th C.C.A. 04-3102) challenging the failure of the trial court to grant sanctions against Medical Supply.

406. The coconspirators UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars did however renew their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US Bancorp and consulting with representatives for US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth Circuit Court of Appeals to uphold the trial court's erroneous ruling. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US Bancorp and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, all originating from the cartel's agents Shughart Thomson and Kilroy's past and current share holders.

407. The Shughart Thomson & Kilroy counsel, Andrew DeMarea failed to file a reply brief in the interlocutory appeal for the US Bancorp appellees. The Tenth Circuit court clerk called him two days later to remind him and urged him to file for an extension one day beyond the date the brief was due and seven days beyond the deadline for a motion for extension of time under 10th Cir. R. 27.4(F).

408. Andrew DeMarea also refused to turn in a parties case management conference report on the form required by local rule in the Kansas District Court. He repeatedly assured the magistrate during the first case management conference that the Medical Supply case would be dismissed.

409. Mark Olthoff, an attorney for Shughart Thomson & Kilroy in their Kansas City, MO office appeared to write all pleadings and briefs for the defendants until the second appeal where he appears to have been replaced by Susan C. Hascall of the Kansas City, MO office who was a Tenth Circuit Court of Appeals law clerk through 2000.

410. Mark Olthoff's trial pleadings repeatedly misstated and misrepresented Medical Supply's Amended Complaint and pleadings to the court, even after it had been repeatedly drawn to the court's attention that Mr. Olthoff was exploiting the court's reliance on the experience of Shughart Thomson &

Kilroy and was neglecting to read or consider Medical Supply's pleadings. In its order, the court even admonished Medical Supply's for failing to research law and facts that the record evidences had been researched. The negligence was entirely that of Mr. Olthoff and the court's or a result of the court's misplaced reliance on Mr. Olthoff.

411. The Medical Supply action against US Bancorp was dismissed but not on arguments or authorities presented by Shughart Thomson & Kilroy's dismissal memorandum. The first findings of law and fact made by the court in the case were *sua sponte* and both were clearly erroneous.

412. The court did not respond to Medical Supply's arguments for reconsideration or correct its factual errors. It is believed that the Shughart Thomson & Kilroy former managing partner obtained the magistrate assignment to Medical Supply's case against General Electric because of his relationship to Shughart Thomson & Kilroy and it provided an opportunity to address the same fact pattern as the earlier case because GE breached its contract with Medical Supply once the electronic marketplace GHX created by GE and its hospital supplier competitors discovered Medical Supply was attempting again to enter the market for hospital supplies.

413. On January 14th, 2005, Andrew DeMarea was directed to file an ethics complaint against Medical Supply. Like the "complaint" filed by Sherri Price, no allegations of misconduct appear in DeMarea's complaint, it merely incorporates by reference attached Medical Supply filings in the District Court and the Tenth Circuit and the appellate panel's sanction of Medical Supply's counsel for a "frivolous appeal." The "complaint" also contained Medical Supply's motion for en banc review of the sanctions. The sanction order itself admitted the trial court and the hearing panels were mistaken in stating there was no private right of action contained in the USA PATRIOT Act.

414. The former Shughart Thomson & Kilroy managing partner used his position as magistrate assigned to the Medical Supply action against General Electric to deny Medical Supply discovery. A decision he also made in the Bolden case. On January 20, 2005 the magistrate testified under oath in the disciplinary prosecution of Medical Supply's counsel that he had only denied discovery in a few cases. He stated he was unaware of any other case he was assigned where the respondent was an attorney. He visibly winced when he was then questioned if he was a magistrate in Medical Supply v. General Electric et al. where the respondent was the sole counsel for the plaintiff.

415. On January 19th, 2005, the state disciplinary tribunal heard arguments that the magistrate was the complaining witness in fact for the complaint made by the assistant city attorney against Medical Supply's counsel. Sherri Price made no independent allegations or observations of misconduct against the respondent and merely incorporated by reference Magistrate O'Hara's report and recommendation from Bolden's pretrial conference. The disciplinary tribunal ordered the magistrate to drive to Topeka and testify under oath.

416. The former Shughart Thomson & Kilroy managing partner acting as magistrate added to his attacks against Medical Supply's counsel with further statements impugning the respondent's competence. . The magistrate testified that Bolden's counsel was the worst attorney he had seen in 20 years. The magistrate alleged that Medical Supply's counsel did not have the skill or knowledge of the law a first year law student would possess.

417. The former Shughart Thomson & Kilroy managing partner acting as magistrate made a point of addressing facts that weakened the Kansas Disciplinary Administrator's case from the previous two days and made these assertions unsolicited from the questioning of the Disciplinary Administrator and demonstrated a pre appearance coaching or consultation with the Disciplinary Administrator, especially on the point about Medical Supply's competence being less than that of a first year law student. The magistrate could not have known that Medical Supply's counsel had testified the previous day that many states permit law students to represent clients in civil rights actions because of the shortage of counsel willing to undertake this difficult and unlucrative work.

418. The former Shughart Thomson & Milroy managing partner acting as magistrate impugned the professional ability of Medical Supply's counsel in an order where he was neither a party or attorney, The magistrate stated unequivocally that Medical Supply's counsel was incompetent. During testimony under oath on January 20th, 2005, the magistrate stated he could not recall ever stating in an order where the respondent was not an attorney that the respondent was incompetent.

15. The Impending Threat Of Monopolization of the Market For Hospital Supplies In E-Commerce

419. Industry insiders and investment message boards are communicating that it is likely Neoforma, Inc, with its 1,500 hospitals $4.1 billion in gross transaction volume and $6.8 billion in supply chain data will be acquired by GHX, LLC this year.

420. The purpose of the merger is to restrain trade in the e-commerce market for hospital supplies and increase the market power of both companies, which is 80% to the entire control of the single company GHX. A second purpose of the merger is to conceal the loss of funds belonging to Novation's member hospitals in the Neoforma venture.

421. Neoforma, Inc. and GHX, LLC have already integrated their electronic marketplaces, sharing data to control prices by preserving the Novation and Premier imposed fees and contracts on manufacturers for internet sales of hospital supplies and pooling electronic marketplace infrastructures to eliminate competition between the two marketplaces and have done so since 2001.

422. GHX connects over 2,200 hospitals to more than 140 suppliers, creating the largest trading exchange in healthcare. The company proclaims; "GHX is the leader in the healthcare trading exchange segment. "On average, GHX processed more than 12,000 purchase orders and $23 million in volume daily at the end of 2004.

SUMMARY OF CLAIMS

423. Medical Supply Chain, Inc., in its antitrust litigation opposing trade restraint in the electronic market for hospital supplies. Medical Supply has experienced substantial antitrust injury from the actions of Novation, a joint venture created by UHC and VHA, Inc. in support of the electronic marketplace entity Neoforma, Inc. which is believed to be an instrumentality of UHC and VHA, Inc. which were both in an alliance to eliminate competition among member competitors in a scheme to inflate prices similar to the alliance of Shell and Texaco to create two joint ventures, Equilon Enterprises LLC and Motiva Enterprises condemned for per se Sherman I prohibited conduct in *Dagher v Saudi Refining Inc*, 369 F.3d 1108, 1114 (9th Cir. 2004).

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

425. Because of these illegal anticompetitive agreements with Novation and Neoforma, Inc., Piper Jaffray and then US Bancorp refused to deal with Medical Supply Chain, Inc. US Bancorp broke a contract with Medical Supply Chain, Inc. to provide escrow accounts needed to capitalize Medical Supply's entry into the hospital supply marketplace, using the pretext of the USA PATRIOT Act. US Bancorp and Piper Jaffray simultaneously stole Medical Supply's intellectual property, which has since been openly used by Novation and Neoforma. US Bancorp and Piper Jaffray have continued to extort property from Medical Supply Chain on behalf of the hospital supply cartel by obstructing entry to the market for hospital supplies through the threat of malicious USA PATRIOT Act reports.

426. Medical Supply attempted to obtain preliminary injunctive relief against US Bancorp, The Piper Jaffray Companies and an Unknown Healthcare Supplier to prevent them from using the USA PATRIOT Act as a sham petition designed to prevent Medical Supply from entering the market and to stop the theft of its intellectual property. To date, Medical Supply has not been successful.

427. In June of 2004, Novation/ Neoforma, Inc. again stopped Medical Supply from entering the market for hospital supplies using exclusive dealing agreements with General Electric and GE's electronic marketplace cartel GHX, LLC. These agreements caused GE to break a written contract to purchase a commercial real estate lease from Medical Supply. The contract included Medical Supply's requirement to use the proceeds to capitalize Medical Supply's entry to market since it was under the extortion of US Bancorp threatened and malicious USA PATRIOT Act reporting. Medical Supply is currently attempting to resolve its contract with GE and obtain injunctive relief and treble damages under Sherman I and II.

428. On December 14, 2004 Medical Supply served notice on UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars that Medical Supply had not succeeded in obtaining prospective injunctive relief against the US Bancorp and Piper Jaffray defendants to prevent antitrust injuries from being obstructed from entering the market for hospital supplies or the theft of Medical Supply's intellectual property. The notice informed the UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars that if they did not provide a substantiated response denying their responsibility for the hospital supply cartel's actions against Medical Supply, they would be held jointly and severally liable:

> "If you dispute that any of these actions were taken against Medical Supply, or that your company is liable as an antitrust coconspirator, please promptly provide a *substantiated* basis for Medical

> Supply's reliance on the same to me at the address provided below. Since your company has not refuted the publicized events and relationships described herein, a constructive use of the time remaining between now and our anticipated filing of February 1, 2005 might be to reach an agreement on the platform and electronic format the millions of recorded transactions, hospital supply contracts, kickbacks and equity shares that will be exchanged through discovery as we collectively document the injuries to America's hospitals and our company from your concerted refusals to deal and group boycotts."

429. Only counsel for Neoforma responded and the purpose of the communication was to have Medical Supply await their answer till after the holidays, an answer that never came.

430. The coconspirators UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars did however renew their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US Bancorp and consulting with representatives for US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth Circuit Court of Appeals to uphold the trial court's erroneous ruling. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US Bancorp and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, all originating from the cartel's agents Shughart Thomson and Kilroy's past and current share holders.

CLAIMS FOR RELIEF

431. Medical Supply seeks the following relief based on continuing anticompetitive conduct by the defendants in an ongoing unlawful enterprise to overcharge Medicare, Medicaid, Champus and private insurance companies with artificially inflated claims and to control the capitalization of healthcare technology companies and supply chain management companies to prevent web based competition from lowering the prices for hospital supplies.

432. The defendants 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 and Andrew S. Duff targeted Medical Supply Chain as a potential competitor that would bypass their monopolized distribution

system for hospital supplies and cause price competition and destroy the anticompetitive advantage held by healthcare technology and supply chain management companies controlled by the defendants in obtaining capitalization.

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

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

COUNT I
DAMAGES FOR COMBINATION AND CONSPIRACY
IN RESTRAINT OF TRADE OR COMMERCE
(15 U.S.C. §§ 1,15)

435. Plaintiff realleges paragraphs 1 through 434.

436. 15 U.S.C. § 1 provides that "Every … combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States… is hereby declared to be illegal."

437. Beginning at least as early as 1998, and continuing until the present date, Defendants entered into a combinations and or conspiracies in unreasonable restraint of trade or commerce among the several States of the United States, in the markets for hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies.

438. These combinations and or conspiracies took the form of Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements, and their respective annual shows. Said Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements were instigated and conducted by Defendants Novation, LLC, Neoforma, Inc.,

Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker who had and have market power over, i.e. a controlling percentage of market share of, the sale of hospital supplies, and the sale of hospital supplies sold in e-commerce; and by Defendants US Bancorp, NA, US Bank , Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff who had and have market power over, i.e. a controlling percentage of market share of, the capitalization of healthcare technology and supply management companies including healthcare venture funds, private placement and public offering underwriting, commercial banking, trust facilities and market research analyst coverage necessary for Medical Supply to obtain external capital and necessary for Medical Supply to self capitalize its entry into the hospital supply market and the market for hospital supplies in e-commerce. Said Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements had the purpose and effect of severely impairing the ability of Medical Supply to sell hospital supplies to hospitals conventionally or through e-commerce and to obtain capital it had self raised to enter the market for hospital supplies in the several States of the United States; and was further intended to eliminate or greatly reduce the availability of hospital supplies through e-commerce regardless of hospital demand in the several States of United States, and impose a burdensome fees on manufacturers and suppliers for selling hospital supplies through web based electronic marketplaces to hospitals and health systems in the several States of the United States.

439. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker are and were direct competitors of Medical Supply in the sale of hospital supplies and the sale of hospital supplies in e-commerce.

440. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker have and have had significant interests in the market for capitalization of healthcare technology and supply chain management companies.

441. The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff competed and compete directly with Medical Supply in the market for capitalization of healthcare technology and supply chain management companies because Medical

Supply was forced by the defendants conspiracies and combinations to self capitalize its entry into market with unique trust accounts from it had solicited from its sales representative candidates.

442. The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have and have had significant interests in the market for hospital supplies and hospital supplies sold in e-commerce where US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have concentrated 70% of their investment and have marketed IPO shares based on exclusive dealing contracts obtained for their client companies with Novation, LLC. , Neoforma, Inc., Volunteer Hospital Association and University Healthsystem Consortium.

443. The defendant Shughart Thomson & Kilroy as a latecomer in October 2002 to the conspiracies and combinations had a significant interest in the markets for hospital supplies and hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies where they were agents for US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff. Shughart Thomson & Kilroy was coerced or voluntarily took unlawful actions to protect and assist the defendants in monopolization and monopoly of the markets for hospital supplies and hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies.

444. The Defendants committed the following per se violations of section 1 of the Sherman Antitrust Act:

**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 and Andrew S. Duff's Group Boycott Under Sherman 1**

445. **(1)** 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 and Andrew S. Duff had agreements to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization.

446. **a.** The defendants 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 and Andrew S. Duff created and enforced agreements to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization with a unity of purpose and a common design and understanding, having a meeting of minds in unlawful plans to limit competition and thereby increase the defendants profitability from overcharging Medicare, Medicaid, Champus and private insurance companies for healthcare costs based on artificially inflated hospital supply costs. The defendants created and enforced unlawful plans to prevent healthcare technology and supply chain management companies from being capitalized and from marketing products and services to healthcare companies without the defendants' participation, approval and profit.

447. **b.** The defendants The Piper Jaffray Companies and Andrew S. Duff refused to offer Medical Supply investment banking services or to respond to Medical Supply's correspondence pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization.

448. **c.** The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer and Andrew Cesere, broke their contract to provide quarterly escrow account deposits of $350,000.00 Medical Supply had relied upon to capitalize its entry into the market for hospital supplies pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization.

449. **(2)** Medical Supply was injured as a direct and proximate result of 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 and Andrew S. Duff's agreements to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization.

450. **(3)** Medical Supply's damages from 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 and Andrew S. Duff's agreements to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization are capable of ascertainment and not speculative.

