UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff - Appellant,

v.

NEOFORMA, INC.; ROBERT J. ZOLLARS; VOLUNTEER HOSPITAL ASSOCIATION; CURT NONOMAQUE; UNIVERSITY HEALTHSYSTEM CONSORTIUM; ROBERT J. BAKER, JR.; US BANCORP NA; US BANK NA; JERRY A. GRUNDHOFFER; ANDREW CESERE; PIPER JAFFRAY COMPANIES; ANDREW S. DUFF; SHUGART THOMSON & KILROY, P.C.; WATKINS BOULWARE, PC; NOVATION LLC,

Defendants - Appellees,

SAMUEL K. LIPARI,

Interested Party - Appellant.

No. 06-3331
(D.C. No. 05-CV-2299-CM)

JUDGMENT

Filed November 16, 2007

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **TYMKOVICH**, Circuit Judge.

This case originated in the District of Kansas and was submitted on the briefs at the direction of the court.

The appeal is dismissed.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

November 16, 2007

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff - Appellant,

v.

NEOFORMA, INC.; ROBERT J. ZOLLARS; VOLUNTEER HOSPITAL ASSOCIATION; CURT NONOMAQUE; UNIVERSITY HEALTHSYSTEM CONSORTIUM; ROBERT J. BAKER; US BANCORP NA; US BANK NA; JERRY A. GRUNDHOFER; ANDREW CECERE; PIPER JAFFRAY COMPANIES; ANDREW S. DUFF; SHUGART THOMSON & KILROY, WATKINS BOULWARE, P.C.; NOVATION, LLC,

Defendants - Appellees,

SAMUEL K. LIPARI,

Interested Party-Appellant.

No. 06-3331

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. 05-CV-2299-CM)

Submitted on the briefs:*

Ira Dennis Hawver, Ozawkie, Kansas, for Plaintiff - Appellant.

Mark A. Olthoff, Shughart Thomson & Kilroy, P.C., Kansas City, Missouri, Andrew M. DeMarea, Shughart Thomson & Kilroy, P.C., Overland Park, Kansas, for Defendants - Appellees, U.S. Bancorp, N.A., U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cecere, Piper Jaffray Companies, and Andrew S. Duff.

Stephen N. Roberts, Janice Vaughn Mock, Nossaman, Guthner, Knox & Elliott, LLP, San Francisco, California, and John K. Power, Husch & Eppenberger, Kansas City, Missouri, for Defendants - Appellees, Neoforma, Inc. and Robert J. Zollars.

Kathleen Bone Spangler, Vinson & Elkins, L.L.P, Houston, Texas, and John K. Power, Husch & Eppenberger, Kansas City, Missouri, for Defendants - Appellees Novation, LLC, Curt Nonomaque, Volunteer Hospital Association, University Healthsystem Consortium and Robert J. Baker.

William E. Quirk, Kathleen A. Hardee, Shughart Thomson & Kilroy, P.C., Kansas City, Missouri, for Defendant - Appellee, Shughart Thomson & Kilroy, P.C., and Watkins Boulware, P.C.

Before **HARTZ**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **TYMKOVICH**, Circuit Judge.

HARTZ, Circuit Judge.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Medical Supply Chain, Inc. (MSC) appeals from a district-court order striking its motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment against it. Because the notice of appeal was untimely and timeliness is jurisdictional, we dismiss the appeal.

We begin by summarizing the rules that govern the timeliness of this appeal. Federal Rule of Appellate Procedure 4(a)(1)(A) states the general rule that the notice of appeal "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." *Cf.* Fed. R. App. P. 4(a)(1)(B) (setting 60-day limit "[w]hen the United States or its officer or agency is a party"). Federal Rule of Civil Procedure 58 sets forth how a judgment or order is to be entered. Under Rule 58(a)(1) ordinarily a "judgment [or] amended judgment must be set forth on a separate document." (Federal Rule of Civil Procedure 54(a) defines *judgment* as "any order from which an appeal lies.") But there are exceptions to the separate-document requirement; a separate document is not required for orders disposing of motions under Rules 50(b), 52(b), 54, 59, and 60. *See* Fed. R. Civ. P. 58(a)(1)(A), (B), (C), (D), (E). Entry is straightforward when a separate document is not required; in that circumstance, the order is "entered" when it is "entered in the civil docket under Rule 79(a)." *Id.* Rule 58(b)(1). But if a separate document is required, the judgment is entered only "when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs: (A) when it is set forth on a separate document, or (B)

when 150 days have run from entry in the civil docket under Rule 79(a)." *Id*. Rule 58(b)(2). We now apply these provisions to the case before us.[1]

MSC filed a 115-page complaint against the defendants alleging 16 causes of action ranging from violation of the Sherman Act to prima facie tort. On March 7, 2006, the district court entered an order that, among other things, dismissed the case and imposed sanctions on MSC. The order resolved all issues between the parties. It was therefore a final judgment, *see id*. Rule 54(b), and appealable, *see Rekstad v. First Bank Sys., Inc.*, 238 F.3d 1259, 1261 (10th Cir. 2001). But the district court did not prepare a separate document setting forth the judgment; so, for purposes of the rules, judgment was not entered until 150 days later, on August 4, 2006. *See* Fed. R. Civ. P. 58(b)(2).

On March 14, 2006, Samuel K. Lipari, MSC's chief executive officer, filed an entry of appearance and the motion at issue on this appeal, a motion for reconsideration of the March 7, 2006, order. Mr. Lipari is not an attorney. His entry of appearance informed the court that he had dissolved MSC, had fired its attorney, and was now going to represent himself. Three days later, MSC's attorney filed a motion for leave to withdraw. On March 27 Mr. Lipari filed a motion for leave to rewrite and amend MSC's complaint if the court were to grant his motion to reconsider. On March 30 he filed a motion to strike a number of

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[1] Effective December 1, 2007, Rule 58 will be restyled, so that Rule 58(a)(1) becomes Rule 58(a) and its subparagraphs (A), (B), (C), (D), and (E) become paragraphs (1), (2), (3), (4), and (5) of Rule 58(a).

filings by various defendants on the ground that they had not been properly served upon him as a pro se litigant. Finally, on July 24, 2006, Mr. Lipari filed in district court a motion to have the case transferred back to the federal district court for the Western District of Missouri, where it had originated.

On August 7, 2006, the district court issued a Memorandum and Order (the M&O) striking the motions filed by Mr. Lipari and denying the motion to withdraw filed by MSC's attorney. The district court ruled that despite MSC's dissolution, it continued to exist for purposes of the litigation and that Mr. Lipari, as a nonattorney, could not represent it and file motions on its behalf. On September 8, 2006, MSC's attorney filed a notice of appeal on behalf of Mr. Lipari and MSC.

Although the notice of appeal could be read to encompass several rulings by the district court, MSC's appellate briefs make clear that the only ruling it challenges is the rejection of the motion to reconsider. Therefore, we need address only the timeliness of the notice of appeal with respect to that order. As MSC appears to concede, the motion to reconsider was a motion under either Federal Rule of Civil Procedure 59, Rule 60, or both. *See Jennings v. Rivers*, 394 F.3d 850, 855 & n.4 (10th Cir. 2005). An order denying such a motion need not be set forth on a separate document in order to be considered "entered" under the rules. *See* Fed. R. Civ. P. 58(a)(1)(D), (E). Thus, entry of the M&O in the district court's docket on August 7 commenced the 30-day period for filing the

notice of appeal. Because the notice of appeal was not filed until September 8—32 days later—it was untimely.

We are not persuaded that any circumstance present in this case delayed the commencement of the 30-day period beyond August 7. One possibility is that an appeal of a motion to reconsider a final judgment, as in this case, is not ripe until the final judgment has been entered. As it turns out, however, the final judgment was entered (in accordance with the 150-day provision of Federal Rule of Civil Procedure 58(b)(2)) on August 4, 2006, three days before the M&O was entered in the court's docket. As a result, we have no reason to decide whether entry of the final judgment was required for ripeness; even if it were required, that requirement was satisfied here.

Another possibility, the one pressed by MSC, is that despite the exception to the separate-document requirement for orders disposing of motions to reconsider, that exception does not apply in the special circumstances of this case. Of course, if a separate document were required by Rule 58(b)(2), then the absence of such a document would mean that the appealed order was not entered until 150 days after August 7, *see* Fed. R. Civ. P. 58(b)(2), and the notice of appeal would have been far from late. MSC presents two arguments why the exception does not apply. We reject both.

First, MSC contends that the exception to the separate-document rule does not apply because the court did not decide the merits of the motion to reconsider,

but rather "struck" it. The exception, however, depends only on whether the order "dispos[es] of" a Rule 59 (or Rule 60) motion, *id*. Rule 58(a)(1); and striking a motion certainly disposes of it.

Second, MSC contends that the exception for orders denying motions under Rule 59 or 60 does not apply in this case, because the denial order was part of an M&O that also disposed of additional motions. We disagree. To be sure, to the extent that the M&O contains a judgment disposing of a nonexcepted motion, a separate document should be filed disposing of that motion. But each order in the M&O should be considered separately for compliance with the separate-document requirement. Rule 58(a) does not say that an order disposing of an excepted motion must be set forth in a separate document if it is disposed of in the same legal paper as an order disposing of a nonexcepted motion. It is unnecessary for all the orders in the M&O to be "entered" at the same time. The purpose of the separate-document rule is to clarify for all concerned that the time for appeal and for postverdict motions has begun. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978); Fed. R. Civ. P. 58 advisory committee's note to 1963 Amendment. The exceptions to the separate-document rule reflect the view that such clarification is not necessary for orders disposing of certain motions, including motions under Rule 59 or 60. The parties are unlikely to be confused about when a district court has finally disposed of a motion to reconsider, whether the court disposes of the motion by itself or disposes of it in a memorandum that

also resolves other motions. Accordingly, entry on the district court's civil docket of the M&O, which contained the order denying MSC's motion for reconsideration, was sufficient for entry of that order.

Finally, we reject the possibility that the appeal from denial of the motion to reconsider might be timely if the time had not yet expired for appeal of another order in the M&O (if, say, entry of the other order required a separate document). We recognize that we have said that "a notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment." *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002). Thus, if the order denying the motion to reconsider "merged in" another order in the M&O, and that order was not "entered" at the time that the M&O was entered in the district court's docket, perhaps there would be additional time to appeal the order denying the motion to reconsider. In this case, however, the striking of the motion to reconsider was hardly merged in the order denying the motion to withdraw as counsel or any of the other orders in the August 7 M&O. Striking the motion was not an interlocutory order "leading up to" one of the other orders. *Id*. (internal quotation marks omitted). Therefore, we need not consider whether a separate document was required for any other order in the M&O.

Because a timely notice of appeal in a civil case is a jurisdictional prerequisite to our review, *see Alva v. Teen Help*, 469 F.3d 946, 952-53 (10th Cir. 2006), we GRANT the defendants' motion to DISMISS the appeal.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

December 10, 2007

Ingrid (KSkc) Campbell
United States District Court for the District of Kansas
Office of the Clerk
500 State Avenue
Robert J. Dole U.S. Courthouse
Room 259
Kansas City, KS 66101-0000

RE: 06-3331, Medical Supply Chain v. Neoforma, Inc., et al
Dist/Ag docket: 05-CV-2299-CM

Dear Clerk:

Please be advised that the mandate for this case has issued today. Please file accordingly in the records of your court or agency.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Andrew M. DeMarea
Sophie N. Froelich
Jonathan H. Gregor
Kathleen A. Hardee
Ira Dennis Hawver
Robert A. Henderson
Janice Vaughn Mock
Mark A. Olthoff

John K. Power
William E. Quirk
Stephen N. Roberts
Kathleen Bone Spangler

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.	)	
SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cv-02299-CM-GLR
	)	
NOVATION LLC, et al,	)	
	)	
Defendants.	)	

Motion For Leave To Withdraw as Counsel

The undersigned attorney, Dennis Hawver, respectfully requests leave of the court to withdraw as counsel for the plaintiffs Medical Supply Chain, Inc. and Samuel K. Lipari in the above-captioned matter in accordance with D. Kan. Rule 83.5.5. The plaintiff has directed counsel to withdraw for the following reasons:

1. Samuel K. Lipari is the successor in interest to the dissolved Missouri corporation Medical Supply Chain, Inc.

2. New conduct by the defendants against Samuel K. Lipari in Missouri necessitates amending the current action.

3. The plaintiff believes the sanctions ordered against Medical Supply Chain, Inc. are in error.

4. The plaintiff believes that to represent the substantial public interest in vindicating federal law against the defendants monopolizing the market for hospital supplies in the United States in violation of the Sherman Act that he will be required to reopen issues in this action.

5. This court has threatened the plaintiff in its order granting dismissal with further injury if the plaintiff seeks to continue this action for any reason.

6. The undersigned attorney is not a government attorney and can only provide representation where a possibility of compensation and an absence of risk exists. It is the undersigned's informed view that a government case might be the only vehicle to enforce the public policy against the actions that have injured the plaintiff.

7. Attached is a proposed order granting withdraw of counsel (exhibit 1) and a signed acknowledgement of service to the plaintiff of this motion to withdraw (exhibit 2).

Wherefore the undersigned attorney respectfully requests that the court grant the proposed order ending his representation of the plaintiff in this matter before the court as Case No. 05-cv-02299-CM-GLR and is instructed to seek leave of the court to withdraw from representing the plaintiff in the related case *Lipari v. US Bank, et al* Case No. 2:07-cv-02146-CM.

Respectfully submitted,

/s/ Dennis Hawver

Ira Dennis Hawver 8337
6993 Highway 92
Ozawkie, Kansas 66070
Telephone (785) 876 2233
Fax (785) 876 3038
hawverlaw@embarqmail.com
Attorney for plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via electronic case filing, on this 27th day of December, 2007 to:

John K. Power
John.Power@Husch.com
Stephen N. Roberts
SRoberts@Nossaman.com
Janice Vaughn Mock
JVaughnMock@Nossaman.com
HUSCH & EPPENBERGER, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
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Attorneys for Appellees Novation, LLC,
Volunteer Hospital Association, Curt
Nonomaque, University Healthsystem
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SHUGHART THOMSON & KILROY, PC
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(816) 421-3355
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Attorneys for Appellees US Bancorp,
U.S. Bank National Association and
Piper Jaffray Companies, Shughart Thomson & Kilroy, P.C.

Via email to:

SAMUEL K. LIPARI,
297 NE Bayview,
Lee's Summit, MO 64064
(816) 365-1306
saml@medicalsupplychain.com

PLAINTIFF

/s/ Dennis Hawver
Ira Dennis Hawver 8337
Attorney for plaintiff

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC. SAMUEL K. LIPARI,	)	
Plaintiff,	)	
v.	)	Case No. 05-cv-02299-CM-GLR
NOVATION LLC, et al,	)	
Defendants.	)	

Order Granting Leave To Withdraw as Counsel

The court hereby grants the plaintiff's attorney Dennis Hawver, leave to withdraw his appearance on behalf of the plaintiff in the above-captioned matter in accordance with D. Kan. Rule 83.5.5.

_____
Hon. CARLOS MURGUIA
United States District Judge

ACKNOWLEDGEMENT OF SERVICE

I hereby certify that a copy of Dennis Hawver's Withdraw of Counsel was received by me via email, on this 27th day of December, 2007.

Dated 12-27-07

SAMUEL K. LIPARI,
297 NE Bayview,
Lee's Summit, MO 64064
(816) 365-1306
saml@medicalsupplychain.com

PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,
et al.,

Plaintiffs,

v. Case No. 05-cv-2299-CM-GLR

NOVATION, LLC,
et al.,

Defendants.

ORDER

This matter comes before the Court on the Motion for Leave to Withdraw as Counsel (doc. 119) filed by Dennis Hawver, counsel for Plaintiffs. Mr. Hawver requests leave to withdraw from representing plaintiffs Medical Supply Chain, Inc. ("Medical Supply") and Samuel K. Lipari in the above-captioned matter in accordance with D. Kan. Rule 83.5.5.

District of Kansas Rule 83.5.5 provides several specific requirements an attorney must comply with when seeking to withdraw as attorney of record in the case. It provides, in pertinent part:

> An attorney seeking to withdraw must file and serve a motion to withdraw on all counsel of record, and provide a proposed order for the court. In addition, the motion must be served either personally or by certified mail, restricted delivery, with return receipt requested on the withdrawing attorney's client. Proof of personal service or the certified mail receipt, signed by the client, or a showing satisfactory to the court that the signature of the client could not be obtained, shall be filed with the clerk.[1]

In support of his motion to withdraw, Mr. Hawver has attached a Notice of Responsibility of Client,

[1]D. Kan. Rule 83.5.5.

which advises his clients that they are responsible for complying with all orders of the court and time limitations established by the rules of procedure or by court order and that the court has not scheduled a hearing or conference at this time. The Notice of Responsibility includes a section entitled "Acknowledgement of Service" that is signed by Samuel K. Lipari. There is, however, no indication that Mr. Lipari is signing on behalf of, or as a representative of, Plaintiff Medical Supply. The Court will therefore sustain in part and overrule in part Mr. Hawver's Motion for Leave to Withdraw. Attorney Dennis Hawver is hereby withdrawn as counsel for Plaintiff Samuel Lipari. The motion is otherwise overruled without prejudice to refiling further motion for leave to withdraw as to Plaintiff Medical Supply.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 29th day of January, 2008.

s/ Gerald L. Rushfelt
Gerald L. Rushfelt
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
(Through assignee Samuel K. Lipari)	)
Plaintiff,	)
v.	) Case No. 05-2299
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 CECERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY, P.C.	)
Defendants.	)

Corrected Motion For Withdraw of Medical Supply Chain, Inc. Counsel

Comes now the undersigned attorney, Dennis Hawver previously appearing for Medical Supply Chain, Inc. and supplements his motion to withdraw his appearance on behalf of the plaintiff in the above-captioned matter in accordance with D. Kan. Rule 83.5.5 with a signed acknowledgment for Medical Supply Chain, Inc. Samuel K. Lipari, assignee of all rights for the dissolved Missouri corporation Medical Supply Chain, Inc. has signed the acknowledgment of responsibilities on behalf of the plaintiff.

Respectfully submitted,

/s/ Dennis Hawver
Ira Dennis Hawver 8337
6993 Highway 92
Ozawkie, Kansas 66070
Telephone (785) 876 2233
Fax (785) 876 3038
hawverlaw@embarqmail.com
Attorney for plaintiff

Notice of Responsibility of Client

Samuel K. Lipari agrees as the assignee of rights for the dissolved Medical Supply Chain, Inc. and on behalf of Medical Supply Chain, Inc.'s assigned rights that he is responsible for complying with all orders of the court and time limitations established by the rules of procedure or by court order. Samuel Lipari further is informed that the court has not scheduled a hearing or conference at this time.

Samuel K. Lipari
On behalf of plaintiff
Medical Supply Chain, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via electronic case filing, on this 13th day of February, 2008 to:

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ATTORNEYS FOR DEFENDANTS

SAMUEL K. LIPARI, (via email)
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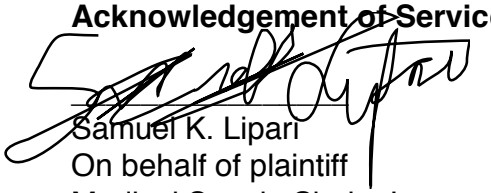
Lee's Summit, MO 64064
(816) 365-1306
saml@medicalsupplychain.com

PLAINTIFF

Acknowledgement of Service



Samuel K. Lipari
On behalf of plaintiff
Medical Supply Chain, Inc.

/s/ Dennis Hawver
Ira Dennis Hawver 8337
Attorney for plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
(Through assignee Samuel K. Lipari)	)
Plaintiff,	)
v.	) Case No. 05-2299
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 CECERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY, P.C.	)
Defendants.	)

Proposed Order

The withdraw of Dennis Hawver from the representation of Medical Supply Chain, Inc. is hereby granted.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this ____day of _____, 2008.

_____
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
(Through assignee Samuel K. Lipari)	)
SAMUEL K. LIPARI	)
Plaintiff,	)
v.	) Case No. 05-2299
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. GRUNDHOFER	)
ANDREW CECERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY, P.C.	)
Defendants.	)

RULE 60(B) MOTION

Comes now the plaintiff Samuel K. Lipari in his individual capacity and as an assignee of all rights of Medical Supply Chain, Inc. a dissolved Missouri corporation and respectfully submits this motion to reopen the present action under F.R.Civ. P. Rule 60(b). The plaintiff respectfully requests that this case be reopened for the following reasons:

Statement of Facts

1. The US Supreme Court over ruled this court's controlling circuit's sufficiency of pleading standard shortly after the present memorandum and order were issued *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007).

2. This court overruled its determination of the plaintiff Samuel K. Lipari's standing as an assignee of the dissolved Medical Supply Chain, Inc. appearing *pro se* in the same matter which continues under the styled *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW.

3. This court did not consider the timely motion for reconsideration brought by Samuel K. Lipari bringing attention to elements of each claim that the complaint sufficiently stated due to the now overruled determination Samuel K. Lipari did not have standing to appear *pro se*.

4. The elements of each claim and their place in the complaint are also identified in the plaintiff's appeal brief at pgs. 18-32. See Appeal Brief excerpt Statement of Facts incorporated herein as **Exb. 1**

5. The Tenth Circuit Court of Appeals declined to exercise jurisdiction over the plaintiff's appeal due to untimeliness.

6. The Memorandum & Order of this court expressly states the bias this court has against this plaintiff and his representatives for vindicating the policies of the US Congress and seeking relief from the Novation LLC hospital supply cartel.

7. The court through its order threatens to injure the plaintiff and his representation if he seeks to exercise his rights in this matter which has deprived the plaintiff of meaningful representation.

8. The court's bias against the plaintiff clearly results from the court's disbelief that the conduct complained of by the plaintiff occurred.

9. The New York Times on November 18, 2007 printed a feature story of a Novation manager who witnessed all the forms of conduct of the cartel alleged in the plaintiff's complaint. See **Exb 2.**

10. The plaintiff's Missouri state law antitrust claims will be filed in Independence, Missouri unnecessarily duplicating the present litigation if the present federal claims are not reopened.

Memorandum of Law

Rule 60(b)(6) of the Federal Rules of Civil Procedure permits a court to relieve a party from final judgment as justice demands, but such relief is limited to "extraordinary situations." See *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1533 (10th Cir. 1992). An intervening change in controlling law can provide the basis of an exception to the mandate rule. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1520 (10th Cir. 1997).

Here, the court of appeals declined to exercise jurisdiction over the appeal so the issues determined by the trial court have not been reviewed. Also this matter still is in the pretrial phase and styled as *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW. The mandate is not a bar to reopening the trial court's decision: ("the 'mandate rule,' provides that a district court must comply strictly with the mandate rendered by the reviewing court.") (quotations omitted), cert. denied, 118 S.Ct. 1034 (1998) specifically where the mandate applied to a matter *sub judice*. *Ute Indian Tribe*, 114 F.3d at 1521.

This action has never ended for *sub judice* purposes because the underlying state court claims over the same conduct have not been tried. For purposes of determining the finality of an order, it must dispose of all claims. (Ordinarily, a judgment is not final unless it disposes of all claims against all parties) *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 (Fed. 1st Cir., 2005).

The Supreme Court case most often cited for preclusion effect of a prior 12(b)(6) dismissal was a dismissal in entirety:

> "2. The Rule 12(b)(6) dismissal that was the source of the Supreme Court's oft-cited footnote in Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), stating that "[t]he dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a `judgment on the merits,'" id. at 399 n. 3, 101 S.Ct. 2424, was likewise a dismissal of "all of the actions `in their entirety,'" id. at 396, 101 S.Ct. 2424."
>
> *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at fn 2 (Fed. 1st Cir., 2005).

By dismissing Medical Supply's state claims without prejudice, a determination not opposed or appealed at the time by the defendants, the trial court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the Memorandum & Order granting dismissal was a mere interim order. *Id.*

The disbelief articulated by the court in its decision toward the plaintiff and his claims contradicts the publicly available securities filings on the sale of Neoforma, Inc, the repeated New York Time's articles on the national market power over hospital supplies exerted by Novation LLC and the entire monopolization of hospital supplies distributed through an electronic marketplace when during the litigation, Neoforma, Inc. was combined with General Electric's GHX, LLC. See **Exb. 3**

The disbelief articulated by the court also contradicts the testimony of Ms. Elizabeth A. Weatherman, managing director of Warburg Pincus LLC before the US Senate Judiciary Committee's Sub-committee on Antitrust (See **Exb. 4**) over the effect of Novation LLC's anticompetitive conduct in preventing healthcare technology companies from receiving venture capital, confirming the averments of the plaintiff's complaint.

The Tenth Circuit itself was overruled for imposing an impermissible heightened standard of pleading and for not treating the plaintiff's averments as truthful in the pre-discovery phase:

> "Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need

only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U. S. ___, ___ (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U. S. 41, 47 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, supra, at ___ (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); *Neitzke v. Williams*, 490 U. S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974)).

Erickson v. Pardus, No. 06-7317 (U.S. 6/4/2007) (2007).

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests that the court reopen its Memorandum and Order dismissing the plaintiff's claims, granting sanctions and reinstate the plaintiff's claims.

Respectfully Submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

I certify I have sent a copy via electronic case filing to the undersigned opposing counsel and via email on 2/13/08.

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BRIEF OF THE APPELLANT

STATEMENT OF THE CASE

Medical Supply, having lost a prospective injunctive relief action against a subset of alleged hospital supply co-conspirators brought the present action for damages against the same and additional co-conspirators resulting from their subsequent conduct, including conduct to interfere with Medical Supply's litigation.

STATEMENT OF FACTS

Medical Supply's complaint begins with a three-page outline that states the specific numbered sections where averments of facts supporting the required elements of Medical Supply's claims are stated.

At ¶¶107-108 aplt. app. at pgs. 36-39 Medical Supply states the controlling case law giving legal jurisdiction for Medical Supply's current action for damages after earlier failing to obtain prospective relief.

Medical Supply's current action does not seek to undo orders made in *Medical Supply I.*

No final judgment on Medical Supply's claims was entered in *Medical*

Exb

Supply I, the earlier action for prospective relief. Pg. 1952.

The trial court in *Medical Supply I* expressly dismissed supplemental Medical Supply claims related to contract and theft of trade secrets without prejudice and those claims were brought in Missouri state court by Samuel Lipari pro se and were subsequently removed by the defendants to Western District of Missouri, the court where they were previously filed as part of the current claim or controversy. Aplt. App. at 2432.

Lipari is seeking remand based on the argument removal was improper. Aplt. App. at 2511.

The trial court dismissed Medical Supply's current federal claims for failing to sufficiently plead the elements. No discovery has been granted in this or the preceding actions.

The following is an incomplete set of averments from the complaint (Aplt. App. at 36-151) that are listed relative to the subheadings identified by controlling precedent as the elements for sufficiently pleading the underlined claims:

Sherman Act § 1:

(1) a contract, combination, or conspiracy among two or more indep. actors;

Medical Supply's complaint alleges with detailed facts the formation of a cartel in the combination of the former competitors Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association and University Healthsystem Consortium for the purpose of creating Exclusionary Contracts and Loyalty Agreements to restrain trade in ¶¶178-220 pgs. 86-95.

(2) that unreasonably restrains trade;

In ¶¶ 255 –309 pgs. 86-109 Medical Supply's complaint describes the defendants' concerted refusal to deal in denying the agreed escrow accounts Medical Supply and the Independence, Missouri US Bank branch had planned to capitalize Medical Supply's entry into the hospital supply market (alleged to be group boycott a *per se* unreasonable restraint of trade).

In ¶¶ 337-369 pgs. 98-107 Medical Supply's complaint describes the defendants' concerted refusal to deal in concerted effort with the non defendant alleged co-conspirators GE And GHX, LLC to act 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 (alleged to be group boycott a *per se* unreasonable restraint of trade).

In ¶¶ 203-210, pgs. 74-76 ¶¶ 386-396 pgs. 112-113 Medical Supply's complaint describes the defendants' product tying arrangements (alleged illegal product tying arrangements a *per se* unreasonable restraint of trade).

In ¶¶ 419-422 pgs. 118-119 Medical Supply's complaint describes the defendants' plans to merge the direct competitors Neoforma with GHX LLC to monopolize all of the product market for hospital supplies delivered though electronic supply chain systems in the nation (alleged to be combination to restrain trade horizontally a *per se* unreasonable restraint of trade).

(3) is in, or substantially affects, interstate commerce

Medical Supply's complaint alleges a substantial harm to consumers, hospitals, nursing homes, state governments, national health insurance plans and thousands of lost lives from decreased access to healthcare resulting from artificially inflated prices, ¶¶59-89 pgs. 46-51.

Sherman Act § 2: Monopolization

(1) the possession of monopoly power

Medical Supply Chain's complaint at ¶¶ 380, 438 pgs. 111, 122 alleged power over a controlling market share of hospital supplies, ¶ 455 pg. 127 power through long term exclusive dealing contracts to maintain higher prices.

Medical Supply Chain's complaint at ¶¶ 36, 50, 502 alleged power to dominate early stage capitalization.

Medical Supply Chain's complaint at ¶¶ 420, 467, 502 alleged power over 80% of hospital supplies through supply chain systems by merging Neoforma with GHX LLC.

a. ability to control prices

Medical Supply Chain's complaint at ¶¶ 122, 208, 216 alleged power to extract kickbacks.

Medical Supply Chain's complaint at ¶¶ 116, 120, 129, 137, 139, 149, 152, 161, 221, 365, 380, 438, 455 alleged power to maintain higher prices.

b. exclude competition

Medical Supply Chain's complaint at ¶¶ 56, 148, 181, 208 386, 387, 434 alleged power to exclude competition.

Medical Supply Chain's complaint at ¶207 alleged power to force tying arrangements .

(2) in the relevant market

Medical Supply Chain's complaint under heading # 2 "The Relative Markets" at pg. 41 identified two relevant product markets and the upstream capitalization services market:

i. relevant products

Medical Supply's complaint alleges the first relevant product market in ¶¶ 33-36 pg. 24 as goods in the 1.8 trillion dollar hospital supply market.

Medical Supply's complaint alleges the second relevant product market in ¶¶ 37-41 pg. 24 as hospital supply products distributed through artificial intelligence enhanced supply chain systems utilizing the internet.

Medical Supply's complaint alleges the third relevant product market in ¶¶ 42-46 pg. 43 as capitalization services for new technology companies seeking to finance entry into the hospital supply market.

ii. geographic markets

Medical Supply's complaint alleges all three relevant product markets to be national; sub heading a and ¶¶ 33, 36 on pg. 42 for the first relevant market of hospital supplies and sub headings b, c and ¶¶ 46 on pg. 43 for the second and

third relevant markets of hospital supplies through electronic supply chain management systems and new healthcare technology companies respectively.

(2) the willful acquisition or maintenance of that power

Medical Supply alleges ongoing conduct to acquire and maintain monopoly power through anticompetitive practices by the defendants nationwide in the three identified relevant product markets in ¶¶ 47-56 pgs. 43-45 through a scheme to falsely state price savings to member hospitals annually to conceal increased costs from kickbacks that originated October 24,1979 and continues to the present ¶¶ 109-133 pgs.55-60; through a marketing scheme by the named defendants using commercial bribes through remunerations to healthcare systems under contracts in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b ¶¶ 134-145; through combination and conspiracies among the defendants to exclude competitors from the market for hospital supplies and the market for hospital supplies through electronic supply chain systems; through using the data obtained to enforce the cartel's increased prices among suppliers allowed in to the cartel's distribution network ¶¶ 146-151; through syndicates to make markets in initial offerings to capitalize healthcare technology companies, control which firms would be allowed into the distribution network and consequently be attractive to stock investors, to extort equity from new firms entering the hospital supply market and to force the management of Neoforma to compromise the interests of its investors, violate its prospectus and not to compete with Novation, VHA and

UHC ¶¶ 151-161 pgs.45-47; and illegal tying arrangements ¶¶ 203-210, ¶¶ 386-396.

Sherman 2 Unilateral refusal to deal ¶¶ 492-495;

Sherman Act § 2: Conspiracy to Monopolize

(1) a combination or conspiracy to monopolize;

Medical Supply alleged specific agreements in paragraphs ¶¶ 178-218 to combine forces between competitors in a conspiracy to monopolize hospital supplies, hospital supplies delivered through electronic supply chain systems and the upstream capitalization of new technology suppliers entering the market for hospital supplies.

(2) overt acts done in furtherance of the combination or conspiracy;

Medical Supply alleged specific acts in paragraphs ¶¶ 455-465 to further the conspiracy or combination.

(3) an effect upon an appreciable amount of interstate commerce;

Medical Supply alleged a staggering effect on interstate commerce from the monopolization in paragraphs ¶¶ 47-94.

(4) a specific intent to monopolize

Medical Supply alleged a specific intent to monopolize in ¶¶ 419-422 describes the planned merger between Neoforma and GHX LLC to monopolize hospital supplies distributed through electronic supply chain systems.

Section 8 of the Clayton Act, 15 U.S.C. § 19

(1) one person serves as a director of two or more corporations;

Medical Supply alleged specific information about exchange of directors. Including the in ¶176 non defendant co-conspirator (defendant Novation subsidiary ¶378) Cardinal Health, Inc.'s Robert Zollars, and joined Neoforma, Inc as CEO (¶13). In ¶ 235 Medical Supply's complaint describes the defendants' placement of defendant VHA designees on two of the seven seats on the defendant Neoforma board of directors, ¶ 368 describes US Bancorp's interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC the Defendant Novation and Premier, ¶ 372 describes how the defendants through The Piper Jaffray Companies subsidiary Piper Jaffray Ventures 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, ¶ 424 describes how The Piper Jaffray Companies exchanged directors with Novation.

(2) the combined capital of any corporation exceeds $1 million;

Medical Supply's complaint at ¶ 55 states that two of the companies the complaint alleges defendants exchanged directors with Premier and Novation negotiated contracts worth more than $30 billion, ¶376 states Novation does $36 billion dollars in sales annually, ¶372 states that Piper Jaffray Ventures had $225 million dollars under management, ¶377 states that Neoforma has $10 billion in sales and receives $ 62 Million a year from Novation. Subheading 11 states

Neoforma is worth $150 Million dollars. Subheading 11 states Piper Jaffray is worth $750 Million dollars.

(3) each corporation is engaged in whole or in part in interstate commerce;

Medical Supply's complaint alleges the defendants engage in interstate commerce ¶¶ 33, 36 and sub headings b, c and ¶ 46 sub heading f , ¶ 376.

(4) the corporations compete with one another

Medical Supply's complaint describes the defendants' elimination of competition amongst each other after exchanging directors in ¶¶ 40, 147, 378, 150, 181, 191, 376, 378, 455, 457, 458, 464, 466, 500.

18 U.S.C. § 1962(c) (RICO)

(1) participated in the conduct

Medical Supply's complaint alleges at ¶¶430, 488, 507, 573, 574, that specifically named defendants participated in the operation and management of the hospital group purchasing enterprise to artificially inflate prices paid by Medicare, Medicaid and Champus. The complaint alleges that the defendants created agreements through unlawful acts and that Shughart Thomson & Kilroy later became part of that enterprise ¶512.

(2) of an enterprise

Medical Supply's complaint alleges at ¶¶151-152, 159-161 that US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff took over Neoforma, Inc. and ran it counter to Neoforma's business plan and prospectus and against the interests of its investors for the purposes of

furthering the RICO enterpise scheme to overcharge government and private insurers for hospital supply costs.