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 and Andrew S. Duff's Allocation of Customers Under Sherman 1

451. **(1)** 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 and Andrew S. Duff had agreements to allocate customers in the market for hospital supplies, and agreements to allocate customers in the market for healthcare technology company capitalization.

452. **a.** The defendants 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 and Andrew S. Duff created and enforced agreements to allocate customers in the market for hospital supplies, and agreements to allocate customers in the market for healthcare technology company capitalization with a unity of purpose and a common design and understanding, having a meeting of minds in unlawful plans to limit competition by allocating customers and thereby increase the defendants profitability from overcharging Medicare, Medicaid, Champus and private insurance companies for healthcare costs based on artificially inflated hospital supply costs. The defendants created and enforced unlawful plans to allocate customers in long term anticompetitive contracts between healthcare technology and supply chain management companies and group purchasing organizations to guarantee companies marketing products and services to healthcare companies with the defendants' participation, approval and profit were being capitalized and that competitors were being excluded from capitalization.

453. **b.** The defendants The Piper Jaffray Companies and Andrew S. Duff refused to offer Medical Supply investment banking services or to respond to Medical Supply's correspondence pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to allocate customers among the

group purchasing organizations to healthcare technology company and supply chain management companies in which the defendants' cartel had a participatory interest.

454. **c.** The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer and Andrew Cesere, broke their contract to provide quarterly escrow account deposits of $350,000.00 Medical Supply had relied upon to capitalize its entry into the market for hospital supplies pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to allocate customers among the group purchasing organizations to healthcare technology company and supply chain management companies in which the defendants' cartel had a participatory interest.

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 and Andrew S. Duff's Horizontal Price Restraint Under Sherman 1

455. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium formed the joint venture Novation, LLC for the illegal purpose of eliminating competition between the two cooperatives, leveraging their market power established with long term anticompetitive and exclusive dealing contracts to restrain trade in a larger percentage of the US hospital market. The Defendants used the combinations and conspiracies to set prices for every member hospital in Novation and Neoforma's markets.

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 and Andrew S. Duff's Vertical Price Restraint Under Sherman 1

456. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium formed the joint venture Novation, LLC for the illegal purpose of eliminating competition between the two cooperatives, leveraging their market power established with long term anticompetitive contracts to restrain trade in a larger percentage of the US hospital market. The new company managed all of the distribution for both competitors, set prices, artificially inflating the costs of all products sold to both hospital member groups and pooled the profits from the sale of hospital supplies.

457. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium eliminated competition by marketing products under the Novation, LLC private brand.

458. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium also retained rebates belonging to both groups of member hospitals and pooled them in a web based electronic marketplace company- Neoforma, Inc. which the defendants Novation, LLC, 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 and Andrew S. Duff gained control of, suppressed and used to forestall competition from an independent web based electronic marketplace for hospital supplies utilizing Medical Supply's business model.

Maintaining Minimum Prices

459. **(1)** 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 and Andrew S. Duff had agreements to maintain minimum prices in the market for hospital supplies, and agreements to maintain minimum prices in the market for healthcare technology company and supply chain management company capitalization.

460. **a.** The defendants 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 and Andrew S. Duff created and enforced agreements to maintain minimum prices in the market for hospital supplies, and agreements to allocate maintain minimum prices in the market for healthcare technology company capitalization with a unity of purpose and a common design and understanding, having a meeting of minds in unlawful plans to limit competition by maintain minimum prices and thereby increase the defendants profitability from overcharging Medicare, Medicaid, Champus and private insurance companies for healthcare costs based on artificially inflated hospital supply costs. The defendants created and enforced unlawful plans to maintain minimum prices in long term anticompetitive contracts between healthcare technology and supply chain management companies and group purchasing organizations to guarantee companies marketing products

and services to healthcare companies with the defendants' participation, approval and profit were being capitalized and that competitors who would not maintain minimum prices were being excluded from capitalization.

461. **b.** The defendants The Piper Jaffray Companies and Andrew S. Duff refused to offer Medical Supply investment banking services or to respond to Medical Supply's correspondence pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to maintain minimum prices among the group purchasing organizations to healthcare technology company and supply chain management companies in which the defendants' cartel had a participatory interest and exclude companies that would not maintain minimum prices.

462. **c.** The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer and Andrew Cesere, broke their contract to provide quarterly escrow account deposits of $350,000.00 Medical Supply had relied upon to capitalize its entry into the market for hospital supplies pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to allocate customers among the group purchasing organizations to healthcare technology company and supply chain management companies in which the defendants' cartel had a participatory interest and exclude companies that would not maintain minimum prices.

463. **d.** The defendants' anticompetitive conduct to maintain prices included using the US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff underwritten company Omnicell's software and later Neoforma, Inc.'s to monitor pricing and fulfillment of products sold throughout the distribution channels of Novation, LLC, Volunteer Hospital Association and University Healthsystem Consortium to enforce the defendant's scheme to artificially inflate prices of hospital supplies.

464. **e**. Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker utilized an electronic reporting

arrangement facilitated by Neoforma, Inc. to foster parallel pricing with the competitor GPO Premier and throughout the competing electronic marketplace GHX, LLC to fix prices of hospital supplies.

465. **f.** (1) Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker has contracted, combined, and conspired (2) with a separate economic entity supplier and manufacturers (3) to set the price at which the products are resold (4) in an independent commercial transaction with a subsequent hospital purchasers.

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 and Andrew S. Duff's Tying Agreements Under Sherman 1

466. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium formed the joint venture Novation, LLC for the illegal purpose of eliminating competition between the two cooperatives, leveraging their market power established with long term anticompetitive and exclusive dealing contracts to restrain trade in a larger percentage of the US hospital market. The Defendants used the combinations and conspiracies to tie products and lines of products so that hospitals were unable to chose between vendors.

467. The Defendants tied membership in their electronic marketplace, Neoforma, Inc. with their competitor Premier's electronic marketplace GHX, LLC so that every hospital that enrolled in GHX, LLC was required to also enroll in Neoforma so that the Defendants could exclude electronic marketplaces outside of the combination and conspiracy.

15 U.S.C. § 15 provides that

> "… any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore… without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

468. As a direct result of Defendants' unlawful activity, Plaintiff has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

469. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, for the denial of the escrow accounts and approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, for the denial of the second capitalization attempt through the sale of the

lease to GE Transportation. The plaintiff is entitled to recover total Sherman 1 damages of $3,000,000,000.00 and the cost of suit including a reasonable attorney's fee.

COUNT II
INJUNCTIVE RELIEF FOR COMBINATION AND CONSPIRACY
IN RESTRAINT OF TRADE OR COMMERCE
(15 U.S.C. §§ 1,26)

470. Plaintiff realleges paragraphs 1 through 469.

471. 15 U.S.C. § 26 provides that "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief… against threatened loss or damage by a violation of the antitrust laws… [and] the cost of suit, including a reasonable attorney's fee."

472. Unless enjoined from doing so, Defendants will continue to violate 15 U.S.C. § 1.

473. Plaintiff is also entitled to recover their cost of suit, including a reasonable attorney's fee.

COUNT III
DAMAGES FOR MONOPOLIZATION
(15 U.S.C. §§ 2,15)

474. Plaintiff realleges paragraphs 1 through 473.

475. 15 U.S.C. § 2 provides that "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 of commerce among the several States… shall be deemed guilty" of an offense against the antitrust laws of the United State.

476. Defendants collectively have at all times material to this complaint maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies in the several Stated of the United States; and have used, attempted to use, or combined and conspired to use, their monopoly power to affect competition in the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies sale of the same in the several States of the United States in violation of 15 U.S.C. § 2.

477. As a direct result of Defendants' unlawful activities, Plaintiff has suffered and will continue suffer substantial injuries and damages to their businesses and property.

478. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

Threat of USA PATRIOT Act Suspicious Activity Reporting

479. The Defendants repeatedly used the USA Patriot Act to deny services of US Bank and US Bancorp to Medical Supply, causing the loss of Medical Supply property. The Defendants, despite their regulated status as financial institutions and corporate officers of financial institutions responsible for providing a professional service; denied Medical Supply, a known domestic corporation in good standing with its Secretary of State and State Department of Revenue an escrow account service on the basis of increased reporting requirements for new accounts under the USA PATRIOT Act even though The US Treasury Department had previously announced it was delaying the date account opening requirements become issued and effective and Us Bancorp was under no reporting requirements for Medical Supply's escrow accounts.

480. The Defendants continue to endanger the plaintiff Medical Supply and its associates with wrongful denial of services and facilities of US Bancorp where Medical Supply has its accounts or at other national and state banks where Medical Supply may be denied services based on erroneous or bad faith reporting by the Defendants.

481. The Defendants continue to endanger the plaintiff Medical Supply its associates and customers with wrongful denial of services and facilities of national and state banks where Medical Supply may be denied services based on the Defendants unprofessional and bad faith denial of escrow accounts based on the USA PATRIOT Act. The Defendants action prevents Medical Supply from escaping the denial of escrow accounts history and banking references in all new financial arrangements.

482. On October 22, 2002 Medical Supply approached an attorney of Shook, Hardy and Bacon for the purpose of acting as escrow agent in substitute accounts to be set up at a national bank. After asking why Medical Supply's existing bank did not provide the accounts, the attorney declined to act as escrow agent out of a justified fear his firm would also receive a malicious suspicious activity report.

Violation of §802 of The USA PATRIOT Act

483. The Defendants continue to endanger the plaintiff Medical Supply, its associates and customers with illegal conduct that prevents them from or threatens to prevent them providing a market solution to this governmental healthcare policy issue.

484. The US Senate Judiciary Committee's Antitrust Subcommittee has held three consecutive hearings on the anticompetitive practices in the national market for hospital supplies. The illegal actions of the defendants have prevented Medical Supply from having the resources to appear and testify.

485. The Defendants through their illegal obstruction of Medical Supply's entry into the markets for hospital supplies and hospital supplies in e-commerce have attempted to influence the national policy debate on group purchasing organization regulation by denying legislators statistics and data from a functioning independent electronic marketplace.

The Filing of a Malicious USA PATRIOT Act Suspicious Activity Report (SAR)

486. On information and belief, Medical Supply has discovered that the Defendants have filed malicious suspicious activity reports against Medical Supply and its founder Samuel Lipari.

487. The Defendants have deliberately and intentionally filed a baseless USA PATRIOT Act suspicious activity report as part of a conspiracy and or combination to keep Medical Supply out of the market place for hospital supplies and hospital supplies sold in e-commerce and to keep Medical Supply from being able to self fund its entry into market by destroying Medical Supply's ability to capitalize healthcare technology and supply chain management companies.

Harassing Medical Supply and its Agents Outside of This Action

488. The Defendants through Neoforma and Robert Zollars, acting for the other defendants and in a conspiracy and combination with the unnamed coconspirators GE, GE Healthcare, GE Capital and GHX caused Medical Supply and its counsel to be threatened with sanctions for filing an action to prevent GE from restraining trade in the market for hospital supplies and hospital supplies in e-commerce.

489. Neither GE or its counsel furnished a reason why Medical Supply would be sanctioned for filing the suit and intended to intimidate or harass Medical Supply by implying that GE and Neoforma have illegal influence and control over the legal system.

490. The Defendant Shughart Thomson & Kilroy has acted outside of litigation in defense of the Defendants and repeatedly sough to deprive Medical Supply of counsel under color of state law by causing

Medical Supply's counsel to have multiple ethics complaints filed and prosecuted for the sole purpose of preventing Medical Supply from having effective representation.

491. The Defendants knew Shughart Thomson & Kilroy was succeeding in extra legal influencing of Medical Supply's case against the US Bancorp defendants and the action against GE and its subsidiaries and overtly ratified said conduct for the purpose of monopolizing the markets in the sale of hospital supplies and hospital supplies in e-commerce and the market in capitalizing healthcare technology and supply chain management companies.

Unilateral Refusal To Deal

492. The Piper Jaffray Companies and Andrew S. Duff unilaterally as a single firm refused to provide investment banking services to Medical Supply to monopolize the market in capitalizing healthcare technology and supply chain management companies because Medical Supply was not seeking underwriting and to control the downstream markets in the sale of hospital supplies and hospital supplies in e-commerce where The Piper Jaffray Companies and Andrew S. Duff have substantial interests.

493. US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere as a single firm unilaterally refused to provide trust escrow accounts and other banking services to Medical Supply to monopolize the market in capitalizing healthcare technology and supply chain management companies because Medical Supply was not seeking underwriting from US Bancorp and Piper Jaffray and to control the downstream markets in the sale of hospital supplies and hospital supplies in e-commerce where The Piper Jaffray Companies and Andrew S. Duff have substantial interests.

494. As a direct result of Defendants' unlawful activities, Plaintiff has suffered and will continue suffer substantial injuries and damages to their businesses and property.

495. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

COUNT IV
INJUNCTIVE RELIEF FOR MONOPOLIZATION
(15 U.S.C. §§ 2,26)

496. Plaintiff realleges paragraphs 1 through 495.

497. Unless enjoined from doing so, Defendants will continue to violate 15 U.S.C. §2.

498. Plaintiff is also entitled to recover their cost of suit, including a reasonable attorney's fee.

COUNT V
DAMAGES FOR INTERLOCKING DIRECTORS
(15 U.S.C. § 19)

499. Plaintiff realleges paragraphs 1 through 498.

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

501. The fourth paragraph of Section 8 provides:

> "No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, 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 provisions of any of the antitrust laws."

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

503. As a direct result of Defendants' unlawful activities, Plaintiff has suffered and will continue suffer substantial injuries and damages to their businesses and property.

504. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fees.

COUNT VI
DAMAGES FOR COMBINATION AND CONSPIRACY
IN RESTRAINT OF TRADE OR COMMERCE
(26 MO. § 416.031(1), § 416.121(1),(1))

505. Plaintiff realleges paragraphs 1 through 504.

506. 26 Mo § 416.031 (1) provides that "Every… combination or conspiracy in restraint of trade or commerce in this state is unlawful."

507. Beginning at least as early as 1998, and continuing until the present date, Defendants entered into a combinations and or conspiracies in unreasonable restraint of trade or commerce among the several States of the United States, in the markets for hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies.

508. These combinations and or conspiracies took the form of Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements, and their respective annual shows. Said Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements were instigated and conducted by Defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker who had and have market power over, i.e. a controlling percentage of market share of, the sale of hospital supplies, and the sale of hospital supplies sold in e-commerce; and by Defendants US Bancorp, NA, US Bank , Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff who had and have market power over, i.e. a controlling percentage of market share of, the capitalization of healthcare technology and supply management companies including healthcare venture funds, private placement and public offering underwriting, commercial banking, trust facilities and market research analyst coverage necessary for Medical Supply to obtain external capital and necessary for Medical Supply to self capitalize its entry into the hospital supply market and the market for hospital supplies in e-commerce. Said Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements had the purpose and effect of severely impairing the ability of Medical Supply to sell hospital supplies to hospitals conventionally or through e-commerce and to obtain capital it had self raised to enter the market for hospital supplies in the several States of the United States; and was further intended to eliminate or greatly reduce the availability of hospital supplies through e-commerce regardless of hospital demand in the several States of United States, and impose a burdensome fees on manufacturers and suppliers for selling hospital supplies through web based electronic marketplaces to hospitals and health systems in the several States of the United States.

509. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker are and were direct competitors of Medical Supply in the sale of hospital supplies and the sale of hospital supplies in e-commerce.

510. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker have and have had significant interests in the market for capitalization of healthcare technology and supply chain management companies.

511. The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff competed and compete directly with Medical Supply in the market for capitalization of healthcare technology and supply chain management companies because Medical Supply was forced by the defendants conspiracies and combinations to self capitalize its entry into market with unique trust accounts from it had solicited from its sales representative candidates.

511. The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have and have had significant interests in the market for hospital supplies and hospital supplies sold in e-commerce where US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have concentrated 70% of their investment and have marketed IPO shares based on exclusive dealing contracts obtained for their client companies with Novation, LLC. , Neoforma, Inc., Volunteer Hospital Association and University Healthsystem Consortium.

512. The defendant Shughart Thomson & Kilroy as a latecomer in October 2002 to the conspiracies and combinations had a significant interest in the markets for hospital supplies and hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies where they were agents for US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff. Shughart Thomson & Kilroy was coerced or voluntarily took unlawful actions to protect and assist the defendants in monopolization and monopoly of the markets for hospital supplies and hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies.

513. 26 Mo. § 416. 121 provides that:

1. "Any person… who is injured in his business or property by reason of anything forbidden or declared unlawful by section [416.031(1)] … may:

(1) Sue for damages sustained by him, and… shall be awarded threefold damages by him sustained and reasonable attorneys' fees… together with the costs of suit."

514. As a direct result of Defendants' unlawful activity, Plaintiff has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

515. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

COUNT VII
INJUNCTIVE RELIEF FOR COMBINATION AND CONSPIRACY
IN RESTRAINT OF TRADE OR COMMERCE
(26 MO. § 416.031(1), § 416.071(1), (2), § 416.121(1)(1))

516. Plaintiff realleages paragraphs 1 through 515.

517. 26 Mo. § 416.071 provides for:

1. "… such preliminary or permanent injunctive relief and … such temporary restraining orders as are necessary to prevent and restrain violations of section 416.031… [and]

2. … such prohibitory injunctions and other restraints as [the court] deems expedient to deter …and secure against… committing a future violation of section [416.031(1)]… [and] such mandatory relief as is reasonably necessary to restore or preserve fair competition in the trade or commerce affected by the violation."

518. 26 Mo. § 416.121 provides that:

1. "Any person… who is injured in his business or property by reason of anything forbidden or declared unlawful by section [416.031(1)] … may:

(2) Bring proceedings to enjoin the unlawful practices, and… shall be awarded reasonable attorneys' fees… together with the costs of the suit."

519. Unless enjoined from doing so, Defendants will continue to violate 26 Mo. § 416. 031(1).

520. Plaintiffs are also to recover their costs of suit and reasonable attorneys' fees.

COUNT VIII
DAMAGES FOR MONOPOLIZATION
(26 MO. § 416.031(2), § 416.121(1),(1))

521. Plaintiff realleages paragraphs 1 through 520.

522. 26 Mo. § 416.031(2) provides that "It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state."

523. Defendants collectively have at all times material to this complaint maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies, the sale of hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies.

524. As a direct result Defendants' unlawful activities, Plaintiff has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

525. Plaintiff is entitled to recover actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

COUNT IX
INJUNCTIVE RELIEF FOR MONOPOLIZATION
(26 MO. § 416.031(2), § 416.071(1), (2), § 416.121(1),(2))

526. Plaintiff realleges paragraphs 1 through 525.

527. Unless enjoined from doing so, Defendants will continue to violate 26 Mo. § 416.031(2).

528. Plaintiff is also entitled to recover their costs of suit and reasonable attorneys' fees.

COUNT X
DAMAGES FOR TORTIOUS INTERFERENCE WITH
CONTRACT OR BUSINESS EXPECTANCY

529. Plaintiff realleges paragraphs 1 through 528.

530. Plaintiff's individual representative candidate trust accounts with US Bank and its contract to sale the office building lease to General Electric Transportation Co. were required for Medical Supply to enter the markets for hospital supplies and hospital supplies for e-commerce and were contracts or business expectancies Said activities were intended by Defendants and performed by Defendants.

531. Defendants knew of said contracts or business expectancies.

532. Having such knowledge, Defendants intentionally conspired to interfere and did interfere with such contracts or business expectancies, so as to cause breach of the same.

533. Defendants did so without justification and stated pretextual reasons for their actions.

534. As a direct and proximate result of said actions of Defendants, Plaintiff has suffered and will continue to suffer injuries and damages to its business and properties.

535. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

536. Defendants' actions were willful, wanton, malicious and oppressive.

537. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XI
DAMAGES FOR BREACH OF CONTRACT

538. Plaintiff realleges paragraph 1 through 537.

539. The Defendant US Bank breached an enforceable contract with Medical Supply that was a written contract under Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq.

540. The Defendants US Bank and Shughart Thomson & Kilroy caused the breach of US Bank's contractual duty to Medical Supply to provide trust accounts based on a deliberately false reason, the USA PATRIOT Act.

541. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

542. Defendants' actions were willful, wanton, malicious and oppressive.

543. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XII
DAMAGES FOR BREACH OF FIDUCIARY DUTY

544. Plaintiff realleges paragraph 1 through 543.

545. The Defendant US Bank owed a duty to Medical Supply to know the USA PATRIOT Act was not a bar to providing Medical Supply its trust accounts.

546. The Defendant US Bank owed a duty to Medical Supply to not disclose confidential information to Medical Supply's competitors, the defendants in this action.

547. The Defendant US Bank breached its fiduciary duty to Medical Supply without justification and stated pretextual reasons for their actions.

548. The Defendant US Bank and Shughart Thomson & Kilroy breached US Bank's fiduciary duty to Medical Supply by denying the existence of a valid contract and without providing a basis in fact or law for the contract to be void.

549. The Defendants US Bank and Shughart Thomson & Kilroy caused the breach of US Bank's fiduciary duty to Medical Supply in conspiracy with the other defendants.

550. As a direct and proximate result of said actions of Defendants, Plaintiff has suffered and will continue to suffer injuries and damages to its business and properties.

551. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

552. Defendants' actions were willful, wanton, malicious and oppressive.

553. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XIII
DAMAGES FOR FRAUD AND DECEIT

554. Plaintiff realleges paragraph 1 through 553.

555. Each of the acts, practices, misrepresentations, violations and other wrongs complained of above have been engaged in by Defendants with malice and with specific and deliberate intent to oppress, defraud, deceive and injure Plaintiff.

556. Said activities aforementioned by Defendants were done in concert and in secret with the intention to injure Plaintiff all the while knowing that the lack of candor and disclosure of the true acts and activities by Defendants would give Defendants an economic advantage over Plaintiff. Defendants were engaged in concealed fraudulent conduct. Defendants, and each of them, had a duty under the antitrust and anticompetitive which Defendants breached constituting a fraud and deceit upon Plaintiff.

557. Said activities were intended by Defendants to cause injury to Plaintiff by and through intentional misrepresentations to Plaintiff and third parties concerning Plaintiff.

558. Said activities did directly and proximately cause injury to Plaintiff.

559. Said activities were and are unjustified.

560. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

561. Defendants' actions were willful, wanton, malicious and oppressive.

562. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XIV
DAMAGES FOR PRIMA FACIE TORT

563. Plaintiff realleges paragraphs 1 through 562.

564. To whatever extent said activities of Defendants may not violate antitrust laws or tortuously interfere with contract or business expectancy, said acts and activities of Defendants are still unlawful and fraudulent.

565. Said activities were intended by Defendants and performed by Defendants.

566. Said activities were intended by Defendants to cause injury to Plaintiff.

567. Said activities did directly and proximately cause injury to Plaintiff.

568. Said activities were and are unjustified.

569. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

570. Defendants' actions were willful, wanton, malicious and oppressive.

571. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XV
DAMAGES FOR RACKETEERING
INFLUENCED CORRUPT ORGANIZATION (RICO) CONDUCT
(18 U.S.C. § 1962(c), 18 U.S.C. § 1962(d))

572. Plaintiff realleges paragraph 1 through 571.

573. On January 21, 2005 Medical Supply discovered the Defendants' pattern of inflicting injuries on the plaintiff to obstruct its entry into the market for hospital supplies and hospital supplies in e-commerce. An important component of the Defendants' scheme was to interdict capital required by Medical Supply to

enter the market. The Defendants targeted Medical Supply's founder in 1995 and targeted Medical Supply upon its incorporation in 2000. From the outset, the Defendants have maintained a continuous pattern of preventing an independent clearinghouse electronic market place from interfering with their common enterprise to to artificially inflate prices paid by Medicare, Medicaid and Champus.

574. The Defendants violated 18 U.S.C. § 1962(c) by conducting a RICO enterprise (the hospital group purchasing enterprise to artificially inflate prices paid by Medicare, Medicaid and Champus) through a pattern of racketeering activity.

575. The Defendants violated 18 U.S.C. § 1962(d) through participation in a RICO conspiracy.

576. The Defendants engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

577. The Defendants participated in the operation and management of the hospital group purchasing enterprise to artificially inflate prices paid by Medicare, Medicaid and Champus itself.

578. When Medical Supply sought to appeal the outcomes in the Kansas District Court, the Defendants sought the assistance of Shughart Thomson & Kilroy to intimidate, harass and obstruct Medical Supply and prevent Medical Supply and its agents from testifying and preventing evidence in federal court.

579. To realize that goal the Defendants directly and tacitly caused Shughart Thomson & Kilroy to create and arrange for Medical Supply's counsel to receive repeated ethics complaints and to be prosecuted by the State of Kansas Disciplinary Administrator based on the false and misleading testimony of Shughart Thomson & Kilroy's former managing partner, a federal magistrate judge and a sham complaint made by the Shughart Thomson & Kilroy counsel defending US Bancorp and Piper Jaffray.

580. Shughart Thomson & Kilroy through its employees and past employees created the plan to retaliate against and intimidate and harass Medical Supply's counsel when they discovered Medical Supply could not obtain outside counsel due to conflicts of interest in law firms the plaintiff had approached.

581. Shughart Thomson & Kilroy through its employees and past employees implemented the plan and carried out its operations with the intent and motive of making sure that the Defendants could continue the enterprise to monopolize the markets in hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies without challenge by the US District Court.

582. The Defendants implicitly ratified Shughart Thomson & Kilroy's conduct on their behalf and relied on the conduct to attempt to avoid Medical Supply's intention to seek redress. Shughart Thomson & Kilroy engaged in "racketeering activity" as that term has been defined by Congress, see 18 U.S.C. § 1961(1).

583. The Defendant Shughart Thomson & Kilroy through its officers, employees and agents injured Medical Supply in violation of 18 USC § 1503 when it caused false and misleading testimony to be given against Medical Supply's counsel and again when it caused its employee to file a facially void ethics complaint against Medical Supply's counsel. The purpose of the Defendant Shughart Thomson & Kilroy's complaint was intimidation and harassment of Medical Supply's counsel to interfere with the administration of justice in the federal antitrust action against the Defendants.

584. 18 USC § 1503 entitled "Influencing or injuring officer or juror generally" provides:

> "(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States,… in the discharge of his duty…or injures any such officer,… in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b)."

585. The Defendant Shughart Thomson & Kilroy through its officers, employees and agents injured Medical Supply in violation of 18 USC § 1513 when it caused false and misleading testimony to be given against Medical Supply's counsel and again when it caused its employee to file a facially void ethics complaint against Medical Supply's counsel to deprive him of property in the form of his license to practice law. The purpose of the Defendant Shughart Thomson & Kilroy's retaliation against Medical Supply's counsel was to interfere with the administration of justice in the federal antitrust action against the Defendants.

586. 18 USC § 1513 entitled "Retaliating against a witness, victim, or an informant" provides:

> "(e) [2] Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.
>
> (b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation [1] supervised release,,[1] parole, or release pending judicial proceedings given by a person to a law enforcement officer;"

587. In furtherance of their enterprise to artificially inflate healthcare costs, the Defendants stole copyrighted works to keep Medical Supply from realizing its plan to enter the market for hospital supplies. The Defendants stole copyrighted works that included business plans, algorithms, confidential proprietary business models, customer and associate lists from Medical Supply Chain, Inc. in 2002 and from its predecessor company Medical Supply Management in 1995 and 1996 in violation of 17 USC § 506 entitled "Criminal offenses" providing:

> "(a) Criminal Infringement.— Any person who infringes a copyright willfully either— for purposes of commercial advantage or private financial gain, or
> by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000, shall be punished as provided under section 2319 of title 18, United States Code. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement."

588. The Defendants violation falls under 18 USC § 2319 entitled "Criminal infringement of a copyright" which provides:

> "(a) Whoever violates section 506 (a) (relating to criminal offenses) of title 17 shall be punished as provided in subsections (b) and (c) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law."

589. Defendants violated The Hobbs Act prohibition against racketeering by preventing Medical Supply's entry into commerce under color of official right in violation of 18 U.S.C. 1951, which states:

> "Section 1951. Interference with commerce by threats or violence
>
> Whoever in any way or degree obstructs, delays, or affects
> commerce or the movement of any article or commodity in commerce,
> by robbery or extortion or attempts or conspires so to do, or
> commits or threatens physical violence to any person or property in
> furtherance of a plan or purpose to do anything in violation of
> this section shall be fined under this title or imprisoned not more
> than twenty years, or both.
> b) As used in this section – The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or
> threatened force, violence, or fear, or under color of official
> right."

590. Defendants interfered with and obstructed Medical Supply's entry into market by threatening the plaintiff with the filing of a USA PATRIOT Act suspicious activity report which would destroy the

plaintiff's ability to make financial wire transactions with corresponding banks required to effectively compete in the market for hospital supplies.

591. As a direct result Defendants' unlawful activities, Plaintiff has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

592. Plaintiff is entitled to recover actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

COUNT XVI
DAMAGES FOR MALICIOUS FILING OF A SUSPICIOUS ACTIVITY
REPORT (SAR) UNDER THE USA PATRIOT ACT
(Pub. L. No. 107-56 (2001),18 U.S.C.§1030 (e), 31 U.S.C. § 5318 (g)(3))

593. Plaintiff realleges paragraphs 1 through 592.

594. On information and belief the Defendants through US Bank and US Bancorp NA and maliciously filed a suspicious activity report ("SAR") concerning Medical Supply and its founder Samuel Lipari with federal authorities for the purpose of securing a financial benefit for the Defendants including US Bank and US Bancorp NA and were not protected by the safe harbor provisions of 31 U.S.C. § 5318 (g)(3).