(3) through a pattern

Medical Supply's complaint alleges more than two predicate acts in furtherance of the Defendants' enterprise. Over 14 acts are listed *infra*:

(4) of racketeering activity:

i. 18 U.S.C. § 1962(c) Hobbs Act Prohibited Extortion

Medical Supply's complaint alleges theft of trade secrets at ¶¶297, 316-322 theft of trade secrets to obstruct Medical Supply's entry into the hospital supply market in violation Hobbs Act.

Medical Supply's complaint alleges extortion at ¶¶171, 180, 198, 210, 211, 213, 215, 219, 368, 369, 399-406, 414, 416-418, 479-482-485, 488, 490.

i. 18 U.S.C. § 1962(c) Commercial Bribery

Medical Supply's complaint alleges commercial bribes ¶¶ 141-143 (HRDI scheme)184, 210, 211.

In ¶143 Medical Supply's complaint alleges 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 through Healthcare Research and Development Institute ("HRDI")

ii. 18 U.S.C. § 1962(c) Fraud based Allegations subject to Rule 9

Medical Supply pled fraudulent RICO predicate acts describing who, what, where and when misrepresentations were made and how they materially deceived to further the enterprise and injure Medical Supply in ¶ 268 Fraudulent failure to reveal US Bancorp's ownership of the treasury fund selected for escrow accounts, despite fiduciary relationship; ¶¶275, 278 Fraud pretext of USA PATRIOT ACT; and ¶¶392-396 Novation's creation and use of a fraudulent Surgical Instrument savings calculator software program, ¶ 126 Novation's inflated system wide savings report for 2005.

In ¶ 152 the complaint identified US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff benefit from Piper Jaffray's false recommendations on Neoforma that 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.

Association in Fact Enterprise

(1) union or group of individuals associated in fact although not a legal entity

The group purchasing enterprise alleged was different than the defendants' corporate and subsidiary relationships and included the companies Novation LLC, Neoforma, Inc. VHA and UHC that had partial ownership in each other, but also included US Bancorp, US Bank and the Piper Jaffray companies which were independent legally of the first set of companies. Medical Supply also alleged the enterprise to include General Electric, HRDI and Shughart Thomson & Kilroy

which had no common ownership with the other entities. See ¶¶ 141-143, 151-153, and 365-369.

(2) some type of organizational structure

Medical Supply at ¶¶147-153 describes the organizational structure of the group purchasing enterprise. Each defendant's role in the group purchasing enterprise is described throughout the complaint.

(3) operation and control of the Enterprise

Medical Supply's complaint alleges at ¶¶580-581 that Shughart Thomson & Kilroy created the plan to retaliate against Medical Supply outside of the courtroom and implemented the plan, carrying out operations to assist in accomplishing the group purchasing enterprise's objectives.

18 U.S.C. § 1962(d) (RICO) Conspiracy:

(1) independent violation of subsections (a), (b), or (c)

Medical Supply's complaint alleges the above independent violations of 18 U.S.C. § 1962(c) theft of trade secrets at ¶¶297, 316-322 theft of trade secrets to obstruct Medical Supply's entry into the hospital supply market in violation Hobbs Act. Medical Supply's complaint alleges extortion at ¶¶171, 180, 198, 210, 211, 213, 215, 219, 368, 369, 399-406, 414, 416-418, 479-482-485, 488, 490. Medical Supply's complaint alleges commercial bribes ¶¶ 141-143 (HRDI scheme)184, 210, 211.

(2) conspiracy to violate

Medical Supply's complaint alleges conspiracy to violate RICO at ¶¶ 347, 370, 374, 398, 404-407, 428, 430, 487, 549.

(3) knowing participation

Medical Supply's complaint alleges knowing participation at ¶¶ 410, 425, 427, 430, 488, and 549.

(4) at the direction of defendant co-conspirators:

Medical Supply's complaint alleges conduct directed by coconspirators at ¶¶ 405, 413, and 488.

(5) specificity what the agreement was,

Medical Supply's complaint alleges specifically the agreement or scheme- the over arching plan to illegally inflate hospital supply costs to overcharge government and private health insurers was at ¶¶ 109-130, 430, 573.

(6) who entered into the agreement,

Medical Supply's complaint alleges what persons and entities entered into the agreement at ¶¶ 141-143, 151-153, 365-369, and at ¶¶ 410, 425, 427, 430, 488, and 549.

(7) the agreement commenced,

Medical Supply's complaint alleges at ¶ 573 that "The Defendants targeted Medical Supply's founder in 1995 and targeted Medical Supply upon its incorporation in 2000" and that the coconspirators renewed their agreement commencing at ¶ 430 "…in the period from December 14, 2004 to February 3rd, 2005."

(8) what actions were taken in furtherance of it

Medical Supply's complaint alleges actions in furtherance of the conspiracy at ¶¶ 413-418, 580-592.

Medical Supply's supplemental state law claims against GE from Medical Supply II were improperly removed from Missouri 16th Circuit State Court at Independence, Missouri to the Western District of Missouri court of Hon. Judge Fernando J. Gaitan, Jr. whose disclosure stated was on the board of St. Luke's Healthcare System, a Lee's Summit Missouri hospital that co-owns the defendant VHA and the defendant Novation. See pg. 2523.

Hon. Senator Mike DeWine, the chair of the US Senate Judiciary Committee's Antitrust Subcommittee hearing that during the fourth year of antitrust hearings on the defendant Novation's anticompetitive conduct in the hospital supply market concluded Novation's abuses could be better corrected with private antitrust litigation than with new legislation ¶95 on pg.52. Senator Mike DeWine lost his re-election on November 4, 2006. The senator from Missouri, Hon. Jim Talent also lost his seat in part because of the healthcare issue. See KC Star Buzz Blog Sept 29, 2006 CAMPAIGN AD BUZZ | McCaskill criticizes Talent on Medicaid.

On December 12, 2006 Hon. Judge Fernando J. Gaitan, Jr. remanded the action back to state court for lack of federal jurisdiction. A jury trial is scheduled for October 29th, 2007.

President George Bush who has observed that there is an absence of competition in healthcare (¶47 on pg.43) came to St. Luke's Health System in Lee's Summit, Missouri with Secretary of Health and Human Services Michael Leavitt, two days after the State of the Union speech to personally initiate the administration's plan to make healthcare affordable. Office of the President, January 25, 2007 press release.

Governor Matt Blunt described in the complaint ¶85 at pg. 50 as having to cut Missouri citizens from Medicaid because of hospital supply cost increases, made healthcare the central priority of his State of the State speech but on January 25th chose to speak about healthcare at other Missouri communities rather than appear with President George Bush in Lee's Summit. Office of the President, January 25, 2007 press release Comments of Secretary Leavitt.

On the same day, the New York Times reported that the Attorney General for the State of Connecticut, Richard Blumenthal reached a settlement with H.R.D.I. that Medical Supply identified as a co-conspirator but did not name as a defendant over the commercial bribes given to hospital administrators ¶¶ 141-143 pg. 61. H.R.D.I. agreed to end operations as a for profit company. "Group Settles Health Sales Conflict Case", NY Times Jan. 25, 2007

US Bancorp and US Bank NA removed the supplemental state claims in the present action to the Western District of Missouri court of Hon. Judge Fernando J. Gaitan, Jr.. Medical Supply filed a timely motion for remand alleging improper removal which is awaiting a decision. See pg. 2511.

SUMMARY OF ARGUMENTS

Medical Supply and Samuel Lipari argue that earlier litigation prior to the breach of the contracts with US Bank had no claim preclusion effect on the current claims for damages under clearly established Tenth Circuit applications of Restatement (Second), Judgments § 24 Transactional Analysis to pre-breach litigation. Medical Supply and Samuel Lipari also argue each required element of each count was pled and that Samuel Lipari had standing to seek reconsideration pro se as the assignee of a dissolved Missouri corporation.

I. Whether The Trial Court Erred By Failing To Apply Transactional Analysis And Lawlor To Determine If Medical Supply And Lipari's Claims Were Precluded By *Medical Supply I*.

Standard of Review. "We apply a de novo standard of review to questions of res judicata." *May v. Parker-Abbott Transfer and Storage, Inc.*, 899 F.2d 1007 (C.A.10 (Colo.), 1990).

At page 20 of the trial court Memorandum and Order pg. 1508, the trial court states Medical Supply's claims summarily as causes of action by statute number without examining the different transactions the claims are based on.

The clear error of the court is strikingly revealed in the court's concise recitation of ***causes of action*** the court had dismissed in the earlier *Medical Supply I* action simply because they are again ***causes of action*** in the present complaint. The court was mistaken over the third element of Claim Preclusion that while still using the language "cause of action" has been refined in the Tenth Circuit to reflect The Restatement (Second), Judgments § 24 and cannot be satisfied unless

The New York Times

November 18, 2007

Blowing The Whistle, Many Times

By MARY WILLIAMS WALSH

WHEN Cynthia Fitzgerald started out in pharmaceutical sales 20 years ago, she received ample training on the right and wrong ways to sell medical products. Right was selling on the merits. Wrong was luring customers with perks and freebies. It was O.K. to buy doctors lunch or dinner, for example, but tempting them with lavish gifts was taboo.

"There were pretty stringent rules back then," recalls Ms. Fitzgerald, now 50 and a grandmother living in Dallas. "It was really clinically driven."

But she says those early lessons didn't serve her so well when she went to work on the other side of the table in 1998, in health care purchasing. Going by the book, and expecting her colleagues and employer to do the same, cost her a job, most of her friendships and several years of her life, she says.

Eventually, Ms. Fitzgerald decided to file what could become one of the largest whistle-blower lawsuits on record. And her case, which names more than a dozen companies as defendants -- some with well-known names like Johnson & Johnson, Becton Dickinson and Merck -- offers a window onto a little-known world, where billions of dollars' worth of medical products are sold each year to institutional buyers like hospitals.

The suit, filed in 2003 in federal court in Dallas, and unsealed this year, argues that improper sales practices, together with erroneous accounting, are invisibly draining millions of dollars out of vital public programs like Medicare through overcharges or unauthorized uses. While whistle-blower cases typically involve, at most, a handful of companies, Ms. Fitzgerald's alleges systemic fraud across a whole network of companies and more than 7,000 health care institutions.

Her contentions are set against a complex backdrop: spiraling health care costs and debates about Medicare. State and federal authorities in Texas are investigating Ms. Fitzgerald's allegations, and any decision by them to join her case may give the suit momentum in the courts. But her corporate adversaries dispute her accusations.

"Cynthia Fitzgerald is rehashing old rumors and suspicions," said Jody Hatcher, senior vice president of Novation, the company in Irving, Tex., at the heart of her lawsuit. "These allegations have been examined in depth by a variety of different authorities, and no one has proven any of them to be true. The simple fact is that Ms. Fitzgerald's allegations are false."

For her part, Ms. Fitzgerald bristles at the idea that her lawsuit is without merit or, in response to common critiques of whistle-blower cases, about easy money. "I thought they were really nice people," she says. "I was so grateful and thankful to have a steady income again. I wouldn't have rocked the boat for any small thing to save my life."

So why did she rock the boat?

"It was wrong," she says of the behavior she asserts she has witnessed. "And I knew it was wrong."

NINE years ago, while still recovering from a financially ruinous divorce, Ms. Fitzgerald decided to move to Dallas from her native Omaha. She knew almost no one in her new city. She graduated from the University of Nebraska 13 years earlier with a communications degree, then worked in sales and marketing in the food, pharmaceutical and insurance industries.

When she moved to Texas, she says, "It was pretty bleak." She adds, "I went from having Thanksgiving dinners in a house with my family to living in an apartment that was so small that every time I turned around I ran into myself."

More than anything, she said, she wanted stability -- a steady job at a company where she could climb the ladder and work until she retired. After months of looking, she joined Novation. The company helped thousands of hospitals, rehabilitation centers, home health agencies and doctors' offices nationwide negotiate

prices for medieal supplies -- a wide range of items as diverse as saline solution and huge imaging machines.

Novation assigned her a portfolio of medical and surgical produets for whieh its member hospitals were spending an estimated $240 million a year: rubber gloves, surgieal tools and so forth. The company sent her to a training elass where, among other things, she says she learned once again about ethical purchasing procedures.

"I cannot overemphasize in the beginning how excited I was and really feeling blessed," she says. "I felt like I got a seeond ehanee. Even though it was on the other side of sales, it was still sales."

But as she settled in, she says, not everything in her new workplaee squared with what she had been told in training, a situation that eame to a head one day in 1998, when she was still just a few months into the job. According to her complaint, she and her boss met with a Johnson & Johnson sales team that was vying for an exclusive, three-year contract to sell $130 million worth of IV equipment to Novation's clients. It was a valuable contract, and Ms. Fitzgerald had the power to decide who would get it.

The bids were already in. Ms. Fitzgerald understood this to be a mandatory "silent period," when she was not supposed to meet privately with any of the bidding companies. All communications with vendors were supposed to be in writing, and if Ms. Fitzgerald disclosed any information to any bidder, she was required to tell them all.

In a deposition in a separate lawsuit filed against Novation by a medical supplier, a former Novation executive, John M. Burks, did not dispute that the Johnson & Johnson meeting took place. But he said that Ms. Fitzgerald misunderstood the rules, and that Novation permitted such meetings at that point. (When reached for comment, Mr. Burks said his views haven't changed since his deposition.)

Ms. Fitzgerald says she had a very different understanding of the meeting. Discussions behind closed doors, tipping off a company on how to structure a winning bid, naming her price -- this could be a felony, she recalls thinking :bid-rigging.

"How much will it take to get the contract?" she says one of the salesmen askcd her, according to her complaint. "Others before you have done it."

She says she chose not to do so. "Oh, no!" she recalls blurting out, bringing the meeting to a halt. "This is illegal, and I don't look good in orange."

A spokesman for Johnson & Johnson, Marc Monseau, said, "We vigorously deny the allegations and will defend ourselves against them in court."

Ms. Fitzgerald did not stop there. After the salesmen left, she says, she confronted her boss in the women's room. Shouldn't they report the incident to the legal department? Hadn't they just been told that someonc at Novation had taken a bribe?

Her boss offered no satisfaction, Ms. Fitzgerald says in her complaint. Concerned about the integrity of a bidding proeess shc was responsible for, she began pursuing the matter herself.

OVER the following weeks, she says, she scoured hcr portfolio for contracting anomalies. She told colleagues about what had happened; some confidcd that similar things had happened to them. Others left anonymous notes on her desk. She began to think that Johnson & Johnson should be excluded from the bidding as a penalty for what shc considered a serious ethical breach.

She says she took her concerns to Novation's legal department, human resources and even the company's president. In his deposition, Mr. Burks confirmed her activities, but called her "an employee who doesn't simply undcrstand that when a supplier asks an inappropriate question, you simply say no and move on."

Ms. Fitzgerald says she passed over Johnson & Johnson for the IV contract, awarding it instead to Becton Dickinson. She said Becton had a superior bid, which provided a number of opportunities for Novation and member hospitals to be rewarded with rebates and other payments.

Becton said it believes that Ms. Fitzgerald's accusations of improprieties in how contracts were awarded are baseless and that her complaint is "without merit."

She turned to the next contract, for trash bags -- and the same thing started to happen, according to her complaint. When Ms. Fitzgerald told representatives of one vendor, Heritage Bag, that she was planning to put that contract up for bid, shc says, onc representativc told her at dinner with several people that he would

"take care of" her. Heritage Bag did not respond to repeated requests for an interview.

Ms. Fitzgerald asked her supervisor if she could be taken off the trash-bag contract. Her supervisor agreed, but then gave her a negative performance review. It said that among other things, she was rude, unable to meet deadlines and kept trying to "overhaul" parts of Novation that were outside her job deseription, according to a copy of the review. Ms. Fitzgerald refused to sign it. Relations deteriorated, and 15 days later, shc was fired for "nonperformance of duties that were clearly identified as part of her job description," according to Mr. Burks's deposition.

Ms. Fitzgerald says she believes she was shown the door because she had stumbled onto illegal behavior involving hundreds of millions of dollars and had refused to look the other way.

"It's hilarious how stupid I was," she says. "I knew that it was wrong, but I thought that if I just went to the right people, they would correct it. I was very naïve. I didn't realize that it was systemic."

The False Claims Act is a fedcral law that allows private individuals to sue on behalf of thc United States if they believe that they have inside knowledge of a fraud. Their lawsuits stay under court seal at first, to give federal and state investigators time to look into the accusations quietly and to decide whether to join the case. If the govemment recovers money, the whistle-blower gets 15 to 30 percent of thc amount.

Though enacted to fight war profiteering, the False Claims Act has become a potent weapon in the battle against escalating health care costs. Of the 20 largest False Claims Act recoveries listed on the Web site of Taxpayers Against Fraud, a group that supports whistle-blowers and their lawyers, 19 involved health care companies. (The other involved municipal bonds.)

The size of recoveries has soared in recent years. All told, the govemment has rccovered more than $20 billion since 1986, when the False Claims Act was last amended, with $5 billion of it in the last two years.

The biggest single whistle-blower settlement to date was the $900 million that Tenet Hcalthcare, a hospital company, paid last year to settle accusations of overbilling the Medicare program. That settlement is dwarfed by the $1.7 billion that HCA, another big hospital chain, paid between 2000 and 2003 to settle a number of fraud suits.

Companies and their lawyers say the growing caseload is a sign that the False Claims Act, with its promise of a payout for whistle-blowers, is motivating disgruntled employees to file nuisance suits that can tie up law-abiding companies for years.

Proponents of the law say that $20 billion of recoveries is proof that contracting fraud is real, and that offering whistle-blowers a percentage is a good way to compensate them for the near-certainty that they will be fired.

"Protection for people who are willing to risk their lives and livelihoods, their carecrs and reputations, is critical," said Richard Blumenthal, the attorney general of Connecticut, in Senate hearings last year.

As Ms. Fitzgerald sees it, Mcdicare's losses grow out of the way that Novation and the vendor companies negotiate contracts.

When companies submitted bids to Novation, she recalled, they did not typically quote a simple price. Rather, they proposed package deals with opportunities for rebates, frequent-buycr discounts, "loyalty" rewards and baskets of products tied together. They might throw in free training for hospital staff, chances to participate in clinical trials, shares of stock, project sponsorships, sometimes even cash. The vendors also paid Novation for administering their contracts and for other services.

Ms. Fitzgerald says her compensation rewarded her for closing deals that maximized these payments -- not for simply finding the lowest bid. Vendors preferred to combinc higher upfront prices with rebates or other cash-back rewards, she says, because that obscured the net unit price of their products, making it harder for hospitals to comparison-shop.

But this also allowed millions of dollars to become "lost" in the system, shc says. Novation passed on many of the payments to hospitals, she says, but not in a way that hospitals could accurately report them to the govemment. Thus they ended up overstating their supply costs, she says, and getting largcr Medicare reimbursements than they werc cntitled to. The lawsuit does not contend that the hospitals did this deliberately, but that Novation knew it was happening.

A 2005 audit by Daniel R. Levinson, the inspector general of thc fedcral Department of Health and Human Services, appears to bear her out. After studying the finances of three unnamed purchasing consortiums in

response to repeated questions from Congress, federal agencies and the news media about their business practices, Mr. Levinson reported that their member hospitals "did not fully account" for such flows of money. In just five years, the discrepancies ran into the hundreds of millions of dollars.

Novation said that there was no evidence that any underreporting was intentional. It cited the complexity of how hospitals are required to report costs and said it believed that hospitals met all legal requirements in how they reported Novation's distributions to them.

In the past, a prosecutor's decision whether or not to join a whistle-blower lawsuit could be a make-or-break moment. If the government became involved, defendants often settled right away. The announcement usually coincided with the unsealing of the whistle-blower's complaint.

But now that the lawsuits have become so complex, and investigations so slow, judges have become impatient with sealed lawsuits moldering in their courts. Some are ordering the complaints unsealed before investigators finish examining the claims.

That is what happened in Ms. Fitzgerald's case. Last May, a federal judge in Dallas unsealed her suit, which had languished for four years. The assistant United States attorney for the Northern District of Texas , Sean R. MeKenna, and the Texas attorney general, Greg Abbott, notified the court that they were still investigating and would decide later whether to join the case.

THAT leaves Ms. Fitzgerald on her own for now. After Novation fired her, she was contractually forbidden from disclosing information about the company or filing lawsuits against it for three years, she says. Once that period lapsed, she gradually became aware she was eligible to file a suit under the False Claims Act. That led her to Phillips & Cohen, a law firm involved in whistle-blower cases.

Her firing, meanwhile, left her unable to get another job in her field; word of her demise at Novation seemed to precede her wherever she went. Former colleagues stopped speaking to her. "I was probably at one of the lowest points in my life," she says.

She eventually founded her own business, Dimension Medical Supply. But she regrets the contentious departure from Novation, a company that made her feel as if she "was coming home" when it hired her. Deciding to speak out about the company's dealings was difficult, she says.

"I warred with myself," she says. "There weren't any blacks in upper management. I knew that there were opportunities there, and I could rise to those opportunities."

She was tempted, she says, to follow the status quo at Novation. And a little voice in her head kept saying, "Why can't you just take the money and run? Buck up, girl, this is the system. You can take it and go places."

In the end, the place she decided to go was court.

Equity owners of GHX are Johnson & Johnson Health Care Systems Inc.; GE Healthcare; Baxter Healthcare Corp.; Medtronic USA, Inc.; Abbott Exchange, Inc.; Siemens; Becton, Dickinson & Co.; Boston Scientific Corp.; Tyco Healthcare Group, LP; Guidant Corp.; C.R. Bard, Inc.; AmerisourceBergen Corp.; Cardinal Health, Inc.; Fisher Scientific International, Inc.; McKesson Corp.; B Braun Medical Inc.; Premier, Inc.; HCA; VHA Inc. and University HealthSystem Consortium. For more information, visit www.ghx.com.

Posted on Monday, March 06, 2006
Posted by host

Return

Testimony of
Ms. Elizabeth A. Weatherman
Managing Director
Warburg Pincus, LLC

April 30, 2002

PRINTABLE VERSION

Good Morning. My name is Bess Weatherman and I am Vice Chair of the Medical Group of the National Venture Capital Association. I am here today on behalf of the more than 475 professional venture capital and private equity firms dedicated to stimulating the flow of equity capital to emerging growth and developing companies. Our members currently invest more than $36 billion per year in such companies and have invested nearly $210 billion in aggregate over the past 20 years, funding nearly all of the most important technological breakthroughs of that period. A substantial number of these firms invest heavily in the life sciences field that includes biotechnology, drug development, medical devices and therapeutics and health care services. In 2001, the venture capital community invested more than $4.2 billion, or more than 10% of all venture investing last year, in these medical industries.

Venture investment in the life sciences has given new hope to people who suffer maladies across virtually the entire spectrum of diseases and afflictions. In fact, without patient investment from venture capitalists, the biotechnology and medical technology industry, for example, would be virtually nonexistent. Almost every biotechnology product that has been approved for sale by the Food and Drug Administration has been financed by the venture capital community. The venture community also provided financing for many of the medical devices and therapeutics we take for granted today, including the entire interventional cardiology or stent industry. These now standard medical treatments allow patients to lead longer and healthier lives. The venture community's dedication to the medical technology industry exists despite heavy government regulation and the longer-term investing strategy required for successful development of new medical technology, even when compared to other emerging market investments.

Few can argue that what these companies do is critically important to the well being of the American public and the world at large. However, the results of the debate we are holding today on reforming group purchasing organizations to ensure a competitive and open market for all medical industry producers will directly affect the future of emerging life science companies and in turn impact the availability of the important medical products these companies are

Ext

developing.

Let me be clear, 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. Permitting this innovation stifling practice is unnecessary and counter to what we believe should be a fundamental role of the government: enhancing health by making new or improved products widely available as quickly and efficiently as possible.

THE ROLE OF VENTURE CAPITAL IN IMPROVING AMERICA'S HEALTH

Venture capital plays an integral, often-unsung role in the development of medical technology. In fact, venture capital is the single most important source of early stage financing to new and emerging health-focused companies. During the past 30 years, the venture community financed 1,324 innovative medical companies with more than $20 billion in start up capital. These companies now have sales of tens of billions of dollars, employ more than 2 million people and most importantly, have revolutionized medical care for nearly all Americans. It is fair to say that virtually every U.S. citizen born during the last thirty years has benefited or will benefit, in his or her lifetime, personally and significantly from one or more of the drugs or medical devices developed with U.S. venture capital. These include MR imaging, ultrasound, angioplasty / stents, implantable defibrillators, spinal implants, pulse oximetry and drugs for cancer, heart attacks, and anemia, to name a very few. It is also important to note that the real medical impact of venture investments is also significantly greater than even these numbers would suggest, since our investments are normally focused only on ground breaking or revolutionary technology by the very nature of our investment selection process. Many of these companies' names are now synonymous with progressive medical technology including Guidant, Amgen, and Genentech.

WHY MEDICAL DEVICE AND BIOTECHNOLOGY COMPANIES NEED VENTURE CAPITAL

Medical device and biotechnology companies need venture capital because their capital needs are so large, their time to market so long – due in large part to regulatory compliance—and their risks so high. There are enormous entrepreneurial risks in bringing medical products to market—risks that include proving product safety and efficacy, securing patent protection, securing a good distribution channel, facing entrenched competition, and possibly running out of money before the product can reach a significant portion of the market – to name just a few. Such characteristics make these young companies ineligible for bank financing or other sources of private capital.

It is important to note that venture capitalists will accept these legitimate risks

that traditional financial institutions and government supported programs cannot — it's part of our function. But, VCs do not, cannot, and will not accept unnecessary and unfair risks. We need to provide our investors with justification that substantial capital investment can result in successful product development and financial gain. Thus, we have no interest in products that can be blocked from fairly competing for a share of a market, even after a long, expensive and risky product development cycle. Simply put, venture capitalists will increasingly stay away from many investments in long-term, high-risk medical breakthroughs if the government continues to allow anticompetitive business practices to artificially limit access to medical market.

STANDARD BUSINESS PRATICES BY GROUP PURCHASING ORGANIZATIONS AFFECT VENTURE CAPITAL INVESTMENT EMERGING MEDICAL COMPANIES, AND PATIENT CARE

GPO roadblocks have greatly diminished the attractiveness of medical device and biotechnology investments because they reduce the confidence of venture capitalists that they will have fair access to medical markets and thereby will achieve a return on very risky investments. To put this in perspective, between 1990 and 1994 at least 22% of all companies financed by venture capitalists were medical device or biotechnology companies, with medical device companies accounting for approximately 9% and biotechnology companies accounting for 13% of the 22%. By comparison, during the period 1999 to 2001 these companies made up only 8.9% of all companies receiving venture capital financing. Of this 8.9%, device companies received 5.0% and biotechnology companies receive 3.9%.

These numbers dropped dramatically from 1999 – 2001 when 9.8%, 7.1% and 11% respectively of the companies funded were medical device or biotechnology companies. For these years, medical device companies dropped more, making up only 5.5%, 3.9% and 6.2% of the combined totals.

One of the reasons for this relative decline new investment is a lack of market access brought about by the business practices and the increasing power of GPOs. GPO practices such as contract exclusivity, substantial fee structures, and product bundling, if allowed to continue, will so constrict potential markets that product segments where these practices are widely adopted will simply not be considered for venture capital backing. This investment drain will result in a stagnation of product innovation and stymie improved patient care across these product sectors.

The arguments made by GPOs about the "administrative" savings they provide to members could be applied to every single sector of the economy and are virtually identical to the arguments made by the anticompetitive "trusts" of the early 1900s, which led to the landmark Sherman Antitrust laws. The idea that the GPOs "save" money for hospitals by extracting larger price discounts from producers than they could achieve by themselves, is unprovable and most likely wrong – unprovable because no one knows what the "real" market price would

be in a truly competitive market among producers (in the absence of GPO gatekeeping). In fact, in product areas where GPOs collude with producers who already have virtual monopolies, the "discounted" price that the GPOs claim to achieve is almost certainly well above what the market price would be in an open and competitive marketplace. The impact of the GPOs in healthcare is equally anticompetitive and stifling of innovation, and there is no special reason why the healthcare system should be the only sector of the economy where such practices are tolerated.

The venture capital industry exists, in part, because the antitrust philosophy of the United States prevents entrenched, unmoveable competitors from abusing their market power to unfairly restrain competition. By their very nature, virtually every company we finance is a "revolutionary" and a threat to the established order. The technological innovations they develop, whether in computers, electronics, software, telecommunications or medicine, are inevitably threats to some existing larger competitor who will use all means at its disposal to defend itself. It is hard enough to overcome that kind of power in an open and competitive market place. It is nearly impossible when monopolistic producers collude with monopsonistic buyers such as GPO to suppress competition. This is precisely what is now happening in healthcare.

As the GPOs become more powerful and add more technologically sophisticated products to their portfolios (instead of the more commodity-like products such as rubber gloves, syringes and cotton swabs that they originally focused on) the adverse impact on innovation will increase. There will be fewer and fewer areas in which venture capital will invest. The current trend is not encouraging.

The venture capital community believes that collusion between GPOs and providers of medical products to limit market access to competitors is extremely anticompetitive and not justified by any peculiarities of the medical sector. On the contrary, while the government would not tolerate such practices in any other sector of the economy, for it to tolerate (and even encourage) this situation in medicine is disturbing, because one of the clear effects of these practices is to impede innovation. In medicine, in contrast to any other sector, reduced innovation ultimately affects patients' lives and health. There is no doubt that patients' lives have been lost and other harm done as a result of GPO's activities. In light of this, the special exemptions from the normal operation of the antitrust laws granted to the GPOs should be viewed with even greater, not less skepticism.

Conclusion

The venture capital community believes that there are enormous opportunities to continue to improve the health of the American public through the development and application of new technology. These efforts are already very time consuming, expensive and risky, particularly given recent increases and uncertainties in the U.S. regulatory environment. Despite this, the venture

capital community is committed to further investment in U.S. healthcare technology. We welcome open and competitive marketplaces, and we believe that competition has served the American public well by stimulating fair prices and vast technological innovation. The increasing power of GPOs, and their collusive and anticompetitive activities with larger medical companies, threatens to undermine the open and competitive markets that have produced such obvious benefits for the American public, not only in healthcare, but also across the entire economy. We would strongly encourage the committee to consider legislation to correct these abuses and again open these markets to fair and vigorous competition. Thank you.

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PRINTABLE VERSION

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

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-2299-CM**
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

Medical Supply's claims in the captioned case ended nearly two years ago when this Court dismissed its Complaint. The Tenth Circuit then dismissed its appeal as untimely. There is no merit to Mr. Lipari's motion. Moreover, Samuel Lipari is not authorized to represent Medical Supply Chain, Inc. in this case and, thus, the motion must be denied.

A. Course of Proceedings

On October 22, 2002, Medical Supply Chain, Inc. ("Medical Supply") filed a Complaint in the United States District Court for the District of Kansas alleging numerous claims arising from the alleged refusal of U.S. Bank to provide certain escrow account services (*Medical Supply I*). Shortly thereafter, Medical Supply amended its Complaint and added claims for the violation of the Sherman and Clayton Acts, the Hobbs Act, the USA Patriot Act, and certain state law claims seeking injunctive and declaratory relief as well as hundreds of millions of dollars in alleged damages.

On June 16, 2003, this Court dismissed the Complaint. *Medical Supply Chain, Inc. v. US Bancorp. et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003). The Tenth Circuit Court of Appeals affirmed and ordered Medical Supply's counsel to show cause why he should not be sanctioned. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished) (Exhibit "A"). On December 30,

2004, this Court found that Medical Supply's counsel had filed a frivolous appeal and remanded the matter to the district court for a determination of the sanctions amount. (Exhibit "B").

While this Court was considering the sanctions issue in *Medical Supply I*, *see* 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed another action in the United States District Court for the Western District of Missouri (*Medical Supply II)*. The *Medical Supply II* Complaint reasserted most of Medical Supply's previously dismissed federal and state law claims. The Missouri federal court transferred this action to this Court. On March 7, 2006, this Court granted renewed motions to dismiss, denied the motion to substitute plaintiff as moot and issued sanctions jointly against Medical Supply and its former counsel. 419 F. Supp.2d 1316, 1335-36 (D. Kan. 2006). On November 16, 2007, the Tenth Circuit Court of Appeals dismissed the untimely appeal, 508 F.3d 572 (10th Cir. 2007), and the mandate thereafter issued.[1]

B. Samuel Lipari is not authorized to file the motion on behalf of the Plaintiff, Medical Supply Chain, Inc.

The Court should not permit Mr. Lipari to file pleadings on behalf of Medical Supply as he is not the plaintiff in the captioned case and has demonstrated no authority, legal or otherwise, to represent Medical Supply Chain, Inc. in this Court. *See* D. Kan. Rule 83.5.1; *In re Arnold*, 56 P.3d 259 (Kan. 2002); *Atchison Homeless Shelters, Inc. v. Atchison County*, 946 P.2d 113 (Kan. App. 1997). Absent a duly licensed attorney filing a pleading on behalf of the corporation Medical Supply Chain, Inc., the document should be stricken and the relief requested denied. This Court previously struck Lipari's pleadings in this case finding he could not represent the plaintiff. (Exhibit "C," p. 4, Order dated August 7, 2006.)

[1] Samuel Lipari, as the alleged assignee of Medical Supply's previously dismissed state law claims, has filed claims against U.S. Bancorp and U.S. Bank that were first filed in *Medical Supply I* or *Medical Supply II*. *Lipari v. U.S. Bancorp and U.S. Bank*, Case No. 2:07-CV-02146-CM.

C. The Motion Lacks Merit.

As Mr. Lipari's pleading recognizes, Fed. R. Civ. P. 60 (b)(6) exists only to provide relief in extraordinary circumstances.[2] None exist here. Medical Supply had full opportunity to litigate all of the issues raised from 2002-2006 and they were decided against the company. It would be an inconceivable waste of the Court's resources, a strike at the presumed finality of judgments (particularly after all appeals have run their course) to say nothing of the cost and expense to the parties, for Mr. Lipari's unsubstantiated claim of "injustice" to be given further consideration.

Although Mr. Lipari correctly states the standard under which Rule 60(b) motions are reviewed, *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1533 (10th Cir. 1992), the case does not support him. In particular, the Court held that a change in law or judicial view from an established rule of law – which Mr. Lipari argues occurred here – is not such an extraordinary circumstance to justify relief under Rule 60(b)(6). *Id.* at 1535; *see also Kustom Signals, Inc. v. Applied Concepts, Inc.*, 247 F. Supp.2d 1233, 1244 (D. Kan. 2003).

"Exceptional circumstances are not present every time a party is subjected to potentially unfavorable consequences as a result of an adverse judgment properly arrived at. . . . [Plaintiff] had a full and fair opportunity to litigate his claim. The district court properly found that he [was not entitled to relief]. Accordingly, [plaintiff] is not entitled to relief under Fed. R. Civ. P. 60(b)(6)." *Atkinson v. Prudential Property Co.*, 43 F.3d 367, 373-74 (8th Cir. 1994). *Colorado Interstate Gas Co.* is consistent with this statement of the law. None of the points raised in the motion rise to the level of extraordinary circumstances to justify vacating the judgment in this case.[3]

[2] Defendants note that Mr. Lipari has filed a virtually identical motion in *Medical Supply Chain, Inc. v. U.S. Bancorp, et al.*, Case No. 02-2539-CM, which is also opposed.