595. The USA PATRIOT Act § 310. Financial Crimes Enforcement Network requires the maintenance of a government wide data access service and data banks for financial crime reporting including suspicious activity reports. In threatening to cause a malicious suspicious activity report or in causing a malicious suspicious activity report t be filed against Medical Supply, the defendants have violated 18 U.S.C.§1030.

596. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (The USA PATRIOT Act) Pub. L. No. 107-56 (2001), 115 Stat. 272. at § 814 of the USA PATRIOT Act entitled DETERRENCE AND PREVENTION OF CYBERTERRORISM created a private right of action for Medical Supply to address the conduct of the Defendants in gaining access to the FINCEN network for the purpose of filing a suspicious activity report to prevent Medical Supply from providing hospital supplies and reducing healthcare costs.

597. The USA PATRIOT Act amended 18 U.S.C.§1030 to include a cause of action for impairment, or potential impairment of medical diagnosis, treatment or care, physical injury, a threat to public health or safety.

598. The USA PATRIOT Act reaffirmed the civil liability and private rights of action provisions of 18 U.S.C.§1030 (e) DAMAGES IN CIVIL ACTIONS- to include civil liability for any person may maintain a civil action for damages and injunctive relief.

599. 18 U.S.C.§1030 provides:

> 18 U.S.C.§1030. Fraud and related activity in connection with computers
>
> Whoever - knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value,
> (5)
> (iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and
> (B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused) -
> (ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;
> (iii) physical injury to any person;
> (iv) a threat to public health or safety;
> (g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage."

600. The USA PATRIOT Act) Pub. L. No. 107-56 (2001), 115 Stat. 272. at § 351 modified 31 U.S.C. § 5318 (g)(3) to eliminate immunity from civil liability for malicious suspicious activity reporting:

> "(g) Reporting of suspicious transactions.--
> In General.-The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.
> * *
> Liability for disclosures.--
> In general.-Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable under law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement),

for such disclosure or for any failure to provide notice of such disclosure to the person who is subject of such disclosure or any other person identified in the disclosure."

601. The Act specifies that financial institutions are to report" any possible violation of law or regulation." Congress did not intend the Act's safe harbor to give banks blanket immunity for malicious, willful criminal and civil violations of law.

602. Importantly, the Act requires there to be a "possible" violation of law-"possible" being the operative word-before a financial institution can claim protection of the statute.

603. The Defendants knew there was no possible violation and that the USA PATRIOT Act know your customer provision did not apply to the subject escrow accounts.

604. US Bank and US Bancorp did not file a report of a "possible violation" of the law but rather acted maliciously and willfully in an attempt to have Medical Supply deprived of high level banking services including international wire fund transactions on information the defendants knew to be false.

605. Said activities aforementioned by Defendants were done in concert and in secret with the intention to injure Plaintiff all the while knowing that the lack of candor and disclosure of the true acts and activities by Defendants would give Defendants an economic advantage over Plaintiff. Defendants were engaged in concealed fraudulent conduct.

606. Said malicious suspicious activity reporting against Medical Supply and its founder Samuel Lipari was done with the purpose of restricting the availability of and access to hospital supplies and resulted in impairment and potential impairment of medical diagnosis, treatment and care, along with physical injury, and constituted a threat to public health and safety

607. Said activities were intended by Defendants to cause injury to Plaintiff by and through intentional misrepresentations to third parties concerning Plaintiff.

608. Said activities did directly and proximately cause injury to Plaintiff.

609. Said activities were and are unjustified.

610. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

611. Defendants' actions were willful, wanton, malicious and oppressive.

612. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

613. Plaintiff could not have reasonably discovered its injuries, or that its injuries were wrongfully caused, until January 21st, 2005, when Shughart Thomson & Kilroy's former managing partner testified under oath in the Kansas Attorney Disciplinary Prosecution of the plaintiff's counsel.

PRAYER FOR RELIEF

WHEREFORE Plaintiff demands:

(1) That Defendants, their agents and servants, be enjoined during the pungency of this action and permanently from their activities in unreasonable restraint of trade or commerce and in monopolizing, attempting to monopolize, or combining or conspiring to monopolize.

(2) That Defendants be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' activities in unreasonable restraint of trade or commerce and in monopolizing, attempting to monopolize, or combing or conspiring to monopolize, in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00 for the conduct related to the refusal to provide trust accounts and approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00 for the conduct related to preventing Medical Supply from selling the office building lease to General Electric Transportation Co. for a total of approximately $3,000,000,000.00.

(3) That Defendants be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' activities in tortuous interference with contract or business expectancy and/or in prima facie tort, in the amount of approximately $1,000,000.00, together with punitive or exemplary damages for the same, in an amount in excess of $10,000.00.

(4) Medical Supply Chain, Inc. seeks damages for the injury of its business associates and stakeholders, including Blue Springs, Missouri, loss of good will and the injury of the 2000 hospitals loosing money due to high supply costs under *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir.1994)'s interpretation of standing on a RICO statutes having a common antitrust basis.

(5) That Defendants be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' activities in violation of civil racketeering laws, in the amount of approximately $500,000.00, multiplied by three for total damages of approximately $1,500,000.00.

(6) That Defendants be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' activities in violation of the USA PATRIOT Act, in the amount of approximately $500,000.00.

(7) That Defendants pay to Plaintiff the costs of this action and reasonable attorney's fees to be allowed to the Plaintiff by the Court.

(8) That Plaintiffs have such other and further relief as is just.

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully request that the court award damages and provide other relief, attorneys fees and costs.

Respectfully Submitted

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

DEMAND FOR TRIAL BY JURY

Comes now plaintiff and makes demand for a trial before 8 jurors.

S/Bret D. Landrith

Bret D. Landrith
Kansas Supreme Court Number 20380

DESIGNATION OF PLACE OF TRIAL

Comes now plaintiff and designates Kansas City, Missouri as the place of trial.

S/Bret D. Landrith

Bret D. Landrith
Kansas Supreme Court Number 20380

Andrew M. DeMarea
ademarea@stklaw.com
Direct Dial (816) 395-0685
Fax (913) 451-3361

The Law Firm Of

SHUGHART THOMSON & KILROY

A Professional Corporation

January 12, 2005

RECEIVED

JAN 14 2005

DISCIPLINARY ADMINISTRATOR

Stanton A. Hazlett, Esq.
Disciplinary Administrator
Supreme Court of Kansas
701 Jackson Street, First Floor
Topeka, Kansas 66603-3729

RE: *Medical Supply Chain, Inc. vs. US Bancorp, N.A., et al.*

Dear Mr. Hazlett,

I write to send you a series of pleadings from a case my firm has been involved in as defense counsel for the past two years, *Medical Supply Chain, Inc. vs. US Bancorp, et al.* The case was originally before Judge Carlos Murguia in the U.S. District Court of Kansas. After losing on a motion to dismiss, plaintiff appealed to the Tenth Circuit, which has recently denied the appeal and remanded the case to Judge Murguia for sanctions to be entered against plaintiff's counsel, Bret D. Landrith. Per his most recent pleading, Mr. Landrith's contact information is 2961 SW Central Park #G33, Topeka, Kansas 66611, (785) 267-4084, and his Kansas Supreme Court number is 20380.

I am not certain whether a duty of reporting currently exists on me pursuant to Supreme Court Rule 226-8.3. However, I had enough concerns about it, specifically in relation to Rules 226-1.1 and -3.1, that I felt it appropriate to forward the pertinent pleadings from this case to your office for consideration as to Mr. Landrith.

The enclosed materials include:

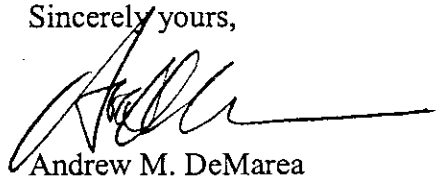
1. Plaintiff's Complaint for Urgent Injunctive Relief (October 22, 2002);
2. Plaintiff's Amended Complaint (November 12, 2002);
3. Clerk's Courtroom Minute Sheet of November 18, 2002, denying plaintiff's TRO, and a transcript of the hearing from that date;
4. Clerk's Courtroom Minute Sheet of December 12, 2002, denying plaintiff's Preliminary Injunction, and a transcript of the hearing from that date;
5. November 19, 2003 Memorandum and Order from Judge Murguia, dismissing plaintiff's case;
6. Memorandum and Order, from Judge Murguia, denying plaintiff's motion for new trial;
7. January 7, 2003 letter from Tenth Circuit clerk, regarding deficiencies in plaintiff's brief as filed;

COMPLAINT

8. January 9, 2003 Order from Tenth Circuit, denying plaintiff's motion for preliminary injunction pending appeal;
9. December 10, 2003 Order and Judgment from Tenth Circuit, explaining new case number for the appeal (provided here simply as an explanatory reference for you about the case numbering);
10. November 8, 2004 Order and Judgment from Tenth Circuit denying appeal and ordering plaintiff and plaintiff's counsel to Show Cause why they should not be sanctioned;
11. Appellant's November 8, 2004 response to the Court's Order to show cause;
12. December 30, 2004 Order from the Tenth Circuit, sanctioning plaintiff's counsel to pay attorneys fees and double costs, and remanding case to Judge Murguia for that purpose;
13. December 30, 2004 Order from the Tenth Circuit, denying plaintiff's motion for rehearing *en banc*;
14. January 11, 2005 brief filed by plaintiff's counsel with the District Court, styled, "Notice of Motion for En Banc Rehearing of Sanctions Filed by Plaintiff Appellant and Intent to Submit Evidence All Parties' Reasonable Attorney's Fees Exceed $360.00 An Hour";
15. January 11, 2005 brief, apparently filed by plaintiff's counsel with the Tenth Circuit, styled, "MOTION FOR EN BANC REHEARING OF PANEL SUA SPONTE SANCTIONS".

Please contact me if I can answer any questions for you or be of assistance in any regard. Otherwise I will leave this matter to your office for handling, if necessary.

Sincerely yours,



Andrew M. DeMarea

Enclosures

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:
Deputy Clerk

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.

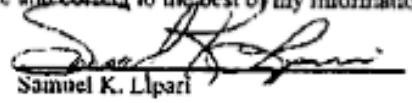
33. The defendants seek to transfer Medical Supply's case to Kansas. I have feared for my life during parts of this litigation especially after calling the Ft. Worth, TX office of the US Attorney to ask to speak to the attorney that issued the criminal subpoenas against my cases defendants and being 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.

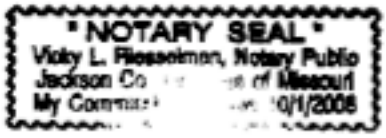


Samuel K. Lipari

Subscribed and sworn to before me this 18th day of April, 2005.

Notary

Commission expires 10/01/08



CITIZEN'S CRIMINAL COMPLAINT

This complaint is made by Bret Landrith, counsel for Medical Supply Chain, Inc., (herein "Medical Supply"), a Missouri Corporation located at 1300 NW Jefferson Court, Blue Springs, MO 64015.

Medical Supply has been the victim of Hobbs Act extortion, obstruction of justice and Sherman Act §§1 and 2. Medical Supply was the last ecommerce hospital supply marketplace not controlled or acquired by Novation, LLC or Premier Purchasing Partners. Medical Supply attempted to enjoin the actions being taken against it with two civil law suits filed in Kansas District Court. Unfortunately, Medical Supply continued to suffer extortion, and its counsel was subjected to intimidation and harassment. Both cases were compromised by the defendants corrupt influence over forum.

This complaint outlines the conduct committed against Medical Supply during the prosecution of the case. Outside of corruptly influencing the court, US Bancorp NA filed a malicious suspicious activity report under the USA PATRIOT Act to prevent Medical Supply from having access to banking services and effectively kept it from entering the market for hospital supplies.

Two US Attorneys that appeared connected to the criminal investigation of Novation, LLC have died and three more in the Ft Worth office of the US Department of Justice with antitrust expertise have been dismissed. Medical Supply does not believe there is currently an active criminal investigation of the supplier side of hospital Medicare false claims.

The Hon. Magistrate Judge James P. O'Hara engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. The complainant believes that Judge James P. O'Hara used his magistrate's office to obtain special treatment for his former law firm Shughart, Thomson & Kilroy and improperly engaged in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office.

TENTH CIRCUIT CASES EFFECTED

Medical Supply Chain v US Bancorp, NA.; Case No. 02-3443, 03-3342

Medical Supply Chain v General Electric Co.; Case No. 04-3075, 04-3102

Bolden v City of Topeka; Case No. 04-3306

STATEMENT OF FACTS

1. The. Hon. Judge James P. O'Hara is a magistrate in the District of Kansas with an office in Kansas City, Kansas federal courthouse.

2. Before becoming a magistrate, Judge O'Hara was the managing partner and shareholder in the law firm Shughart, Thomson & Kilroy where he worked for 18 years and managed the firm's Overland Park, Kansas office. The firm's website continues to list him in a biographical press release giving the impression they have significant influence in the Kansas District Court. **Atch. 1**

3. The Kansas District Court biography of Judge O'Hara states that he started in the legal profession as a law clerk for the Kansas Attorney Disciplinary Administrator's office and

states that he has served on several Kansas attorney disciplinary committees while working for Shughart, Thomson & Kilroy.

4. The complainant, Bret D. Landrith, Esq. undertook the representation of Medical Supply Chain, Inc. in an action against U.S. Bancorp NA, several of its subsidiaries and officers, an independent legal identity named as Unknown Healthcare Supplier and several identified coconspirators which were not to be named as defendants until discovery. The complaint sought injunctive and declaratory relief for Sherman §§ 1and 2 antitrust violations and pendant state claims related to the theft of intellectual property and contract.

5. The firm Shughart, Thomson & Kilroy (STK) represented all the defendants except the Unknown Healthcare Supplier and the defense was argued by STK's Overland Park office attorney Andrew M. DeMarea at two preliminary injunctive relief hearings.

6. DeMarea did not appear familiar with the subject matter of the case, believing it to be about health insurance instead of hospital supplies and did not refute that he had not read the motions from the case in the second hearing:

> "The transcripts added to the record confirm that US Bancorp's counsel was unfamiliar with the motions and pleadings that were the subject of the two hearings. US Bancorp's counsel stated repeatedly and erroneously the issues were health insurance and pricing and appeared at all times to be very far a field from the subject matter of the case."

Medical Supply Reply Brief, pg. 2, Case No. 02-3443.

7. The case is of great importance to the 1.8 trillion dollar hospital supply industry where Medical Supply was the last remaining independent electronic marketplace for hospital supplies in a national market controlled by a hospital supply group purchasing monopoly that has been the subject of three US Senate Judiciary Antitrust Sub Committee hearings. The second of which discussed the conduct committed against Medical Supply by US

Bancorp and its investment bank subsidiary and also described the later conduct committed against Medical Supply by General Electric. **Atch. 2**

8. The denial of preliminary injunctive relief resulted in Medical Supply seeking an interlocutory appeal, which surprised both the presiding judge, Hon. Carlos Murguia and visibly angered Andrew M. DeMarea even though this outcome was extensively briefed in the motion being heard.

9. The denial of temporary relief caused Medical Supply to lose the $350,000.00 it had raised from its representative candidates to enter the market for hospital supplies. Medical Supply also lost its intellectual property including its proprietary trade secrets, business models and algorithms. Some of the intellectual property was later incorporated into the US Bancorp's hospital supplier co-conspirator's business practices.

10. A series of state disciplinary actions started to be taken against Medical Supply's counsel, who had attempted to earn a living as a solo civil rights practioner while awaiting the Tenth Circuit's ruling on the Medical Supply case.

11. Hon. Judge James P. O'Hara had knowledge of the first two disciplinary complaints made against Bret Landrith for representing an African American James Bolden and his chief witness, David Price in separate Kansas Court of Appeals case. The complaints were not made by the clients but instead by a motions attorney for the state court and in later testimony it was discovered that it was the conduct accurately describing denial of equal protection and due process rights suffered by the clients in bringing the appeal that prompted the complaint. **Atch. 3.**

12. With knowledge of the discriminatory treatment depriving James Bolden of access to Shawnee District Court records and an opportunity to litigate his appeal, Hon. Judge

James P. O'Hara at a pre trial order conference in the concurrent federal civil rights action attacked Bret Landrith as incompetent, inviting James Bolden to sue his counsel for malpractice and suggesting that Bolden could better represent himself pro se. **Atch. 4.**

13. Judge O'Hara reiterated these same statements in his report and recommendation to the presiding judge, which he directed to be mailed in certified delivery to James Bolden. **Atch. 5.**

14. The basis for these attacks on Bret Landrith turned out to be pretextual. Controlling law clearly makes the City responsible for the conduct of its officers in their official capacity. A fact Judge O'Hara well knew and in an unrelated pretrial order conference the following day accepted the voluntary stipulation of parties that all officials be voluntarily dismissed. Judge O'Hara also stated as much in a footnote to his report**. Atch. 5.**

15. The reason for Judge O'Hara's targeting of Bret Landrith appears to be in retaliation for his representation of Medical Supply where SKT's failure to appreciate the extreme risk to their clients resulted in a litigation record that clearly made SKT the guarantor of any damages that might be awarded against US Bancorp. This is consistent with his sua sponte pretrial order statements about malpractice insurance when it was clear that even if Bolden was deprived of individual defendants, the City was the party financially liable. Piper Jaffray conducted a study showing a web based electronic marketplace like Medical Supply would save over $20 billion dollars in hospital supply costs.

16. Sherri Price the counsel for the City of Topeka who relied entirely on Magistrate O'Hara to represent her clients during the pretrial order conference filed an ethics "complaint" against Bret Landrith. The "complaint" stated that Mr. Landrith had included

the earlier ethics complaint as an attachment to Bolden's pleadings which is not a violation of the Kansas Rules of Professional Conduct and Sherri Price incorporated by reference Magistrate O'Hara's Report and Recommendation, making no observations of assertions of Mr. Landrith's misconduct of her own. **Atch. 6.**

16. Andrew DeMarea failed to file a reply brief in the interlocutory appeal for the US Bancorp appellees. The Tenth Circuit court clerk called him two days later to remind him and urged him to file for an extension one day beyond the date the brief was due and seven days beyond the deadline for a motion for extension of time under 10th Cir. R. 27.4(F). **Atch. 7.**

17. Andrew DeMarea refused to turn in a parties case management conference report on the form required by local rule in the Kansas District Court. He repeatedly assured Magistrate Waxe during the first case management conference that the Medical Supply case would be dismissed.

18. Mark Olthoff, an attorney for SKT in their Kansas City, MO office appeared to write all pleadings and briefs for the defendants until the second appeal where he appears to have been replaced by Susan C. Hascall of the Kansas City, MO office who was a Tenth Circuit Court of Appeals law clerk through 2000.

19. Mark Olthoff's trial pleadings repeatedly misstated and misrepresented Medical Supply's Amended Complaint and pleadings to the court, even after it had been repeatedly drawn to the court's attention that Mr. Olthoff was exploiting the court's reliance on the experience of SKT and was neglecting to read or consider Medical Supply's pleadings. In its order, the court even admonished Bret Landrith for failing to research law and facts that the record evidences had been researched. The negligence was

entirely that of Mr. Olthoff and the court's or a result of the court's misplaced reliance on Mr. Olthoff.

20. The Medical Supply action against US Bancorp was dismissed but not on arguments or authorities presented by SKT's dismissal memorandum. The first findings of law and fact made by the court in the case were sua sponte and both were clearly erroneous.

21. The court did not respond to Medical Supply's arguments for reconsideration or correct its factual errors. It is believed that Judge O'Hara obtained the magistrate assignment to Medical Supply's case against General Electric because of his relationship to SKT and it provided an opportunity to address the same fact pattern as the earlier case because GE breached its contract with Medical Supply once the electronic marketplace GHX, LLC created by GE and its hospital supplier competitors discovered Medical Supply was attempting again to enter the market for hospital supplies.

22. On January 14th, 2005, Andrew DeMarea was directed to file an ethics complaint against Bret Landrith. Like the "complaint" filed by Sherri Price, no allegations of misconduct appear in DeMarea's complaint, it merely incorporates by reference attached Medical Supply filings in the District Court and the Tenth Circuit and the appellate panel's sanction of Bret Landrith for a "frivolous appeal." The "complaint" also contained Medical Supply's motion for en banc review of the sanctions. See **Atch. 8** The sanction order itself admitted the trial court and the hearing panel were mistaken in stating there was no private right of action contained in the USA PATRIOT Act. However, it is unfortunately clear that Judge O'Hara, Olthoff and DeMarea have no interest in the law, only in perpetuating a smear of Medical Supply's counsel, despite clear Tenth Circuit and Supreme Court authority that the sole check on judicial

misconduct that can remedy its effect is appeal. *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584 at 589-90 (C.A.10 (Okl.), 1994).

23. Judge O'Hara used his position as magistrate assigned to the Medical Supply action against General Electric to deny Medical Supply discovery. A decision he also made in the Bolden case. On January 20, 2005 Judge O'Hara testified under oath that he had only denied discovery in a few cases. He stated he was unaware of any other case he was assigned where Bret Landrith was an attorney. He visibly winced when he was then questioned if he was a magistrate in Medical Supply v. General Electric et. al. where Bret Landrith was the sole counsel for the plaintiff. See **Atch. 9. (transcript to be supplemented)**

24. The disciplinary tribunal heard arguments that Judge O'Hara was the complaining witness in fact for the complaint made by the assistant city attorney against Bret Landrith. Sherri Price made no independent allegations or observations of misconduct against Bret Landrith and merely incorporated by reference Magistrate O'Hara's report and recommendation from Bolden's pretrial conference. The disciplinary tribunal ordered Judge O'Hara to drive to Topeka and testify under oath. See **Atch. 9.**

25. Judge O'Hara added to his attacks against Bret Landrith with further statements impugning Bret Landrith's competence. . Judge O'Hara testified that James Bolden's counsel was the worst attorney he had seen in 20 years. Magistrate O'Hara alleged that Mr. Landrith did not have the skill or knowledge of the law a first year law student would possess. See **Atch. 9.**

26. Judge O'Hara made a point of addressing facts that weakened the Kansas Disciplinary Administrator's case from the previous two days and made these assertions

unsolicited from the questioning of the Disciplinary Administrator and demonstrated a pre appearance coaching or consultation with Stanton Hazlett, especially on the point about Bret Landrith's competence being less than that of a first year law student. Judge O'Hara could not have known that Landrith had testified the previous day that many states permit law students to represent clients in civil rights actions because of the shortage of counsel willing to undertake this difficult and unlucrative work. See **Atch. 9.**

27. Judge Vratil, the presiding Judge on Bolden's case upheld Magistrate O'Hara's recommendations which cut out many claims based on City of Topeka policies that had a negative impact on members of a protected class. Judge Vratil relied on Magistrate O'Hara's judgment that the affidavits of misconduct against process servers and Bolden's witnesses provided no basis for relying on the City's unqualified appearance as effective service under the alternative use of Kansas serevice of process rules and provided no basis for extending discovery. Judge Vratil also demonstrated an impression that Bret Landrith was mentally incapable of arguing motions before the court in the final case management conference before trial which appeared to be the result of Magistrate O'Hara's influence. Later Judge Vratil was able to make an independent judgment of Bret Landrith's competence demonstrated by Bolden prevailing on some motions disputed before trial.

28. When Judge O'Hara returned to Kansas City, events still seemed to be set against Mr. Bolden's cause. The notice that the record on appeal was complete was erroneously given to the Tenth Circuit, though the mistake was clear from the appearance docket that two transcripts that had been ordered still were not part of the record. The appeals clerk for

Kansas District court would not correct the record, Bolden made a motion to correct the record, which was not addressed by Magistrate O'Hara. See **Atch. 10**

29. Bolden's motion for an extension of time was sent to both the Tenth Circuit and the Kansas District Court. However it did not appear on the Tenth Circuit Court of Appeals appearance docket. Bolden's counsel called the Tenth Circuit and a deputy clerk identified as Kathy stated that it had been received two days before but it was still not docketed. After the call Kathy reentered on the docket that Bolden's brief was due January 26th. See **Atch. 11**

30. On the same day, counsel called the Kansas District Court appeals clerk who stated she was working on the letter correcting the date the record was complete. However, this letter did not appear on the docket the 25th or even the 26th. Bolden's counsel was forced to work without sleep to file an incomplete appellate brief on the 26th emailing the brief to the court and counsel for the City and turning in the briefs and appendixes to US Postal Delivery service for the Tenth Circuit and the City of Topeka. See **Atch. 12**

31. Both the Kansas District Court correction of the record on appeal and the Tenth Circuit docketing of the motion for extension occurred after the brief and appendix was received, giving the appearance to an impartial observer that the events were coordinated to manufacture an ethics violation for Bolden's counsel after the failure of previous attempts.

32. James Bolden is unable to find counsel to represent him in defending against the final steps of the City of Topeka to take his two properties for a public use without compensating him.

33. Bret Landrith is unable to take civil rights clients because his speech has been chilled by the action of Judge O'Hara through the Kansas Office of the Disciplinary Administrator and he is likely to be disbarred for conduct required by the Kansas Rules of Professional Conduct.

34. In an order where Bret Landrith was neither a party or attorney, Magistrate James P. P'Hara stated Bret Landrith was incompetent. During testimony under oathe, Magistrate O'Hara stated he could not recall ever stating in an order where Mr. Landrith was not an attorney that Mr. Landrith was incompetent. See **Atch 13**.

STATEMENT OF VIOLATIONS

Allegations of Conduct Violating Judicial Cannons:

I. Judge James P. O'Hara's name is being used in the Shughart, Thomson & Kilroy corporate web site, falling within the proscription of Kansas Judicial Canon 2B wherein it is stated . . . "a judge . . . should not lend the prestige of his office to advance the private interests of others."

II. Judge James P. O'Hara has violated Kansas Judicial Canon 2, which in substance, provides that the judge not only must avoid impropriety, but also the appearance of impropriety.

III. Judge James P. O'Hara has violated Kansas Judicial Canon 3C(1)(b), which in substance, provides that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where

he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter.

IV. Judge James P. O'Hara has violated Kansas Judicial Canon 3C(1)(c) which provides, in substance, that a judge should disqualify himself when he knows that he has a financial interest in the subject matter in controversy, or any other interest that could be substantially affected by the outcome of the proceeding. "Financial interest" is defined in Canon 3C(3)(c) as ownership of a legal or equitable interest, however small. Judge James P. O'Hara

V. Judge James P. O'Hara has violated Kansas Judicial Canon 2, which in substance, provides that the judge not only must avoid impropriety, but also the appearance of impropriety.

Allegations of criminal conduct:

VI. Judge James P. O'Hara has violated James Bolden's civil rights in causing the intimidation and harassment of James Bolden's counsel Bret Landrith and by encouraging the intimidation and harassment of James Bolden and his witnesses under the color of Kansas law to deprive them of the right to representation, redress, freedom of speech and to give testimony by City of Topeka officials. Judge O'Hara's conduct violates 18 U.S.C.§ 241, 18 U.S.C. §1513(b).

VII. Judge James P. O'Hara has participated in a conspiracy between Shughart, Thomson & Kilroy, US Bancorp NA, The Piper Jaffray Companies, Novation LLC and Neoforma, Inc. to obstruct Medical Supply's entry into the national market for hospital supplies by

attempting to intimidate and harass Medical Supply's counsel and deprive the company of the means to assert its legal rights. The Hobbs Act 18 U.S.C.§1951, The Sherman Antitrust Act 15 U.S.C. §1 and Retaliating Against a Victim Witness or Informant 18 U.S.C. §1513(b).

S/ Bret D. Landrith

S/ Sam K. Lipari

SHUGHART THOMSON & KILROY P.C.

Attorney James P. O'Hara Named U.S. Magistrate Judge

James P. O'Hara, managing partner of the Shughart Thomson & Kilroy law firm's Overland Park office, has been appointed U.S. Magistrate Judge in Topeka, Kansas.

O'Hara, 44, of Overland Park, will succeed Ronald C. Newman, who died in September 1999. He will be one of four U.S. Magistrate Judges in Kansas, and will have a split docket between Topeka and Kansas City, Kansas. O'Hara was selected from among 24 applicants by U.S. District Judges in Kansas with the assistance of a merit selection panel of 11 Kansas lawyers and laypersons.

"I'll miss my colleagues at Shughart Thomson & Kilroy," said O'Hara. "It's been a real pleasure to be associated with such a talented and experienced team of attorneys."

John M. Kilroy, Jr., managing partner of the firm, commended O'Hara.

"We feel lucky to have practiced law with Jim for the last 18 years. He will be an outstanding Magistrate and we are fortunate that he is willing to make this commitment to public service."

As a U.S. Magistrate Judge, O'Hara will handle pre-trial scheduling and procedures for civil cases and will preside over settlement conferences, mediation and, with consent of the litigants, disposition of civil cases. Magistrate Judges also prepare criminal cases for trial and try misdemeanor cases.

O'Hara joined Shughart Thomson & Kilroy in 1982 and was named a shareholder and director in 1987. During his 18-year career as a trial attorney, he has handled primarily business litigation and complex divorce cases. He has served on the firm's executive, associates and hiring committees, and has been managing partner of its 12-lawyer Overland Park office since 1998.

O'Hara earned his bachelor's degree from the University of Nebraska in 1977 and his law degree with honors from Creighton University School of Law in 1980. He served as a law clerk for two Federal Judges: the late Robert V. Denney, U.S. District Judge in Nebraska; and C Arlen Beam, formerly U.S. District Judge in Nebraska, now a U.S. Circuit Judge on the U.S. Court of Appeals for the 8th Circuit. He has served as a member of the Bench Bar Committee of the U.S. District Court in Kansas and as a member of the Kansas Board for Discipline of Attorneys, a 20-member board appointed by the Kansas Supreme Court to conduct evidentiary hearings and adjudicate disciplinary complaints.