[3] Lipari begins his motion with a "Statement of Facts" section. However, the statements are argumentative and substantially without support.

First, Mr. Lipari asserts that "an impermissible heightened standard of pleading" was applied to Medical Supply's Complaint. It is clear that the Court did not apply such a standard in *Medical Supply I*, 2003 WL 21479192, because the United States Court of Appeals for the Tenth Circuit decided this issue and, in its December 30, 2004 Order, stated clearly that "[o]ur review shows that the district court did not apply a heightened pleading standard to the amended complaint." (Exhibit "B," p. 3.) In this case, the Court gave several reasons why dismissal was required including *res judicata*. 419 F. Supp. 2d 1316. Lipari is not entitled to further judicial consideration of the point.

Second, Lipari suggests additional "evidence" ought to be considered. However, Rule 60(b)(2) relief must be sought within one year of the judgment. Fed. R. Civ. P. 60(c)(1). Moreover, as the exhibits to Lipari's brief clearly show, the additional "facts" all relate to occurrences that took place prior to the dismissal of Medical Supply's case and there is no assertion that the evidence was unavailable.

Finally, Lipari makes the bold argument that this Court's prior dismissal is not a final judgment.[4] Mr. Lipari misunderstands federal procedure and the finality principle identified in *Colorado Interstate Gas Co.* The Court specifically entered judgment on the merits against the plaintiff on all federal claims while dismissing the state law claims without prejudice. The judgment was final with respect to the federal claims. Any argument that this captioned case is somehow continuing because the state law claims were dismissed without prejudice is plainly wrong. Lipari's reliance on *AVX Corp. v. Cabot Corp.*, 424 F.3d 28 (1st Cir. 2005) is misplaced. Unlike the Court's dismissal of the entire Complaint here, in *AVX* the court had dismissed only two counts (leaving

[4] Likewise, Lipari seems to argue that the Tenth Circuit Court of Appeals merely "declined to exercise jurisdiction over the appeal." The consequence of Medical Supply's failure to file a timely notice of appeal was the mortal blow to any further appellate review. Medical Supply (and Lipari) must accept that there is no action *sub judice* with respect to Case No. 05-2299-CM. Lipari also suggests the Court is biased and does not believe his allegations. Such a challenge has no legal or factual support.

others pending) and the parties subsequently filed a joint stipulation of dismissal without prejudice. There is no room for doubt that the Court's March 7, 2006 judgment is final.

Because of the motion's rancor, defendants are not about to leave it unopposed. Nevertheless, having to respond to this baseless pleading, in an action where no claims have pended for nearly two years, is a perversion of the judicial process. The Tenth Circuit Court of Appeals has made it clear that litigants who continue to file vexatious and abusive motions, the effect of which is to simply harass parties, will not be tolerated. Courts have gone so far as to bar persons from filing additional papers absent some prior approval process. *See Johnson v. Stock*, 2005 WL 1349963 (10th Cir., June 8, 2005); *Lundahl v. NAR Inc.*, 2006 WL 1495070 (D. Idaho, May 24, 2006). At a minimum, Mr. Lipari should be precluded from further filings in this case, particularly where he has no authority to act on behalf of Medical Supply Chain, Inc. in the captioned action.[5]

Respectfully submitted,

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[5] In its August 7, 2006 Order, this Court made the following observation: "[T]he court reiterates that it dismissed plaintiff's case with prejudice and sanctioned plaintiff for violations of Federal Rule of Civil Procedure 11(b) and 28 U.S.C. § 1927. Plaintiff has a history of filing frivolous lawsuits and motions, for which the court has sanctioned plaintiff on several occasions. ***Future attempts to resurrect this case could result in the court imposing additional sanctions.***" (Exhibit "C," p. 5) (emphasis added).

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above item was filed in PDF format with the Court pursuant to its *Case Management / Electronic Case Files* program and thereby a notice of filing was e-mailed to counsel of record herein, all on the 21st day of February, 2008.

A copy was also served via United States mail, postage prepaid, to:

Mr. Samuel K. Lipari
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/s/ Mark A. Olthoff
Attorney for Defendants

HMedical Supply Chain, Inc. v. U.S. Bancorp, NA C.A.10 (Kan.),2004.

This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,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.

Nov. 8, 2004.

Bret D. Landrith, Topeka, KS, for Plaintiff-Appellant.

Andrew M. Demarea, Shughart, Thomson & Kilroy, Overland Park, KS, Mark A. Olthoff, Shughart, Thomson & Kilroy, Kansas City, MO, for Defendants-Appellees.

Before McCONNELL, HOLLOWAY, and PORFILIO, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.JOHN C. PORFILIO, Circuit Judge.

****1** After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See*Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Medical Supply Chain, Inc. appeals from the dismissal of its complaint asserting claims under the Sherman Antitrust Act, the Clayton Antitrust Act, the Hobbs Act, and the USA Patriot Act, and various state law claims. In dismissing the complaint, the district court determined that plaintiff failed to state a claim for relief under each of the antitrust acts and that there was no private right of action under the USA Patriot Act. Because the district court dismissed all of plaintiff's federal law claims, it declined to retain jurisdiction over appellant's state law claims. Plaintiff argues that the district court erred by: 1) dismissing plaintiff's antitrust claims by imposing a heightened pleading standard,[FN1] and 2) finding no private right of action under the USA Patriot Act. We review de novo the district court's grant of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir.1999).

FN1. Appellant's brief mentions its Clayton Act and Hobbs Act claims, but appellant fails to include any argument as to how the district court erred in dismissing those claims. *See* Aplt. Br. at 7-8, 19. Any issue with respect to those claims is therefore waived. *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555 (10th Cir.1992).

Having reviewed the briefs, the record, and the applicable law pursuant to the above-mentioned standard, we conclude that the district court correctly decided this case. We therefore AFFIRM the challenged decision for the same reasons stated by the district court in its Memorandum and Order of June 16, 2003. Appellant's Motion to Amend Complaint on Jurisdictional Grounds is DENIED.

Finally, in the district court's order, the court reminded plaintiff's counsel of his obligations under Rule 11 and stated "[p]laintiff's counsel is advised to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." Aplt.App. Vol. II at 402. Plaintiff then proceeded to file this appeal that is not supported by the law or the facts. Accordingly, we ORDER the plaintiff and plaintiff's counsel to SHOW CAUSE in writing within twenty ***732** days of the date of this order why they, jointly or severally, should not be

EXHIBIT A

sanctioned for this frivolous appeal pursuant to Fed. R.App. P. 38. *See Braley v. Campbell*, 832 F.2d 1504, 1510-11 (10th Cir.1987) (discussing court's ability to impose sanctions against clients and their attorneys under Fed. R.App. P. 38).

C.A.10 (Kan.),2004.
Medical Supply Chain, Inc. v. US Bancorp, NA
112 Fed.Appx. 730, 2004 WL 2504653 (C.A.10 (Kan.)), 2004-2 Trade Cases P 74,607

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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

EXHIBIT B

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	No. 05-2299-CM
NEOFORMA, INC., et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Pending before the court are plaintiff's Motion for Reconsideration (Doc. 80); plaintiff's counsel Ira Dennis Hawver's Motion to Withdraw (Doc. 81); plaintiff's Motion Under Rule 15 for Leave to Rewrite and Amend Complaint to Cure Any Defects Requiring Dismissal Remaining After Outcome of Reconsideration Motion (Doc. 92); plaintiff's Motion to Strike Documents # 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93 (Doc. 95); and plaintiff's Motion to Rewind Action and Return Proceeding to the Western District of Missouri in the Interest of Justice Under 28 U.S.C. [§] 1631 (Doc. 102).

I. Background

On March 9, 2005, plaintiff Medical Supply Chain, Inc. ("Medical Supply") filed the above-captioned case in the United States District Court for the Western of District Missouri, case number 05-2010-CV-W-ODS. Plaintiff brought suit against Neoforma, Inc.; Robert J. Zollars; Volunteer Hospital Association ("VHA"); Curt Nonomaque; University Healthsystem Consortium; Robert J. Baker; US Bancorp NA; U.S. Bank National Association; Jerry A. Grundhofer, Andrew Cesare;[1]

[1] Throughout the docket sheet, this defendant's last name was spelled numerous different ways. The court will use "Cesare," the spelling most often used by defendants' counsel.

EXHIBIT C

Piper Jaffray Companies; Andrew S. Duff; Shughart Thomson & Kilroy, P.C.;[2] and Novation, LLC. Plaintiff's 115 page complaint alleges sixteen counts including claims for price restraint under the Sherman Act, restraint of trade and monopolization under both federal and Missouri law, conspiracy, tortious interference with contract or business expectancy, breach of contract, breach of fiduciary duty, fraud, prima facie tort, and claims under RICO and the USA PATRIOT Act.

The Western District of Missouri court transferred the case to this court on July 14, 2005. On March 7, 2006, this court dismissed plaintiff's case after finding that each of plaintiff's federal claims failed to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and declining to retain supplemental jurisdiction over plaintiff's state law claims. The court also found that claim preclusion barred several of plaintiff's claims. Furthermore, the court held that plaintiff's 115 page complaint violates Federal Rules of Civil Procedure 8(a) and 8(e)(1), and granted sanctions to defendants pursuant to Federal Rule of Civil Procedure 11(b) and 28 U.S.C. § 1927.

II. Analysis

A. Motion to Withdraw

On January 30, 2006, Bret D. Landrith withdrew as counsel for plaintiff after being disbarred from the practice of law in the State of Kansas on December 9, 2005 for violating Kansas Rules of Professional Conduct relating to competence, meritorious claims, candor toward the tribunal, fairness to opposing parties and counsel, respect for rights of third persons, and misconduct. On February 2, 2006, the court denied plaintiff's request to substitute Samuel K. Lipari, CEO of Medical Supply, as plaintiff for Medical Supply because although Medical Supply's corporate status was dissolved on

[2] Plaintiff's complaint names "Shughart Thomson & Kilroy Watkins Boulware, P.C." but the law firm's correct name is "Shughart Thomson & Kilroy, P.C.."

January 27, 2006, dissolution had not occurred at the time Mr. Lipari filed his motion to substitute. The court ordered Medical Supply to retain counsel because Mr. Lipari could not proceed *pro se* on behalf of a corporation. On February 7, 2006, Ira Dennis Hawver entered his appearance on behalf of Medical Supply.

Mr. Hawver requests that the court allow him to withdraw because Mr. Lipari no longer requires his representation. Attached to his motion to withdraw is Mr. Lipari's Entry of Appearance (Doc. 79), suggesting that Mr. Lipari intends to replace Mr. Hawver. But Mr. Lipari is not an attorney, and Mr. Hawver did not offer substitute counsel. The court finds that Mr. Hawver's motion does not comport with D. Kan. Rule 83.5.5, which requires withdrawing counsel without substitute counsel to "provide evidence of notice to the attorney's client containing (1) the admonition that the client is personally responsible for complying with all orders of the court and time limitations established by the rules of procedure or by court order and (2) the dates of any pending trial, hearing or conference." Mr. Hawver did not provide such notice to the court. As such, the court denies Mr. Hawver's motion to withdraw.

B. Mr. Lipari's Motions (Docs. 80, 92, 95 and 102)

On March 14, 2006, one week after this court dismissed plaintiff's case, Mr. Lipari filed an Entry of Appearance (Doc. 79). Since that time, Mr. Lipari has filed four motions currently pending before the court. The question before the court is whether Mr. Lipari may represent Medical Supply or substitute himself for Medical Supply.

Because Medical Supply was incorporated under the laws of Missouri, the effect of corporate dissolution on pending litigation is governed by Missouri law. Pursuant to Mo. Ann. Stat. § 351.476.2(6), "[d]issolution of a corporation does not: . . . (6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." *See also Reben v. Wilson*, 861

S.W.2d 171, 176 (Mo. App. E.D. 1993). Therefore, even though Medical Supply was dissolved, its corporate existence continues for purposes of proceeding with this litigation. Medical Supply remains the sole plaintiff in this case.

Moreover, Mr. Lipari cannot proceed *pro se* on behalf of Medical Supply because a *pro se* individual may not represent a corporation. *See Nato Indian Nation v. State of Utah*, 76 Fed. Appx. 854, 856 (10th Cir. 2003) ("Individuals may appear in court pro se, but a corporation, other business entity, or non-profit organization may only appear through a licensed attorney.") (citations omitted).

The court also finds that Mr. Lipari may not substitute himself for Medical Supply. Federal Rule of Civil Procedure 25(c), which governs the procedural substitution of a party after a transfer of interest, states: "In case of any transfer of interest, the action *may* be continued by or against the original party, *unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action*." Fed. R. Civ. P. 25(c) (emphasis added). As evidenced by the plain language of Rule 25(c), the court has discretion to allow Mr. Lipari to substitute. *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1324 (10th Cir. 1978). The court declines to exercise its discretion, however, because this case has been dismissed, and substitution will not change that outcome.

Mr. Lipari also argues that because the court sanctioned him personally, the court should allow him to represent himself *pro se*. Mr. Lipari is mistaken. The court sanctioned Medical Supply, not Mr. Lipari. Although the court discussed Mr. Lipari's personal involvement in the litigation in its ruling opposing sanctions against plaintiff and plaintiff's counsel, it did so for the purpose of demonstrating plaintiff's culpability. It is irrelevant that Mr. Lipari, as Medical Supply's sole shareholder, is ultimately liable for plaintiff's sanctions.

For the above-mentioned reasons, the court strikes each of Mr. Lipari's pending motions, including Documents 80, 92, 95 and 102. Consistent with this ruling, the court cautions Mr. Lipari

against filling additional motions. Of course, plaintiff may allow Mr. Hawver or other counsel to represent it. But the court reiterates that it dismissed plaintiff's case with prejudice and sanctioned plaintiff for violations of Federal Rule of Civil Procedure 11(b) and 28 U.S.C. § 1927. Plaintiff has a history of filing frivolous lawsuits and motions, for which the court has sanctioned plaintiff on several occasions. Future attempts to resurrect this case could result in the court imposing additional sanctions.

IT IS THEREFORE ORDERED that Ira Dennis Hawver's Motion to Withdraw (Doc. 81) is denied.

IT IS FURTHER ORDERED that plaintiff's Motion for Reconsideration (Doc. 80); plaintiff's Motion Under Rule 15 for Leave to Rewrite and Amend Complaint to Cure Any Defects Requiring Dismissal Remaining After Outcome of Reconsideration Motion (Doc. 92); plaintiff's Motion to Strike Documents # 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93 (Doc. 95); and plaintiff's Motion to Rewind Action and Return Proceeding to the Western District of Missouri in the Interest of Justice Under 28 U.S.C. [§] 1631 (Doc. 102) are hereby stricken from the record.

Dated this 7th day of August 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
(Through assignee Samuel K. Lipari)	)	
SAMUEL K. LIPARI	)	
Plaintiff,	)	
v.	)	Case No. 05-2299
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. GRUNDHOFER	)	
ANDREW CECERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY, P.C.	)	
Defendants.	)	

PLAINTIFF'S RULE 60(B) MOTION RESPONSE MEMORANDUM

Comes now the plaintiff Samuel K. Lipari in his individual capacity and as an assignee of all rights of Medical Supply Chain, Inc. a dissolved Missouri corporation and respectfully submits this memorandum in response to the defendants' opposition to reopen the present action under F.R.Civ. P. Rule 60(b). The plaintiff respectfully requests that this case be reopened for the following reasons:

Memorandum

1.The defendants' counsel have by their response to the Rule 60b motion unanimously elected to litigate the plaintiffs' state antitrust claims against the defendants and additional named Missouri hospital VHA and Novation, LLC co-conspirators in the 16th Circuit at Independence, Missouri action *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217.

2. The Missouri state law claims were expressly dismissed without prejudice by this court and not opposed by the defendants or counter appealed. *Lipari v. Novation LLC et al;* 0816-CV04217 also includes subsequent antitrust conduct by the defendants including acts as recently as February 2008.

3. This court's memorandum and order granted a dismissal the plaintiff opposed citing US Supreme Court authority in *Lawlor v. National Screen Service Corp*., 349 U.S. 322 75 S.Ct. 865, 99 L.Ed.

1122 supporting the plaintiff's right to bring new claims based on subsequent conduct of previous defendants:

> *"Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122,. In *Lawlor* five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged."

Engelhardt, v.Bell & Howell Co., 327 F.2d 30 at ¶ 42 (8th Cir, 1964).

4. This court's dismissal of the plaintiff's case contradicted the state of antitrust conspiracy pleading articulated by the US Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 U.S. 2197, 127 S. Ct. 1955 (2007) on May 21, 2007:

> "In *Twombly*, the Supreme Court held that the plaintiffs failed to state a claim under § 1 of the Sherman Antitrust Act. **The plaintiffs had alleged that defendants had engaged in parallel conduct, but had pleaded no set of facts making it plausible that such conduct was the product of a conspiracy**. In reaching this decision, the Supreme Court rejected language that long had formed part of the Rule 12(b)(6) standard, namely the statement *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. at 45-46." [emphasis added]

Phillips v. County of Allegheny, No. 06-2869 at page 7 (3rd Cir. 2/5/2008) (3rd Cir., 2008).

5. In an act of clear error by Hon. Judge Carlos Murguia's memorandum and order sanctioned the plaintiff for pleading the additional facts necessary to show the antitrust conspiracy was plausible.

6. The intervening change in controlling law for the Tenth Circuit and this court was *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007) and *Erickson* concerns the discussion of plausibility in *Twombly*:

> "What makes *Twombly's* impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new "plausibility" paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting Conley's "no set of facts" language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. Therefore, our review of how *Twombly* altered review of Rule 12(b)(6) cases must begin by recognizing the § 1 antitrust context in which it was decided. See e.g., *Twombly*, 127 S. Ct. at 1963 ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.")."

Phillips v. County of Allegheny, No. 06-2869 at page 7-8 (3rd Cir. 2/5/2008) (3rd Cir., 2008).

7. The Eight Circuit has adopted the plausibility change after Erickson as a necessity to plead the sufficient additional facts as the plaintiff's complaint was sanctioned for:

> "The plaintiffs need not provide specific facts in support of their allegations, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam), but they must include sufficient factual information to provide the "grounds" on which the claim rests, and to raise a right to relief above a speculative level. *Twombly*, 127 S. Ct. at 1964-65 & n.3."

Schaaf v. Residential Funding Corporation, No. 06-3694 at pg 5-6 (8th Cir. 2/22/2008) (8th Cir., 2008).

8. The Tenth Circuit described the effect of *Twombly* in *Ton Services*:

> "Prior to the Supreme Court's recent decision *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007), we reviewed the sufficiency of a complaint de novo and upheld dismissal only when it appeared the plaintiff could prove no set of facts in support of the claims that would entitle him to relief. *Coosewoon v. Meridian Oil Co*., 25 F.3d 920, 924 (10th Cir.1994). In *Bell Atlantic*, the Supreme Court articulated a new "plausibility" standard under which a complaint must include "enough facts to state a claim to relief that is plausible on its face." 127 S.Ct. at 194; *Alvarado v. KOB-TV, LLC*, ___ F.3d ___, ___, 2007 WL 2019752 at *3 (10th Cir. July 13, 2007) ("We look for plausibility in th[e] complaint.").13 Under either standard, all well-pleaded factual allegations are accepted as true and construed in the light most favorable to the plaintiff. *Alvarado*, 2007 WL 2019752 at *3."

Ton Services, Inc. v. Qwest Corp., 493 F.3d 1225 at 1235-1236 (10th Cir., 2007).

9. The court also described the effect of Twombly and Erickson in more detail along with the decision by this circuit to change its Rule 12 b6 pleading standard in footnote 2 to *Alvarado v. Kob-Tv, L.L.C*., 493 F.3d 1210 (10th Cir., 2007).

> "2. In *Bell Atlantic*, the Supreme Court stated that the old standard, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" is "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atlantic Corp*., 127 S.Ct. at 1968-69. Although the Supreme Court was not clear on the articulation of the proper standard for a Rule 12(b)(6) dismissal, its opinion in Bell Atlantic and its subsequent opinion in *Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007), suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief. See *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir.2007) (considering Bell Atlantic and Erickson and concluding that a "plausibility" standard was what the Supreme Court intended).
>
> Although we now restate our Rule 12(b)(6) standard in order to bring it into compliance with Bell Atlantic, we emphasize that in this case our decision would be the same regardless of whether we used the old "no set of facts" standard, see, e.g., *David*, 101 F.3d at 1352, or adopt either a plausibility standard or a requirement that the complaint include factual allegations sufficient to "raise a right to relief above the speculative level." Bell Atlantic Corp., 127 S.Ct. at 1965."

Alvarado v. Kob-Tv, L.L.C., 493 F.3d 1210 (10th Cir., 2007).

10. The new Rule12(b)(6) standard which this court's memorandum and order conflicts with is precisely this plausibility. The memorandum and order faults the plaintiff's complaint as unbelievable and frivolous. The plaintiff's claims against new defendants and co-conspirators of US Bank and US Bancorp were based on subsequent conduct and separate and later transactions and therefore were plausible under *Lawlor v. National Screen Service Corp*., 349 U.S. 322 75 S.Ct. 865, 99 L.Ed. 1122. This court's memorandum and order has been contradicted by the intervening change of law in *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007), fleshing out the plausibility standard of *Bell Atlantic Corp. v. Twombly*,

127 U.S. 2197, 127 S. Ct. 1955 (2007) decided two weeks earlier on May 21, 2007 and directly over ruling this Circuit.

11. The plaintiff's action continues in the form of contract claims against US Bank and US Bancorp in this court as *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW and continues in the form of state law antitrust claims in 16th Circuit at Independence, Missouri action *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217. There has not been a dismissal of actions in their entirety as pointed out in *Avx Corp. v. Cabot Corp*., 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). Therefore the matter *sub judice* has not reached finality permitting relief due to intervening change in controlling law. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1521 (10th Cir. 1997).

12. The plaintiff appears for himself as assignee, the Tenth Circuit order declining jurisdiction for lack of timeliness stated the plaintiff who is not an attorney does not have to make a separate entry of appearance, *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW and *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217 will likely result in discovery and a jury determining what the defendants did to deprive the petitioner of his original attorney and to deprive the plaintiff of unimpeded representation by other attorneys.

13. A determination to deny this motion to reopen based on failing to recognize the plaintiff's pro se appearance as assignee would instantly result in a cause of action to accrue to the plaintiff for the value of the federal claims against the defendants in this action.

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests that the court reopen its Memorandum and Order dismissing the plaintiff's claims, granting sanctions and reinstate the plaintiff's claims.

Respectfully Submitted,

S/ Samuel K. Lipari

_____

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

CERTIFICATE OF SERVICE

I certify I have caused a copy to be sent via electronic case filing to the undersigned opposing counsel on 2/26/08.

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S/ Samuel K. Lipari
_____
Samuel K. Lipari

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
(Through assignee Samuel K. Lipari)	)	
SAMUEL K. LIPARI	)	
Plaintiff,	)	
v.	)	Case No. 05-2299
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. GRUNDHOFER	)	
ANDREW CECERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY, P.C.	)	
Defendants.	)	

NOTICE OF CONCURRENT MISSOURI STATE ANTITRUST ACTION

Comes now the plaintiff Samuel K. Lipari in his individual capacity and as an assignee of all rights of Medical Supply Chain, Inc. a dissolved Missouri corporation and respectfully gives notice of the concurrent Missouri antitrust action filed February 25, 2008 in the 16th Circuit at Independence, Missouri and captioned *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217.

A copy of the petition in *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217 is attached for electronic filing with this notice to the defendants. s in the 16th Circuit at Independence, Missouri action *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217.

Respectfully Submitted,

S/ Samuel K. Lipari

_____

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CERTIFICATE OF SERVICE

I certify I have caused a copy to be sent via electronic case filing to the undersigned opposing counsel on 2/26/08.

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S/ Samuel K. Lipari
_____
Samuel K. Lipari

IN THE STATE OF MISSOURI
JACKSON COUNTY SIXTEENTH CIRCUIT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff* vs.	)	
NOVATION, LLC NEOFORMA, INC. GHX, LLC ROBERT J. ZOLLARS VOLUNTEER HOSPITAL ASSOCIATION VHA MID-AMERICA, LLC CURT NONOMAQUE THOMAS F. SPINDLER ROBERT H. BEZANSON GARY DUNCAN MAYNARD OLIVERIUS SANDRA VAN TREASE CHARLES V. ROBB MICHEAL TERRY UNIVERSITY HEALTHSYSTEM CONSORTIUM ROBERT J. BAKER JERRY A. GRUNDHOFER RICHARD K. DAVIS ANDREW CECERE THE PIPER JAFFRAY COMPANIES ANDREW S. DUFF COX HEALTH CARE SERVICES OF THE OZARKS, INC. SAINT LUKE'S HEALTH SYSTEM, INC. STORMONT-VAIL HEALTHCARE, INC. SHUGHART THOMSON & KILROY, P.C. HUSCH BLACKWELL SANDERS LLP LATHROP & GAGE L.C. *Defendants.*	) **Case No.**)	**Missouri Antitrust, Fraud, Tortious Interference, Prima Facie Tort** **Jury Trial Demanded**

PETITION

Pursuant to 16th Circuit Court of Jackson County Missouri local rule 3.2, the plaintiff lists the names address and contact information if known for the parties and registered agents for service of process by the Jackson County Sheriff:

Parties

Plaintiff :

Samuel K. Lipari, 297 NE. Bayview, Lee's Summit, MO 64064 816-365-1306
saml@medicalsupplychain.com

Defendants:

Novation LLC. (“Novation”) 125 East John Carpenter Frwy Suite 1400 Irving, TX 75062. 972-581-552 kgoldste@novationco.com

Neoforma Inc. (Neoforma), 3061 Zanker Road, San Jose, California 95134.

GHX, LLC, 1315 W. Century Drive, Louisville CO 80027 720-887-7000 kconway@ghx.com

Robert J. Zollars, 525 Race Street, San Jose, CA 95126 408-882-5100

Volunteer Hospital Association of America, Inc. (VHA), 220 E. Las Colinas Blvd., Irving, TX 75039.

VHA Mid-America, LLC, c/o The Corporation Company, Inc., 515 South Kansas Avenue , Topeka, KS 66603

Curt Nonomaque, President and CEO, VHA Inc., 220 E. Las Colinas Blvd., Irving, TX 75039.

Thomas F. Spindler, Area Senior Vice President, VHA Mid-America LLC, 8500 West 110th Street - Suite 118, Overland Park, KS 66210 913-319-6220 tspindle@vha.com

Robert H. Bezanson, President & CEO CoxHealth, 1423 North Jefferson, Springfield, MO 65802 417-269-6107 robert.bezanson@coxhealth.com

Gary Duncan, President & CEO (Chair) Freeman Health System,1102 West 32nd Street Joplin, MO 64804-3599 417-347-6602 gdduncan@freemanhealth.com

Charles V. Robb SVP/CFO., Saint Luke's Health System, 10920 Elm Avenue, Kansas City, MO 64134 816-932-2206 crobb@saint-lukes.org

Sandra Van Trease, Group President, BJC HealthCare, 4444 Forest Park Avenue, St. Louis, MO 63108 314-286-2111 svantrease@bjc.org

Micheal Terry, President/Chief Executive Officer, Salina Regional Health Center, 400 South Santa Fe (67401), PO Box 5080 Salina, KS 67402-5080 785-452-7144 mterry@srhc.com

University Healthsystem Consortium (UHC) is a company headquartered at 2001 Spring Road, Suite 700 Oak Brook, Illinois 60523-1890.

Robert J. Baker, President and CEO of UHC, 2001 Spring Road, Suite 700 Oak Brook, Illinois 60523.

Jerry A. Grundhofer, Chairman of US Bancorp, Inc., 800 Nicollet Mall, Minneapolis, MN 55402.

Richard K. Davis, President and CEO of US Bancorp, Inc., 800 Nicollet Mall, Minneapolis, MN 55402.

Andrew Cecere, Chief Financial Officer of US Bancorp, Inc., 800 Nicollet Mall, Minneapolis, MN 55402.

The Piper Jaffray Companies (“Piper”), 800 Nicollet Mall, Suite 800, Minneapolis, MN 55402

Andrew S. Duff, CEO of Piper Jaffray, 800 Nicollet Mall, Suite 800, Minneapolis, MN 55402.

Cox Health Care Services Of The Ozarks, Inc., c/o Registered Agent Robert H. Bezanson, 1423 N. Jefferson Avenue, Springfield MO 65802

Saint Luke's Health System, Inc., 10920 Elm Avenue, Kansas City, MO 64134

Stormont-Vail Healthcare, Inc., 1500 Southwest Tenth Avenue, Topeka, KS 66604; c/o Michael Lummis, Registered Agent Office: 1500 Southwest Tenth Avenue , Topeka, KS 66604

Shughart Thomson & Kilroy, P.C. ("Shughart") c/o STK Registered Agent, Inc., 120 W 12th ST Ste 1800, Kansas City MO 64105

Husch Blackwell Sanders LLP ("Husch Blackwell") c/o C T Corporation System, 120 South Central Avenue, Clayton, MO 63105

Lathrop & Gage L.C. c/o Registered Agent Ltd., 2345 Grand #2500, Kansas City, MO 64108

TABLE OF CONTENTS

COMPLAINT

Comes now the petitioner, Samuel K. Lipari on his personal property interest as the sole assignee of rights for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer and appears *pro se*.

I. Introduction

1. The petitioner brings this actions against some members of a hospital supplies cartel for their conduct in keeping the plaintiff out of the Missouri market for hospital supplies distributed to hospitals and other health systems including clinics and nursing homes through anticompetitive long term exclusionary contracts.

2. The hospital supply cartel of VHA, UHC and Novation LLC artificially inflates the costs of hospital supplies, hospital supply management and of hospital supplies distributed through electronic marketplaces like the petitioner's and during the time period complained of, shared with its member hospitals the unlawful overcharging of healthcare insurance providers.

3. The previous litigation by the has ended the utility of Neoforma, Inc for passing on these unlawful kickbacks and has forced the defendants to enter into two failed schemes to substitute the flow of government healthcare tax dollars through VHA, UHC and Novation LLC in Missouri.

4. The first was to eliminate Medicaid in this state and to replace the insurance plan with a Missouri state pilot program administering the federal Medicare and Medicaid funds without federal controls or auditing called Insure-Missouri as the Republican National Committee model for the nation.

5. The second failed plan was to take from the State of Kansas the academic credentials, doctors and residents and operate the Novation LLC Saint Luke's Plaza hospital in Kansas City, Missouri as a National Cancer Institute Certified Research Center even though no curriculum, staff or qualifying programs were in existence.

6. The defendants were desperate to replace the loss of preferential treatment of their Medicare claims by Blue Cross Blue Shield of Kansas, Inc. on February 29, 2008.

7. During the complained of time period sheltered the defendant conspirator's Missouri hospitals and Nursing homes from effective oversight and permitted CoxHealth and Saint Luke's to unlawfully grow their revenue by tens of millions of dollars a year.

8. The two schemes failed when the petitioner on April 9, 2007 discovered and press released that the US Attorney Todd Graves had been targeted by Karl Rove and former US Attorney General Alberto Gonzales for Graves' investigation of Medicare fraud at CoxHealth.

II.Averments

9. The petitioner makes the following averments of fact regarding the jurisdiction of this court, the previous and related proceedings and the identity and conduct of the parties.

10. Each factual averment is pled to meet the requirements of Missouri Supreme Court Rule 55(b)(3) in that the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

11. Each factual averment is relative to proving the petitioner's claims and the petitioner is entitled to discovery of records in the possession of the defendants to produce documents or papers, which contain evidence relevant to the subject matter involved in the pending action under Missouri Supreme Court Rule 56.01.

A.Jurisdiction

The petitioner asserts the following basis for the court's jurisdiction over this matter.

1. Subject Matter Jurisdiction

12. This court has subject matter jurisdiction over the defendants herein to state statutory causes of action consisting of violations of Missouri state antitrust statutes §§ 416.011 to 416.161, RSMo and state common law tortuous interference with business relationships; fraud; and prima facie tort claims**.**

2. Personal Jurisdiction

13. Personal jurisdiction over the defendant corporations and individual persons exists under Mo. Rev. Stat. § 416.131.

14. Personal jurisdiction over the defendant corporations and individual persons exists under the Missouri long-arm statute, Mo. Rev. Stat. § 506.510 (2007).

3. Venue

15. The plaintiff makes a well pleaded complaint claiming state statutory causes of action over violations of Missouri state antitrust statutes §§ 416.011 to 416.161, RSMo and state common law tortuous interference with business relationships; fraud; and prima facie tort claims against the defendants' conduct occurring in Jackson County.

16. The plaintiff's complaint is against defendants that regularly do business in Jackson County, Missouri.

17. Venue in Jackson County is proper under Mo. Rev. Stat. § 416.545 where the plaintiff resides and the causes of action herein accrued.

18. Venue in Jackson County is proper under Mo. Rev. Stat. § 416.131. 1 where defendants reside, engage in business and have agents.

4. Timeliness

19. This matter is timely under Mo. Rev. Stat. § 416.131. 2 having been commenced within four years after the relative antitrust causes of action against new defendants and subsequent conduct of prior defendants accrued.

20. This matter is timely under Mo. Rev. Stat. § 516.230 having been commenced within one year after the suffering of a nonsuit on March 7, 2007 in *Medical Supply Chain, Inc. v. Novation LLC et al* KS Dist. Court Case No.: 05-2299, an action originally filed in Missouri on March 9, 2005 as *Medical Supply Chain, Inc. v. Novation LLC et al.* W.D. of MO Case No. 05-0210-CV-W-ODS.

5. Procedural History

21, The petitioner, in the name of his Missouri corporation Medical Supply Chain, Inc. ("Medical Supply") initiated litigation against members of the defendants' hospital supply cartel in the US District Court for Kansas in October 2002 to enjoin the cartel from interdicting $350,000.00 the plaintiff had raised to enter the hospital supply market. A detailed description of the legal actions between the plaintiff and members of the defendants' hospital supply cartel is incorporated by reference as **Appendix One**.

6. Table of Prior and Related Cases

23. The petitioner as a hospital supply distributor prevented from entering the market is the efficient enforcer of Missouri antitrust statutes. The related federal and state legal actions against the defendant cartel's members are listed in a table incorporated by reference as **Appendix Two**.

7. Governing Law

24. The Missouri state long arm statute § governs this court's jurisdiction over the out of state defendants.

25. The Missouri State Antitrust Chapter 416 Monopolies, Discriminations and Conspiracies; statutes §§ 416.011 to 416.161, RSMo govern the substantive claims of the petitioner related to statutory violations of state law against anticompetitive conduct.

26. The petitioner has averred the existence of antitrust conspiracy to the current new antitrust pleading standard under *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1970, 167 L.Ed.2d 929 (2007).

27. The petitioner's right to bring new claims based on subsequent conduct of previous defendants is governed by *Lawlor v. National Screen Service Corp*., 349 U.S. 322:

> *"Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122,. In Lawlor five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged."

Engelhardt, v.Bell & Howell Co., 327 F.2d 30 at ¶ 42 (8th Cir, 1964).

28. The petitioner's claims for tortuous interference with a business expectancy, fraud and prima facie tort are governed by the common law of the State of Missouri.