Effective immediately, O'Hara has resigned as a shareholder and director of Shughart Thomson & Kilroy, a leading Kansas City law firm. The firm announced Tuesday that Lawrence A. Swain, Chair of the Intellectual Property and Technology Group, has been named the new partner in charge of the Overland Park office.

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Contact us by email at solutions@stklaw.com.

Click here to read our Disclaimer.

Medical Supply Chain

Empowering Health Systems, Optimizing Supply Chain Results

CONGRESSIONAL HEARINGS

Hearing Before the Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights of the United States Senate on "Hospital Group Purchasing: How to Maintain Innovation and Cost Savings"
September 14, 2004

Hearing Before the Committee on the Judiciary United States Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights on "Hospital Group Purchasing: Has the Market Become More Open to Competition?
July 16, 2003

Hearing before the Senate Committee on the Judiciary Subcommittee on Antitrust, Business Rights and Competition on Hospital Group Purchasing: Lowering Costs at the Expense of Patient Health and Medical Innovations?
April 30, 2002

LITIGATION

Medical Supply Chain, Inc. vs. US Bancorp Piper Jaffray
MSC vs. US Bancorp Piper Jaffray Amended Complaint
MSC vs. US Bancorp Piper Jaffray Appeal Brief
MSC vs. US Bancorp Piper Jaffray Order and Show Cause
MSC vs. US Bancorp Piper Jaffray Letter to the Senate November 10 2004
MSC vs. US Bancorp Piper Jaffray Show Cause Reply
MSC vs. US Bancorp Piper Jaffray Letter to the Senate November 23 2004
MSC vs. US Bancorp Piper Jaffray En Banc Motion
MSC vs. US Bancorp Piper Jaffray En Banc Motion Attachment 1
MSC vs. US Bancorp Piper Jaffray En Banc Motion Attachment 2
MSC vs. US Bancorp Piper Jaffray En Banc Motion Attachment 3
MSC vs. US Bancorp Piper Jaffray En Banc Motion Attachment 4
MSC vs. US Bancorp Piper Jaffray Sanction Order
Motion for En Banc Rehearing of Sanctions
Exb. 1 Order of Sanctions Pg. 17-25
Exb. 2 En Banc Motion Pg. 26-43
Exb. 3 Sherman Claims Pg. 44-55
Exb. 4 Letter To Chief Clerk Patrick Fisher Pg. 56-58
Exb. 5 Excerpt From Motion For New Trial Pg. 59-70
Exb. 6 Trial Court Order Pg. 71-86
Exb. 7 USA Patriot Act Claims Pg. 87-94
Exb. 8 Appelate Show Cause Order Pg. 95-97

Medical Supply Chain, Inc. vs. General Electric Company
MSC vs. General Electric Company Amended Complaint
MSC vs. General Electric Company Appeal Brief
MSC vs. General Electric Company Answer Brief

PRESS RELEASE

"Medical Supply Chain Enables Interactive eBusiness Communications; A Strategy to Remove Artificially Inflated Health Care Cost"

Kansas City, MO. -- January 26, 2005

"Medical Supply Chain Targets Health Care's Out of Control and Artificially Inflated Supply Costs With The Next Generation of e-Commerce"
Kansas City, MO. -- January 11, 2005

"Second US Attorney Death in Novation Medicare Fraud Case"
Kansas City, MO. -- September 17 2004

"General Electric Faces Ruling as Novation Medicare Co-Conspirator"
Kansas City, MO. -- August 26 2004

"General Electric Ordered Into Antitrust Mediation"
Kansas City, MO. -- April 7 2004

"Healthcare Marketplace Medical Supply Chain, Inc. Announces Bid to Acquire US Bank's Troubled Investment Banking Unit US Bancorp Piper Jaffray"
Kansas City, MO. -- January 27 2003

"Healthcare Reform Suffers A Massive Blow From Improper Use of The USA Patriot Act"
Kansas City, MO. -- February 6 2003

"Medical Supply Chain, Inc. is Raising the Standards in Healthcare E-Commerce, Defining Efficiencies for the Healthcare Supply Chain."
Kansas City, MO. -- March 21 2001

"MedicalSupplyChain.com Launches Global Trade Exchange for Institutional Healthcare Enterprises"
Kansas City, MO. -- May 30 2000

"MedicalSupplyChain.com Selects theSupplyChain.com to Enable Independent Trading Exchange"
Newport Beach, CA. -- May 25 2000

PUBLICATIONS

October 18 2004 "US Atorney's Office Loses 3 Go-To Guys'"
By MATT STILES

August 21, 2004 "Wide U.S. Inquiry Into Purchasing for Health Care"
By MARY WILLIAMS WALSH

September 4, 2002 "A Persistent Small Supplier Gets Contract for Hospitals"
By BARRY MEIER

August 15, 2002 "3 Medical Supply Companies Receive U.S. Agency Subpoenas"
By MARY WILLIAMS WALSH

August 9, 2002 "Buying Group for Hospitals Vows Change"
By BARRY MEIER with MARY WILLIAMS WALSH

August 6, 2002 "Buying Group for Hospitals Changes Ways"
By BARRY MEIER and MARY WILLIAMS WALSH

August 4, 2002 "Hospitals Strut in a Lurching Market"
By REED ABELSON

August 1, 2002 "Accusation of Conflicts at a Supplier to Hospitals"
By MARY WILLIAMS WALSH

July 24, 2002 "Audits Scrutinized at Operator of Hospital-Supplies Web Site"
By MARY WILLIAMS WALSH

July 19, 2002 "Questioning $1 Million Fee in a Needle Deal"
By BARRY MEIER with MARY WILLIAMS WALSH

June 7, 2002 "A Mission to Save Money, a Record of Otherwise"
By MARY WILLIAMS WALSH

May 1, 2002 "Senate Panel Criticizes Hospital Buying Groups"
By BARRY MEIER and MARY WILLIAMS WALSH

April 30, 2002 "Hospitals Sometimes Lose Money by Using a Supply Buying Group"
By MARY WILLIAMS WALSH and BARRY MEIER

April 27, 2002 "Hospital Group's Link to Company Is Criticized"
By MARY WILLIAMS WALSH

April 23, 2002 "Hospital Products Get Seal of Approval at a Price"
By BARRY MEIER

March 26, 2002 "When a Buyer for Hospitals Has a Stake in Drugs It Buys"
By MARY WILLIAMS WALSH

March 4, 2002 "Medicine's Middlemen; 2 Powerful Groups Hold Sway Over Buying at Many Hospitals"
By WALT BOGLANICH

REPORTS

United States General Accounting Office Tuesday April 30, 2002 Testimony Before the Subcommittee on Antitrust, Competition, and Business and consumer Rights, Committee on the judiciary, U.S. Senate
GAO GPO Report

Blue Print For An Efficient Supply Chain Wednesday January 10, 2001
Lynn James Everard, C.P.M., C.B.M Healthcare Supply Chain Strategist
Blueprint for an Efficient Health Care Supply Chain

The Exclusion of Competition For Hospital Sales Through Group Purchasing Organization Tuesday June 25, 2002 Harvard Law Professor Einer Elhauge
Harvard Law Study

MEDICAL NEWS

Orange Juice Can Help Promote Health...
-- Ad - http://www.floridajuice.com, Sat Jan 29 2005 00:08:00 GMT-0600

Vietnam's 11th Bird-Flu Death Under Probe for Possible Human Transmission...
-- Bloomberg, Sat Jan 29 2005 00:08:00 GMT-0600

A 13-year-old girl becomes 11th bird flu death in Vietnam in a month? (updated PM 02:03)...
-- China Post, Fri Jan 28 2005 23:59:00 GMT-0600

1 more bird flu patient in Vietnam dies, Cambodian suspected¡¡...
-- China Economic Net, Fri Jan 28 2005 23:57:00 GMT-0600

One more bird flu patient dies in Vietnam...
-- Peoples Daily Online, Fri Jan 28 2005 23:56:00 GMT-0600

ASCO-GI: Advanced Pancreatic Cancer Patients Respond to FOLFOX-6 Regimen...
-- Doctors Guide, Fri Jan 28 2005 23:42:00 GMT-0600

Study Confirms ICDs More Effective In Preventing Sudden Cardiac Death Than Medical Therapies...
-- Science Daily, Fri Jan 28 2005 23:30:00 GMT-0600

NIAID Begins Enrolling Volunteers For Novel HIV Vaccine Study...
-- Science Daily, Fri Jan 28 2005 23:30:00 GMT-0600

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

Appellate Court of Kansas
Kansas Judicial Center, Room 374
301 S.W. 10th Avenue
Topeka, Kansas 66612- 1507

FILED
APR 21 2003
CAROL G. GREEN
CLERK OF APPELLATE COURTS

JAMES L. BOLDEN,

Appellant,

v.

Case No: Case No. 03 90087 A

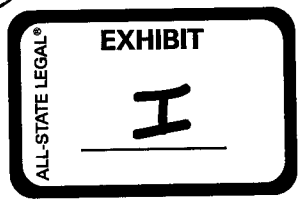
THE CITY OF TOPEKA

Appellee,

MOTION FOR VOLUNTARY WITHDRAW AND DISCLOSURE OF COSTS

The appellant James L. Bolden appears through his attorney Bret D. Landrith, Esq. and makes this motion to voluntarily withdraw his appeal before this court due to the Apellee's bad faith demolition of the homes Mr. Bolden's appeal sought to protect and the Clerk of the Appellate Court's bad faith prosecution of the appeal. Mr. Bolden through this motion also discloses the costs and attorney's fees lost to him when these state agencies denied him his Due process rights during this appeal and over which jurisdiction is now appropriate in the District of Kansas federal court under fee and cost shifting statutes including 42 USC § 1988. Mr. Bolden has with reluctance been forced to choose withdraw over the threatened dismissal or continued bad faith prosecution of this appeal for the following reasons:

Granted. The appeal is dismissed.
90087 RDP 5-5-03



1. The Judicial branch employees including Shawnee District Court file clerk and her immediate supervisor in the court records department obstructed justice by repeatedly denying Mr. Bolden's counsel access to the case file. The Shawnee District Court file clerk and her immediate supervisor told Mr. Bolden's counsel the case file was not a public record and even though he had been asked by Mr. Bolden to represent him in this appeal and was an attorney admitted to the Kansas bar, he would not be permitted to see the file.[1] This issue was resolved in favor of Mr. Bolden when after an Ex Parte meeting with the trial court judge, the Shawnee District Court records custodian was directed to let Mr. Bolden's counsel have access to the records.

2. The Shawnee Court clerk's office refused to provide the record for the appeal docketing statement. The request was referred to a senior employee who stated the record would not be provided and he should give up his expectation of receiving it, even though he had driven from Pittsburg, KS for that purpose. Counsel stated he would return at 4:15pm regardless for the purpose of obtaining the record. When he returned, the record was available.

3. Mr. Bolden and his counsel met great resistance to filing the docketing statement. Once Mr. Bolden had entered the clerk's office, the Judicial Branch employee checking the certified records accompanying the docketing statement called over her supervisor. The supervisor refused to accept the docketing statement because although it contained the required records, two cases had been consolidated at the district court level. Mr.

[1] Ms. Carol Green, Clerk of the Appellate Court sought to justify this denial of access to a public record by the judicial branch in a conversation on April 15th, 2003 with the explanation courts could refuse access to files by attorneys who had not maintained them appropriately, the counsel had never sought a file for copying in Shawnee County or otherwise obtained a court file before.

Bolden's counsel explained that a certified copy of each appearance record with entries notating the consolidation and referencing the consolidation orders were also part of the record and were the appellant counsel's documentation and argument for the Appellate court jurisdiction over this appeal. Mr. Bolden's counsel was repeatedly told to return to Shawnee County court and try to obtain other documents and to file the docketing statement on another day. Counsel stated that it was at great expense to drive to Topeka and that the Shawnee County Clerk's office had denied access to the case files and refused to provide the record on appeal. Counsel offered to seek any further documents the clerk may require, but this offer was rejected. Counsel then informed the supervisor that the outcome of the Clerk of Appellate court in refusing to accept the docketing statement would not be an attempt to re-file it on another day but instead an action in mandamus seeking to have the clerk perform this duty. At this point, the supervisor acquiesced and accepted the docketing statement.

4. The appellant counsel's assistants presented the brief in the above captioned case on March 17, 2003. Employees of the Clerk of the Appellant Court objected to receipt of the brief because they stated in error that the brief did not contain a Statement of Facts. One assistant called the counsel in Pittsburg, KS to relay this objection and the line was left open until the Clerk's office employee recanted his objection to accepting the brief.

5. An employee of the Clerk of the Appellant Court then objected to the Statement of Facts because it was not keyed the record with citations and objected to accepting the brief for filing. The brief however, contained a jurisdictional statement explaining the exception under Kansas law K.S.A. 77-617 (d) entitling the appellant to raise issues

regarding the administrative agency's actions after the hearing and the facts not previously before the trial court were included for the purposes of these new issues.

6. The appellate court ruled *sua sponte* that the brief would have to be rewritten and refilled. This order added great expense to Mr. Bolden while the facts in his brief revealed the City of Topeka had demolished his properties instead of waiting for the appeal and had retaliated against him by canceling his soul source of income, a janitorial contract with the city. This ruling aggravated Mr. Bolden's hardship and threatens to cause his appeal not to be heard.

7. The appellant filed a motion for reconsideration of this ruling. The motion also requested a determination of fees and costs for the motion so that the City of Topeka would not be charged for the appellant's response motion to the *sua sponte* action of the court. No special determination or signed order was received, instead an unsigned note from the Clerk of the Court of Appeals was sent stating the motion had been denied.

8. The appellant received a ruling dated April1, 2001 that seems to contradict Supreme Court Rule 3.02 and requires the appellant to produce again certified Shawnee County Court documents showing the consolidation of the cases, even though the record is to be provided by the Shawnee County Court Clerk under the rule. The appellant understands this as retaliation for the motion for reconsideration. This ruling provides additional barriers and obstruction of Mr. Bolden's appeal consistent with that identified in the motion for reconsideration.

9. A voluntary withdraw of appeal by the plaintiff does not require an order. Mr. Bolden has determined his Due Process rights are being violated in this appeal by the agencies of the State of Kansas- Judicial Branch and the City of Topeka. Mr. Bolden will

raise his claims that were before this court in his current related federal action. Since the City of Topeka destroyed his homes before an appeal of the injunction to stop the demolition could be heard, Mr. Bolden has determined all of his remaining claims can now be raised in federal court without impacting the *Younge*r Doctrine. *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)., *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1170-71 (10th Cir. 1998). If however the *Younger* doctrine is invoked, it is believed the above showing of bad faith prosecution experienced by Mr. Bolden to date would meet the exception for federal jurisdiction under the criteria stated in *Perez v. Ledesma*, 401 U.S. 82, 85 (1971).

10. No answer or ruling to the appellant's present April 7th motion for clarification has been made by April 21st, the Court of Appeals own show cause deadline.