B. Statement of Facts

29. The plaintiff avers the following facts as true to the best of his knowledge or will likely to be proven through discovery:

1.Parties

30. The following persons and corporations are subject to this legal action:

a. Plaintiff

31. Samuel K. Lipari, 297 NE. Bayview, Lee's Summit, MO 64064.

b. Defendants

32. Novation LLC. ("Novation") 125 East John Carpenter Frwy Suite 1400 Irving, TX 75062

33. Neoforma Inc. (Neoforma), 3061 Zanker Road, San Jose, California 95134.

34. GHX, LLC, 1315 W. Century Drive, Louisville, CO 80027.

35. Robert J. Zollars, 525 Race Street, San Jose, CA 95126.

36. Volunteer Hospital Association of America, Inc. (VHA), 220 E. Las Colinas Blvd., Irving, TX 75039.

37. VHA Mid-America, LLC, c/o The Corporation Company, Inc., 515 South Kansas Avenue , Topeka, KS 66603.

38. Curt Nonomaque, President and CEO, VHA Inc., 220 E. Las Colinas Blvd., Irving, TX 75039.

39. Thomas F. Spindler, Area Senior Vice President, VHA Mid-America LLC, 8500 West 110th Street - Suite 118, Overland Park, KS 66210.

40. Robert H. Bezanson, President & CEO CoxHealth, 1423 North Jefferson, Springfield, MO 65802.

41. Gary Duncan, President & CEO (Chair) Freeman Health System,1102 West 32nd Street Joplin, MO 64804-3599.

42. Charles V. Robb SVP/CFO., Saint Luke's Health System, 10920 Elm Avenue, Kansas City, MO 64134.

43. Sandra Van Trease, Group President, BJC HealthCare, 4444 Forest Park Avenue, St. Louis, MO 63108.

44. Micheal Terry, President/Chief Executive Officer, Salina Regional Health Center, 400 South Santa Fe (67401), PO Box 5080 Salina, KS 67402-5080.

45. University Healthsystem Consortium (UHC) is a company headquartered at 2001 Spring Road, Suite 700 Oak Brook, Illinois 60523-1890.

46. Robert J. Baker, President and CEO of UHC, 2001 Spring Road, Suite 700 Oak Brook, Illinois 60523.

47. Jerry A. Grundhofer, Chairman of US Bancorp, Inc., 800 Nicollet Mall, Minneapolis, MN 55402.

48. Richard K. Davis, President and CEO of US Bancorp, Inc., 800 Nicollet Mall, Minneapolis, MN 55402.

49. Andrew Cecere, Chief Financial Officer of US Bancorp, Inc., 800 Nicollet Mall, Minneapolis, MN 55402.

50. The Piper Jaffray Companies ("Piper"), 800 Nicollet Mall, Suite 800, Minneapolis, MN 55402.

51. Andrew S. Duff, CEO of Piper Jaffray, 800 Nicollet Mall, Suite 800, Minneapolis, MN 55402.

52. Cox Health Care Services Of The Ozarks, Inc. ("CoxHealth"), c/o Registered Agent Robert H. Bezanson, 1423 N. Jefferson Avenue, Springfield MO 65802.

53. Saint Luke's Health System, Inc., 10920 Elm Avenue, Kansas City, MO 64134.

54. Stormont-Vail Healthcare, Inc., 1500 Southwest Tenth Avenue, Topeka, KS 66604; c/o Michael Lummis, Registered Agent Office: 1500 Southwest Tenth Avenue , Topeka, KS 66604.

55. Shughart Thomson & Kilroy, P.C. ("Shughart") c/o STK Registered Agent, Inc., 120 W 12th ST Ste 1800, Kansas City MO 64105.

56. Husch Blackwell Sanders LLP ("Husch Blackwell") c/o C T Corporation System, 120 South Central Avenue, Clayton, MO 63105.

57. Lathrop & Gage L.C. c/o Registered Agent Ltd., 2345 Grand #2500, Kansas City, MO 64108.

2. The Relative Markets

58. The petitioner identifies the following relative product and services markets as being monopolized by the defendants Novation LLC. Neoforma Inc., GHX, LLC, Robert J. Zollars, Volunteer Hospital Association of America, Inc.(VHA), VHA Mid-America, LLC, Curt Nonomaque, Thomas F. Spindler, Robert H. Bezanson, Gary Duncan, Charles V. Robb, Sandra Van Trease, Micheal Terry, University Healthsystem Consortium (UHC), Robert J. Baker, Jerry A. Grundhofer, Richard K. Davis,

Andrew Cecere, The Piper Jaffray Companies, Andrew S. Duff, Cox Health Care Services Of The Ozarks, Inc. (CoxHealth), Saint Luke's Health System, Inc., Stormont-Vail Healthcare, Inc., Shughart Thomson & Kilroy P.C., Husch Blackwell Sanders LLP, Lathrop & Gage L.C.:

a. The Missouri Hospital Supply Market

59. The petitioner avers that the defendants monopolized and/or attempted to monopolize the geographic market of hospital supplies sold in the State of Missouri to hospitals.

60. The petitioner avers that the defendants monopolized and/or attempted to monopolize the geographic market of hospital supplies sold in the State of Missouri to nursing homes.

61. The petitioner avers that the defendants monopolized and/or attempted to monopolize the geographic market of automated hospital supplies management sold in the State of Missouri to hospitals.

62. The petitioner avers that the defendants monopolized and/or attempted to monopolize the geographic market of automated hospital supplies management sold in the State of Missouri to nursing homes.

b. The Missouri e-commerce Hospital Supply Market

63.The petitioner avers that the defendants monopolized and/or attempted to monopolize the sub market of hospital supplies sold in the geographic area of the State of Missouri to hospitals through electronic marketplaces.

64. The petitioner avers that the defendants monopolized and/or attempted to monopolize the sub market of hospital supplies sold in the geographic area of the State of Missouri to nursing homes through electronic marketplaces.

c. The Upstream Healthcare Technology Company Capitalization Market in Missouri.

65. The petitioner avers that the defendants monopolized and/or attempted to monopolize the geographic market of healthcare technology company capitalization hospital in the State of Missouri for new ventures with products for hospital use in the treatment of patients.

2. Anticompetitive Activity in the Subject Relevant Markets

66. The petitioner avers that the defendants have monopolized the above relevant markets through conduct prohibited by the Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo and that the prohibited conduct has injured Missouri hospital supply customers including health systems and patients.

67. The petitioner also avers that the petitioner has been injured by conduct prohibited by the Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo and that but for the actions of the defendants, the petitioner would be selling hospital supplies to hospitals and nursing homes in the State of Missouri.

a. The Harm To Buyers In The Market

68. The petitioner avers that the defendants have violated the Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo injuring Missouri hospital supply customers including health systems and patients.

i. The Harm to Hospitals

69. VHA through Novation LLC contracts management controls the purchasing at 41 hospitals in Missouri, including: BJC HealthCare, Cox Health System in Springfield, Freeman Health System in Joplin, St. Luke's Health System in Kansas City, Liberty Hospital, Skaggs Medical Center in Branson, St. Francis Medical Center in Cape Girardeau, and Citizens Memorial Hospital in Boliver.

70. As VHA members, the hospitals are deceived into participating in VHA programs where artificially inflated hospital supply contracts are controlled by Novation LLC to add 20 to 45% on average to the costs of purchases of essential, but expensive, supplies for their patients.

71. The defendants VHA and UHC are group purchasing organizations (“GPOs”).

72. The defendants VHA and UHC represent themselves as extensions of hospital purchasing departments providing special expertise, negotiating experience, electronic tools and processes to streamline buying and save hospitals hundreds of millions of dollars each year.

73. In actuality, VHA steered its members to the Novation LLC scheme that artificially inflates hospital supplies and extorts illegal kickbacks from the manufacturers represented by Novation LLC.

74. VHA steered Missouri hospitals toward purchasing more than $718.4 million in supplies in 2005 exclusively through Novation LLC.

75. The defendants through VHA and VHA Mid-America, LLC misrepresent that "On average, hospitals buying through Novation save an average of one to three percent, compared with purchasing on their own or through another GPO. These savings fall immediately to a hospital's bottom line, giving them resources that can be used for other purposes, such as providing the hospital with more staff to provide better care." VHA press release dated February 23, 2008.

76. And that Missouri hospital members "saved more than $43.3 million in 2005. " VHA press release dated February 23, 2008.

77. In reality, Novation LLC has taken money belonging to Missouri hospitals in the market the petitioner is being kept out of by the defendants.

78. On August 21, 2004 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]

79. On July 31, 2006 the London Times reported the existence of the US Department of Justice investigation of Novation's conduct as a hospital group purchasing organization or "GPO" and quoted Professor Prakash Sethi, president of the International Center for Corporate Accountability at Baruch College in New York who stated "My most conservative estimates suggest that GPOs extract extra profits of $5 billion (£2.6 billion) to $6 billion which legitimately belong to their principal clients, the hospitals."

80. Missouri hospitals purchasing through Novation LLC, VHA or UHC in actuality lost 5% annually of their bottom line revenue as institutions and suffered a resulting loss of capacity to serve Missourians.

ii. The Harm To Healthcare Services Consumers

81. The anticompetitive conduct of the defendants have artificially inflated hospital supply costs creating an over 11% per year increase in healthcare costs.

82. The suppression of economic competition in hospital supplies has led to unsustainable increases in healthcare costs.

83. The actions of the hospital supply cartel defendants to deprive critical inputs required by new entrants to the market, including breaking their contracts with the petitioner demand investigative scrutiny.

84. The injury to Missouri's healthcare consumers has been aggravated by the defendants' misconduct as part of an agreement with other hospital supply distributors to control access to the hospital supply market conditioned on participating in a scheme to artificially inflate the costs of hospital supplies.

iii. Loss of Healthcare Insurance

85. The artificial inflation of hospital supply costs and the resulting continuing double digit increases in healthcare costs have become unsustainable for private healthcare insurance plans.

86. As a result of the relator's failure to advance his antitrust and state law based contract claims in federal court due to the misconduct of the defendants, the first 65,000 Missouri residents were cut off of Medicaid benefits on July 1, 2005.

87. 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.

88. 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 hospital supplies that is the primary relevant market the petitioner is attempting to enter.

89. 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.

90. Currently 719,000 Missourians are without health insurance.

91. However, the increased costs on health systems including hospitals and nursing homes is being passed on to the five million Missourians covered by health insurance, increasing the loss of jobs and

healthcare insurance benefits.

iv. The Injury To Healthcare Insurance Plans

92. Insure-Missouri quotes Dwight L. Fine, Senior Vice President for Health Policy, Missouri Hospital Association as stating:

"As more people lose coverage, the costs associated with caring for the growing uninsured population are shifted to those with health insurance thus making it more expensive. As health insurance costs increase, more employers stop offering coverage to their employees…"

v. The Loss Of Life From Decreased Access To Healthcare

93. Insure-Missouri also quotes Dwight L. Fine, Senior Vice President for Health Policy, Missouri Hospital Association as stating:

"Studies show that those who are uninsured delay seeking needed care, which leads to the onset of chronic diseases. More importantly, those studies tell us that those who have health insurance live longer than those who do not."

94. 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.

95. 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.

96. 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.

97. 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 103,015 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.

98. Videotapes exist and are discoverable of surgeries in Missouri hospitals which were stopped due to unforeseen shortages of critical hospital supplies with the foreseeable and certain death of the patient resulting.

b. The Harm to Medical Supply

99. The petitioner has been injured by conduct prohibited by the Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo.

100. The petitioner lost over $300,000.00 raised in October 2002 to capitalize his entry into the hospital supply market through US Bank escrow accounts the petitioner had contracted for as a substitute for Piper Jaffray's venture capital services.

101. The petitioner obtained a replacement of over $300,000.00 to capitalize his entry into the hospital supply market by selling the lease of a Blue Springs, Missouri Office building to the General Electric Company.

102. The defendants have repeatedly violated Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo during the period of March 25, 2004 through February 25, 2008 to deprive the petitioner of inputs required to enter the subject relevant Missouri markets including tortiously interfering with the petitioner's property rights to his claims against US Bank NA, US Bancorp, Inc. and the General Electric Company.

103. The conduct of the defendants in obstructing the petitioner in his federal litigation to recover the market entry capitalization included separate Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo violations to deprive the petitioner of his corporate counsel, representation by Missouri and Kansas attorneys and therefore the enjoyment of the right for Medical Supply Chain, Inc. to be incorporated under the laws of the State of Missouri.

104. The conduct and transactions of the defendants in violation of Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo caused the foreseeable injury of the petitioner being forced to dissolve Medical Supply Chain, Inc. on January 27th, 2006

105. The conduct and transactions of the defendants to cause the petitioner to be forced to dissolve his Missouri corporation occured subsequent to the petitioner's filing of the federal antitrust action on March 9, 2005 styled *Medical Supply Chain, Inc. v. Novation LLC et al.* W.D. of MO Case No. 05-0210-CV-W-ODS.

106. The petitioner is obstructed from necessary inputs and critical facilities including capitalization for marketing as long as he is deprived of the right to be incorporated under the laws of the State of Missouri by the anticompetitive conduct of the defendants.

107. The defendants chose to injure the petitioner by depriving him of state and federal government related benefits and immunities constructively and through bribery and extortion instead of *Noerr-Pennington* Doctrine protected petitioning.

c. The Need For Private Antitrust Enforcement

108. The petitioner brings his claims for redress because of the inability of the State of Missouri and the Federal Government to enforce their respective antitrust regulatory schemes in the complex electronic marketplaces where hospital supplies are distributed.

i. The Limited Resources Of The US Department Of Justice

109. The plaintiff asserts that the US Department of Justice under for Attorney General Alberto Gonzales and the Federal Trade Commission Chairwoman Deborah Platt Majoras have acted to protect the hospital supply cartel created by Novation LLC.

(A) FTC Chairwoman Deborah Platt Majoras

110. The Federal Trade Commission enforcement attorneys had to hire the petitioner's expert witnesses Lynn Everard and Patti King to document and explain how the electronic marketplaces for hospital supplies run by Neoforma, Inc. and GHX LLC created a choke point over all the supplies purchased in the nation's hospitals.

111. The Federal Trade Commission enforcement attorneys were excited about ending the monopoly in hospital supplies Lynn Everard and Patti King revealed to them.

112. The Chairwoman Deborah Platt Majoras saw to it that the agency did not prevent the merger of Neoforma, Inc. and GHX LLC to further Karl Rove's protection of the defendants' hospital supply cartel.

(B) F.B.I. Director Robert Mueller

113. The Federal Bureau of Investigation under Director Robert Mueller has no will to exercise the responsibilities of his office and did not investigate the criminal conduct against the petitioner in the Kansas District Court in a complaint made by the petitioner at the direction of the US Tenth Circuit Court of Appeals in 2005.

114. To this date less than one third of Federal Bureau of Investigation employees even have access to the Internet at their workspace desks as was disclosed in answers to questions made by Willie T. Hulon, Executive Assistant Director.

115. National Security Branch of the Federal Bureau of Investigation in a recent House and Senate hearing on the F.B.I.'s implementation of recommendations made by the 9/11 Commission.

116. FBI Executive Assistant Director Willie T. Hulon testified on October 23, 2007 with 9/11 Commission Chairmen Lee Hamilton & Thomas Kean before a Senate Select Intelligence Committee hearing on the FBI's National Security Strategic Plan.

117. The hearing examined the FBI's reform effort and how the agency is adapting to meet national security challenges.

118. Sen. John Rockefeller of West Virginia chaired the hearing and the senior minority party member Sen. Kit Bond of Missouri also questioned the witnesses.

119. The hearing is on video including Executive Assistant Director Willie T. Hulon at the following url:
http://12.170.145.161/search/basic.asp?ResultStart=1&ResultCount=10&BasicQueryText=Senate+Select+Intelligence+Cmte.+Hearing+on+the+FBI%27s+National+Security+Strategic+Plan

ii. How the Defendants' Cartel Avoided Federal Prosecution in Texas

120. 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 terminated.

(A) The deaths of two Assistant US Attorneys

121. On the night of July 29, 2004 some lawyers from the US Attorney for the Northern District of Texas Office watched the conclusion of the Democratic National Convention on television.

122. Senator John Forbes Kerry had accepted the nomination and gave a stirring speech interrupted 43 times by applause.

123. Senator Kerry said his brand of leadership "starts by telling the truth to the American people. That is my first pledge to you tonight: As president, I will restore trust and credibility."

124. The speech inspired some listeners in Dallas Texas to think that by January, John Ashcroft would no longer be Attorney General or control the US Department of Justice for the Bush administration.

125. Breaking Main Justice's unwritten policy of prosecuting only healthcare providers and never the two giant Group Purchasing Organizations Novation LLC and Premier, Inc. that put their customers up to wholesale Medicare fraud, a criminal subpoena was issued

126. The Dallas Texas U.S. Attorney's office Criminal Chief Shannon Ross who was just 44 years old supervised seventy criminal prosecutors.

(1) AUSA Thelma Louise Quince Colbert

127. Federal whistleblower False Claims Act cases for the district were overseen by Fort Worth, Texas Civil Enforcement Head Thelma Louise Quince Colbert.

128. Southern University Law Center awarded Assistant US Attorney Thelma Louise Quince Colbert the 1998 Distinguished Alumnus Award for having served as the first editor-in-chief of the school's law review and where she was first in her class, graduating summa cum laude.

129. Assistant US Attorney Thelma Louise Quince Colbert was tasked with the majority of Medicare Fraud cases for Texas.

(2) AUSA Shannon K. Ross

130. New York Times reporter Mary Williams Walsh wrote "Wide U.S. Inquiry Into Purchasing for Health Care," one of the most comprehensive early stories on August 21, 2004 regarding the Justice Department's (USDOJ) inquiry into healthcare industry purchasing, antitrust issues and other Medicare abuses.

131. Novation LLC, Merck, Bristol-Myers Squibb, Genentech, G.E. Healthcare and Cardinal Health were all cited in the subpoena.

132. Federal investigators were seeking evidence of health care fraud, conspiracy to defraud the United States, theft or bribery involving programs receiving federal funds, obstruction of investigations and other possible violations.

133. Mary Williams Walsh reported the subpoena was signed by Assistant US Attorney Shannon K. Ross, criminal chief of the United States attorney's office in Dallas.

134. Assistant U.S. Attorney Shannon K. Ross was interviewed about the subpoenas by New York Times reporter Mary Williams Walsh for a follow up story on Saturday September 11, 2004.

135. The story ran in the New York Times on September 14, 2004, the day of the second US Senate Judiciary Committee hearing on Novation LLC's anticompetitive conduct and was entitled "U.S. to Address Possible Abuses in Hospital Supply Industry"

136. The article described Shannon K. Ross's work stating:

> "The United States attorney in Dallas is now conducting a criminal investigation and about a month ago served subpoenas on more than a dozen companies in the hospital supply business, and on Novation.
>
> One particular problem is the practice among the purchasing companies of accepting payments from the very medical product suppliers whose products they are supposed to evaluate.
>
> The payments are ostensibly to cover the cost of administering the contracts, and limited payments for that purpose are expressly exempted from the federal anti-kickback law for health care. But this loophole has long created the appearance that lucrative contracts are sometimes awarded to suppliers making the highest payments.
>
> The payments have also become extremely complicated and hard to trace over the years. In the past, some payments were made in cash, some in stock or stock options; some were a percentage of each hospital's purchases. And some payments were larger than allowed under the law."

137. However, unknown to many of the Senate antitrust hearing participants, Assistant U.S. Attorney Shannon Ross was found dead on September 13, 2004, just 55 days after Colbert turned up dead in her swimming pool on July 20, 2004.

138. When the petitioner called Shannon Ross' office he was surprised and shocked to hear she was not there and had passed away.

139. The petitioner checked and verified that the tragedy had occurred and posted an announcement on September 17th, 2004 for others in the healthcare industry, unwittingly providing the only press announcement of the event:

(B) "**Second US Attorney Death in Novation Medicare Fraud Case**

> *US Attorney Shannon Ross, the second death in the Ft. Worth, TX US Attorney office connected to the governments investigation of Novation, GE and other GHX members for Medicare fraud*
>
> Kansas City, MO (PRWEB) September 17, 2004 -- Assistant US Attorney for Texas, Shannon Ross died on Monday September 13th, 2004. Shannon Ross, who supervised 70 US Justice Department prosecutors, had issued the criminal subpoenas to healthcare suppliers General Electric in addition to other members of GHX, LLC that do business with Novation, the largest healthcare GPO, under the investigation that sparked the New York Times article Wide U.S. Inquiry Into Purchasing For Health Care" on Saturday August 21, 2004.

Sam Lipari, President of Medical Supply Chain, Inc. stated that Ms. Ross was a courageous believer in the rule of law and that the Ft. Worth, TX Office of the US Attorney was the first to actually obtain manufacturer records and compare them to the monopolist suppliers and their client hospitals. Medical Supply Chain, Inc. has alleged that Medicare is overcharged by sum 40% through Sherman Act prohibited supplier cartels in the $1.8 Trillion dollar healthcare industry and is civilly prosecuting Novations joint venture partners GE and US Bancorp Piper Jaffray for conspiring to keep its more efficient web based marketplace from providing lower cost products to hospitals.

Shannon Ross death was preceded by the death of Thelma Quince Colbert on July 20th, also of the Ft. Worth US Attorneys office and the head of a special civil litigation unit that prosecuted companies for defrauding government-funded programs.

About Medical Supply Chain

Medical Supply Chain, Inc. (MSCI) is a Health System service center providing supply chain resources and technology to the health system (hospital) and their trading partners. MSCI supports and complements the work and goals of the supply chain professional in their pursuit to strategically direct supply-chain activities and relationships. When this occurs real supply-chain value will find its way into healthcare and only then will the layers of cost and inefficiencies be removed. MSCI transforms health systems with empowerment to control their own supply chain costs."

Above from Medical Supply Chain, Inc. press release September 17th, 2004.

(C) The termination of three more experienced Assistant US Attorneys

140. Karl Rove utilized Alberto Gonzales take over of the US Department of Justice to reign in the independence of the US Attorneys around the nation to strengthen the protection racket of the conspiracy hub and to further protect the control of hospital supply distribution through the Novation LLC cartel.

141. Karl Rove with Alberto Gonzales also caused enemies of the cartel to be targeted by unlawful wiretapping and electronic surveillance for the purpose of more effectively obstructing justice where it could not be controlled by a US Attorney or the F.B.I.

142. Karl Rove was caught by surprise when the Assistant US Attorney Shannon K. Ross that headed the criminal division for the Northern District of Texas signed criminal subpoenas against the Novation LLC cartel members in an investigation triggered by a whistleblower False Claims Act filing against Novation LLC.

143. Karl Rove therefore relied on then U.S. Deputy Attorney General Paul J. McNulty to change the rules for investigating publicly traded corporations in the McNulty Memo authored in December 2006 to prevent the Northern District of Texas US Attorney's office from requesting records of member hospital funds being laundered by Novation LLC through the petitioner's competitor Neoforma, Inc.

144. Former US Attorney General Alberto Gonzales was a partner in Vinson & Elkins, LLP which represented the defendant Novation, LLC in antitrust cases including the one brought by the petitioner in 2005.

145. On information and belief, the defendants' protectors in the current administration determined the stakes were high enough over Novation LLC to necessitate decimating the whole civil fraud unit in Dallas-Fort Worth, Texas.

146. The remainder of the experienced core of white collar crime prosecutors in the Dallas and Ft. Worth offices were terminated by Richard B. Roper, III after Roper was sworn in as interim United States Attorney for the Northern District of Texas and at the direction of Attorney General Alberto Gonzales for having violated Karl Rove's protection of Novation LLC, VHA and UHC.

147. 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.

148. 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 False Claims Act litigator Thelma Louise Quince Colbert.

149. The Dallas Morning News article stated Ms. Ross, who had been feeling ill, was found September in her home. Ms. Colbert accidentally drowned a month earlier in July.

iii. Discovery that the Hospital Supply Cartel Protection Reached To Kansas City

150. On April 9, 2007 the petitioner published a press release to call attention to the unusual circumstances in which the extremely competent US Attorney for the Western District of Missouri, Todd Graves had been removed from office and bizarrely replaced with Bradley J. Schlozman of Kansas.

(A) Medical Supply Chain press release dated April 9, 2007

151. The press release referenced documents obtained by the petitioner from third party sources in his litigation against Novation LLC and the other hospital supply cartel members and stated:

"Medical Supply Chain founder Samuel Lipari unearthed a US Department of Justice memo revealing the Office of the Attorney General had targeted not eight but ten US Attorneys including the former attorney for the Western District of Missouri, Todd P. Graves. The documents were obtained during Medical Supply Chain's discovery related to the civil antitrust action *Medical Supply Chain, Inc. v. Novation LLC, et al*, Western District of Missouri case #05-210-CV-W-ODS filed on March 9, 2005.

The e-mail dated January 9th, 2006 from Kyle Sampson, chief of staff for Attorney General Alberto Gonzales, to Harriet Miers and William Kelley at the White House, shows the ten U.S. Attorneys that were first selected to voluntarily resign or face termination. Attorneys that resigned were redacted. Todd P. Graves of Missouri resigned March 24, 2006.

The Western District of Missouri US Attorney office under Todd P. Graves had been active in prosecuting Medicare fraud. Medical Supply Chain, Inc.'s civil antitrust suit against Texas based Novation LLC, Volunteer Hospital Association (VHA), University Health System Consortium (UHC) and Neoforma, Inc. alleges the companies formed a cartel and were involved in a scheme to monopolize hospital supplies to defraud Medicare through payments to administrators and kickbacks. The scheme resulted in almost all of Kansas City, Missouri St. Luke's hospital's one hundred million dollar supply budget being purchased through Novation LLC. St. Luke's merged with University of Kansas Hospital after Irene Cumming, CEO of the University of Kansas Hospital was given a job by University Health System Consortium (UHC) on March 19, 2007.

The first prosecutor identified as being fired by the Office of the Attorney General was Carol Lam, a U.S. Attorney in San Diego, California. Carol Lam was personally prosecuting Medicare fraud at the Tenet Healthcare Alvarado hospital when political pressure was brought on the Justice Department to remove her from office. Carol Lam's prosecution caused the U.S. Department of Health and Human Services threatened to cut Medicare and Medicaid funds to Alvarado Hospital Case # 03CR15870 US Dist. Court Southern California.

On May 17, 2006, Alvarado Hospital's parent company, Tenet Healthcare, agreed to sell or close the hospital and pay $21 million to settle criminal and civil charges.

Medical Supply Chain discovered documents include a December 4, 2006 e-mail from Attorney General Alberto Gonzales' Chief of Staff Kyle Sampson targeting Carol Lam. On December 7, 2006, the Justice Department fired Carol Lam and the six other U.S. attorneys that refused to resign.

Samuel Lipari became concerned that Attorney General Alberto Gonzales was using the firing of appointed US Attorneys and senior assistant US Attorneys to obstruct justice in investigations involving public corruption on October 18, 2004 when white collar crime prosecuting Assistant US Attorneys Leonard Senerote, Michael Uhl and Michael Snipes were fired from the Ft. Worth Texas office of the US Attorney that had issued subpoenas in an ongoing investigation of Novation LLC and other hospital suppliers for anticompetitive practices. Samuel Lipari was especially concerned over the firings in the Ft. Worth office where the chief US Attorney responsible for Medicare fraud, Thelma Louise Quince Colbert had been found dead in her swimming pool on July 20th, 2004 and the Ft. Worth office Senior US Prosecuting Attorney that had signed the subpoenas, Shannon Ross (formerly of Kansas) was found dead in her home on September 13th, 2004. Shannon Ross's investigation of Novation LLC sparked the New York Times article "Wide U.S. Inquiry Into Purchasing For Health Care" on Saturday August 21, 2004.

Attorney General Alberto Gonzales used a little known provision of the USA PATRIOT Act to replace Todd P. Graves with Bradley Schlozman. Bradley Schlozman failed to prosecute public corruption related to the Medical Supply Chain litigation and failed to enforce civil rights laws related to the Novation LLC defendants success in getting Medical Supply Chain's counsel Bret D. Landrith disbarred. Samuel Lipari raised these concerns before the US Court of Appeals for the Eight Circuit. On January 16, 2007 Attorney General Gonzales tried to quell criticism of the mass US Attorney firings and the misuse of the USA PATRIOT Act by announcing John Wood would be taking Schlozman's place in Kansas City."

Above from Medical Supply Chain press release dated April 9, 2007.

152. When Karl Rove's role in politically influencing the operations of the US Department of Justice started coming to light as a result of the "Ninth US Attorney" press release created by the petitioner in the first part of April, 2007, the hospital supply cartel's protection conspiracy hub of Rove and McNulty turned to Scott J. Bloch, head of the Office of Special Counsel (and former Kansas Disciplinary Administrator representative) to run protection for Karl Rove.

(B) Special Counsel Scott J. Bloch

153. Scott J. Bloch was supposed to be investigating Karl Rove, warrantless surveillance and the Hatch Act employment violations of the defendant Bradley J. Schlozman (also from Kansas) and Schlozman's conduct in Missouri to protect the hospital supply cartel defendants from the petitioner but identified more strongly with his role protecting hospital supply cartel members than his government job as Special Counsel.

154. Scott J. Bloch's real direction and actions were not from the mandate of his government office but instead communicated to him through the Republican National Committee ("RNC") email system from his hospital supply cartel protector associates in the conspiracy hub of Rove's USDOJ protection scheme.

155. An investigation of Scott J. Bloch however, by the federal Office of Personnel Management's inspector general looking into claims that Mr. Bloch improperly retaliated against employees and dismissed whistleblower cases without adequate examination, threatened to expose the USDOJ's protection selling conspiracy hub's use of RNC email to control the US Department of Justice.

156. To protect the conspiracy, Scott J. Bloch destroyed evidence including the RNC email on Dec. 18 and Dec. 21, 2006 by having his drive and two others used by departed aides subjected to a level seven wipe. The wipe eliminates the possibility of the hard drives being forensically reconstructed.

iv. The Attempt to Interfere With CoxHealth Investigation

157. Staffers for Missouri's US Senator Christopher S. "Kit" Bond approached the Bush administration in 2005 and suggested that it might be wise to remove Graves from his post after his four year term expired because of his wife's involvement in a controversial 'fee office' patronage scheme in Missouri.

(A) Senator Kit Bond

158. Later Senator Kit Bond did become directly involved in Graves' termination in early 2006.

159. Senator Kit Bond 's spokesman Shana Marchio said in a statement: “Senator Bond … upon (Graves’) request personally called the White House to gain Todd extra time to wrap up case work before his departure."

160. The White House rejected Senator Kit Bond’s efforts on Graves’ behalf because of “performance” concerns. E-mails from the Justice Department and the White House have used similar language in discussing the other U.S. attorneys who were fired.

(B) Appointment of USA Bradley J. Schlozman

161. Bradley J. Schlozman was appointed to serve as the United States Attorney for the Western District of Missouri under an Attorney General Appointment on March 23, 2006.

162. On July 3, 2006 , the federal grand jury investigating Medicare fraud at CoxHealth in Springfield, Missouri ended its term without issuing indictments.

163. However, the evidence of Medicare fraud by defendant Robert H. Bezanson’s CoxHealth hospital that had been heard and recorded during the grand jury term was too substantial for the USDOJ not to proceed.

164. The hospital supply cartel was concerned that the widespread inquiry started by former US Attorney Todd Graves would also lead to charges against the artificial inflation of hospital supplies through the kickback practices and Medicare fraud used by the defendants VHA Mid-America, LLC, VHA and Novation, LLC.

165. The continuing prosecution of CoxHealth had to be narrowed and kept from targeting Novation LLC.

(C) Appointment of USA John Wood

166. After the petitioner’s April 9, 2007 press release caused Bradley J. Schlozman to be recalled, the administration at the direction of Karl Rove appointed John F. Wood to the position of US Attorney for the Western District of Missouri on April 11, 2007.

167. US Attorney John F. Wood is a cousin of Senator Kit Bond.

v. Hospital Cartel Stops the Federal Grand Jury Over VHA Defendant's Medicare Fraud

168. The petitioner knew of US Attorney Todd Graves' reputation as a supremely competent state prosecutor and had followed Grave's prosecution of the Kansas City pharmacist that had diluted chemotherapy drugs.

(A) USA Todd Graves

169. The petitioner did not know at the time he discovered Todd Graves had also been targeted and wrongfully fired as a US Attorney over an ongoing Medicare Fraud investigation of a Missouri hospital.

170. Just like the Western District of Missouri's US Attorney Todd Graves, the first prosecutor identified as being fired by the Office of the Attorney General was Carol Lam, a U.S. Attorney in San Diego, California.

171. Like Graves, Carol Lam was personally prosecuting Medicare fraud.

(B) USA Carol Lam

172. US Attorney Carol Lam had investigated and then prosecuted the Tenet Healthcare Alvarado hospital when political pressure was brought on the Justice Department to remove her from office.

173. Tenet Healthcare is a member of Novation LLC and the hospital supply cartel.

174. Carol Lam's prosecution caused the U.S. Department of Health and Human Services threatened to cut Medicare and Medicaid funds to Alvarado Hospital over Case # 03CR15870 US Dist. Court Southern California.

175. On May 17, 2006, Alvarado Hospital's parent company Tenet Healthcare, agreed to sell or close the hospital and pay $21 million to settle criminal and civil charges.

(C) Defendant Robert H. Bezanson

176. The defendant Robert H. Bezanson is President & CEO of CoxHealth a hospital system in Springfield, Missouri that also operates a nursing home.

177. CoxHealth, like Tenet Healthcare Alverado is also a member of Texas based Novation LLC which includes the Volunteer Hospital Association ("VHA") and University Health System Consortium ("UHC").

178. The defendant Robert H. Bezanson has participated in the fraudulent reports of Novation, LLC that misrepresent the hospital supply cartel's artificial inflation of hospital supply costs as a savings to CoxHealth.

179. In 2007, the fraud of the "savings" report was continued but under the name of Robert H. Bezanson's other organization, the defendant VHA Mid-America, LLC, a subsidiary of VHA and also a member participant in Novation, LLC.

vi. Federal Grand Jury Investigation of Defendant Bezanson's Hospital For Medicare Fraud

180. On August 26, 2005 the Springfield Missouri News-Leader reported that US Attorney Todd Graves U.S. Attorney Todd Graves names former Cox CEO Larry Wallis and former Cox Chief Financial Officer Larry Pennel as targets. He names former Cox employee David Tapp, Cox corporate compliance officer Betty Breshears and the present action defendant Cox CEO Robert Bezanson as subjects of the government action.

(A) CoxHealth

181. The News-Leader August 26 article also stated under the heading "New Revelations" information about the investigation:

> "Bezanson first publicly acknowledged on April 1 that an "audit" was being conducted by Health and Human Services. Subsequent hospital memos and court documents mentioned an investigation.
>
> Graves' court document reveals for the first time who and what is under scrutiny at Cox.
>
> The document states, "Since at least December 2004, agents from the United States Department of Health and Human Services, Office of Inspector General, Office of Investigations have been investigating allegations that defendant Cox and its agents/employees/corporate officers were and are involved in the commission of criminal health care fraud with respect to the Medicare program."
>
> The document explains that a government attorney told a Cox attorney in January 2005 that investigators were looking into allegations of Medicare fraud and needed to perform an on-site audit at Cox. The Cox lawyer indicated Cox was aware of possible irregularities and was conducting an internal investigation.
>
> One of the matters under investigation is the method by which Cox billed Medicare for dialysis services, Graves said.

"The specific allegation is that the physicians were paid despite not providing a service," he said.

Graves continued: "The government's investigation is wide-ranging and includes numerous additional matters that have nothing to do with Cox's dialysis services program and the physicians who were working in Cox's dialysis services program.

"Numerous Cox agents, employees, or officers have been identified as targets and/or subjects of the government action," it states.

Graves' document names Wallis, Pennel, Bezanson, Breshears and Tapp "by way of illustration and not by way of limitation."

182. Above from August 26, 2005 the Springfield Missouri News-Leader article Federal probe looks at 5 Cox officials Investigation focuses on determining whether Medicare fraud took place. By Kathleen O'Dell.

183. On July 3, 2006 , The News-Leader reported the federal grand jury issued no indictments in the CoxHealth Medicare fraud investigation before ending its term.

184. The News-Leader article stated that “Among the unanswered questions after the grand jury's dismissal Thursday is the status of an overlapping civil suit filed on behalf of two fired Cox employees. Their attorney, Matthew Placzek, declined to comment about the issue Thursday.”

185. The News-Leader reported on October 3, 2006 - A U.S. District Court judge has lifted the stay, or delay, he imposed in November 2005 on the lawsuit against CoxHealth (Springfield, MO) filed by two former dialysis administrators.

186. The same article stated Roger Cochran and Dennis Morris claim they were wrongfully fired in 2004 after it became known they cooperated with federal law enforcement officials investigating alleged fraudulent business practices at Cox, court records show.

187. And that CoxHealth has been ordered by a U.S. District Court judge to produce internal files that led to the firing of two dialysis supervisors.

188. The News-Leader reported on September 17, 2007 - CoxHealth officials have confirmed the system has set aside $26 million in a special fund for possible expenses and settlement of an ongoing, wide-ranging federal probe.

189. The article stated; "U.S. attorneys have said in court documents they are investigating whether Cox officials committed Medicare fraud by knowingly overcharging the government program for kidney dialysis services by using a method of billing it was not eligible to use.

190. The article also reported Investigators are also looking at whether Cox officials paid two kidney specialists to serve as medical directors at Ozarks Dialysis Services even though they did not provide a service, according to a court document."

191. CoxHealth's $26 million is five million dollars larger than even the May 17, 2006 agreement of Tenet Healthcare to pay $21 million to settle criminal and civil charges for Tenet Healthcare Alvarado.

vii. Karl Rove Saw Removing US Attorney Todd Graves As Protecting Novation, LLC and VHA

192. Governor Matt Blunt and the Blunt family were strong social conservative Republicans, loyal to the Bush Administration. The Southern part of Missouri had always been key to George W. Bush's success and the destiny of the Republican party relied on the whether the swing state went with the GOP or its traditionally Democrat roots.

(A) Governor Matt Blunt

193. Governor Matt Blunt's hometown is Springfield, Missouri and the financial support of the above living wage population and especially healthcare professionals and the management in the CoxHealth and Freeman healthcare systems has been essential to the Blunt family's political fortunes.

(B) Lathrop & Gage LC

194. The defendant Lathrop & Gage LC employed Mark F. "Thor" Hearne, a high-level GOP operative, friend of Karl Rove, former national general counsel for the Bush/Cheney '04 political campaign, and co-founder of the American Center for Voting Rights (ACVR) that was used by the Republican National Committee to coordinate voting disenfranchisement.

(C) Mark F. "Thor" Hearne

195. Mark F. "Thor" Hearne, in his capacity at Lathrop & Gage LC, was also Missouri Governor Matt Blunt's long-time legal man counsel.

196. Both Missouri Governor Matt Blunt and Lathrop & Gage LC were being investigated by the Arkansas U.S. Attorney Bud Cummins in association with the privatization of the lucrative state licensing fee offices when Cummins was wrongfully fired by the US Department of Justice at the direction of Karl Rove.

197. U.S. Attorney Bud Cummins was then replaced by Tim Griffin a former assistant and protege of Karl Rove.

viii. Fallout from MSC April 9th Press Release Revealing Todd Graves was the Ninth US Attorney

198. On the day Lathrop & Gage LC was tied to the US Attorney firing scandal, the law firm's CEO Tom Stewart requested a 90-day sabbatical on April 23rd 2007 "for matters having to do with personal and family health."

(A) Lathrop & Gage LC

199. Tom Stewart had previously announced that he would leave his position as chief executive at Lathrop & Gage LC to become chairman, effective July 1, 2007.

200. Instead, he has left Lathrop & Gage LC firm altogether and the KC Star reported that "Stewart held the top job at the firm for 18 years. During his tenure the firm grew from about 60 attorneys to 280."

(B) Uninsurable Risk of Husch & Eppenberger LLC

201. At Husch & Eppenberger LLC, the previous incarnation of the defendant Husch Blackwell Sanders LLP the firm had undertaken the entire representation of the hospital supply cartel co-conspirators General Electric, GE Capital and GE Transportation in addition to the conflicting interest of being local counsel for the defendants Novation LLC, VHA, UHC, Neoforma, Inc., Robert J. Zollars, Curt Nonomaque and Robert J. Baker.

202. John K. Power of Husch Blackwell Sanders LLP had handled the case load by imitating the conduct of the Shughart Thomson & Kilroy P.C. attorneys who consistently obtained outcomes against the petitioner in the Kansas District Court that contradicted the facts and controlling law.

203. When the petitioner brought his state law claims to the 16th Circuit and this court, John K. Power of Husch Blackwell Sanders LLP would fail to show up for the court's hearings or participate in

court ordered mediation, prompting the petitioner to finally press release John K. Power of Husch & Eppenberger LLC's absences:

ix "$450 Million Dollar Medical Supply Lawsuit Returned to Missouri State Court

Samuel Lipari wins remand order following an untimely removal of state contract claims that exposed Health Care Corruption

Independence, MO (PRWEB) December 12, 2006 -- Medical Supply Chain founder Samuel Lipari's lawsuit for $450 million dollars in damages over a contract with General Electric (GE) to finance the Independence Missouri firm's entry into the hospital supply market in June 2003 was returned to Jackson County 16th Circuit Court at Independence by the US District Court for the Western District of Missouri. The GE defendants attempted to remove the case to US District Court on July 17, 2006 after General Electric lost a motion to dismiss the lawsuit on May 31, 2006 and failed to attend two Jackson County Circuit Court hearings or participate in court ordered mediation since the lawsuit was filed March 22, 2006. The lawsuit is *Lipari v General Electric, et al*, Case # 0616-CV07421

United States District Judge Hon. Fernando J. Gaitan, Jr. ordered the lawsuit remanded back to Jackson County 16th Circuit Court of the State of Missouri on November 29, 2006 because the federal court lacked jurisdiction.

The lawsuit defendants General Electric Company, General Electric Capital Business Asset Funding Corporation and GE Transportation System Global Signaling, LLC are represented by the St. Louis, Missouri law firm Husch & Eppenberger, LLC through their Kansas City, Missouri attorney John K. Power. John K. Power, Husch & Eppenberger, LLC 1200 Main Street Suite 2300 Kansas City, MO 64105, (816) 283-4651.

Samuel Lipari is the founder of Medical Supply Chain and is currently launching a consumer oriented discount medical supply business based in Independence, Missouri: http://MedicalSupplyLine.com Mr. Lipari is representing himself in the lawsuit.

About Medical Supply Chain:

Medical Supply Chain (MSC) is a worldwide provider of web-based supply chain collaboration solutions with an electronic marketplace serving health care communities and their trading partners. Medical Supply Chain was founded in May of 2000 with a mission to deliver enabling supply chain technology in health care. To learn more visit: http://www.MedicalSupplyChain.com"

Above from Medical Supply Chain press release dated December 12, 2006.

204. The press releases and the fact that the petitioner maintains all his documents openly on the www.medicalsupplychain.com/news web site caused MedicalSupplyChain.com information to show up earlier in Google searches than the Husch & Eppenberger, LLC web site

205. The bad public relations image caused Husch & Eppenberger, LLC' senior successful partners with business to start leaving or considering leaving for their own practice or to form small boutique firms competing with Husch & Eppenberger, LLC.

206. After the April 9th 2007 press release identifying Todd Graves as the 9th US Attorney wrongfully fired caused attention to be directed toward Husch & Eppenberger, LLC's conduct in the petitioner's litigation against the General Electric hospital supply cartel defendants.

207. Without even shame or embarrassment, John K. Power of Husch & Eppenberger LLC caused General Electric's CEO to become a RICO (18 U.S.C. § 1962 *et seq*.) defendant as federal claims were added to the petitioner's action against General Electric.

(A) Husch Blackwell Sanders LLP

208. Husch & Eppenberger, LLC's senior partners who had ignored discrete notice by the petitioner of John K. Power's conduct eventually became aware of the problems for the firm and began a desperate campaign to merge into another Missouri regional firm.

209. The firm eventually agreeing to take Husch & Eppenberger, LLC's three hundred attorneys was Blackwell Sanders LLP.

210. Recently the two firms announced that their common enterprise will be named Husch Blackwell Sanders LLP and Husch & Eppenberger, LLC's web site has stated that its name has changed to Husch Blackwell Sanders LLP.

(B) Kansas City Business Journal

211. The Kansas City Business Journal reported that the merger had to take place by December 31st 2007 and speculated that this was do to a conflict of interest between Blackwell Sanders LLP and Husch & Eppenberger, LLC's clients.

212. What the Kansas City Business Journal was unaware of was the liability created from the management of the legal defense of the General Electric clients in the litigation with the petitioner.

213. The Kansas City Business Journal was also unaware that Husch & Eppenberger, LLC had replaced Washington DC based Arnold & Porter as the sole counsel for the General Electric defendants.

214. Husch & Eppenberger, LLC had been put first into the role of local counsel in the Kansas District court antitrust litigation and then into sole counsel on the 16th Circuit Independence Missouri contract claims because of Husch & Eppenberger, LLC's billion dollar municipal bond underwriting malpractice coverage.

215. On information and belief the petitioner avers that the December 31st, 2007 deadline was the expiration of Husch & Eppenberger, LLC's malpractice liability and that liability insurance has been transferred under false representations to the insurers of Husch Blackwell Sanders LLP or in the alternative has ceased to be in force.

x. The Defendants' Need To Change Their Revenue Model

216. The defendants CoxHealth, Stormont-Vail Healthcare, Inc.,and Saint Luke's Health System, Inc., needed to change their revenue model.

217. While organized as Missouri nonprofit corporations, CoxHealth and Saint Luke's Health System, Inc. have the goal of increasing payments for services and goods sold through their institutions.

(A) Loss of Preferential Medicare Reimbursement through Blue Cross Blue Shield Of Kansas, Inc.

218. Previously, this increased revenue was achieved through favorable treatment by Blue Cross Blue Shield Of Kansas, Inc., located in Topeka, Kansas.

219. An African American whistle blower named Rosalind Wynne reported to the federal government in the early 1990's that Medicare coding procedures were not being followed in the Medicare and Medicaid administration contract held by Blue Cross for Kansas, Missouri and Nebraska.

220. The action, eventually styled *US ex rel, Rosalind L. Wynne v. Blue Cross Blue Shield Of Kansas, Inc.*, KS District Court Case No. 05-4035-RDR was held under seal for over six years.

221. The federal government however acted on the information furnished by Wynne and unknown to her, reached a settlement with Blue Cross Blue Shield Of Kansas, Inc. and the State of Kansas which had regulatory control over the insurer while Governor Kathleen Sebelius was the Insurance Commissioner for Kansas from 1994-2002.

(B) USA Eric F. Melgren

222. The United States Attorney for the District of Kansas Eric F. Melgren was on the purge list in January 2006 but was removed from the targeting list by demonstrating his loyalty to Karl Rove and Attorney General Alberto Gonzales and did not intervene in the False Claims Act case against Blue Cross Blue Shield of Kansas for the fraud in processing Medicare claims for Missouri, Kansas and Nebraska.

223.. The hospital supply cartel defendants were still able to receive favorable treatment from Blue Cross Blue Shield Of Kansas, Inc. which resulted in approval of inappropriate up-coding and elimination of audits until 2007 when the contract was awarded to Wisconsin Physicians Service Health Insurance Corp., of Madison, Wis. a legitimate Medicare Administrator.

224. In May 2007, the Centers for Medicare and Medicaid Services, a branch of the U.S. Department of Health & Human Services, told Blue Cross Blue Shield of Kansas it wasn't in the running any longer for a major Medicare contract to cover Kansas, Nebraska, Iowa and Missouri in Medicare Part A (inpatient) and Medicare Part B (outpatient).

225. The intervention of Karl Rove in continuing the suppression of enforcement against Blue Cross Blue Shield Of Kansas, Inc. had caused Blue Cross management to mistakenly believe it could continue to destroy and delay valid claims for some regional healthcare providers while giving preferential treatment to the hospital supply cartel members to advance the anticompetitive interests over the healthcare marketplace of Missouri, Kansas and Nebraska.

226. In May 2007, the Centers for Medicare and Medicaid Services, a branch of the U.S. Department of Health & Human Services, told BCBS it wasn't in the running any longer for a major Medicare contract to cover Kansas, Nebraska, Iowa and Missouri in Medicare Part A (inpatient) and Medicare Part B (outpatient).

227. The continuation of these practices which resulted in substandard performance of the Medicare and Medicaid administration contracts resulted in Blue Cross Blue Shield Of Kansas, Inc.'s management losing the contract and 350 living wage jobs in Topeka, Kansas by February 29, 2008.

(C) Insure-Missouri

228. Governor Matt Blunt had followed the RNC template of "hurt 'em and heal 'em" to accomplish the hospital supply cartel's plan to break Medicaid and lead an end run around the US Congress with a replacement program that opted out of Medicare's controls and safe guards and awarded the funds to the State of Missouri in a pilot program.

229. The defendant Husch Blackwell Sanders LLP through the influence of the hospital supply cartel installed a former Husch Eppenberger LLC attorney as Jane Drummond to serve as the Director of the Department of Health and Senior Services (DHSS) where she directs Missouri's healthcare purchasing.

230. The Insure-Missouri scheme attempts to source vendors through a request for proposal process that was secretive and quickly concluded.

231. The vendors that knew of the RFP and the meetings required to submit a proposal also participated in Governor Matt Blunt's creation of Insure-Missouri and in determining the ¼ billion dollar budget for the first phase.

232. The exploratory meetings, exchange of studies, emails and phone records were all to be maintained as Missouri state documents, even the schema of the software for the portal or electronic marketplace.

233. The portal utilizing Cerner's software creates a digital version of the Alabama Certificate of Need Board, allocating market share between insurance providers and hospital supplies to VHA /Novation LLC.

234. The central utility of Insure-Missouri to the hospital supply cartel defendants however is the scheme's liberation of Medicare dollars to replace Medicaid with payments that did not have Congress' audits and controls.

235. Insure-Missouri was intended to replace Blue Cross Blue Shield Of Kansas, Inc.'s liberal preferential allocation of Medicare dollars so the artificial inflation could continue.

xi. Phase I of the Plan To Eliminate Missouri Medicaid And Effective Cost Auditing

236. February 29, 2008 is judgment day for the hospital supply cartel defendant hospitals CoxHealth, Stormont-Vail Healthcare, Inc.,and Saint Luke's Health System, Inc. who would lose the backroom practices of trusted Blue Cross Blue Shield Of Kansas, Inc. employees and the mysterious suspense audits and bulk audit free Medicare claims administration frequently enjoyed by the defendants and their bottom line.

237. The hospital supply cartel defendants CoxHealth and Saint Luke's Health System, Inc. along with the 39 other "nonprofit" Missouri hospital members of the defendants Volunteer Hospital Association of America, Inc. (VHA), VHA Mid-America, LLC, Novation LLC and Neoforma, Inc. now GHX, LLC, including BJC HealthCare, Freeman Health System in Joplin, St. Luke's Health System in Kansas City, Liberty Hospital, Skaggs Medical Center in Branson, St. Francis Medical Center in Cape Girardeau, and Citizens Memorial Hospital in Boliver all were depending on the defendant hospital supply cartel's scheme to eliminate Medicaid and replace the coverage with a new federal and state funded health insurance plan designed by the Republican National Committee to be piloted in Missouri.

238. The name of the new program was to be called “Insure Missouri”. www.insuremissouri.org

239. The plan calls for opting out of the federal Medicaid system and replacing it with a Missouri state pilot program that controlled and administered federal Medicare funds in a block grant, free of the audits and requirements of the federal Medicaid and Medicare programs.

240. The lifting of federal controls is specifically required by the defendants CoxHealth and Saint Luke's Health System, Inc. to replace the favorable preferential treatment enjoyed under

241. The “Insure Missouri” program was to be the centerpiece of Governor Matt Blunt’s re-election campaign and was promoted by Blunt in his 2008 State of the State Address.

242. In 2005, to make way for the initiative that would eliminate federal oversight of Medicare and Medicaid expenditures required by the defendant cartel to artificially inflate hospital supply costs, Governor Matt Blunt cut 162,000 Missouri citizens off Medicaid.

243. The hospital supply cartel defendants, Karl Rove the former deputy chief of staff to the Bush administration and the Republican National Committee had worked extensively with Governor Matt Blunt, Henry Herschel and Ed Martin in secret meetings and utilizing email and “Blackberry” text messaging to determine state policy and administration rulemaking.

244. The Missouri House of Representatives were left out of the decision making process by Governor Matt Blunt’s administration, even key representatives from his own party.

KOMU TV in Jefferson City, Missouri reported the dissension:

> “Republican Rob Schaaf from St. Joseph says he wants to scrutinize Gov. Matt Blunt's Insure Missouri program. Blunt wants to sign up thousands of working parents by this spring, but that could be delayed by the study. Schaaf plans to finish before the state budget is approved. He says he wants to be sure the plan works before it gets money. Some lawmakers are annoyed that Blunt has already begun to seek bids from insurance companies. He plans to ask for $43 million to pay for the program.”

KOMU House Republicans Study New Health Plan Published: Friday, January 11, 2008 at 12:38 PM.

245. The Democrat House Minority leader, Representative Paul LeVota stated:

> "If the governor is serious about improving health care in this state, he should start by reversing the disastrous cuts he imposed three years ago that resulted in 180,000 Missourians losing access to health-care services," House Minority Leader Paul LeVota, D-Independence, said. "This is something we can do now - without a tax increase and without resorting to questionable schemes that leave many Missourians behind."

246. Blunt stalls insurance plan kickoff, Governor wants time to sway legislators. By Jason Rosenbaum, Columbia Tribune, February 23, 2008.

247. On information and belief, the actual reason the Governor of Missouri Matt Blunt halted the registration of Missourians into the Insure-Missouri plan was due to the unplanned visit by Mike Leavitt, Secretary of the U.S. Department of Health and Human Services to Kansas City on February 20 , 2008.

248. On information and belief, Secretary Mike Leavitt communicated to the hospital supply cartel and Governor Matt Blunt that the U.S. Department of Health and Human Services could no longer endorse Missouri opting out of the administration of Medicaid and Medicare funds by federal contractors as had been earlier planned by the Bush administration under Karl Rove.

249. On information and belief, Secretary Mike Leavitt halted the plan because of renewed investigations of Governor Matt Blunt by the USDOJ as a result of the US Attorney firing scandal and Karl Rove's use of the US attorneys in a protection selling scheme.

xii. Destroying Evidence in Covering Up Missouri Governor Matt Blunt's Work With the Cartel

250. The defendant conspirators through the State of Missouri administrative branch have acted to conceal Governor Matt Blunt's involvement in furthering the interests of the hospital supply cartel.

251. In November 2007, the State of Missouri Office of Administration filed an ethics complaint against Scott Eckersley for acting ethically in his service to the State of Missouri and to Governor Matt Blunt.

252. Scott Eckersley, a Springfield attorney was deputy counsel to Missouri State Governor Matt Blunt but was fired on Sept. 28 because he had been raising questions about whether Blunt and his staff were handling e-mails in compliance with state record-retention and open-records laws.

253. Scott Eckersley was fired and defamed in retaliation for pointing out that Blunt's administration was destroying e-mails in violation of Missouri's open-records law.

254. The lawsuit by former Governor Blunt attorney Scott Eckersley alleges that Blunt's top aides ordered staff to delete e-mails to avoid having to provide information to the media and public under Missouri's Sunshine Law.

255. Scott Eckersley's former supervisor, Governor Blunt's Chief Counsel Henry Herschel, has been replaced and moved into another state job as retribution for allowing the Scott Eckersley's criticism of destroying email and records to become public.

256. Attorney Rich AuBuchon, General Counsel of the Office of Administration has fraudulently mislead the public in order to continue the concealment of illegal destruction of email, electronic text messages and other state records some of which are connected to the hospital supply cartel's scheme to switch Missouri off of Medicaid where their artificial inflation of hospital supply costs would go unchecked:

> "Mr. Eckersley never once voiced a concern, never once wrote an e-mail, never once talked to other employees in the office evidencing any concern that the governor's office was not complying with the Sunshine Law or any record-retention policies."

257. Rich AuBuchon's misrepresentation contradicts the fact that Scott Eckersley sent emails to Rich Chrismer, Governor Blunt's Chief Counsel Henry Herschel and Ed Martin before September 20, 2007 advising Administration officials about the email retention policy that was being deliberately violated.

258. On or about October 25, 2007 Rich Aubuchon made the following intentional and written misrepresentation of facts to to the editorial page editor of the Springfield News-Leader, Tony Messenger:

> "On Friday, September 28, 2007, Martin and Pryor met with Eckersley to discuss his departure. [...] He spoke about his role in the General Counsel's office and asserted for the first time his views about the policy of record retention."

259. Rich AuBuchon is assertions in the letter were known by AuBuchon to be false.

260. Aubuchon's letter makes clear, he had by that time made an exhaustive search through all Eckersley's emails and would therefore have been fully aware of the emails sent before September 28 from Eckersley to others in the governor's office stating his views about the violation of the record retention policy.

261. Governor Matt Blunt and the governor's office attorney Ed Martin had instructed Rich AuBuchon, the General Counsel of the Office of Administration to go forth and make misrepresentations to defend Governor Blunt against Scott Eckersley's public exposure of the violation of records retention laws and the intentional destruction or spoliation of email records because by early fall of 2007, the Missouri Governor knew he was a person of interest in the US Attorney firing investigations.

262. The petitioner's revelation on April 9, 2007 that former Western District of Missouri US Attorney Todd Graves had been fired caused the US Senate and House of Representatives Judiciary Committees to expand their respective investigations and Governor Matt Blunt and Ed Martin knew they had created an unlawful policy of destroying records to conceal Governor Matt Blunt's work in the hospital supply cartel scheme to switch Missouri off of Medicaid.

263. Governor Matt Blunt and Ed Martin knew that their direct misrepresentations regarding why Scott Eckersley would lead to federal felony indictments while Governor Matt Blunt still held office.

264.While Missouri newspapers were covering the controversy over the firing of Scott Eckersley and the failure of Governor Matt Blunt and Ed Martin to have a lawful policy regarding the retention of email and other electronic records, Missouri Attorney General Jay Nixon received information from a whistleblower in the administration that the back up tapes had been tampered with to eliminate evidence.

265. On January 22, 2008 Governor Matt Blunt announced he would not be running for re-election.

xiii. The Defendants Scheme To Fraudulently Obtain Federal Cancer Research Funds

266. The Hall Family Foundation has been a central supporter of the Kansas City Area Life Sciences Institute, Inc. ("KCALSI") chaired by Irvine O. Hockaday Jr.

267. The Hall Family Foundation contributed over $800,000.00 to KCALSI.

(A) Irvine O. Hockaday Jr.

268. Irvine O. Hockaday, Jr., is the retired president and chief executive officer of Hallmark Cards, Inc.

269. Mr. Hockaday is a celebrated Republican Party contributor:

> "I believe that the way President Clinton has conducted himself in office is wanting," said Irvine O. Hockaday, the chief executive of Hallmark Cards, who said he was not thrilled by the choice but planned to vote for Mr. Dole.
> "We're at a stage in the evolution of our democracy where the power of example has become disproportionately important," Mr. Hockaday said. "The inconsistencies in delivering on his word and the way the White House has handled Whitewater and Filegate issues all add up to a counterproductive behavioral example."

Above from "Executives Back Dole Despite Clinton Record" By Judith H. Dobrzynski, New York Times, October 18, 1996.

(B) Kansas City Area Life Sciences Institute, Inc.

270. The Kansas City Area Life Sciences Institute, Inc. is located at Kansas City 2405 Grand Blvd Suite 500, Kansas City, MO 64108, in the Hallmark, Crown Center area.

271. KCALSI became the coordinating entity for the larger effort to obtain a Kansas City Missouri National Cancer Center in the Plaza area Hospital facility of the defendant Saint Luke's Health System, Inc. a Novation LLC, VHA hospital.

272. Primarily seeing KCALSI as a lobbying organization to promote government life sciences research investment in the greater Kansas City area, Irvine O. Hockaday Jr. saw Saint Luke's Health System, Inc. as a more agile, entrepreneurial entity than the UMKC School of Medicine to develop into a National Cancer Center.

273. Other stakeholders in KCALSI like principals in the Kansas City Star have criticized UMKC's unwillingness to expand its innovative Doctor education program to include more students to meet the emergency shortage of medical doctors nationwide.

274. KCALSI promoted a scheme to staff their vision of a national Cancer research program at Saint Luke's with resident Doctors from the University of Kansas.

275. KCALSI called the project "The National Cancer Institute (NCI) Comprehensive Cancer Center Designation for KUMC."

276. This vision failed to account for the needs of Kansas hospitals and communities, especially in Wichita and the Western half of the state that depended on those same residents.

(C) KU Medical School

277. Instead KCALSI focused on the advantages to be gained from leveraging KU Medical School's academic credentials for the bountiful research dollars a designated National Cancer Center would qualify to receive, even as much as two billion dollars a year.

278. To secure the unusual arrangements of obtaining the KU Medical School students, researchers and residents for work across the state line into Missouri, KCALSI had to bring Kansas Governor Kathleen Sebelius on board and to also pry KU Medical School free of the KU Hospital

Authority in Kansas City, Kansas which was created to protect the state teaching hospital known popularly as KU Medical Center from Saint Luke's Health System, Inc.'s competition.

(D) KU Hospital CEO Irene Cumming

279. Irene Cumming, CEO of the University of Kansas Hospital was given a job by the hospital supply cartel defendant University Health System Consortium (UHC) on March 19, 2007 to help KCALSI take control of KU medical School.

280. Irvine O. Hockaday Jr. openly expressed his involvement in trying to merge KU Medical School with the defendant Saint Luke's Health System, Inc. a Novation LLC hospital chain to create a federally funded National Cancer Center:

> "Much has been written about the affiliation discussions that have been going on between KUMC, KUH and SLH.
> I can report that Letters of Intent have been signed between these institutions to affiliate for purposes of teaching and research.
> These letters will be submitted to the Boards of both hospitals at their February meetings.
> The signed agreements describe a collaboration around teaching and research which would leverage the complimentary strengths of each institution.
> There is enormous promise in this.
> But, not all issues have been resolved—as they must be for a master affiliation agreement to be concluded. Gaps exist between KUMC and KUH on key issues.
> Importantly, however, the Chancellor of the University of Kansas unequivocally assured me and asked me to assure you that resolving these remaining issues will be top priority for KU. He will dedicate his full effort to that end.
> He further advised that the clear goal of the University is to complete this process and fulfill our vision of a national recognized life sciences center.
> This clear and unequivocal commitment by Chancellor Hemenway recognizes a central reality: there is one purpose of these affiliations and only one.
> And that is to accelerate and elevate medical research and patient care in our region...to the benefit of our residents and beyond.
> That is the only reason for affiliation.
> And it is every reason.
> To let parochial institutional interests, bureaucratic complexities or individual agendas to supersede our regional opportunity—even our obligation—would subvert the very purpose and hope of this conference.
> The Chancellor has said he will not let that happen.
> In a remarkable statement of support for the affiliation concept, a combination of foundations and businesses have committed a pool of approximately $150M—and that could grow—to this effort...so long as the institutional leadership pursues a truly collaborative effort.
> You should know the names of those who have stepped forward in such unprecedented fashion.
> Cerner, DST, Embarq, GKCCF, Great Plains Energy, H&R Block, Hall Family Foundation, Hallmark
> Kansas City Southern, Sprint, YRC, Three anonymous
> Hopefully their leadership will be mirrored by that of University of Kansas and KU Hospital.
> This has not been easy...nor will the execution of such an undertaking be easy.
> Truman and UMKC have legitimate questions that will need to be addressed."

Above from Hockaday 2007speech to the Kansas City Chamber of Commerce.

xiv. Novation LLC Plan To Launder Federal Cancer Research Funds Replacing Neoforma

281. The defendants Novation LLC, VHA, VHA Mid-America, LLC, Thomas F. Spindler, Robert H. Bezanson, UHC, GHX LLC and Curt Nonomaque acted through Karl Rove who made repeated visits to Kansas City, Missouri gave assurances that the National Cancer Center revenue would be legitimately accounted for and used to fund research.

(A) Novation LLC, VHA, VHA Mid-America, LLC

282. The defendants Novation LLC, VHA, VHA Mid-America, LLC, Thomas F. Spindler, Robert H. Bezanson, UHC, GHX LLC and Curt Nonomaque omitted telling Missouri and Kansas State officials that the research dollars would replace the money the hospital supply cartel had previously laundered through Bob Zollars and Neoforma, Inc. to pay kickbacks to hospital administrators in exchange for acting contrary to their institutional interest and maintaining long term artificially inflated hospital supply contracts with Novation LLC.

283. The defendants Novation LLC, VHA, VHA Mid-America, LLC, Thomas F. Spindler, Robert H. Bezanson, UHC, GHX LLC and Curt Nonomaque acting through Karl Rove assured Missouri Governor Matt Blunt and Kansas Governor Kathleen Sebelius that Elias A. Zerhouni, M.D, director of The National Institutes of Health (NIH), a part of the U.S. Department of Health and Human Services would be able to cause John E. Niederhuber, M.D., the Director of the National Cancer Institute (NCI) to compromise its cancer research center standards and make the combination of the Novation LLC hospital Saint Luke's and the University of Kansas Medical School a National Cancer Institute (NCI)-designated Comprehensive Cancer Center.

(B) Saint Luke's

284. The defendant Saint Luke's, the University of Kansas Medical School and KCALI made representations of eligibility to the National Institute of Health when the Saint Luke's Plaza hospital and the KU Medical School did not have the research faculty, protocols or instructional curriculum to qualify and that the newly created institution would reasonably take as long as a decade to legitimately qualify.

(C) USA Todd Graves Revealed to be Ninth US Attorney Wrongly Fired

285. The petitioner being faced with his competitors' Novation LLC, Neoforma, Inc. VHA and UHC openly committing antitrust felonies and tens of thousands dying from loss of health insurance in the cartel's increasingly unaffordable healthcare, could not understand the federal subsidization of the monopoly with National Cancer funds given to Novation LLC.

286. Earlier, the Bush Administration had privatized the Veteran's Administration system into using the hospital supply cartel Novation, LLC for procurement.

287. The petitioner's April 9, 2007 press release stated:

"The Western District of Missouri US Attorney office under Todd P. Graves had been active in prosecuting Medicare fraud. Medical Supply Chain, Inc.'s civil antitrust suit against Texas based Novation LLC, Volunteer Hospital Association (VHA), University Health System Consortium (UHC) and Neoforma, Inc. alleges the companies formed a cartel and were involved in a scheme to monopolize hospital supplies to defraud Medicare through payments to administrators and kickbacks. The scheme resulted in almost all of Kansas City, Missouri St. Luke's hospital's one hundred million dollar supply budget being purchased through Novation LLC. St. Luke's merged with University of Kansas Hospital after Irene Cumming, CEO of the University of Kansas Hospital was given a job by University Health System Consortium (UHC) on March 19, 2007."

Above from MSC press release dated April 9, 2007. The press release had the effect of putting State of Kansas officials on notice of what was happening.

288. A public relations representative for KU Hospital called the petitioner that afternoon to demand the retraction of the release. Then in the evening called again withdrawing the request for retraction and merely pointing out details about the differences between KU Hospital and KU medical School.

(D) Kansas State Legislature

289. The Kansas State Legislature had some renewed questions however about the proposed merger.

290. As a net loser like Truman Medical Center and UMKC School of Medicine, the Kansas State Legislature's questions were about how the merger could go through without harming the significant public investment in KU School of Medicine to serve communities around Kansas with Doctors and Residents that would otherwise not be there for citizens of Kansas.

(E) Governor Kathleen Sebelius

291. Governor Kathleen Sebelius had recruited the Johnson County moderate Republican District Attorney Paul Morrison to run as a Democrat for Attorney General of Kansas, despite his repeated human rights violations in the Karbino Kuel matter and participation in the City of Topeka Housing and Urban Development ("HUD") corruption scheme by attempting to prosecute the Kansas Army National Guardsman Mark Hunt and prevent his deployment to Iraq where he had volunteered to go and needed the income to support his family.

(F) Kansas Attorney General Paul Morrison

292. Governor Kathleen Sebelius had Kansas Attorney General Paul Morrison talk to members of the Kansas legislature and stake holders in the University of Kansas to counter the petitioner's press release.

293. Kansas Attorney General Paul Morrison knew that the petitioner's counsel Bret D. Landrith had been wrongfully disbarred to conceal federal crimes committed by Kansas State judicial branch officials.

(G) KS Department of Revenue Secretary Joan Wagnon

294. Kansas Attorney General Paul Morrison met with David Martin Price and his attorney Craig Collins over the kidnapping of Baby C in retaliation for Price's protected public speech against former Mayor Joan Wagnon (later campaign treasurer for Governor Kathleen Sebelius and currently Secretary of the Kansas Department of Revenue).

295. The petitioner's attorney Bret D. Landrith had represented David Martin Price *pro bono* on the appeal when Price's Kansas State appointed attorney refused to do so.

296. David Martin Price (like Mark Hunt) was a crucial witness to the City of Topeka's theft of HUD funds in the Kansas District Court Civil Rights and Fair Housing Act case *James Bolden v. City of Topeka*, brought by the petitioner's attorney Bret D. Landrith.

297. Kansas Attorney General Paul Morrison before was shocked that the career staff of the Kansas Attorney General's office had kept the matter from him and examined the evidence with Craig Collins concluding the child had been unlawfully taken.

298. Kansas Attorney General Paul Morrison promised to investigate and prosecute those responsible for the kidnapping and cover up.

(H) K.B.I. Director Robert "Bob" E. Blecha

299. Kansas Bureau of Investigation ("K.B.I".) Director Robert "Bob" E. Blecha and his predecessor K.B.I. Director Larry Welch did not investigate the retaliatory kidnapping of Baby C or the cover-up during the court proceedings, though David Martin Price had repeatedly contacted them.

300. The petitioner avers the following six paragraphs on information and belief:

301. In Spring of 2007, Kansas Attorney General Paul Morrison repeatedly misrepresented to members of the Kansas legislature that the petitioner's federal civil case against the defendants Novation LLC, VHA and UHC in *Medical Supply Chain, Inc. v. Novation, et al.*, KS Dist. case number 05-2299-CM (Originally Western District of Missouri case #05-210-CV-W-ODS) had no merit.

302. Kansas Attorney General Paul Morrison repeatedly misrepresented to members of the Kansas legislature that Novation LLC was not being investigated by the USDOJ over Medicare False Claims.