11. In having to forfeit his appeal to escape further bad faith prosecution and due process violations, the appellant has lost the filing fee of $130 and the attorney's fees for preparing the brief and the motions in this case. This unpaid total is 81 hours at 130$ an hour.

12. Since the issues of this appeal will now be raised in an ongoing federal civil rights case, where they will be heard for the first time in a state or federal court, and the issues are raised on the same conduct by the City of Topeka before the federal court, jurisdiction for award of fees and costs is now before the US District Court for the District of Kansas under the applicable fee shifting statutes including 42 USC § 1988 for civil rights, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Federal Act), Pub. L. No. 91-646, 42 U.S.C. § 4601 (1994) *et seq.* and K.S.A. 58-3501. Should the appellee or Kansas Court of Appeals desire to attempt the award of

costs or fees, or otherwise assert concurrent jurisdiction, notice under Multi District Litigation rules will be required to be made in the matter of *JAMES L. BOLDEN v. THE CITY OF TOPEKA, MAYOR HARRY FELKER, JAY OYLER and MIKE McGEE* CASE NO.: 02-2635 KHV.

Whereas the appellant now voluntarily withdraws his appeal, having suffered the demolition of his houses and property at the hands of his opponent in disregard of this appeal and raises the briefed issues in federal court for their first hearing, the appellant now takes leave of the courts of the State of Kansas.

Respectfully Submitted,

Bret D. Landrith

Bret D. Landrith
Attorney for James L. Bolden

CERTIFICATE OF MAILING

I certify that on April 21st, 2003, I deposited a copy of this document, postage paid in the US Mail addressed to the following:

Ms. Sherri Price
Assistant City Attorney
215 E. 7th, Street, Suite 353
Topeka, Kansas 66603-3979

Bret D. Landrith

Bret D. Landrith
Kansas Supreme Court # 20380
605 W. Kansas
Pittsburg, KS 66762
1-620.231-7636
Fax 1-734-549-6495

A true copy ATTEST
Carol G. Green
Clerk Supreme Court

IN THE UNITED STATES MAGISTRATE COURT

FOR THE DISTRICT OF KANSAS

TOPEKA, KANSAS

JAMES L. BOLDEN,)

---------- Plaintiff,)

)

vs.) Case No.

) 02-CV-2635

CITY OF TOPEKA, et al.,)

---------- Defendant.)

TRANSCRIPT OF TAPE-RECORDED

FINAL PRETRIAL CONFERENCE

BEFORE

HONORABLE JAMES P. O'HARA

on

November 20, 2003

APPEARANCES:

For the Plaintiff: Mr. Bret D. Landrith
Attorney at Law
12820 SW Highway 4
Topeka, Kansas 66610

For the Defendant: Ms. Sherri L. Price
City of Topeka
Legal Department
215 Southeast 7th
Topeka, Kansas 66603

Court Reporter: Jana L. Willard, CSR, RPR
Nora Lyon & Associates
1515 South Topeka Avenue
Topeka, Kansas 66612

But, Mr. Bolden, you ought to be aware of the fact that if these six defendants are ultimately dismissed from the case by Judge Vratil **that you would have certain remedies that you might want to discuss with another lawyer that you could exercise against Mr. Landrith, who's charged with responsibly and professionally representing you in this case.** And I-- I don't mean to be uncharitable to either of you, **but this case has been handled in an exceptionally sloppy way.**

I'm not sure, Mr. Bolden, that you'd been

doing any worse if you were to represent yourself. And I have a lot of folks in civil rights case that do represent themselves. **But this case, in this Court and based on what is of public record in the Kansas Court of Appeals, is disturbing to say the least.**

ATTACHMENT 8

19 In contrast, as a practical matter, it appears that plaintiff probably would suffer little, if any, prejudice if the individual defendants were dismissed.

Fn 19, Magistrate O'Hara's Report and Recommendation pg. 10

Stated more directly, the court is deeply troubled by Mr. Landrith's apparent incompetence. The pleadings he has filed (see, e.g., docs. 1, 13, 23, 35, 37, & 42), and his non-responsive, rambling, ill-informed legal arguments during the pretrial conference, suggest that he is not conversant with even the most basic aspects of the Federal Rules of Civil Procedure. The court doubts that Mr. Landrith has any better grasp of the substantive law that applies to this case. Based on what transpired at the pretrial conference, plaintiff appears more articulate than Mr. Landrith. Plaintiff may be better served by representing himself without any attorney if indeed Mr. Landrith is the only attorney willing to take the case.

Magistrate O'Hara's Report and Recommendation pg. 12

The Clerk's Office shall serve copies of this report and recommendation on all counsel of record, and shall also send a copy via certified mail, return receipt requested, to the plaintiff, Mr. James L. Bolden, at 4218 S.E. Ridgeview Terrace, Topeka, Kansas 66609.

Magistrate O'Hara's Report and Recommendation pg. 13

CITY OF TOPEKA

CITY ATTORNEY
215 SE 7th Street Room 353
Topeka, Kansas 66603-3979
Phone 785-368-3883
Fax 785-368-3901

RISK MANAGEMENT
215 SE 7th Street Room 353
Topeka, Kansas 66603-3979
Phone 785-368-3883
Fax 785-368-3901

CITY PROSECUTION
215 SE 7th Street Room 260
Topeka, Kansas 66603-3979
Phone 785-368-3910
Fax 785-368-3104

December 3, 2003

Stanton A. Hazlett
Disciplinary Administrator
701 SW Jackson Street, 1st Floor
Topeka, Kansas 66603

Re: Bret D. Landrith

Dear Mr. Hazlett:

I am forwarding you a report and recommendation filed by Magistrate Judge O'Hara in a case in which Mr. Landrith is representing the plaintiff, James Bolden. Mr. Landrith had previously attached a copy of the disciplinary complaint filed against him by the appellate court as well as his response to that complaint as exhibits to an earlier pleading in this action. He also commented on the complaint and investigation at a recent pretrial conference of this case. Judge O'Hara directly addresses Mr. Landrith's incompetence in the handling of this case on pages 11 and 12 of the enclosed document.

Sincerely,

Sherri Price

Sherri Price
Assistant City Attorney

SP:bn

Enclosure

COMPLAINT

02-3443 Medical Supply Chain v. US Bancorp, NA., et al

1/6/03 [1577139] Appellant's corrected brief filed by Medical Supply Chain. Original and 7 copies. c/s: y. Served on 1/6/03. Oral argument? n. Appendix filed. Original and 2 appendix copies. **Appellee's brief due 2/10/03 for Unknown Healthcare, for Brian Kabbes, for Lars Anderson, for Susan Paine, for Andrew Cesere, for Piper Jaffray, for Mutual Fund Services, for Institutional Trust, for Corporate Trust, for US Bank Private and for US Bancorp, NA**. (kf)

[02-3443]

1/8/03 [1576827] Appellant's motion for preliminary injunction pending appeal submitted to court. (mt) [02-3443]

1/9/03 [1577188] Order filed by Judges Seymour & O'Brien denying appellant's motion for preliminary injunction pending appeal. Parties served by mail. (mt) [02-3443]

Proceedings include all events.
02-3443 Medical Supply Chain v. US Bancorp, NA., et al

1/10/03 [1577795] Notice of appearance filed by Mark A. Olthoff and Andrew M. DeMarea as attorney for defendants US Bancorp, NA., US Bank Private, Corporate Trust, Institutional Trust, Mutual Fund Services, Piper Jaffray, Andrew Cesere, Susan Paine, Lars Anderson, Brian Kabbes, except "Unknown Healthcare Supplier". CERT. OF INTERESTED PARTIES (y/n): y. (mt) [02-3443]

1/10/03 [1577801] Appellees' Rule 26.1 Disclosure Statement (Corporate Disclosure Statement) filed by all defendants other than "Unknown Healthcare Supplier". Original and 3 copies. c/s: y. (mt) [02-3443]

1/13/03 [1578207] Appellees' response filed by US Bancorp, NA., et al., to Appellant's motion for preliminary injunction pending appeal. Original and 3 copies. c/s: y (kjs)

[02-3443]

1/21/03 [1580331] Filed notice record is complete 1/10/03. (mt)

[02-3443]

2/12/03 [1587114] Appellee's motion to extend time to file appellee's brief until 3/12/03 filed by US Bancorp, NA., US Bank Private, Corporate Trust, Institutional Trust, Mutual Fund Services, Piper Jaffray, Andrew Cesere, Susan Paine, Lars Anderson, Brian Kabbes. Original and 3 copies. c/s: y (kjs) [02-3443]

2/13/03 [1587526] Order filed by PF granting Appellees motion to extend time to file eres brief until [1587114-1] 3/12/03 for Brian Kabbes, et al. No further extensions. Parties served by mail. (kjs) [02-3443]

3/13/03 [1595409] Appellee's brief filed by US Bancorp, NA., et al.. Original and 7 copies. c/s: y. Served on 3/12/03. Oral Argument? n, Appendix filed. Original and 1 appendix copy. Appendix Pages: 44. Appellant's optional reply brief due 3/31/03 for Medical Supply Chain. (sl) [02-3443]

3/31/03 [1599620] Appellant's reply brief filed by Medical Supply Chain. Original and 7 copies. c/s: y (kjs)

Andrew M. DeMarea
ademarea@stklaw.com
Direct Dial (816) 395-0685
Fax (913) 451-3361

The Law Firm Of

SHUGHART THOMSON & KILROY

A Professional Corporation

January 12, 2005

RECEIVED

JAN 14 2005

DISCIPLINARY ADMINISTRATOR

Stanton A. Hazlett, Esq.
Disciplinary Administrator
Supreme Court of Kansas
701 Jackson Street, First Floor
Topeka, Kansas 66603-3729

RE: *Medical Supply Chain, Inc. vs. US Bancorp, N.A., et al.*

Dear Mr. Hazlett,

I write to send you a series of pleadings from a case my firm has been involved in as defense counsel for the past two years, *Medical Supply Chain, Inc. vs. US Bancorp, et al.* The case was originally before Judge Carlos Murguia in the U.S. District Court of Kansas. After losing on a motion to dismiss, plaintiff appealed to the Tenth Circuit, which has recently denied the appeal and remanded the case to Judge Murguia for sanctions to be entered against plaintiff's counsel, Bret D. Landrith. Per his most recent pleading, Mr. Landrith's contact information is 2961 SW Central Park #G33, Topeka, Kansas 66611, (785) 267-4084, and his Kansas Supreme Court number is 20380.

I am not certain whether a duty of reporting currently exists on me pursuant to Supreme Court Rule 226-8.3. However, I had enough concerns about it, specifically in relation to Rules 226-1.1 and -3.1, that I felt it appropriate to forward the pertinent pleadings from this case to your office for consideration as to Mr. Landrith.

The enclosed materials include:

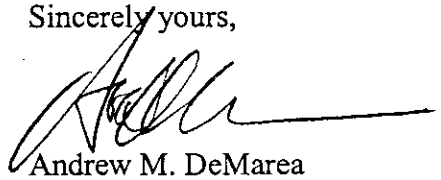
1. Plaintiff's Complaint for Urgent Injunctive Relief (October 22, 2002);
2. Plaintiff's Amended Complaint (November 12, 2002);
3. Clerk's Courtroom Minute Sheet of November 18, 2002, denying plaintiff's TRO, and a transcript of the hearing from that date;
4. Clerk's Courtroom Minute Sheet of December 12, 2002, denying plaintiff's Preliminary Injunction, and a transcript of the hearing from that date;
5. November 19, 2003 Memorandum and Order from Judge Murguia, dismissing plaintiff's case;
6. Memorandum and Order, from Judge Murguia, denying plaintiff's motion for new trial;
7. January 7, 2003 letter from Tenth Circuit clerk, regarding deficiencies in plaintiff's brief as filed;

COMPLAINT

8. January 9, 2003 Order from Tenth Circuit, denying plaintiff's motion for preliminary injunction pending appeal;
9. December 10, 2003 Order and Judgment from Tenth Circuit, explaining new case number for the appeal (provided here simply as an explanatory reference for you about the case numbering);
10. November 8, 2004 Order and Judgment from Tenth Circuit denying appeal and ordering plaintiff and plaintiff's counsel to Show Cause why they should not be sanctioned;
11. Appellant's November 8, 2004 response to the Court's Order to show cause;
12. December 30, 2004 Order from the Tenth Circuit, sanctioning plaintiff's counsel to pay attorneys fees and double costs, and remanding case to Judge Murguia for that purpose;
13. December 30, 2004 Order from the Tenth Circuit, denying plaintiff's motion for rehearing *en banc*;
14. January 11, 2005 brief filed by plaintiff's counsel with the District Court, styled, "Notice of Motion for En Banc Rehearing of Sanctions Filed by Plaintiff Appellant and Intent to Submit Evidence All Parties' Reasonable Attorney's Fees Exceed $360.00 An Hour";
15. January 11, 2005 brief, apparently filed by plaintiff's counsel with the Tenth Circuit, styled, "MOTION FOR EN BANC REHEARING OF PANEL SUA SPONTE SANCTIONS".

Please contact me if I can answer any questions for you or be of assistance in any regard. Otherwise I will leave this matter to your office for handling, if necessary.

Sincerely yours,



Andrew M. DeMarea

Enclosures

U.S. District Court
District of Kansas (Kansas City)
CIVIL DOCKET FOR CASE #: 2:02-cv-02635-KHV

Bolden v. Topeka City of, et al
Assigned to: Judge Kathryn H. Vratil
Demand: $0
Case in other court:
10CCA, 04-03306
Cause: 42:1983 Civil Rights Act
Date Filed: 12/20/2002

10/25/2004
122
TRANSCRIPT ORDER FORM by Court Reporter Theresa Hallberg ordering transcripts of 6/10/04, 11/24/03, 7/9/04 re 118 Notice of Appeal - Final Judgment filed by James L Bolden (Appeal No. 04-3306) Transcript due by 12/14/2004. (trs) (Entered: 10/25/2004)

11/23/2004
123
TRANSCRIPT ORDER FORM by Court Reporter Nora Lyon ordering transcripts of Pretrial Conference re 118 Notice of Appeal - Final Judgment filed by James L Bolden (Appeal No. 04-3306) Transcript due by 12/15/2004. (km) (Entered: 11/30/2004)

12/10/2004
124
TRANSCRIPT of proceedings held 11-20-03 before Judge James P. O'Hara,Transcript of Tape-Recorded Final Pretrial Conference, 68 pgs., Court Reporter: Jana L. Willard.

(Nora Lyon & Associates,) (Entered: 12/10/2004)

12/14/2004
125
Letter to Court of Appeals from Court Reporter, Nora Lyon, stating that all transcripts ordered in this case have been filed with the Clerk of the District Court as of 12/8/04. (km) (Entered: 12/17/2004)

12/17/2004
126
LETTER TO 10CCA stating record is complete re 118 Notice of Appeal - Final Judgment (Appeal No. 04-3306) (km,) (Entered: 12/19/2004)

01/14/2005
127
MOTION to Amend/Correct *Record on Appeal Status* by Plaintiff James L Bolden(Landrith, Bret) (Entered: 01/14/2005)

01/20/2005
128
NOTICE of Appeal Brief Extension by James L Bolden (Attachments: # 1 Exhibit Motion for Extension# 2 Supplement Attached Motion to Correct)(Landrith, Bret) (Entered: 01/20/2005)

01/24/2005
129
TRANSCRIPT of proceedings held 6-10-04 before Judge khv, Court Reporter: teh.