303. Kansas Attorney General Paul Morrison repeatedly misrepresented to members of the Kansas legislature that the petitioner's claims were bogus because the petitioner's attorney Bret D. Landrith had been disbarred by the State of Kansas for incompetence.

xv. AG Paul Morrison's Interference in Petitioner's Antitrust Case To Protect Cancer Funds

304. Kansas Attorney General Paul Morrison did not disclose to members of the Kansas legislature was that as Attorney General, Paul Morrison had directed Kansas Highway Patrol Superintendent Colonel William Seck to target the petitioner through the Kansas Highway Patrol and caused the petitioner's father's logistics business trucks to be stopped on Kansas Highways and his drivers to be arrested.

(A) Kansas Highway Patrol Superintendent Colonel William Seck

305. Kansas Attorney General Paul Morrison was acting on information from the hospital supply cartel defendants that the logistics business run by the petitioner for the petitioner's father Samuel Lipari

Sr. who was dying of cancer provided the sole resources for the petitioner to maintain the action *Medical Supply Chain, Inc. v. Novation, et al*., KS Dist. case number 05-2299-CM.

306. The purpose of Kansas Attorney General Paul Morrison's targeting the Lipari trucks through Kansas Highway Patrol Superintendent Colonel William Seck was to interfere with the petitioner's federal civil litigation *Medical Supply Chain, Inc. v. Novation, et al*., KS Dist. case number 05-2299-CM against the defendants' hospital supply cartel.

(B) KU Chancellor Robert Hemenway

307. The defendant Saint Luke' at the encouragement of AG Paul Morrison, KCALI, Irvine O. Hockaday Jr. and University of Kansas Chancellor Robert Hemenway went ahead and announced that KU Med School and Saint Luke's had concluded their merger agreement soley for the purpose of obstructing members of the Kansas State Legislature from furthering their investigation of the petitioner's allegations.

xvi. Kansas Officials' Interference In Petitioner's Antitrust Case For Defendants' Cancer Scheme

308. Kansas Attorney Discipline Office officials and their agents including Stanton Hazlett, Gene E. Schroer, John J. Ambrosio, Isaac L. Diel, Rex A. Sharp and Gayle B. Larkin committed misconduct as detailed elsewhere in this petition to protect the hospital supply cartel's scheme to turn the defendant Novation LLC hospital Saint Luke's into a National Cancer Center.

309. The misconduct in the disbarment of the petitioner's counsel Bret D. Landrith during *Medical Supply Chain, Inc. v. Novation, et al*., KS Dist. case number 05-2299-CM at the direction of the defendant Shughart, Thomson & Kilroy, P.C. through its senior partner US Magistrate James P. O'Hara and its attorney Andrew DeMarea is detailed in **Appendix Three**.

310. The misconduct of Kansas Highway Patrol officers under the direction of Kansas Highway Patrol Superintendent Colonel William Seck and Kansas Attorney General Paul Morrison in targeting the petitioner's trucks and drivers for the purpose of depriving the petitioner of the means to seek redress occured because of the belief that Kansas would benefit from $2 Billion dollars a year in health science research grants the Novation LLC hospital Saint Luke's at 4401 Wornall in Kansas City, Missouri would start receiving in a cancer research program headed currently by Thomas Jeffery Wieman, M.D.

311. The State of Kansas would benefit because the University of Kansas Medical School which the Novation LLC hospital St. Luke's needed to give the appearance it could qualify as a major research center would share in the research grant revenue.

312. The Kansas officials ignoring the discipline office's misconduct knew though the value of the conspiracy hub's offering.

313. Federal funds to the nation's largest medical research and education facilities had been significantly cut by the current administration.

314. More established and qualified institutions like the University of Missouri at Kansas City Medical School are having difficulty meeting their budgets for legitimate life saving ongoing research.

315. The Kansas officials believed they would benefit from the hospital supply cartel' ability to steer funds away from legitimately established research programs that could be used to build an actual qualifying research program that would meet what they were representing as already in existence.

xvii. The Clean Up of the Failed Scheme to Divert Federal Cancer Research Funds

316. On November 18th, 2007 the NY Times published a feature article by Mary Williams Walsh About an African American Novation LLC manager named Cynthia I. Fitzgerald who witnessed all the forms of conduct of the hospital supply cartel alleged in the plaintiff's federal antitrust complaint.

317. The manager had been the relator in a Medicare False Claims Act case held under seal by the USDOJ to protect Novation LLC, VHA and UHC.

318. When the petitioner finally succeeded in having US Attorney general Alberto Gonzales resign from office, the false claims action was finally released by the USDOJ shortly thereafter.

319. The Medicare False Claims Action is styled *US ex rel Cynthia I. Fitzgerald v. Novation LLC, VHA, University Healthcare Consortium et al*, N. Dist. Of Texas Case 3:03-cv-01589.

320. The Republican National Committee recognized that the hospital supply cartel's scheme to make the defendant hospital Saint Luke's a National Cancer Center and thereby replace Neoforma, Inc. as a vehicle to launder funds to hospital administrators participating in Novation LLC's long term anticompetitive contracts to artificially inflate hospital supplies had blown up.

321. The RNC knew the political fall out in Missouri, an important swing state was again in danger of determining which party controlled the Presidency and Congress after 2008.

322. The RNC lost the majority in the US Senate when US Senator Claire McCaskill prevailed over US Senator Jim Talent as a result of the political fall out from the first phase of the defendant hospital supply cartel's scheme to eliminate Medicaid and pilot state controlled health insurance plans using Medicare funds in Missouri at the beginning of Governor Matt Blunt's election.

(A) President George W. Bush's Return Visit

323. On January 31, 2008 President Bush flew again to Kansas City, Missouri.

324. President Bush went directly to Irvine O. Hockaday Jr.'s Hallmark Cards at Crown Center.

325. There President Bush and his staff cemented the details of a damage control plan for Karl Rove and Irvine O. Hockaday Jr.'s scheme compromising the integrity of Elias A. Zerhouni, M.D, director of The National Institutes of Health (NIH).

(B) Irvine O. Hockaday Jr.

326. Karl Rove and Irvine O. Hockaday Jr.'s exploitation of influence peddling to cause Elias A. Zerhouni, M.D and the U.S. Department of Health and Human Services to make John E. Niederhuber, M.D., the Director of the National Cancer Institute (NCI) compromise his agency's cancer research center standards and make the combination of the Novation LLC hospital Saint Luke's and the University of Kansas Medical School a National Cancer Institute (NCI)-designated Comprehensive Cancer Center had injured Kansas University and Kansas Governor Kathleen Sebelius' reputations.

(C) Representative Samuel B. 'Sam' Graves

327. After Hallmark Cards, the president's motorcade traveled to the private residence of Missouri US Congress Representative Samuel B. 'Sam' Graves, the brother of former US Attorney Todd Graves to help Representative Sam Graves raise money for re-election.

328. Irvine O. Hockaday Jr. and The Hall Family Foundation announced on February 20, 2008 that the Hall foundation is buying a Fairway office building in Johnson County that could under conditions be given to KU Med Center.

329. On February 21, 2008 Irvine O. Hockaday Jr. and The Hall Family Foundation announced a

$43 million gift to fund Children's Mercy expansion, the Kansas City Urban Hospital that with doctors and residents from UMKC School of Medicine serves the Missouri population that would have been most injured by the defendants scheme to divert research funds to a Plaza Saint Luke's hospital without a curriculum or research staff so that Novation LLC could launder the money through the cartel.

4. The Hospital Group Purchasing Enterprise To Artificially Inflate Prices

330. 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.

331. 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.

332. 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.

333. 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.

334. 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.

335. 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.

336. 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."

337. 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.

338. 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.

339. 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.

340. 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.

341. 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.

342. 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.

343. 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.

344. 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.

345. 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.

346. The fraud however is easily verified. The economic forecasts of VHA, 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.

347. 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.

348. 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.

349. 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.

350..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.

351. 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.

352. 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.

353. 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.

354. 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

355. 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.

356. 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.

357. 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.

358. 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.

359. 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.

360. 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.

361. 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.

362. 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.

363. 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.

364. 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.

365. 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).

366. 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).").

367. 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.

368. 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.

369. 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.

370. 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).

371. 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.

372. 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.

373. 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.

374. 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.

375. 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.

376. 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."

377. 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."

378. 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."

379. 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"

380. 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.

381. 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.

382. 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.

5. The Origin of Technology That Made GPO's Obsolete And Eliminated Two Distribution Levels

383. 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.

384. 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.

385. 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.

386. 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.

387. 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.

388. 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.

389. 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.

390. 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.

391. 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.

392. 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.

393. 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.

394. 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.

395. 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.

396. 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.

397. 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.

398. 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."

6. The Defendants Foreclosure of Competition In The Market For Hospital Supplies Through Exclusionary Contracts and Loyalty Agreements That Have The Same Exclusionary Effect.

399. 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.

400. 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.

401. 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.

402. 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.

403. 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.

404. 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.

405. 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.

406. 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.

407. 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.

408. 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%.

409. 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)

410. 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.

411. 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."

412. 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.

413. 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].

414. 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."

415. 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.

416. 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.

417. 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.

418. 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.

419. 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.

420. 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).

421. 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.

(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.

422. 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.

423. 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]

424. 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.

425. 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.

426. 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.

427. 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).

428. 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.

429. 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.

430. 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.

431. 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.

432. 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.

433. 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.

434. 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.

435. 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.

436. 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.

437. 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."

438. 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).

7. The Monopolization Of The Hospital Supply Industry By The Defendants In Conspiracies And Combinations With Premier, GHX, LLC and Their Predecessor Corporations

439. 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.

440. 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.

441. 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.

442. 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.

443. 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.

444. 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.

445. 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.

446. 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.

447. 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.

448. 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.

449. 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.

450. 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.

451. 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.

452. 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.

453. 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.

454. 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.

455. 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.

456. 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."

457. 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."

458. 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."

459. 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."

460. 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.

461. 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.

462. 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.

463. 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.

464. 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).

465. 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."

466. 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.

467. 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.

468. 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).

469. 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:

> "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]

470. 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.

a. US Bancorp's current President and CEO, Richard K. Davis

471. Samuel Lipari, founder of Medical Supply Chain, has discovered US Bancorp's current President and CEO, Richard K. Davis continued the extortion of healthcare supplier companies that caused US Bank's parent company to jettison its investment-banking unit US Bancorp Piper Jaffray. Samuel Lipari's lawsuit against US Bank has been in federal court since October 2002.

472. The National Association of Securities Dealers in 2002 found a US Bancorp managing director, Scott Beardsley, threatened to discontinue coverage of Antigenics Inc., a biotechnology company that develops treatments for cancers and infectious diseases, if Antigenics did not select US Bancorp Piper Jaffray as a lead underwriter for a planned secondary stock offering. Antigenics required the capital to enter the hospital supply market controlled by Novation LLC. As part of a settlement with the NASD, US Bancorp was censured and fined $250,000.

473. US Bancorp accepted liability for $12.5 million in disgorgement and an additional $12.5

million in penalties over US Bancorp Piper Jaffray's actions in falsely representing investment research related to capitalizing technology companies in IPO's on the NASDAQ stock exchange in 2003 as a result of Securities and Exchange Commission v. U.S. Bancorp Piper Jaffray Inc., 03 CV 2942 (WHP) (S.D.N.Y.).

474. US Bancorp underwrote the IPO for Neoforma, Inc.

475. Neoforma was taken private in 2007 by Novation LLC to conceal member hospital kickbacks laundered through the publicly traded company from the Ft. Worth, Texas US Department of Justice's False Claims Act investigation of Novation LLC for Medicare Fraud involving over 2500 Novation LLC hospitals.

476. The whistleblower case continues on as *United States ex rel. Cynthia I. Fitzgerald v. Novation LLC et al* N. Dist of TX Case no. 3:03-cv-01589 (2.) and has been covered by the New York Times (3.).

477. Jerry A. Grundhofer, the former CEO of US Bancorp attempted to disassociate US Bank from the notorious US Bancorp unit Piper Jaffray while Richard K. Davis was president by giving away Piper Jaffray to shareholders in a desperate spin off after two attempts to sell the investment unit at a hundred million dollar loss fell through in 2003.

478. However, Richard K. Davis continued a policy of using US Bank to interfere with healthcare technology companies attempting to enter the hospital supply market controlled by Novation LLC.

479. Samuel Lipari discovered US Bancorp's agents while under the control of CEO Richard K. Davis continued to obstruct Lipari's Medical Supply Chain's entry into the market for hospital supplies as recently as January 2008. Emails and court records now show that Shughart Thomson & Kilroy, P.C. acting at the direction of US Bancorp CEO Richard K. Davis repeatedly interfered with Lipari's efforts to obtain trial counsel in Medical Supply's Missouri litigation against General Electric (exchange symbol GE).

480. GE provided the $600 million dollars to take Neoforma, Inc. private and prevent the USDOJ from obtaining access to hospital kickback records in the Medicare False Claims Act investigation. US Bancorp CEO Richard K. Davis attempted to conceal the fraud by omitting disclosure of the potential litigation liability in Securities and Exchange Commission filings as required under § 302 of the Sarbanes-

Oxley Act. KPMG LLP also endorsed the filings omitting the disclosures required under § 302 of the Sarbanes-Oxley Act.

8. Defendants' Tortious Interference with the Petitioner's Business Relations

481. The petitioner has been injured by various combinations of the defendants tortiously interfering with the petitioner's business relationships and business expectancies.

a. Tortious Interference with Business Relations by Defendants Lathrop & Gage L.C.

482. On or about April 11, 2005, the defendant Lathrop & Gage L.C. took advantage of its confidential attorney counsel relationship with McClatchey papers to advance Lathrop & Gage L.C.'s agenda of supporting Karl Rove's influence peddling scheme through the Republican National Committee that included the selling of USDOJ protection.

483. Lathrop & Gage L.C. caused the Independence Missouri newspaper the Examiner to confront its investigative reporter James Dornbrook over the first of a planned series of articles dealing with the state cuts in Medicaid brought by Governor Matt Blunt.

484. The immediate purpose of Lathrop & Gage L.C. was to prevent the petitioner from obtaining redress for General Electric's real estate obligations to the petitioner and thereby tortiously interfere in the petitioner's business expectancies and relationships with General Electric, General Electric Transportation and GE Capital.

485. Lathrop & Gage L.C. knew that the petitioner was relying on these expectancies to capitalize Medical Supply Chain, Inc.'s entry into the hospital supply market controlled by Novation LLC. and that the USDOJ was protecting Novation LLC.

486. The article featured the petitioner and his company Medical Supply Chain, Inc. and described his experience in federal court and his efforts to get redress and provide competition to lower costs in hospital supplies and increase access to affordable healthcare.

487. James Dornbrook and his paper the Examiner were subjected to Governor Matt Blunt and the Republican National Committee associated law firm Lathrop & Gage L.C.'s "fear counseling" to discourage news media from reporting on challenges to the healthcare interests of the defendant cartel members with false threats of publishing liability.

488. Missouri attorney Mark F. “Thor” Hearne who was the president of Lathrop & Gage L.C. coordinated Karl Rove and the Republican National Committee’s schemes to deprive African Americans of their vote with state legislators, secretaries of state and even county voting officials.

489. The schemes were so effective that even the petitioner’s witness, Bret D. Landrith, a Republican who had registered with the State of Kansas upon renewing his driver’s license for his new address in a traditionally African American Topeka Kansas neighborhood two blocks down from the Brown vs. Board of Education Memorial was challenged and no record of his change reached the Shawnee County polling station.

490. Mark F. “Thor” Hearne of Lathrop & Gage founded the National Republican Committee front group known as American Center for Voting Rights (“ACVR”).

491. The May 3rd, 2007 McClatchy was the story breaking the news that the Western District of Missouri US Attorney Todd Graves was the Ninth US Attorney improperly fired released by the petitioner on April 9th, 2007.

492. Missouri's Governor Matt Blunt is also a client of Lathrop & Gage L.C., and has been represented for years by Hearne. Blunt, Hearne, and the ACVR were all central to the McClatchy(the conglomerate that owns and runs the Kansas City Star) piece as originally filed by Greg Gordon and the role of each of them in the Kansas City Star's May 3rd, 2007 altered version of the story was subsequently removed or otherwise greatly watered down.

493. The McClatchy reporter called the petitioner on April 9th and verified the story with US Senate staffers permitted to see the unredacted US Justice Department emails.

494. The defendant Lathrop & Gage L.C. participated in the scheme by US Bancorp CEO, Richard K. Davis, Chairman Jerry Grundhofer and Shughart, Thompson & Kilroy PC to deprive the petitoner of the representation services of the petitioner’s original attorney Bret D. Landrith.

495. The petitioner’s witness David Price was an activist for judicial reform in Kansas and had successfully raised enough signatures to get the issue of returning to the election of judges on the Shawnee County ballot during an election.

496. The petitioner’s attorney Bret D. Landrith fulfilled his annual Kansas Bar obligation by representing David Price *pro bono* in a parental rights termination for adoption case on appeal.

497. Kansas State Republican Senator John L. Vratil is a managing partner of Lathrop & Gage L.C. and in his capacity as a member of the Kansas Judicial Council prepared a substitute reform of performance reporting in retention elections announced on December 26, 2005 to counter legislative efforts to change the selection process for judges.

498. The head of the Kansas Supreme Court panel hearing the disbarment case against the petitioner's attorney, Hon. Justice Donald L. Allegrucci chaired the Judicial Council, but did not disclose his participation in it. See "Judicial panel suggests reviews", Topeka Capital Journal December 26, 2005.

499. The face of the disbarment of the petitioner's attorney expressly finds Landrith should be disbarred for his association with David Price and David Price's protected speech unrelated to Landrith's representation of Price in violation of the Fourteenth Amendment's protection of the rights to Free Speech, Association and Redress.

500. Additionally the disbarment of Landrith is expressly for taking James Bolden's action to federal court where the Tenth Circuit overturned the dismissal on the brief written by Bret D. Landrith for James Bolden.

501. The direct goal of the hospital supply cartel acting through the defendant Lathrop & Gage L.C. in having further articles about the petitioner's litigation censored in the Independence Examiner, Kansas City Star, and the Topeka Capital Journal was to make it possible to influence the outcome of the petitioner's litigation in Kansas District Court to take a business expectancies and property rights from the petitioner without the possibility of a broader civic involvement causing the petitioner's claims to be taken seriously.

502. Later, Lathrop & Gage L.C. as advisor and counsel to other regional newspapers would help to cause the information on Bradley J. Schlozman's misconduct and the wrongful dismissal of US Attorney Todd Graves discovered by the petitioner to be under reported or excluded from coverage to further the hospital supply's protection from enforcement by the USDOJ or from Federal Trade Commission chairwoman, Deborah Platt Majoras and in maintaining Karl Rove and the Republican National's political control of US Department of Justice law enforcement for the purpose of protecting the enterprises' taking of property rights and market share from the petitioner.

b. Tortious Interference with Business Relations

by Defendants Husch Blackwell Sanders LLP

503. The defendant Husch Blackwell Sanders LLP (formerly Husch Eppenger LLC) tortiously interfered with several business relationships and expectancies of the petitioner.

504. On Wednesday, August 24th, 2005, the defendant Husch Blackwell Sanders LLP acting through its *pro hac vice* agent Jonathan L. Glecken of Arnold & Porter, LLP, lead counsel for the defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC , threatened Medical Supply's counsel with the loss of his home if he did not withdraw Medical Supply's Missouri state law contract based claims.

i. Interference with Business Relationship with Bret D. Landrith

505. The defendant Husch Blackwell Sanders LLP acting through its *pro hac vice* agent Jonathan L. Glecken tortiously interfered with the business relationship between the petitioner and his legal counsel when Jonathan L. Glecken told the petitioner's counsel Bret D. Landrith that Landrith would have his house taken from him and all his property if he did not stop seeking redress for the petitioner even on the Missouri state law claims, which were not in dispute or subject to sanction.

506. Jonathan L. Glecken of Arnold & Porter, LLP, and John K. Power as agents of the defendant the defendant Husch Blackwell Sanders LLP and the hospital supply cartel members acting through Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC in *ex parte* communications with judicial branch officials and officials of the City of Blue Springs caused prejudice against the petitioner and his counsel to extort from them their property rights and the right to vindicate the petitioner's contract claims by representing GE as rich and powerful with the ability to control court outcomes and that the petitioner because he did not have money was not entitled to have his contract rights enforced.

ii. Interference with Business Relationship with David Sperry

507. Before filing the initial petition against the General Electric hospital supply cartel members in this court, the petitioner sought out Missouri licensed counsel experienced in commercial torts and contract law.

508. The only attorney the petitioner could find to visit with him about the claims was David Sperry of Independence, Missouri who had both experience in complex commercial litigation and the discovery disputes the petitioner anticipated would be the deciding issue in his claims.

509. After interviewing the petitioner, David Sperry was incredulous and shocked that the petitioner's prior counsel had been disbarred.

510. The defendant Husch Blackwell Sanders LLP succeeded in interfering with the business expectancy of legal representation and interfered with the petitioner's business relationship with David Sperry when Sperry declined to take the case because the power of the GE defendants over the court system as exercised by Husch Blackwell Sanders LLP and its *pro hac vice* agent Jonathan L. Glecken of Arnold & Porter, LLP would likely result in ethics complaints and in the case being transferred to a distant venue where it would be impossible for him to economically prosecute the case and his property rights in the contingent fee representation of the petitioner would be forfeited.

iii. Interference with Business Relationship with James C. Wirken and the Wirken Group

511. After his Missouri state claims copied and pasted from the Kansas District Court complaint against the GE defendants where they were dismissed without prejudice survived a GE dismissal motion, the petitioner was referred to Mr. James C. Wirken founder and Chairman of the Wirkin Law Group in Kansas City, Missouri.

512. Mr. James C. Wirken graciously agreed to schedule an appointment to interview the petitioner on the possibility of representing his claims against GE.

513. However, before the actual meeting could take place, the present action defendant Husch Blackwell Sanders LLP through its employee John K. Power, MO Lic # 70448 had contacted James C. Wirken and his son who also was counsel at Wirkin Law Group to conduct several conversations to discourage the Wirkens from representing the petitioner.

514. During the conversations, Husch Blackwell Sanders LLP through John K. Power placed the Wirkens in fear of associating with the petitioner, falsely stating that the petitioner had been repeatedly sanctioned for baseless claims, that Husch Blackwell Sanders LLP's clients, the GE defendants were so powerful that no law firm could stand up to them and placing the Wirkens in fear that all the services

provided the petitioner would go uncompensated because the GE defendants would prevail no matter what in court.

515. Mr. James C. Wirken did politely interview the petitioner and charitably offered some constructive criticisms regarding the presentation of the case but strongly urged the petitioner to continue on *pro se*.

516. Mr. James C. Wirken stated that the Wirkin Group would hve to charge $7,500.00 to just read the complaint and would have to have a very sizeable retainer to cover any further research or meetings to just determine whether they would represent the petitioner.

517. The petitioner believed this was unusual for a cut and dried contract case that had already survived dismissal intact and where the petitioner had prevailed in obtaining a remand and understood that his business expectancy in the Wirkin Group's legal representation had been tortiously interfered with.

518. In January 2008, Mr. James C. Wirken did offer to visit with the petitioner about representing him in his GE litigation.

519. The petitioner is currently trying to overcome the additional economic injuries inflicted upon him by the defendants subsequent to the filing of the amended GE RICO petition in federal court, to be in a position again to pay for Wirkin Group's legal representation should it be offered.

c. Tortious Interference with Business Relations
by Defendants Jerry Grundhofer, Richard K. Davis,
Husch Blackwell Sanders LLP, Shughart Thomson & Kilroy PC

520. The defendants US Bancorp CEO, Richard K. Davis and Chairman Jerry Grundhofer through their defense counsel's detailed sworn affidavits for attorney's fees admit time spent with John K. Power and other attorneys of Husch Eppenger LLC now Husch Blackwell Sanders LLP met with Shughart Thomson & Kilroy PC attorneys for the purpose of coordinating General Electric's defense of contract and antitrust claims brought by the petitioner in *Medical Supply Chain, Inc. v. General Electric Company, et al*., KS Dist. case number 03-2324-CM and where US Bancorp had no interest in the sale of lease contract between Medical Supply Chain, Inc. and General Electric.

521. The defendants Husch Blackwell Sanders LLP met with Shughart Thomson & Kilroy PC have repeatedly failed to produce these documents in the petitioner's discovery requests in this court and the Kansas District Court.

522. The petitioner has evidence that includes emails between the petitioner and Norman E. Siegel of Stueve Siegel Hanson, LLP that support a business relationship or expectancy was formed between himself and Stueve Siegel Hanson, LLP.

523. The petitioner sought to retain Norman E. Siegel to represent the petitioner's contract related claims against General Electric and state antitrust claims against General Electric's hospital supply co-conspirator Novation LLC in the 16th Circuit State of Missouri Court at Independence, Missouri.

524. The petitioner's cause was likely to return to federal court in the US District Court for the Western District of Missouri if the state representation could not be obtained in time.

525. During the course of communications about representation, the petitioner's claims against General Electric were removed to the Western District court. Seigel was one of only a handful of attorneys in the region that had the skills set required to replace the petitioner's original counsel in the General Electric and Novation LLC litigation whom the defendants had caused to be disbarred.

526. The defendant US Bancorp CEO, Richard K. Davis and Chairman Jerry Grundhofer through their agent Shughart, Thompson & Kilroy PC delegated the conduct of the litigation to Shughart, Thompson & Kilroy PC without controls in place to prevent fraud and racketeering as required under § 302 of the Sarbanes-Oxley Act and caused the petitioner's federal court litigation with General Electric in Missouri to be obstructed and interfered by depriving the petitioner of the representation of Stueve Siegel Hanson, LLP. during September to December of 2007.

527. The defendant US Bancorp CEO, Richard K. Davis and Chairman Jerry Grundhofer through their agent Shughart, Thompson & Kilroy PC caused the petitioner to be denied counsel and a prosecuting witness in the body of Norman E. Siegel and deprived the petitioner of the business expectancy of the legal representation of Stueve Siegel Hanson, LLP to prevent the petitioner from mitigating or covering for his damages from the defendants US Bank and US Bancorp's breach of the contract for escrow accounts and to prevent the petitioner from realizing the benefit from the contract or business expectancy with General Electric.

528. The defendants US Bank and US Bancorp interfered with and caused the petitioner to lose his business expectancy in the representation by Stueve Siegel Hanson, LLP and supplemented their continuing interference with the petitioner's business expectancy with General Electric by having their

agent Shughart Thompson & Kilroy, PC and the person Mark A. Olthoff, KS # 70339 fraudulently misrepresent the reputation of the petitioner and the petitioner's business and legal claims to Norman E. Siegel in the period from November 20th to December 8, 2007.

529. On December 7, 2008 the petitioner heard from Norman E. Siegel numerous misrepresentations about the viability of his claims that did not originate from case law or the documentation.

530. Some of the misrepresentations were clear "whoppers" like the litigation against the defendant conglomerate US Bancorp with banking and non-banking subsidiaries was not viable because banks cannot be liable for antitrust.

531. Notwithstanding the obvious, that US Bancorp is not a bank, Congress has specifically created policy specifically prohibiting banks anticompetitive acts in their client's market, creating a specific bank antitrust act The anti-tying section (Sec. 106) of the Bank Holding Company Act (BHCA) of 1970, and including banks in provisions of the Sherman and Clayton Antitrust Acts.

532. The overwhelming weight of American antitrust law reveals banks are not immune.

533. This misrepresentation of the law was communicated to Norman E. Siegel by the defendants US Bancorp President and CEO Richard K. Davis; Chairman Jerry Grundhofer; and Shughart Thomson & Kilroy PC through Mark A. Olthoff, KS # 70339 in the week preceding December 7, 2007.

534. The defendants US Bancorp President and CEO Richard K. Davis; Chairman Jerry Grundhofer; and Shughart Thomson & Kilroy PC through Mark A. Olthoff, KS # 70339 also communicated to Norman E. Siegel in the week preceding December 7, 2007 the intentional factual misrepresentation that the petitioner had claimed US Bank and US Bancorp monopolized banking services when the defendants and Mark A. Olthoff, KS # 70339 knew the petitioner had claimed that US Bank, US Bancorp and US Bancorp Piper Jaffray were in an anticompetitive agreement with Novation LLC to deprive healthcare technology companies of capital to enter the national hospital supply market and the national hospital supply market for supplies delivered through the internet by preventing new entrants from getting capitalized through the cartel's misconduct and group boycott.

535. The petitioner had also repeatedly supplied Mark A. Olthoff, KS # 70339 with the US Senate Judiciary Committee's Sub-Committee on Antitrust Business Rights and Competition's April 30, 2002, on

"Hospital Group Purchasing: Lowering Costs at the Expense of Patient Health and Medical Innovation?" and specifically the hearing testimony of Ms. Elizabeth A. Weatherman, Managing Director Warburg Pincus, LLC. See Weatherman testimony about suppression of healthcare venture capital. http://judiciary.senate.gov/testimony.cfm?id=859&wit_id=2403

536. See also video of Ms. Elizabeth A. Weatherman's testimony and questioning in US Senate Holds Hearing to Review GPO Practices (Selected Testimony) http//64.58.153.9/senatehearing2.wmv

537. US Bancorp's current President and CEO, Richard K. Davis and Chairman Jerry Grundhofer are liable in their individual capacities for acting in excess of their corporate authority for tortious interference with the petitioner's General Electric lease sale contract on the conduct of their agent Shughart Thompson & Kilroy, PC to deprive the petitioner of counsel and interfere in the petitioner's representation of claims against the GE defendants in the State of Missouri 16th Circuit Court at Independence, Missouri and the US District Court for the Western District of Missouri.

538. US Bancorp's President and CEO, Richard K. Davis President and Chairman Jerry Grundhofer committed tortious interference with US Bank's contracts and relationship with the petitioner by omitting reference or disclosure of US Bancorp's (NYSE USB) liability in the Kansas District Court litigation from US Bancorp's securities filings as required under § 302 of the Sarbanes-Oxley Act, where the extended corporate governance reposited in the US Bancorp Board of Directors would have resulted in the contracts with the petitioner being honored and Medical Supply Chain entering the market for hospital supplies.

539. US Bancorp's President and CEO, Richard K. Davis is also liable for conduct by his agent Shughart Thompson & Kilroy PC to deny the petitioner discovery of evidence through extrinsic fraud to withhold evidence that can be used as exhibits by the petitioner in the present Kansas District Court litigation.

d. Tortious Interference with Business Relationship Between Petitioner and US Senator Claire McCaskill Through Attempted Extortion Over Judy Jewsome Tortious For Helping Petitioner's Witness David Price by Defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC

540. The Hospital Supply Market includes highly regulated products and purchasing procedures created by the US Congress and administered through multiple federal agencies.

541. The petitioner's success in entering the hospital supply depends on the ability to obtain information and to seek redress from legislative aids in the offices of Missouri's US Senator, the Hon. Claire McCaskill and the petitoner's senior Congressional Representative, the Hon. Emmanuel Cleaver, II.

542. Tough neutral in the last election cycle, the petitioner's litigation and resulting documentation on www.medicalsupplychain.com/news ended up shaping the debate in the narrow range of issues that shaped the election loss of former Senator Jim Talent as the state's electorate began to become concerned over the hospital supply cartel's artificial inflation of healthcare costs that resulted in the loss of healthcare insurance for many in Missouri's middle class and in the Missouri legislature being forced to cut thousands of Missourians from Medicare coverage. See *MSCI v. Novation et al* pg. 8-24 http://www.medicalsupplychain.com/pdf/MSC%20vs.%20Novation%20et%20al.pdf

543. Missouri's US Senator, the Hon. Claire McCaskill and Kansas freshman Congresswoman the Hon. Nancy Boyda because of their surprising and unexpected successes have become influential leaders both in Washinton, D.C, the Democrat Party and in their respective districts.

544. The Hon. Nancy Boyda was elected in a close race with her popular Republican predecessor Jim Ryan when the petitioner's Kansas replacement attorney Dennis Hawver was tackeled, pinned to the floor and arrested in front of President George W. Bush by US Secret Service men coordinating City of Topeka Police Department plain clothes detectives at a Ryan rally.

545. The television coverage of Hawver, a Republican candidate for Governor of Kansas being arrested and held over night for writing stop the war on the back of a paper sign given to all Ryan supporters was such a shocking repudiation of the US Constitution to Kansas voters that even some of Congressman Jim Ryan's Social Conservative Republican base stayed home or felt duty bound to respond to the event by voting for Boyda.

546. The petitioner sought out Missouri's US Senator, the Hon. Claire McCaskill immediately because of the effect of the warrantless wire tapping impeding the petitioner's use of Sprint Nextel cell phones and blocking the maintenance of the petitioner's web sites and email communications through SBC's internet service provider hosting as a result of the hospital supply cartel defendants' USDOJ protection under US Attorney General Alberto Gonzales.

547. The hospital supply cartel defendants through the deliberate networking with State of Kansas officials willing to disregard their oaths of office and violate clearly established rights of citizens to further the interests of Novation LLC and their agents directed Kansas state judicial branch employees acting in an investigative role to misuse their office injuring the petitioner a citizen of Missouri and his Missouri business.

i. The defendants' retaliation against Judy Jewsome

548. The defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC through their networking with Kansas State Judicial Branch officals caused US Congresswoman' Nancy Boyda's sole African American staff member Judy Jewsome in the Democrat congresswoman's Topeka Kansas office to be attacked as unfit to be admitted to the Kansas Bar.

549. Judy Jewsome was targeted by the defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC because she had handled Congresswoman's Nancy Boyda's constituent services case for David Price seeking to have his kidnapped son returned.

550. David Price is a witness and associate of the petitioner who was a plaintiff in *United States ex rel Michael W. Lynch v Seyfarth Shaw et al*. Case no. 06-0316-CV-W- SOW in the Western District of Missouri and in injunction actions against the RICO defendant Seyfarth Shaw in Illinois and Kansas seeking to prevent Seyfarth Shaw from injuring the petitioner's associate Michael Lynch.

551. The defendant Missouri law firm Husch & Eppenger LLC represented the RICO defendant Seyfarth Shaw in Kansas District court against David Price.

552. Judy Jewsome was targeted by the defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC because she set up a meeting between David Price and his counsel, Kansas attorney Craig Collins and Governor Kathleen Sebelius of Kansas and Kansas Attorney General Paul Morrison to hear the evidence of the kidnapping.

553. The meeting was then canceled at the last minute due to the influence of the defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC.

554. The defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC through staff members of the Kansas Attorney General's Office tried two more

times to keep David Price and his attorney Craig Collins from meeting with the Kansas Attorney General Paul Morrison before Price and Collins succeeded.

555. Kansas Attorney General Paul Morrison was shocked that the career staff of the Kansas Attorney General's office had kept the matter from him and examined the evidence concluding the child had been unlawfully taken and promising to investigate and prosecute those responsible for the kidnapping and cover up.

556. Fran Acree of the Kansas Attorney Admissions office used the false probable cause pretext that a private or personal email written by Judy Jewsome describing a policy of complete disclosure by applicants as unfair was a basis to investigate Judy Jewsome as unfit and to bring a complaint to prevent her from sitting for the July 2007 Kansas Bar examination.

557. Fran Acree is an attorney and in her capacity as head of the State of Kansas Office of Attorney Admissions was sworn to uphold the Constitution and knew she was violating the trust of the people of Kansas when she took the pretextual based action against Judy Jewsome on behalf of the Kansas Attorney Disciplinary Administrator Stanton Hazlett.

558. US Congresswoman' Nancy Boyda's husband who is also a Kansas attorney, defended Judy Jewsome during the proceedings but had substantial reason to doubt they would prevail in the admission's hearing and even had cause to suggest that if Judy Jewsome would be allowed to sit for the examination, she should not count on being allowed to pass it, though Miss Jewsome was a good student and prior to attending law school worked in the Kansas Attorney General's office.

559. The effect of the attack on Judy Jewsome for performing protected constituent services, even though she was a federal employee and working in a US Congressional Office and additionally as an African American, a member of a protected class was so brazen a display of extral legal power by Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC that it has chilled and made ineffective the petitioner's business relationship with the staff of Missouri's US Senator, the Hon. Claire McCaskill.

560. In fact, the spreading fear from Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC's power has prevented even associates of the petitioner from obtaining redress through Congressional offices.

561. Kansas City, Missouri's senior Congressional Representative, the Hon. Emmanuel Cleaver did not respond to the petitioner's former attorney Bret D. Landrith's request for assistance as a new resident of Jackson County, MO and constituent of Cleaver's seeking help in ending retaliation based on Landrith's representation of the African American James Bolden in a federal Civil Rights action.

e. Tortious Interference with Business Relationship Between Petitioner and Donna Huffman, the Petitioner's Trusted Advisor, Real Estate finance Expert and Potential Replacement Counsel by Defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC

562. The defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC through their networking with State of Kansas officials willing to disregard their oaths of office and violate clearly established rights of citizens to further the interests of the named defendants and their agents directed Kansas state judicial branch employees acting in an investigative role to misuse their office injuring the petitioner a citizen of Missouri and his Missouri business.

i. The defendants' retaliation against Donna Huffman

563. The petitioner sought out the real estate financial help of Donna Huffman, a mortgage broker licensed by the states of Kansas and Missouri and by the United States Department of Housing and Urban Development (H.U.D.) in January 2007 while considering a sale or purchase of his father's Lee's Summit town home to continue the stability of his father's trucking business while his father made arrangements to undergo extensive chemotherapy in treatment of bone cancer.

564. The defendants caused Donna Huffman to be retaliated against for her association with the petitioner and his witness Bret D. Landrith.

565. Two investigators from the Kansas Attorney Disciplinary Administrator Stanton Hazlett's office came to the petitioner' s attorney Dennis Hawver's Ozawkie Kansas office around 8:30 am, Tuesday morning, November 27, 2007.

566. While there, the investigators and Dennis Hawver telephoned the petitioner's witness Bret D. Landrith in Lee's Summit, Missouri and revealed to Landrith that the Kansas Attorney Disciplinary Administrator was investigating Donna Huffman for fitness to be admitted to the Kansas Bar.

567. An investigator questioned Landrith about the Western District of Missouri case *Huffman v. ADP, Fidelity et al*, Case No. 05-CV-01205.

568. The Kansas Attorney Disciplinary Administrator investigators from Stanton Hazlett's office wanted to know if Landrith had represented Donna Huffman and if he had been paid by her.

569. The *Huffman v. ADP, Fidelity* action is available on Stanford Law School's class action website at http://securities.stanford.edu/1035/ADP05_01

570. Landrith informed the two investigators that he had represented Donna Huffman on the Western District of Missouri case and that he never received a fee or payment for the case because he was disbarred and no longer was entitled to the property right of contingent fees for his representation but that he thought it had settled because Huffman later gave him gratuitously $2,000.00.

571. Landrith also informed the investigators that 100,000 to 300,000 members of the prospective class had been screwed out of their retirement because Donna Huffman could not find a replacement attorney after he had been disbarred.

572. Landrith reminded Kansas Attorney Disciplinary Administrator Stanton Hazlett's investigators that their office had disbarred him for bringing the Civil Rights claims of the African American James Bolden against the city of Topeka to federal court which Landrith had prevailed on in the Tenth Circuit Court of Appeals following disbarment and for representing James Bolden's witness against the City of Topeka theft of H.U.D. funds in an adoption appeal where David Price's infant son had been kidnapped.

573. The F.B.I. raided the City of Topeka front company Topeka City Homes which had been set up and controlled by the city after the Kansas District court erroneously dismissed Bolden's case and seized the records for violation of H.U.D. financial requirements.

574. As a result of Bret D. Landrith notifying the petitioner on November 27, 2007 of this meeting, the petitioner learned that his business associate Donna Huffman, an intelligent, capable woman who he trusts had been prevented from taking the July 2007 bar examination and was in danger of being found unfit by the influence of Kansas Attorney Disciplinary Administrator Stanton Hazlett's office over whether she is admitted in her home state and likely any other state to practice law on the false probable cause of being a plaintiff in the Western District of Missouri case *Huffman v. ADP, Fidelity et al*, Case No. 05-CV-01205 which was not frivolous and where the defendant Fidelity admitted to the claim

impermissible fees on some of the subject Simple IRA mutual funds in a mailing to the prospective ADP class members after the complaint was filed.

575. The defendant Husch Blackwell Sanders LLP represented the wrong doers in *ADP, Fidelity et al* and attempted to exploit both the disbarment of Huffman's counsel Bret D. Landrith by extrinsic fraud perpetrated by the defendant Shughart, Thompson & Kilroy PC.

576. While Huffman was unrepresented by counsel, Husch Blackwell Sanders LLP misrepresented to Huffman the current state of federal antitrust statutes to securities dealers and threatened Huffman with sanctions disparaging Landrith's representation of the petitioner and the antitrust outcomes obtained by the defendant Shughart, Thompson & Kilroy PC solely through extrinsic fraud on the Kansas District Court.

577. In a direct response to the above averment stated in the petitioner's action against GE, The defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC through their networking with State of Kansas officials willing to disregard their oaths of office and violate federal law, caused Donna Huffman to be again denied the opportunity to take the Kansas Bar Exam.

578. Donna Huffman was prevented from representing the petitioner with the false assertion that she is mentally unfit based merely on the unconstitutional pretext that she asserted her individual legal rights *pro se* in protecting her child and won against the State of Kansas that was found to be abusing Huffman's rights in *Huffman v. State of Kansas Social & Rehabilitation Services*, Shawnee County Kansas District Court case.

579. The Kansas SRS had failed to protect Donna Huffman's child from documented physical abuse and continuing endangerment by Huffman's ex-husband, Chris W. Huffman a State Corridor Engineer for the Kansas Department of Transportation who's connections to the US Department of Transportation make him an important source and facilitator of million of dollars in federal highway funds for Governor Kathleen Sebelius.

580. The agents of the hospital supply cartel were aided by the noblesse oblige the State of Kansas extends higher level officials including Kansas Department of Transportation State Corridor Engineer Chris W. Huffman.

581. The defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC caused the Kansas State Office of Attorney Admissions to make a determination that Huffman was mentally unfit to be an attorney despite the State of Kansas own expert witness testimony to the contrary.

582. The defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC caused the Kansas State Office of Attorney Admissions and Gayle B. Larkin to seek a penalty against Donna Huffman that violates the Americans With Disabilities Act according to the Kansas State Office of Attorney Admissions and Gayle B. Larkin's own brief in another action against another Kansas law school graduate: *In the Matter of the Application of Ian Bruce Johnson For Admission to the Kansas Bar* Application No. 12320 Admissions Attorney's Hearing Brief, pp. 22-23 and thereby compromise the legitimacy of the Office of Attorney Admissions and the Judicial Branch of the State of Kansas which publicly states it conforms to:

> "It is the policy of the Kansas Judicial Branch to comply with the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq*. The ADA prohibits discrimination against qualified individuals with disabilities on the basis of disability. Under the ADA, qualified individuals with disabilities shall not be excluded from participating in, or be denied the benefits of, the Kansas judicial system.
>
> If you believe you have been excluded from participating in, or denied the benefits of, any court system function or program because of a disability, you may file a grievance with the judicial district's ADA officer or with Elizabeth Reimer, Office of Judicial Administration, 301 SW 10th, (785) 296-5309, TDD number 711, reimere@kscourts.org"

Kansas Court Administration ADA home page.

f. Tortious Interference with Business Relations by Defendants Novation LLC, Neoforma Inc., GHX, LLC, Robert J. Zollars, Volunteer Hospital Association of America, Inc., Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, Jerry A. Grundhofer, Richard K. Davis, Andrew Cecere, The Piper Jaffray Companies, and Andrew S. Duff with petitioner's relationships and business expectancies with US Bank NA and US Bancorp, Inc.

583. The petitioner had business relationships and business expectancies with US Bank NA and US Bancorp, Inc. See averments of relationships and expectancies incorporated herein from **Appendix Four**.

g. Tortious Interference with Business Relations by Defendants Novation LLC, Neoforma Inc., GHX, LLC, Robert J. Zollars, Volunteer Hospital Association of America, Inc., Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, Jerry A. Grundhofer, Richard K. Davis, Andrew Cecere, The Piper Jaffray Companies, and Andrew S. Duff with petitioner's relationships and business expectancies with The General Electric Company

584. The petitioner had business relationships and business expectancies with GE, GE Capital And GE Transportation See averments of relationships and expectancies incorporated herein from **Appendix Five**.

III. Claims

The petitioner respectfully requests the court finds the defendants have violated the following counts:

Count I
§ 416.031.1 RSMo

The petitioner avers the following *per se* antitrust violations under the Missouri Antitrust Laws:

(1) the defendants contracted, combined or conspired among each other;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

The petitioner avers that the defendants contracted with each other, combined together and or conspired to form a trust restraining commerce in hospital supplies, services related to managing hospital supplies and hospital supplies distributed through electronic marketplaces.

The petitioner avers VHA Mid-America, LLC has over 80% of Missouri's hospital beds (the industry measure of market share for distribution of hospital supplies)

The petitioner avers that GHX, LLC has 100% of the market for hospital supplies sold to hospitals in Missouri through electronic marketplaces.

The petitioner avers that VHA Mid-America, LLC and GHX, LLC have participated in a group boycott to prevent the petitioner from entering the subject relevant markets in the geographic area of the State of Missouri through the creation of long term exclusionary contracts that prevent competition from the petitioner and/or allocate market share in a misguided scheme to evade the effect of antitrust laws.

a. existence of a trust, contract, combination or conspiracy

The defendant Saint Luke's Health System has an anticompetitive or exclusive dealing contract with the hospital supply cartel and with VHA/Novation LLC and is in combination with VHA/Novation LLC.

The defendant Saint Luke's Health System currently does over $97 million dollars of business with VHA/Novation LLC

> "SLHS is a shareholder and owner of VHA/Novation, the largest Group Purchasing Organization (GPO) in the nation. SLHS accessed 885 VHA/Novation contracts with a total spending of $97 million in 2002. VHA/Novation validates the quality, market share, and availability of the various vendors, and provides SLHS as much as a 6% increase in discounts plus an average 2% rebate for every contract dollar spent, thereby supporting the achievement of SLH objectives. Most key suppliers are accessed through VHA/Novation."

http://baldrige.nist.gov/PDF_files/Saint_Lukes_Application_Summary.pdf at page 7

On information and belief, the VHA Mid-America, LLC hospital defendants Cox Health Care Services Of The Ozarks, Inc. (CoxHealth), and Stormont-Vail Healthcare, Inc. are members of VHA and believe themselves to be "owners" of Novation LLC, receiving 2% in kickbacks on purchases made providing they honor the group boycott agreement of purchasing over 90% of their hospital supplies through Novation, LLC.

b. identification of co-conspirators who agreed with Novation LLC to injure the plaintiff

The petitioner avers the following defendants have agreed with Novation LLC to injure the petitioner:

Neoforma Inc., GHX, LLC, Robert J. Zollars, Volunteer Hospital Association of America, Inc.(VHA), VHA Mid-America, LLC, Curt Nonomaque, Thomas F. Spindler, Robert H. Bezanson, Gary Duncan, Charles V. Robb, Sandra Van Trease, Micheal Terry, University Healthsystem Consortium (UHC), Robert J. Baker, Jerry A. Grundhofer, Richard K. Davis, Andrew Cecere, The Piper Jaffray Companies, Andrew S. Duff, Cox Health Care Services Of The Ozarks, Inc. (CoxHealth), Saint Luke's Health System, Inc., Stormont-Vail Healthcare, Inc., Shughart Thomson & Kilroy P.C., Husch Blackwell Sanders LLP, Lathrop & Gage L.C.

c. business entity co-conspirators were separately incorporated

The petitioner avers that Neoforma Inc., GHX, LLC, Volunteer Hospital Association of America, Inc.(VHA), VHA Mid-America, LLC, University Healthsystem Consortium (UHC), Cox Health Care Services Of The Ozarks, Inc. (CoxHealth), Saint Luke's Health System, Inc., Stormont-Vail Healthcare, Inc., Shughart Thomson & Kilroy P.C., Husch Blackwell Sanders LLP, and Lathrop & Gage L.C. are separately incorporated legally distinct entities.

d. Officer and agent co-conspirators

The petitioner avers that the named individual persons are properly defendants in this antitrust action for the following reasons:

i. independent stake in achieving the object of the alleged conspiracy

The petitioner avers that Robert J. Zollars, Thomas F. Spindler, Robert H. Bezanson, Gary Duncan, Charles V. Robb, Sandra Van Trease, Micheal Terry, Robert J. Baker, Jerry A. Grundhofer, Richard K. Davis, Andrew Cecere, and Andrew S. Duff each had or have a personal stake in restraining competition in hospital supplies in the subject relevant markets.

ii. personal stake in achieving the object of the alleged conspiracy

The petitioner avers that the defendant Robert J. Zollars was CEO of the defendant Neoforma, Inc and is the CEO of a hands free communication device manufacturer that is a healthcare supplier.

The petitioner avers that the defendant Thomas F. Spindler is an officer of both of the defendants Volunteer Hospital Association of America, Inc.(VHA), VHA Mid-America, LLC and is an agent of Novation, LLC and was an agent of Neoforma, Inc.

The petitioner avers that the defendant Robert H. Bezanson is both a Director of VHA Mid-America, LLC and CEO of Cox Health Care Services Of The Ozarks, Inc. (CoxHealth).

The petitioner avers that the defendant Gary Duncan is both a Director of VHA Mid-America, LLC and CEO of Freeman Health System.

The petitioner avers that the defendant Charles V. Robb is both a Director of VHA Mid-America, LLC and CFO of Saint Luke's Health System.

The petitioner avers that the defendant Sandra Van Trease is both a Director of VHA Mid-America, LLC and President of BJC HealthCare.

The petitioner avers that the defendant Micheal Terry is both a Director of VHA Mid-America, LLC and President/Chief Executive Officer of Salina Regional Health Center.

(A) acting beyond the scope of their authority

The petitioner avers that the defendants acted beyond the scope of their authority.

(B) or for their own benefit.

The petitioner avers that the defendants in the alternative acted for their own benefit.

iii. co-conspirator officers

The petitioner avers that the defendant co-conspirators' officers had or did the following:

(A) actual knowledge

The petitioner avers that the defendant co-conspirators' officers had actual knowledge of the complained of conduct.

(B) or constructive knowledge of,

The petitioner avers that the defendant co-conspirators' officers in the alternative had constructive knowledge of the complained of conduct.

(C) and participated in, actionable wrongs

The petitioner avers that the defendant co-conspirators' officers in the alternative had constructive knowledge of the complained of conduct.

iv. co-conspirator agent law firms

The petitioner avers that the defendants Shughart Thomson & Kilroy P.C., and Husch Blackwell Sanders LLP represented clients with conflicting interests against the petitioner.

The petitioner avers that the defendants Shughart Thomson & Kilroy P.C., and Husch Blackwell Sanders LLP represented their own respective organizational interests instead of the interests of their clients.

The petitioner avers that the defendants Shughart Thomson & Kilroy P.C. injured the petitioner instead of counseling US Bancorp, Inc. to settle with the petitioner paying US Bank.

The petitioner avers that the defendants Shughart Thomson & Kilroy P.C. counseled US Bank to not accept a settlement in February 2008 that was neutral and without financial loss for US Bancorp.

The petitioner avers that the defendants Husch Blackwell Sanders LLP counseled clients to act contrary to their respective interests to instead advance the interests of Husch Blackwell Sanders LLP in the State of Missouri.

The petitioner avers that the defendants Shughart Thomson & Kilroy P.C., and Husch Blackwell Sanders LLP elected not to perform professional services for or bill their clients in the hospital supply cartel for legally defending the petitioner's antitrust claims and never deposed witnesses or the petitioner.

Instead the defendants Shughart Thomson & Kilroy P.C., and Husch Blackwell Sanders LLP acted outside the authorization of their clients, outside of the scope of lawful conduct, risking the reputational interests, insurability and licensibility without proportional compensation solely to acquire narrow and hidden political power in the administration of the State of Missouri and within the Kansas District Court.

The petitioner avers that the defendant Lathrop & Gage L.C. used its representation of McClatchey newspapers to prevent the petitioner from obtaining redress in court.

The petitioner avers that the defendant Lathrop & Gage L.C. used Senator Vratil's position on the Kansas Judicial Commission in 2005 and 2006 to deprive the petitioner of counsel and to injure the petitioner's witness David Martin Price.

The petitioner avers that the defendant Lathrop & Gage L.C. acted out of the scope of their authority and in violation of law to advance the firm's Republican National Committee agenda and for the firm's profit and acquisition of power.

(2) the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

a. defendants' anti-competitive behavior injured consumers

The petitioner avers the defendants' anti-competitive behavior injured consumers.

b. defendants' anti-competitive behavior injured competition in the relevant market

The petitioner avers the defendants' anti-competitive behavior injured competition in the relevant market.

(3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

The petitioner avers that the goal of the defendants was the illegal monopolization of the relevant subject markets.

The petitioner avers that the defendants worked to accomplish their goal by committing felonies, interfering with the petitioner's contract property rights and rights to access to the courts, by committing fraud and prima facie tort in a manner that is civilly actionable.

(4) that the plaintiff was injured as a proximate result of that conspiracy.

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

a. plaintiff was a competitor who suffered a direct antitrust injury

The petitioner avers the petitioner was and is a competitor to the defendants and has suffered direct antitrust injuries.

b. plaintiff's injury of the type the antitrust laws were intended to prevent

The petitioner avers the petitioner's injuries were of the type and nature the antitrust laws were intended to prevent.

Count II
§ 416.031.2 RSMo

The petitioner avers the defendants have a monopoly or have attempted to monopolize the subject relevant markets.

A. Monopoly

The petitioner avers that the defendants contracted with each other, combined together and or conspired and thereby enjoy a monopoly restraining commerce in hospital supplies, services related to managing hospital supplies and hospital supplies distributed through electronic marketplaces.

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."

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.

(1) the possession of monopoly power in the relevant market;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

a. defendants have monopoly market share

The petitioner avers the defendants have a monopoly market share of the subject relevant markets.

i. defendants have acquired 80% of the hospital supply market

The petitioner avers the defendants have acquired 80% of the market for hospital supplies in the relevant market.

ii. defendants acquired 100% of the hospital supplies distributed through electronic marketplaces

The petitioner avers the defendants have acquired 100% of the market for hospital supplies distributed through electronic marketplaces in the relevant market.

iii. defendants acquired near exclusive distribution to VHA, UHC and member hospitals

The petitioner avers the defendants have acquired near exclusive distribution to the VHA and UHC member hospitals and that any remainder is controlled by the defendants in a misguided belief that anticompetitive contracts mandating a small percentage purchased outside of Novation LLC , Neoforma, Inc. or GHX LLC evaded Missouri's antitrust statutes.

b. defendants possess Monopoly power

The petitioner avers the defendants possess monopoly power in the subject relevant markets.

i. defendants have power to fix prices

The petitioner avers the defendants have the power to fix prices in the subject relevant markets.

ii. defendants have power to exclude competition

The petitioner avers the defendants have the power to exclude competition.

iii. defendants have the power to extort fees from the manufacturers whose products they distribute

The petitioner avers the defendants have the power to extort fees from the manufacturers and distributors of the products the defendants distribute or allow to be purchased by their member hospitals.

The petitioner hereby incorporates by reference the averments in *US ex rel Cynthia I. Fitzgerald v. Novation LLC, VHA, University Healthcare Consortium et al*, N. Dist. Of Texas Case 3:03-cv-01589. See **Appendix Six**

(2) defendants willfully acquired and maintain their market power

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

The petitioner avers the defendants have acted intentionally and willfully to acquire and maintain their market power in the subject relevant markets.

a. the defendants did not enjoy market power growth or development as a consequence of

The petitioner avers the defendants did not enjoy market power growth or development as a consequence of any of the following reasons:

i. a superior product,

The petitioner avers the defendants did not enjoy market power growth or development as a consequence of a superior product.

ii. business acumen

The petitioner avers the defendants did not enjoy market power growth or development as a consequence of business acumen.

iii. or historic accident

The petitioner avers the defendants did not enjoy market power growth or development as a consequence of historic accident.

b. defendants monopoly power was not obtained for

The petitioner avers the defendants monopoly power was not obtained for the following reasons:

i. a valid business reason

The petitioner avers the defendants monopoly power has not resulted or been created out of a valid business reason.

ii. or concern for efficiency

The petitioner avers the defendants monopoly power has not resulted or been created out of a concern for efficiency.

B. Attempted Monopoly

The petitioner avers the defendants have attempted to monopolize the subject relevant markets.

(1) defendants have a specific intent to accomplish the illegal result;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

The defendants intentionally have worked to establish an illegal monopoly.

(2) defendants have a dangerous probability of success.

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

The defendants have a dangerous probability of monopolizing the subject relevant markets.

i. relevant markets

The petitioner avers the following relevant markets:

(A) product market

The petitioner avers that the markets for hospital supplies and the market for managing hospital supplies was subjected to the defendants prohibited anticompetitive conduct.

attitudes of hospital consumers

The petitioner required market entry capitalization to train hospital customers to adopt an open electronic marketplace.

The defendants required or forced Missouri hospitals and nursing homes to sign longterm contracts with Neoforma, Inc. and later GHX LLC to continue to receive the “savings” Novation LLC was represented as benefiting hospitals.

Missouri hospitals and nursing homes were deceived into believing GHX LLC standardization of suppliers through xml tags prevented doing business with competing online distributors.

reactions of hospital consumers

Missouri hospitals and nursing homes were deceived into believing purchasing through the petitioner or another electronic marketplace would cause their institution to lose substantial and legitimate kickbacks from Novation LLC and the hospital supply cartel.

(B) geographic market

The geographic area of the subject relevant markets is the State of Missouri.

ii. relative submarket

The relevant submarket is hospital supplies distributed through electronic marketplaces.

(A) product market

The relevant submarket is hospital supplies distributed through electronic marketplaces was created in the early 1990's by the petitioner in a business model that was stolen by Cardinal Health and became Neoforma, Inc.

attitudes of hospital consumers

The petitioner required market entry capitalization to train hospital customers to adopt an open electronic marketplace.

The defendants required or forced Missouri hospitals and nursing homes to sign longterm contracts with Neoforma, Inc. and later GHX LLC to continue to receive the "savings" Novation LLC was represented as benefiting hospitals.

Missouri hospitals and nursing homes were deceived into believing GHX LLC standardization of suppliers through xml tags prevented doing business with competing online distributors.

reactions of hospital consumers

Missouri hospitals and nursing homes were deceived into believing purchasing through the petitioner or another electronic marketplace would cause their institution to lose substantial and legitimate kickbacks from Novation LLC and the hospital supply cartel.

(B) geographic market

The geographic area of the subject relevant markets is the State of Missouri.

C. Damages from Monopoly and Attempted Monopoly

As a direct result defendants' unlawful activities, petitioner has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

Petitioner 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 III
Conspiracy to Violate § 416.031(2)

(1) defendants have an agreement or understanding;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

(2) between two or more persons;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

(3) to do unlawful acts prohibited by §§ 416.011 to 416.161, RSMo or to do a lawful act by unlawful means.

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Count IV
Tortious Interference with Business Relations

The petitioner avers the defendants have caused and conspired to cause tortuous interference with the petitioner's agreements, contracts, and business relationships.

(1) Plaintiff had established a contract or valid business relationship or expectancy (not necessarily a contract) to obtain the capital to enter the market for hospital supplies;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Petitioner's individual representative candidate trust accounts with US Bank and its contract to sale the office building lease to GE and 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.

Petitioner's counsel and potential legal representatives were required to obtain petitioner's property rights and benefits from bargains.

Petitioner's counsel and potential legal representatives are required to obtain capital and other inputs to compete with the defendants.

(2) defendants' knowledge of the contract or relationship;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Defendants knew of said contracts or business expectancies.

(3) intentional interference by the defendant inducing or causing a breach of contract or relationship;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Having such knowledge of the petitioner's agreements and relationships, defendants intentionally conspired to interfere and did interfere with such contracts or business expectancies, so as to cause breach of the same.

(4) absence of justification;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Defendants intentionally conspired to interfere and did interfere with petitioner's agreements contracts or business expectancies, and did so without justification and stated pretextual reasons for their actions.

Defendants did not have an interest in the petitioner's agreements contracts or business expectancies.

(5) damages resulting from defendants' conduct.

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

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.

Petitioner 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.

Defendants' actions were willful, wanton, malicious and oppressive.

Petitioner is also entitled to recover punitive damages in an amount in excess of $10,000.00.

Count V
Fraud and Deceit

The petitioner avers the defendants have committed numerous frauds and deceits.

(1) a representation;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Defendants were engaged in concealed fraudulent conduct.

(2) its falsity;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

The defendants representations regarding their savings to hospitals identified above are false.

The defendants representations regarding the validity of the petitioners claims, merits of his past litigation and quality of his legal representation are false.

(3) its materiality;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Said activities were intended by defendants to cause injury to petitioner by and through intentional misrepresentations to petitioner and third parties concerning petitioner.

(4) the speaker's knowledge of its falsity or ignorance of the truth;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

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 petitioner.

(5) the speaker's intent that the representation should be acted on by the hearer in the manner reasonably contemplated;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

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 petitioner .

Said activities aforementioned by defendants were done in concert and in secret with the intention to injure petitioner 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 petitioner .

(6) the hearer's ignorance of the falsity of the representation;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

The petitioner and third parties targeted by the defendants were unaware of the falsehood of the defendant representations.

(7) the hearer's reliance on the representation being true;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

The petitioner, the petitioner associates and customers rely on the truth of the defendants' misrepresentations.

(8) his right to rely thereon;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

(9) the hearer's consequent and proximately-caused injuries.

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Said activities were intended by defendants to cause injury to petitioner by and through intentional misrepresentations to petitioner and third parties concerning petitioner and did injure the petitioner directly and proximately.

Count VI
Prima Facie Tort

(1) an intentional lawful act by the defendant;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

To whatever extent said activities of Defendants including procuring the disbarment and interference with the petitioner's potential may not violate antitrust laws or tortuously interfere with contract or business expectancy, said acts and activities of Defendants are still unlawful and fraudulent.

Said activities were intended by Defendants and performed by Defendants.

Defendants' actions were willful, wanton, malicious and oppressive.

(2) an intent to cause injury to the plaintiff;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Said activities were intended by Defendants to cause injury to the petitioner.

(3) injury to the plaintiff;

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Said activities did directly and proximately cause injury to the petitioner.

Petitioner 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.

(4) an absence of any justification or an insufficient justification for defendant's act.

The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.

Said activities were and are unjustified.

VII. Prayer For Relief

The plaintiff seeks his property expectation damages that would have resulted from his business relations with US Bank, US Bancorp, Inc. and separately from General Electric but for the anticompetitive conduct of the defendants.

The plaintiff seeks treble his above property expectation damages under § 416.121. 1(1) RSMo.

The plaintiff seeks a total after trebling of the above property expectation damages of three billion,

two hundred million dollars ($3,200,000,000.00) in damages.

The plaintiff seeks that the court grant appropriate injunctions under § 416.121. 1(2) RSMO to enjoin the unlawful practices complained of in this petition.

Respectfully Submitted,

S/ Samuel K. Lipari

_____

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Pro se

DEMAND FOR TRIAL BY JURY

The plaintiff respectfully requests a jury decide all questions of fact.

S/Samuel K. Lipari

_____

Samuel K. Lipari

VERIFICATION

State of Missouri)
) SS
County of Jackson)

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 petition and attachments and find the statements therein to be true and correct to the best of my information, knowledge and belief.

_____

Samuel K. Lipari

Subscribed and sworn to before me on this _____ day of February, 2008

_____

Notary

Commission expires:

APPENDIX ONE

Procedural History

1. Plaintiff, in the name of his Missouri corporation Medical Supply Chain, Inc. ("Medical Supply") brought an action to enjoin possible conduct by the defendants and to declare rights of parties under the subject contracts between Medical Supply and US Bank, NA and US Bancorp, Inc. of this antitrust and tortuous interference action in a federal action against US Bank and US Bancorp in the US District Court for Kansas in October 2002.

2. Medical Supply's first action for injunctive and declaratory relief in the U.S. District Court for the District of Kansas was captioned *Medical Supply Chain, Inc. v. US Bancorp, NA et al* KS. Dist. Case No.: 02-2539

3. 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 causing US Bank and US Bancorp to repudiate 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.

4. The Hon. Carlos Murguia denied the temporary restraining order.

5. US Bank and US Bancorp's later conduct breaking the contract 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 of representatives to launch Medical Supply into the market for hospital supplies.

6. 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, LLC a healthcare group purchasing organization ("GPO") competitor of Medical Supply's in the hospital supply market.

7. Also identified in the complaint was Novation, LLC's captive e-commerce marketplace Neoforma, Inc. directly competing with Medical Supply on the Internet.

8. 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.

9. Medical Supply also sought interim pre-hearing relief in the Tenth Circuit seeking to prevent the defendants from filing a malicious USA PATRIOT Act Suspicious Activity Report that would destroy Medical Supply's ability to obtain escrow arrangements, higher level banking and international fund transfer services elsewhere to accomplish its capitalization and conduct hospital supply transactions.

10. Despite the loss of jurisdiction resulting from interlocutory appeal, Hon. Judge Carlos Murguia proceeded on with the action and to hear motions in trial court, ultimately dismissing the federal claims against the US Bancorp defendants and dismissing without prejudice the pendant state claims.

11. The dismissal of the US Bancorp defendants came as the petitioner was filing *Medical Supply Chain, Inc. v. General Electric Company, et al*., KS Dist. case number 03-2324-CM over subsequent conduct by US Bancorp's co-conspirators.

12. The pre-hearing relief opposed by US Bank and US Bancorp was denied and the interlocutory appeal was dismissed as moot due to Judge Carlos Murguia's dismissal of the underlying action against US Bancorp.

13. 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.

14. The Hon. Judge Carlos Murguia dismissed the federal claims in the action against the GE defendants, overturning US Supreme Court controlling precedent that the antitrust co-conspirators need not be made defendants and where the petitioner had identified co-conspirators in the hospital supply cartel. The state law claims were dismissed without prejudice and are currently before the Western District of Missouri.

15. 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.

16. Medical Supply answered the show cause order asserting the trial court had applied the incorrect legal standard for pleading antitrust claims and had misstated the USA PATRIOT Act.

17. After reviewing Medical Supply's reply to the show cause order, 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.

18. Instead of the appellate panel correcting their ruling and ordering that Medical Supply was entitled to injunctive and declaratory relief, the Tenth Circuit panel ordered that Medical Supply's counsel receive the court's most serious sanction for a frivolous appeal.

19. 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.

20. The Tenth Circuit court declined to rehear the case *en banc*.

21. Medical Supply then brought its now ripe damages claims against US Bank and US Bancorp along with its existing pendant state law contract and trade secret misappropriation claims in the Western District of Missouri where the matter was styled *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210.

22. The case was transferred to the District of Kansas at Kansas City, Kansas and recaptioned as *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.:05-2299.

23. The Hon. Judge Kathryn H. Vratil made no rulings in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.:05-2299 delaying the opportunity to obtain discovery on the defendants' participation in the wrongful disbarment of Medical Supply's counsel for almost a year.

24. Kansas District Court Judge Kathryn H. Vratil then participated in an *ex parte* discussion on the day of the disbarment oral argument with personnel and justices of the Kansas Supreme Court, disparaging Medical Supply's counsel without his knowledge or opportunity to question Kansas District Court Judge Kathryn H. Vratil's testimony in conduct designed to cause Medical Supply's counsel to be disbarred without due process.

25. Kansas District Court Judge Kathryn H. Vratil then removed herself from the case on October 20, 2005 minutes before the Kansas Supreme Court justices heard Medical Supply's counsel's oral argument. A transcript of the hearing which was resultantly delayed will give light to these unusual events.

26. The petitioner's case was then transferred to Kansas District Court Judge, Hon. Carlos Murguia who had heard the original action for a temporary restraining order and declaratory relief.

27. The Hon. Judge Carlos Murguia took no action for many months until immediately after Medical Supply's counsel was reciprocally disbarred by the Kansas District Court without disclosing to Medical

Supply's counsel that Kansas District Court Judge Kathryn H. Vratil had participated in *ex parte* testimony over Medical Supply's counsel's "incompetence".

28. The Kansas District Court refused to postpone its decision on reciprocally disbarring Medical Supply's counsel until the Tenth Circuit ruled on the appeal of *Bolden v. City of Topeka* where Medical Supply's counsel representing James Bolden challenged Judge Kathryn H. Vratil's findings of law in that case and where Magistrate Judge James O'Hara, a managing partner in US Bank and US Bancorp's law firm Shugart Thomson & Kilroy, P.C. authored a case management recommendation condemning Medical Supply's counsel for properly relying on controlling case law on alternative state law service of process.

29. The Kansas District Court Clerk's office through Deputy Clerk Kerry Martinez also interfered and obstructed providing records to the Tenth Circuit court for the appeal in *Bolden v. City of Topeka* during and after the state proceedings to disbar Medical Supply's attorney causing the Tenth Circuit to have to postpone the briefing schedule of James Bolden's appeal.

30. The Kansas District Court Judge Kathryn H. Vratil was ultimately overruled on two issues appealed by the petitioner and James Bolden's now disbarred counsel and the decision *Bolden v. City of Topeka*, 441 F.3d 1129. (10thCir.2006) has been favorably cited by the Sixth Circuit.

31. No further court action occurred in the Medical Supply action until the petitioner's counsel had been disbarred, then Kansas District Court Judge Carlos Murguia began in earnest making rulings with the visible purpose of dismissing the action for the lack of counsel and completing the removal of representation participated in by the Kansas District court and to further its adversarial interest in the petitioner's proceeding.

32. The Kansas District Court Judge Carlos Murguia dismissed the federal claims in their entirety for failure to state a claim despite the fact that the compliant was identical in elements of pleading for its claims to the complaint filed in *Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al*, 8th Cir. 03-1441 and 03-1554 and Judge Murguia expressly declined to exert jurisdiction over the state law based claims including the present Missouri state law antitrust claims, tortuous interference with contract, fraud and prima facie tort.

33. The Kansas District court retained jurisdiction over the federal action to sanction Medical Supply's former counsel and the plaintiff Samuel K. Lipari for among other reasons, witnessing his

counsel's disbarment but then because of a timely motion for reconsideration by the plaintiff Samuel K. Lipari, Hon. Judge Carlos Murguia ruled Medical Supply Chain, Inc. would be sanctioned.

34. Medical Supply Chain, Inc. and Samuel K. Lipari as successor in interest gave notice of appeal of the federal court decision on September 8, 2006 and the plaintiff Samuel K. Lipari's federal law based claims over the injuries to his former corporation went before the Tenth Circuit Court of Appeals in *Medical Supply Chain, Inc. v. Novation, et al*, 10th Cir. case no. 06-3331.