(Hallberg, Teri) (Entered: 01/24/2005)

01/24/2005
130
TRANSCRIPT of proceedings held 7-9-04 before Judge khv, Court Reporter: teh.

(Hallberg, Teri) (Entered: 01/24/2005)

01/27/2005
131
Letter to 10CCA stating the record is not complete. A new letter notifying the Court of Appeals will be transmitted when all requested transcripts have been filed. re 118 Notice of Appeal - Final Judgment (Appeal No. 04-3306) (km) (Entered: 01/27/2005)

ATTACHMENT 10

United States Court of Appeals for the 10th Circuit
Case Summary
Court of Appeals Docket #: 04-3306 Filed: 8/18/04
Nsuit: 3440
Bolden v. City of Topeka
Appeal from: United States District Court for the District of Kansas

9/23/04 [1742810] Fee paid. Date paid in District Court on 9/1/04. (mt)

9/24/04 [1743271] Case referred for mediation conferencing. (sl)

9/28/04 [1743929] Order filed by PF - Transcript order form due 10/13/04 for attorney for Bolden. Parties served by mail. (kf)

9/30/04 [1745690] Appellant's motion filed by Appellant James L. Bolden to extend time to file appellant's brief until 12/5/04. Original and 3 copies. c/s: y. (mt)

10/5/04 [1745967] Order filed by PF (eas) denying appellant's motion to extend time to file appellant's brief as unnecessary. - Transcript order form is due 10/13/04 for Theresa E. Hallberg pursuant to Rule 42. The briefing schedule will commence when the district court issues a notice that the record is complete. 10th Cir.R. 31.1(A)(1). To the extent ongoing state court proceedings will impact counsel's representation in this matter, he shall keep this court fully apprised of those proceedings. Parties served by mail. (mt)

10/12/04 [1747837] Acknowledgement of transcript order filed by James L. Bolden. Transcript order due 10/22/04 for Theresa E. Hallberg. (sl)

10/27/04 [1752410] Transcript order form filed by Theresa E. Hallberg and Bret D. Landrith. Transcript due 12/14/04 for Theresa E. Hallberg. (Trial proceedings 6/10/04, 11/24/03, 7/9/04, and motion hearing only 7/9/04) (mt)

11/1/04 [1754014] Acknowledgement of transcript order filed by James L. Bolden. Transcript order due 11/12/04 for Nora Lyon. (Pre trial conference) (mt)

11/15/04 [1756693] Case mediation conferencing terminated. (sl)

11/22/04 [1758914] Transcript order form filed by Nora Lyon and Bret D. Landrith. Transcript of pretrial conference held 11/20/03 due 12/15/04 for Nora Lyon. (mt)

12/13/04 [1764637] Notice filed that the transcript was filed by Nora Lyon in district court on 12/8/04. (kjs)

12/27/04 [1768263] Filed notice record is complete 12/17/04. Appellant's brief and appendix due 1/26/05 for James L. Bolden. (kjs)

1/24/05 [1776865] Appellant's motion filed by James L. Bolden to restart the briefing schedule 40 days from date of amended notice from district court or to extend time 20 days from January 26, 2005, until 2/15/05 [04-3306]. Original and 3 copies. c/s: y (mt)

From: eposone@mobil1.net
Subject: Bolden v. City of Topeka, et al Case No. 04-3306
Date: January 26, 2005 10:34:35 PM CST
To: esubmission@ca10.uscourts.gov
Cc: SPrice@Topeka.org
1 Attachment, 388 KB

January 26th, 2005

TO: Clerk of the Tenth Circuit Court
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257.

RE: Bolden v. City of Topeka, et al Case No. 04-3306, Kan. Dist. Ct. Case 02-02635

Dear Clerk of the Tenth Circuit Court,

Your office has received my January 20th, 2005 motion requesting an extension of time in which to file the opening brief. This Tenth Circuit motion is also entered in the District Court appearance docket of the Bolden case on January 20th, 2005.

On January 25th, after several weeks of inquiries, I was informed by the district court clerk that handles appeals that the erroneous notice the record on appeal was complete sent to you previously was being corrected and that the letter was being prepared for you.

Today, however I observe that neither the entry of the correction appears yet on the district court docket and my motion requesting an extension of time does not appear on your appearance docket.

I am filing a brief today for James Bolden via US Mail delivery service and via email in pdf format. I am mailing you today via US Mail delivery service two copies of the appendix which is the complete and final appendix for the brief, it is unfortunately larger than your email file size limit.

If the record on appeal correction or the motion for extension gives more time for Bolden to file an appellant brief, please disregard today's brief, but retain the appendix and I will serve on you and opposing counsel the final version of the opening brief by its new due date.

Respectfully Submitted

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

Certificate of Service

I certify I have sent a copy of this cover letter and the appendix via U.S. Mail delivery service to opposing counsel for the City of Topeka on January 26th, 2005:

Sprice@topeka. org

Sherri Price
City of Topeka
215 E. 7th
Topeka, KS 66603

S/Bret D. Landrith
_____
Bret D. Landrith
Kansas Supreme Court Number 20380

ATTACHMENT 12

"Defendant's second allegation is that an attorney for the defendants in the Bolden case, Sherri Price, filed an ethics complaint against the plaintiff's attorney, Bret Landrith, and that Ms. Price filed the complaint at the direction of the undersigned magistrate judge. While **the undersigned did comment on the record that there were serious doubts about Mr. Landrith's competency to practice law**, the undersigned did not direct anyone to file an ethics complaint. Even if that were the case, however, the ethics complaint filed by Ms. Price deals with the behavior of Mr. Landrith in his practice of law in that matter, and has no bearing on the instant case." [emphasis added]

Magistrate Judge James P. O'Hara's July 29, 2004 order at page 3 denying pro se plaintiff Melvin Johnson's motion seeking recusal in the pro se plaintiff Melvin Johnson v.Topeka Housing Authority, Kansas District Court Case No. 04-4062-SAC.

ATTACHMENT 13

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

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
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 LEAVE TO JOIN ADDITIONAL DEFENDANTS
UNDER FED.R.CIV.P. 20(A)

Comes now the plaintiff Medical Supply through its attorney Bret D. Landrith and respectfully makes this motion under under Fed.R.Civ.P. 20(a) for leave to join additional parties as defendants in the interest of justice and the economy of the court.

STATEMENT OF FACTS

1. The plaintiff's earlier action on federal claims against General Electric Company and its subsidiaries GE Transportation Systems Global Signaling,L.L.C., General Electric Capital Business Asset Funding Corporation and Jeffrey R. Immelt (herein "GE defendants")has been dismissed.

2. The plaintiff's state based law claims were expressly dismissed without prejudice.

3. The GE court declined to combine this action with the remaining post remand sanctioning of Medical Supply's counsel for correctly making Jeffrey Immelt an antitrust defendant.

4. The Tenth Circuit did not acknowledge or address *Dagher v. Saudi Refining, Inc.,* 2004 WL 1191941 (9th Cir. 2004), a precedent behind Medical Supply's claims in the current action.

5. The Tenth Circuit also did not acknowledge or address common parties to both actions where they were not named as defendants.

6. The plaintiff first sought to combine both actions following the Tenth Circuit's remand, despite the disadvantage of the albeit narrow issue preclusion resulting from the prior courts' orders.

7. The GE defendants did not object to the consolidation but asserted that the previous action could not be amended by the plaintiff to include additional claims.

8. Medical Supply opposed this assertion by filing a motion citing to current Tenth Circuit authority controverting the defendants assertion.

9. The defendants did not reply.

10. The prior action's court made no findings of fact or law on the motion to consolidate or the motion with current Tenth Circuit authority, stating they were "Moot."

11. Conduct by the GE defendants against Medical Supply occurring after the filing and amending of the complaint in the earlier action has given rise to new federal question claims that are not precluded by the dismissal.

12. The chargeable subsequent conduct is alleged by Medical Supply to be in conspiracy with the present defendants and to include all the current action's federal claims except those alleged against the current defendants to have occurred before Medical Supply amended its complaint against the GE defendants to include Jeffrey Immelt.

MEMORANDUM IN SUPPORT

The plaintiff seeks to join the group of defendants in *Medical Supply Chain, Inc. v. General Electric, et al.* to the present action where they are identified as co-conspirators but were not named as defendants. Medical Supply did not charge the GE defendants during the pendency of the prior appeal.

The Tenth Circuit upheld the trial court's express refusal to exert jurisdiction over the actions pendent state claims which are the subject of the present action. Furthermore, an averment of obstruction of justice against the GE defendants contained in the earlier action has risen to a predicate act in a later discovered and identified pattern and practice of a RICO conspiracy under federal law with the present defendants.

Plaintiff's proposed joinder is based on new factual allegations and transactions between the parties. *Zhu v. Countrywide Realty Co., Inc.*, 160 F.Supp.2d 1210 at 1224 (Kan., 2001).

Finally, the GE defendants are co-conspirators in the antitrust claims against the current defendants on conduct that the GE defendants committed after the amended complaint had been filed in the previous action.

> "Under Fed.R.Civ.P. 20(a), joinder is appropriate when a "right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." The Court's discretion is limited by two prerequisites of the rule: a right to relief must be asserted which arises from the same transaction or occurrence, and a question of law or fact common to all the defendants must arise in the action. See *Green Constr. Co. v. Kan. Power & Light Co.*, No. 87-2070-S, 1989 WL 117440, at *1 (D.Kan. Sept. 11, 1989)."

Zhu v. Countrywide Realty Co., Inc., 160 F.Supp.2d 1210 (Kan., 2001)

In a suit to enjoin a conspiracy not all the conspirators are necessary parties defendant. See *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 49 , 30 S.Ct. 10, 14; *United Shoe Mach. Co. v. United States*, 258 U.S. 451, 456 , 42 S.Ct. 363, 365; *Hopkins v. Oxley Stave Co.*, 8 Cir., 83 F. 912, 915, 916; *Rocky Mountain Bell Tel. Co. v. Montana , Federation of Labor, C.C.*, 156 F. 809, 811, 812. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 , 60 S.Ct. 811, 855.[1]

In *Laker Airways*, the court explored its discretion to require parties in an antitrust case and found the rule of permissive joinder usually applied:

> "*Temple v. Synthes Corp.*, 498 U.S. 5, 7, 111 S.Ct. 315, 316, 112 L.Ed.2d 263 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.... The Advisory Committee Notes to Rule 19(a) explicitly state that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability.") (citations and quotations omitted)."

Laker Airways v. British Airways, 182 F.3d 843at 847 (11th Cir., 1999). However, the court found there were circumstances where a ojoint and several tortfeasor's presence was required:

> "Laker's antitrust claims necessarily require that a court evaluate ACL's conduct in relation to Laker, thereby substantially implicating ACL's interests. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92, 105-06 (C.D.Cal.1971) (while under Rule 19 there are some cases which state that antitrust co-conspirators need not be joined, here, joint tortfeasor still had interests covered by Rule 19(a) and therefore had to be joined), aff'd, 461 F.2d 1261 (9th Cir.1972). In order to prove its antitrust claims, Laker would be required to show that ACL acted in other "than an independent manner." Such a ruling would surely implicate the interests of ACL because the United Kingdom's enabling legislation, ASAR, requires that the Secretary of State for Transport withdraw its approval of an appointed coordinator if its behavior is not neutral. ASAR, 4(3). Likewise, in Boles v. Greeneville Housing Authority, 468 F.2d 476 (6th Cir.1972), the Sixth Circuit determined that the Department of Housing and Urban Development (HUD) was an "indispensable party" when

[1] As part of the Kansas District Court and Tenth Circuit's secession from US Law applicable to hospital supply monopolization, these three US Supreme court cases were overruled by the Kansas District Court on this point of law in the two previous Medical Supply Chain cases and plaintiff's counsel was sanctioned.

> plaintiffs "indirectly attacked" HUD's approval of a development plan. Id. at 479.6 Doty v. St. Mary Parish Land Co., 598 F.2d 885, 887 (5th Cir.1979) ("A district court may refuse to proceed with the action if prejudice would result to either the absent party or to parties already joined.").”

Laker Airways v. British Airways, 182 F.3d 843 at 848 (11th Cir., 1999). The GE defendants are not necessary parties but a potential for prejudice in their absence exists.

The Tenth Circuit resolved an issue over whether to apply Rule 19 based on if a party was necessary and determined that since earlier in the action the party was not indispensable than the party is still unnecessary:

> “Our conclusion that Deseret News is not an indispensable party is bolstered, but not determined, by the fact that no party in the case considered Deseret News to be indispensable at the t ime the action commenced. Cf. Burka, 87 F.3d at 483 (supporting conclusion that party joined under Fed. R. Civ. P. 25(c) was not indispensable by reference to "appellants' failure to seek joinder [of the party] as a defendant at an earlier stage of this case"). In ruling on the motions to join Deseret News, the district court observed that "[n]one of the parties contend that Deseret News Publishing was an indispensable party at the time the original Complaint was filed."

Salt Lake Tribune Publishing, Co. LLC v. AT & T Corp., 2003 C10 243 at ¶96 (USCA10, 2003)

Analysis Under Rule 19(b)

If a necessary party cannot be joined, the court must then proceed to Rule 19(b) and consider whether in "equity and good conscience," the suit should proceed without the necessary party. The court balances four factors in this analysis: (1) how prejudicial a judgment would be to the nonjoined and joined parties, (2) whether the prejudice could be lessened depending on the relief fashioned, (3) whether the judgment without joinder would be adequate, and (4) whether the plaintiff would have any alternative remedies were the case dismissed for nonjoinder. See *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072 at 1079 (11th Cir.1983).

If joinder of the GE defendants in the present action is denied, this action may require dismissal without prejudice until all current defendants can be prosecuted with the GE defendants in the Western District of Missouri US District court where Medical Supply will bring the new action.

CONCLUSION

Whereas the plaintiff has new federal claims against the GE defendants General Electric Company and its subsidiaries GE Transportation Systems Global Signaling,L.L.C.,General Electric Capital Business Asset Funding Corporation and Jeffrey R. Immelt for conduct subsequent to the previous action, in addition to untried state law claims that arise out of the transactions identifying the GE parties in the present case;

the plaintiff Medical Supply respectfully requests the court grant leave to join the GE defendants in the interests of justice and the economy of the court's resources.

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith
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 September 15th, 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 (Also attorney for the General Electric defendants and Jeffrey Immelt.)

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

Jonathan I. Gleklen jonathan_gleklen@aporter.com,

Michele Hoffman michele.hoffman@husch.com

Ryan Z. Watts ryan_watts@aporter.com,

Attorneys for Defendants

S/Bret D. Landrith
Bret D. Landrith