35. The plaintiff Samuel K. Lipari undertook to bring the Missouri state law contract based claims as the sole assignee of his now dissolved Missouri corporation in this court acting *pro se* in an action that was captioned *Samuel Lipari* v. *US Bancorp, NA, et al*, 16th Cir Mo. Case no. 0616-CV32307.

36. US Bank and US Bancorp fraudulently removed the action to the US District Court for the District of Missouri asserting diversity but without disclosing to the Clerk of the Western District Court during the *ex parte* removal that the matter had been originally filed in the Western District as *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210 with Missouri resident codefendants.

37. US Bank and US Bancorp through their agent Shughart, Thomson, Kilroy, P.C. fraudulently had the Western District case transferred at US Bank and US Bancorp's false assertion of the interests of justice to the District of Kansas at Kansas City, Kansas where it was recaptioned as *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.:05-2299 and dismissed by the Hon. Judge Carlos Murguia in response to extrinsic fraudulent dismissals filed by Shughart, Thomson, Kilroy, P.C. and Husch Blackwell Sanders LLP for not having pleading elements.

38. The pleading elements for the federal antitrust and racketeering claims were clearly on the face of the *Medical Supply Chain, Inc. v. Novation, et al* complaint and located where the table of contents identified them, exposing the extrinsic fraud on the Kansas District court.

39. US Bank and US Bancorp through their agent Shughart, Thomson, Kilroy, P.C. fraudulently withheld disclosure from the Clerk of the Western District of Missouri that *Samuel Lipari* v. *US Bancorp, NA, et al*, 16th Cir Mo. Case no. 0616-CV32307 was under exclusive federal jurisdiction in the US Court of Appeals for the Tenth Circuit as *Medical Supply Chain, Inc. v. Novation, et al.* 10th Cir. case no. 06-3331.

40. After removing the plaintiff's state law claims with the false assertion of federal diversity jurisdiction where the plaintiff's federal concurrent action was still under the jurisdiction of the Tenth

Circuit which was hearing the plaintiff's appeal, Shughart, Thomson, Kilroy, P.C. again falsely transferred the state action to the Kansas District court misrepresenting to US District Court for Western District of Missouri Hon. Judge Fernando J. Gaitan that the US Bank and US Bancorp sought the case moved in the "interests of justice."

41. The case continues on as *Samuel Lipari* v. *US Bancorp, NA, et al*, KS. Dist. Court Case No.

42. XXXX insert here

43. The Tenth Circuit was over ruled by the US Supreme Court on the impermissible heightened pleading standard appealed earlier by the plaintiff.

44. On February 13, 2008, the plaintiff filed a Rule 60 b Motion in the Tenth Circuit seeking to reopen *Medical Supply Chain, Inc. v. US Bancorp, NA, et al* 112 Fed. Appx. 730 (10th Cir. 2004) where the appellate court exercised original jurisdiction to sanction the plaintiff and the mandate rule prevents the trial court from altering the judgment.

45. On February 13, 2008, the plaintiff also filed a Rule 60 b Motion in the Kansas District Court seeking to reopen *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.:05-2299 where the Tenth Circuit declined to assert jurisdiction over the appeal.

APPENDIX TWO

Table of Prior and Related Cases

Medical Supply Chain, Inc. v. US Bancorp, NA, et al, case no. 02-2539-CM ("*Medical Supply I*") Case 2:05-cv-02299-CM-GLR (All federal claims dismissed, state claims expressly dismissed without prejudice. No discovery or evidentiary hearings. Medical Supply's counsel admonished for failing to research facts or law, including asserting an express private right of action under the USA PATRIOT Act.)

Medical Supply Chain, Inc. v. US Bancorp, NA, et al 112 Fed. Appx. 730 (10th Cir. 2004) (Medical Supply's counsel sanctioned double attorney's fees and costs $23, 956.00 for asserting the existence of an express private right of action under the USA PATRIOT Act and asserting co-conspirators identified in the complaint need not be named defendants.)

Medical Supply Chain, Inc. v. General Electric Company, et al., KS Dist. case no. 03-2324-CM ("*Medical Supply II*") (All federal claims dismissed, state claims expressly dismissed without prejudice. No discovery or evidentiary hearings. Medical Supply's counsel admonished for failing to research facts or law including asserting that co-conspirators identified in the complaint need not be named defendants.)

Medical Supply Chain, Inc. v. General Electric Company, et al. 144 Fed. Appx. 708 (10th Cir. 2005) (Trial court overturned for ruling against sanctions based on merits of state contract claims.)

In re Landrith, 124 P.3d 467, 485-86 (Kan. 2005) (Medical Supply's counsel disbarred for taking *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129 at 1145 (10th Cir., 2006) to federal court and for representation James Bolden's witness David Price.)

Bolden v. City of Topeka, Kan., 441 F.3d 1129 at 1145 (10th Cir., 2006) (Trial court overturned on dismissal of federal civil rights claims after Bret Landrith is disbarred.)

In the Matter of Bret D. Landrith Kansas District Court reciprocal disbarment action continued at request of the respondent until *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129 (10th Cir., 2006) and *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299 were decided.

The Kansas District court reciprocally disbarred Bret D. Landrith after the trial court ordered dismissal and sanctions in *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299 without waiting for the Tenth Circuit decision in *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129.

Samuel Lipari v. *General Electric Company, et al.* 16th Cir Mo. Case no. 0616-CV07421. (Defendant's Motion for Dismissal overruled, then removed to W.D. of Missouri by defendants.)

In Re Samuel K. Lipari, (Petition for Writ of Mandamus to require remanding of *Samuel Lipari* v. *General Electric Company, et al.* Denied), (8th Cir. 2006)

Samuel Lipari v. *General Electric Company, et al.* W.D. MO. Case no. 06-0573-CV-W-FJG Remanded for lack of federal jurisdiction.

Samuel Lipari v. *US Bancorp, NA, et al*, 16th Cir Mo. Case no. 0616-CV32307. (Defendants removed to W.D. of Missouri asserting diversity.)

Samuel Lipari v. *US Bancorp, NA, et al*, United States District Court, Western District of Missouri Case No. 06-1012-CV-W-FJG. (Plaintiff petitioned for remand arguing removal is improper due to existence of diversity when the same claims were filed under supplementary jurisdiction in *Medical Supply Chain, Inc. v. Neoforma et al* W.Dist. of MO Case No. 05-0210- CV-W-ODS which are now *Medical Supply Chain, Inc. v. Neoforma et al* KS Dist. Court Case No.: 05-2299.)

Rochester v. C.R. Bard, Inc., Tyco International Inc., Tyco Healthcare Group LP, Novation LLC, VHA Inc., Premier and Premier Purchasing. United States District Court, Eastern District of Texas Civil Action No. 304 CV 060, (A lawsuit brought by hospital supply manufacturer Rochester. C.R. Bard settled for $49 million dollars. Premier has been dismissed from the antitrust claim in an agreement to pay Rochester $8.8 million dollars.)

Appendix Two
Table of Prior and Related Cases

APPENDIX THREE

State of Kansas Officials Role In Disbarment of Plaintiff's Federal Legal Representation

1 During the period of April 2 through April 18th, 2005 the defendant hospital supply cartel took control of the petitioner's legal representation in the federal antitrust action through extortion over the petitioner's Kansas licensed attorneys.

2 The Kansas State Disciplinary Administrator acting through the private Kansas licensed attorney Gene E. Schroer relayed the privileged information that my counsel Bret D. Landrith will be disbarred regardless of the law or evidence in the record.

3 This information was given in advance of the publication or announcement of any decision as a threat imperiling the petitioner's Missouri corporation Medical Supply Chain, Inc. by revealing it would lose the property right in its legal representation by Bret D. Landrith at a time when the record of the case revealed that efforts to substitute him had resulted in all the law firms with antitrust capabilities being conflicted out.

4 The petitioner would also be forced to forfeit his property rights in redress because a corporation had to be represented by an attorney or its claims would be dismissed with prejudice.

5 The threat relayed by Gene E. Schroer accompanied offers to "save" Medical Supply by providing representation and permitting the petitioner to use the $300,000.00 taken by US Bank to enter into the national market for hospital supplies.

6 This first involved replacing Medical Supply's counsel a Kansas attorney as lead counsel that would not be named and his identity would not be revealed to the petitioner.

7 When the petitioner would not agree to this arrangement, Gene E. Schroer repeatedly promised the petitioner the return of the $300,000.00 US Bancorp deprived Medical Supply of to capitalize the petitioner's company's entry into the hospital supply market if the petitioner and his counsel would travel to Chicago, Illinois and meet two attorneys that Gene E. Schroer would not name or identify.

8 The petitioner was suspicious and alarmed to the point of being in fear for his own safety due to the implausibility of two attorneys interested in taking on the representation of Medical Supply Chain, Inc. but who were unwilling to reveal their identity or talk on the phone.

9 When the petitioner questioned him further, Gene E. Schroer claimed the attorneys were from two different law firms and had to keep the meeting and their identities confidential.

10 The petitioner offered to discuss the case on the phone or to meet the attorneys from Chicago if they traveled to Lee's Summit, Missouri but Gene E. Schroer rejected these alternatives.

11 Gene E. Schroer repeatedly contacted the petitioner attempting to pressure him in taking this "only way" out of what was being done to Bret D. Landrith.

12 The petitioner believed that the trip to Chicago was a ruse or pretext to get the petitioner and his representative Bret D. Landrith to a distant location where they would be harmed or murdered and no longer a threat to the Medicare fraud scheme of GE and the Novation LLC antitrust conspirators VHA, UHC, Neoforma, Inc. and GHX,LLC .[1]

13 The petitioner had heard that Gene E. Schroer had made appointments with Bret D. Landrith's client James Bolden to do Bolden's appeal but took the money from James Bolden and spent the time questioning Bolden about Landrith and not Bolden's case before contacting Bolden to inform him he would not take the case stating it lacked any merit and refusing to return any of the funds (Landrith prevailed in the Tenth Circuit, overturning the trial court.)

14 This knowledge reinforced the petitioner's belief that Gene E. Schroer was acting for the State of Kansas Office of Attorney Discipline of Stanton Hazlett and that Medical Supply Chain, Inc.'s case would be forfeited if he did not accept Gene E. Schroer's arrangements, but the petitioner was to fearful that the trip to Chicago would cause him and Bret D. Landrith to end up like the two Assistant US Attorneys in the Ft. Worth, Texas office investigating the Novation LLP Medicare fraud and laundering of hospital money through Neoforma, Inc.

15 On or about the filing date in 2005, the General Electric defendants and Novation LLC antitrust conspirators VHA, UHC, Neoforma, Inc. and GHX,LLC through their agent John K. Power contacted the

[1] The Criminal Chief of the Dallas U.S. Attorney's office Shannon K. Ross who signed the subpoenas on GE Healthcare and Novation LLC was found dead September 11, 2004 in her home the day before Senate hearings on Novation's hospital supply anti-trust violations and just 55 days after her associate Thelma Colbert in charge of healthcare False Claims Act investigations was found dead. The office subsequently terminated three more Assistant US Attorneys with white collar crime prosecution experience, eventually causing national notice of the improper firings or terminations of US Attorneys related to Medicare fraud investigations and the racketeering deaths of two more Assistant US Attorneys.

Clerk of the US District Court for the Western District Court to complain about the petitioner's counsel Bret D. Landrith being admitted to the Western District of Missouri and being able to file *Medical Supply Chain, Inc. v. Neoforma et al* , W.Dist. of MO Case No. 05-0210- CV-W- ODS the action against the GE defendants' hospital supply market monopoly conspirators.

16 On or about The General Electric defendants and the Novation LLC antitrust conspirators VHA, UHC, Neoforma, Inc. and GHX,LLC through their agent John K. Power caused the State of Kansas Attorney Discipline Office through Stanton Hazlett to make the petitioner's counsel's participation in a reciprocal admission program for which he was eligible that was created between the judges of the US Courts for the Western District of Missouri and the Kansas District courts.

17 This lawful and ethical act is cited as a basis for Landrith's disbarment in *In re Landrith*, 124 P.3d 467, 485-86 (Kan. 2005).

18 The petitioner's attorney had to be prosecuted by Stanton Hazlett and the State of Kansas Disciplinary office because the defendants required an outcome that contradicted the Constitution, statute and Model Rules of Ethics that could only be obtained through denial of due process and fraud.

19 The defendants then made use of this void *ab initio* order to prevent the petitioner's claims and standing from being heard by the court in *Medical Supply Chain, Inc. v. Neoforma et al* , W.Dist. of MO Case No. 05-0210- CV-W- ODS after it had been fraudulently transferred to the Kansas District Court and attempted to use it to prevent this action from being heard in the State of Missouri court where it was filed.

20 The defendants and their agents knew that false probable cause and even charges of committing conduct required by the Kansas Rules of Ethics could be used to get opposing counsel disbarred in the State of Kansas due to their control of the proceedings through Stanton Hazlett to deny due process.

21 The defendants' belief that the petitioner's counsel was not unreasonable, the Kansas Disciplinary Administrator Stanton Hazlett regularly used *ex parte* communications with the law clerks of Kansas Supreme Court Justices to co-write the opinions issued in discipline cases by the Kansas Supreme Court without knowledge of the respondent attorneys or their counsel.

22 This shocking practice of holding proceedings without even the semblance of Due Process led to a continuing legal education class of Kansas prosecuting attorneys being told the out come of one year

suspension in Kansas Supreme Court discipline case *In re Vanderbilt* case no. 93, 394 by Stanton Hazlett's prosecutor Alexander M. Walczak before the opinion was released or filed April 22, 2005 by the Kansas Supreme Court.

23 Jimmie A. Vanderbilt and his attorney John J. Ambrosio found out the Kansas Supreme Court order when the then Douglas County District Attorney attending the CLE class taught by Alexander M. Walczak called Vanderbilt after the lecture.

24 The opinion issued later was exactly as Alexander M. Walczak had described during the CLE class.

25 The petitioner's counsel was disbarred through Stanton Hazlett and the State of Kansas Disciplinary office presenting *ex parte* testimony by Kansas District Judge Kathryn H. Vratil to personnel and justices of the Kansas Supreme Court, disparaging Medical Supply's counsel without his knowledge or opportunity to question Kansas District Court Judge Kathryn H. Vratil's testimony on October 20, 2005 minutes before the Kansas Supreme Court justices heard Medical Supply's counsel's oral argument in defense of his law license.

26 The petitioner's counsel was disbarred through Stanton Hazlett and the State of Kansas Disciplinary office presenting to the tribunal *ex parte* testimony by Magistrate Judge James O'Hara, a managing partner in General Electric co-conspirators' law firm Shugart Thomson & Kilroy that was defending counsel in *Medical Supply Chain, Inc. v. Neoforma et al* , W.Dist. of MO Case No. 05-0210-CV-W- ODS and who denied the petitioner discovery with no basis in law in *Medical Supply Chain, Inc. v. General Electric Company, et al*., KS Dist. case number 03-2324-CM, but under oath in the disbarment hearing denied he had done so.

Procurement through fraud

27 The Disciplinary Administrator Stanton Hazlett proffered the perjured testimony of Sherri Price, Assistant City Attorney for the City of Topeka to the discipline tribunal during the three day evidentiary hearing in January 2005 that the petitioner's attorney Bret D. Landrith had been sanctioned in the Bolden case.

28 The Disciplinary Administrator Stanton Hazlett announced on the second day of the evidentiary hearing by means of *ex parte* communication to the tribunal members that Hazlett was going to prosecute

Landrith for appealing the cartel's antitrust case to the Tenth Circuit based on a clear error in the trial court's determination that the then newly enacted USA PATRIOT Act was devoid of private rights of action when it clearly had more than two express private rights in the text of the enactment as false probable cause, solely to defraud the disciplinary panel.

29 The defendants' co-conspirator and antitrust co-defendants made the complaint used by The Disciplinary Administrator Stanton Hazlett to defraud the disciplinary panel.

30 The Disciplinary Administrator Stanton Hazlett never prosecuted the complaint.

31 The Disciplinary Administrator Stanton Hazlett's law clerk authored a recommendation for disbarment of Bret D. Landrith that falsely stated that Landrith had failed to include citations to the record in the appeal brief of David Price's parental rights termination for adoption.

32 Twice in oral argument before a panel that included some Kansas Supreme Court Justices, the Disciplinary Administrator Stanton Hazlett misrepresented the record to conceal the kidnapping of David Price's infant son.

The Disbarment Proceeding Was For a Malicious Purpose To Usurp Federal Law

33 The Kansas Disciplinary Office through the influence of Stanton Hazlett caused the petitioner's attorney Bret D. Landrith to be suspended the week prior to his October 20, 2005 Kansas Supreme Court oral argument in defense of his license to practice law. This action was taken despite evidence of the hardship upon Landrith presented at the pretrial hearing resulting from the delay in investigating and resolving the disciplinary complaint.

34 The suspension had the foreseeable and intended effect of preventing the petitioner's attorney Bret D. Landrith from arguing the African American James Bolden's appeal before the Tenth Circuit on November 17, 2005. The briefing schedule of James Bolden's appeal had been previously stopped do to actions of the Disciplinary Administrator against the Landrith to interfere in its preparation.

35 On Wednesday, April 20th, 2005 the Federal Bureau of Investigation raided

36 Topeka City Homes, Inc., described on the fourth page of the second amended federal

37 Complaint in Bolden's case as one of the instrumentalities created by the city to self deal HUD funds and seized the city's records. The April 21st and 22nd, 2005 Topeka Capital Journal article described the agency's problems for the time period of James Bolden's complaint.

38 On July 8th, 2005, the City of Topeka's first African American Judge, Municipal Court Judge Deborah Purce suffered the instigation of an investigation for termination immediately after she had ruled in favor of David Price, Landrith's client and chief witness for James Bolden. Judge Deborah Purce stated that the City of Topeka was retaliating against her for acting ethically:

> "People have told me that Ebberts was under pressure from the police department because of my number of 'not guilty' verdicts," Purce said. "It would not be legal or ethical for me to be fired because I weighed evidence in favor of the accused more than Ebberts and police would have liked." Purce also outlined the events of July 8. Armed security guards were called to escort her out of the courthouse"

"Ex-judge sees race as issue" Topeka Capital Journal July 17, 2005.

39 On the day of the petitioner's attorney Bret D. Landrith's Kansas Supreme Court oral argument, the Kansas District Attorney for Shawnee County was forced to release a report chronicling the City of Topeka's false testimony and faked evidence for probable cause warrant requests. The report stated the US Attorney for Kansas had quit accepting Topeka police cases because of city misconduct.

40 The Disciplinary Administrator's ethics prosecution was initiated against the petitioner's attorney Bret D. Landrith during the twenty days preparation for James Bolden's jury trial July 6, 2004 before District Judge Kathryn H. Vratil, necessitating the petitioner's attorney Bret D. Landrith filing in Kansas District court for injunctive relief to postpone the disbarment until after Bolden's case. *Landrith v. Hazlett*, Kansas Dist. Case No. 04-2215-DVB.

APPENDIX Four

Plaintiff's Business Relationship With US Bank and US Bancorp

1 The following statement of facts describes the business relationship of the petitioner Samuel K. Lipari with US Bank, NA and US Bancorp Inc. which was tortiously interfered with by the Missouri antitrust defendants as the facts were presented in the petitioner's litigation against US Bank and US Bancorp. Ere in the word defendants refers to US Bank NA and US Bancoorp, Inc.:

2 On or about 3/12/2002, 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.

3 SAMUEL LIPARI 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.

4 Several national banks were evaluated but US BANCORP NA was selected because it also had an investment banking relationship with Piper Jaffray.

5 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.

6 On or about 4/15/02 SAMUEL LIPARI arranged for Medical Supply's corporate account to be opened at US BANK's SW Topeka, Kansas branch.

7 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.

8 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.

9 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.

10 SAMUEL LIPARI was approved for a personal checking account and an electronic debit card.

11 SAMUEL LIPARI initially used the personal account to pay expenses of Medical Supply with reimbursement from the corporation.

12 US BANK and US BANCORP's Knowledge of Medical Supply

13 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.

14 SAMUEL LIPARI was instructed to send an executive summary of his business plan via email. (Exb 1.)

15 SAMUEL LIPARI sent the summary and financial projections for Medical Supply with a restriction on disclosure notice.

16 Piper Jaffray made no response to the receipt of the executive summary and financial projections from Medical Supply's business plan.

17 SAMUEL LIPARI again telephoned the Minneapolis offices of the Piper Jaffray venture fund managers and his calls were not taken and not returned.

18 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.

19 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.

20 The discussions revealed the current condition of venture funding and IPO underwriting was very troubling.

21 At the time of these meetings the first news of WorldCom's debacle was breaking.

22 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.

23 The venture capital M&A attorney questioned SAMUEL LIPARI about the overtures of large companies seeking to acquire Medical Supply.

24 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.

25 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.

26 SAMUEL LIPARI told the VC attorney that Medical Supply would not compromise itself by being aligned with any existing healthcare supplier.

27 Medical Supply has the solution and SAMUEL LIPARI did not want to be tainted with companies that support the high cost healthcare problem.

28 SAMUEL LIPARI 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.

29 Medical Supply's Internal Capitalization Plan

30 Medical Supply resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and supply chain management technology.

31 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.

32 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.

33 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.

34 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.

35 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.

36 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.

37 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.

38 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.

39 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.

40 After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification class starting the first week of December/02.

41 During this same time, Medical Supply was preparing the escrow account system that the candidates would utilize.

42 Defendants' Offer of US BANCORP Escrow Services

43 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.

44 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.

45 Becky Hainje connected Medical Supply with Brian Kabbes in St. Louis who was responsible for US BANK commercial trust accounts in Missouri and Kansas.

46 Becky Hainje also connected Medical Supply with Douglas Lewis, responsible for commercial loans in the Noland Road office.

47 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.

48 Brian Kabbes asked questions about the candidates, the certification program and how many candidates had been selected so far.

49 Meeting of the Minds With US BANCORP

50 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.

51 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.

52 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.

53 Performance of Escrow Contract

54 Medical Supply altered its escrow contract to conform to Brian Kabbes' suggestion and on or about 10/7/02 emailed the changes to Brian Kabbes.

55 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.

56 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.

57 Oral Confirmation of Escrow Contract

58 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."

59 Becky Hainje suggested SAMUEL LIPARI call Douglas Lewis and make an appointment to apply for the line of credit, which was based on the escrow account assets.

60 Defendants' Receipt of Value for Escrow Contract

61 On or about 10/9/02 Brian Kabbes called to request an additional change in the escrow contract.

62 Brian Kabbes supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US Bank Trust Department, without disclosing the treasury funds vehicle was also owned by US Bancorp which profited from steering US Bank's trust business into the treasury funds vehicle.

63 Written Memorialization of Escrow Service Agreement

64 Medical Supply agreed to the additional change and modified the investment instructions exactly as Brian Kabbes instructed.

65 Medical Supply also ask if there were any other changes needed before Medical Supply sent the contracts out to its certification candidates.

66 Brian Kabbes said there would be no other changes, thereby acknowledging the completion of the memorializing of the written agreement and asked why Medical Supply was sending the candidates the escrow contract.

67 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.

68 Brian Kabbes acknowledged the explanation and agreed to look over the release document Medical Supply developed that candidates would execute following the week long evaluation seminar to be held the first week of December.

69 During this conversation, Brian Kabbes also requested Medical Supply's current corporate good standing documentation from the Missouri Secretary of State's Office.

70 Medical Supply agreed to send him the reinstatement and tax clearance documents on Friday 10/11/02 and that Samuel Lipari was meeting with Douglas Lewis at the Noland Road Branch on the afternoon of Thursday 10/10/02 to set up the credit facility using the escrow accounts as security.

71 Samuel Lipari told Brian Kabbes he would have Douglas Lewis send the requested information to Brian Kabbes on 10/11/02.

72 Brian Kabbes made no statement that US Bank had yet to approve Medical Supply's escrow accounts and sought no additional information.

73 Defendants' Misappropriation Of Trade Secrets

74 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 from its associate program.

75 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.

76 A letter of introduction also stated the contents were protected and restricted disclosure and possession of the materials.

77 Two more folders contained the good standing documentation Brian Kabbes requested and the associate program contracts that were sent to the candidates.

78 Douglas 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.

79 SAMUEL LIPARI further explained that he planned to start a new certification group each quarter.

80 SAMUEL LIPARI was given a loan application and agreed to and did return the application the next day.

81 Repudiation of Agreement to Provide Escrows

82 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.

83 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.

84 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.

85 Later that morning SAMUEL LIPARI called Becky Hainje and asked if she could see what happened.

86 SAMUEL LIPARI explained that Medical Supply was counting on the escrow accounts and that the line of credit depended on them too.

87 SAMUEL LIPARI said he could not believe the USA PATRIOT Act could be a reason that applied to Medical Supply.

88 Becky Hainje said she would call and see what happened.

89 Becky Hainje called back and left a taped recording on the Medical Supply answering system and listed the reasons Brian Kabbes told her.

90 Becky Hainje 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 the know your customer provisions of the "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.

91 US BANCORP Participation in the Repudiation

92 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.

93 Andrew Cesere was unavailable so Medical Supply asked Barb to leave instructions for him to call SAMUEL LIPARI about Medical Supply's corporate escrow account rejection at 9 a.m. the following morning.

94 Barb asked for more details concerning the problem.

95 Barb said Mr. Cesere had a morning meeting but she would get the message to him.

96 At 4:30 p.m. Barb 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.

97 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.

98 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.

99 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. See Attachment 1 Transcript of Recordings.

100 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.

101 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.

102 Ed Higgins said he would check into the matter and call SAMUEL LIPARI back later that day.

103 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.

104 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.

105 Lars Anderson expressed some irritation that Medical Supply had contacted the head of the trust unit about the rejection of escrow accounts.

106 Lars Anderson said the bank had never been on board and it was not a done deal.

107 Brian Kabbes denied that there had been an agreement; he said he had twice told SAMUEL LIPARI.

108 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.

109 Defendants' Knowledge of Breach

110 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.

111 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."

112 Defendants' Knowledge of Irreparable Harm to Medical Supply

113 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.

114 Medical Supply stated that the US 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.

115 Brian Kabbes said that the trust department was a "stand-alone unit" and had its own criteria for accepting customers.

116 **US BANK Refused to Reverse its Decision**

117 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.

118 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.

119 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.

120 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.

121 Medical Supply researched over 300 resumes only to find 30 that appeared to be qualified.

122 Defendants' Fiduciary responsibility for trade secrets

123 On or about 10/17/02 SAMUEL LIPARI telephoned Douglas Lewis and told him what had happened.

124 Douglas said he had sent Brian Kabbes the good standing documentation but not the business plan and associate program.

125 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.

126 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.

127 SAMUEL LIPARI suggested he might find another bank to provide the escrow accounts 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.

128 Douglas Lewis agreed and stated he would keep the business plan materials safe.

129 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.

130 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.

131 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.

132 Medical Supply called the trust department counsel Monday 10/21/02 to ask for service addresses of the other named entities and employees.

133 Kristen Strong said the same address would be good for all and then proceeded to ask what the causes of action were.

134 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.

135 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.

136 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. Jerry Grundhoffer to select the alternative of mutual fact finding to promote a resolution of the matter without litigation.

137 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.

138 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.

139 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.

140 Medical Supply stated that it had not had any communications with US BANK employees since receiving her reply on Friday 10/18/02.

141 Medical Supply informed Strong it was an account holder at US BANK and would continue to have communications with US BANK regarding its other bank business.

142 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.

143 The Shook, Hardy and Bacon attorney 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.

144 On Thursday 10/24/02 Medical Supply filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees.

145 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.

146 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.

147 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.

148 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.

149 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.

150 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.

151 The Defendants' Acceptance of Liability for Medical Supply's Business Plan Damages

152 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.

153 The email explained that these injuries would be far greater if a December 1st deadline is missed and 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.

154 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.

155 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 of the first federal complaint seeking to stop US BANK from reporting negative information about Medical Supply under the USA PATRIOT Act.

156 US BANCORP's counsel reiterated his belief Medical Supply needed to find another bank and that no liability existed.

157 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.

158 US BANCORP's counsel said it would not agree to even just the relief sought in paragraph 66 of the first federal complaint.

159 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.

160 US BANCORP's counsel refused to do so stating that US Bank did not owe any duty to Medical Supply.

161 Defendants' Intellectual Property Misappropriation

162 Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by SAMUEL LIPARI in 1993-1995 was appropriated by HSCA, Medecon and Cardinal Healthcares' subsidiary Owen Healthcare through exploitation of a confidential business relationship and then taken later by many other GPOs.

163 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 Douglas Lewis on 10/10/02.

164 Douglas Lewis gave the documents back to SAMUEL LIPARI.

165 SAMUEL LIPARI specifically ask if the documents were copied or faxed and Douglas Lewis said he put all of the information in his analysis and Samuel Lipari left the bank.

166 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.

167 There were also tractor marks from a copy or fax machine on the back of the entire associate program and the business plan pages.

168 The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied.

169 There were no marks tractor marks on the back of these documents.

170 Medical Supply became fearful of where these documents were sent and who has reviewed them.

171 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.

172 SAMUEL LIPARI became fearful this information would fall into the wrong hands further blocking or eliminating entry to market.

173 Defendants' Breach Injures Medical Supply

174 On or about 11/7/02 SAMUEL LIPARI received a complimentary D&B report dated 10/31/02 on Medical Supply.

175 The report indicated Medical Supply started in 2000 and has a clear credit history and a strong

financial condition.

176 Medical Supply Seeks Federal Declaratory Relief

177 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.

178 Medical Supply had a second preliminary injunction hearing at 12:00 p.m. on December 12, 2002.

179 Medical Supply again sought urgent preliminary injunctive relief, opposed by the defendants from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting, but was denied.

180 On December 17, 2002 Medical Supply filed a notice of interlocutory appeal to The Tenth Circuit Court of Appeals.

181 On June 16, 2003, the Kansas District Court dismissed Medical Supply's action for injunctive and declaratory relief.

182 After losing a motion for new trial, Medical Supply filed a timely notice for appeal on November 21, 2003.

183 On January 7th, 2004, the Tenth Circuit dismissed the interlocutory appeal as moot due to the superceding appeal of the action's dismissal.

184 The Third Attempt to Cover For Defendants' Breach

185 The defendants subjected MSCI to threatened and or actual USA PATRIOT Act Suspicious Activity Reporting (S.A.R.) with the knowledge that such reporting would harm or destroy MSCI's ability to capitalize its entry into the market for hospital supplies.

186 Never the less, on or about May 1st, 2003 Samuel Lipari again attempted to substitute or cover the defendants breach, this time with a capitalization plan involving the purchase of an office building at 1600 N.E. Coronado Drive in Blue Springs.

187 On or about May 7th, 2003 MSCI's loan consultant Joan Mark explained if the General Electric Company 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.

188 Samuel Lipari negotiated a contract to purchase 1600 N.E. Coronado Drive creating for MSCI $350,000.00 in funds earned in the purchase bargain from selling the termination of the building's ten year $5.4 million dollar lease with the building's tenant GE Transportation to its parent corporation, the General Electric Company (GE), which also agreed to provide MSCI a purchase mortgage as part of its contract with MSCI to release GE Transportation from the ten year lease.

189 When GE entered into the contract with MSCI, knowing of the S.A.R. threat by US BANK and US BANCORP related to GE by SAMUEL LIPARI.

190 GE on May 15th, 2003 agreed to buy the deeply discounted remainder of the lease and fund MSCI's mortgage to purchase the office building at 1600 N.E. Coronado Drive after performing diligence over the executive summary of MSCI's business plan and affirming MSCI would be able to repay the mortgage based on MSCI's value proposition and the opportunity in the market for an independent hospital supply electronic marketplace on the internet.

191 Later, GE Medical and its former president Jeffrey R. Immelt, now CEO of GE learned that GE corporate had capitalized MSCI's entry into the hospital supply marketplace when GE's former CEO Jack Welch had specifically instructed Jeffrey R. Immelt to distribute GE Medical's equipment and supplies on the internet first in GE's electronic marketplace Global Exchange and then to form GHX,LLC as an electronic marketplace, both because Jack Welch feared an independent hospital supplier creating an electronic marketplace that would provide lower prices selling supplies from GE's competitors.

192 GHX, L.L.C. was capitalized by and remains under the control of GE and Jeffrey R. Immelt which retains a directorship on the board of the privately held company.

193 With GE and Jeffrey R. Immelt's approval GHX, L.L.C. had subsequently formed a joint venture with the remaining electronic marketplace for hospital supplies, Neoforma, Inc. part of a healthcare technology company capitalization syndicate with US BANCORP's Piper Jaffray and together in an agreement, GHX, L.L.C. and Neoforma allocated market share of the nation's hospitals between each other.

194 GE repudiated its contract, sacrificing $15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, L.L.C. and Neoforma in the market for hospital supplies.

195 MSCI sought to enforce its contract with GE and recover damages in federal court so tat MSCI

would still be able to enter the market for hospital supplies and capitalizing its electronic marketplace.

196 SAMUEL LIPARI filed a *lis pendens* notice in the Jackson County Register of Deeds office based on his state law and antitrust claims in the US District Court.

197 US BANCORP and US BANK Work to Frustrate Recovery From GE

198 The defendants US BANCORP and US BANK along with 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 GE defendants 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.

199 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."

200 A cartel of hospital suppliers organized in an anticompetitive agreement as members of GE's GHX,LLC and including the University Hospital Consortium (UHC), Robert J. Baker, the Volunteer Hospital Association (VHA, Inc.), Novation LLC, Neoforma, Inc. and Robert J. Zollars renewed 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 the defendants US BANCORP and US BANK along with Jerry A. Grundhoffer, Andrew Cesere, the Piper Jaffray Companies and Andrew S. Duff.

201 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.

202 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, originating from US BANCORP and US BANK's agent Shughart Thomson and Kilroy's past and current share holders."

203 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.

204 **BREACH OF CONTRACT**

2) The Defendants breached their contract with Medical Supply (MSCI) which interests are now

3) This contract was executed in writing by the

4) Defendants and MSCI when their respective agents opened the Medical Supply Chain Corporate

5) The Defendants breached their contract with MSCI to provide MSCI with corporate trust services,

6) This contract was made while the plaintiff was influenced by representations over the phone at a

7) No writing or other memorialization of this contract to provide a full range of banking services with

8) The Defendant's Vice President Brian Kabbes and Samuel Lipari came into formation of a written ong term held funds, the directions for US BANK's investment of short term held funds, the selection of investment vehicles

9) The Defendants performed diligence to determine whether to accept the contract with MSCI to

10) The Defendants required only one item to be rectified for approval; a current good standing status

11) The Defendants approved MSCI's escrow form for delivery along with MSCI's associate contract to

12) The Defendants breached the contract to provide escrow accounts to MSCI when the defendants

13) MSCI attempted to cover or substitute as described in the statement of facts, seeking the services of

14) MSCI then attempted to cover or substitute by obtaining the capitalization for entry to market

15) The Defendant US BANCORP injured MSCI with a fraudulent misrepresentation material to their

16) Then Brian Kabbes speaking as a Vice President of US BANK falsely represented to MSCI that US

17) The defendants' officers Lars Anderson and Susan Paine made this fraudulent misrepresentation

18) The defendant US BANCORP's officer Andrew Cesere directed the defendants' officers Lars

19) misrepresentation when it had been questioned by MSCI and SAMUEL LIPARI and to maintain the

20) BANCORP NA, US BANK.

21) The defendants' officers Andrew Cesere, Lars Anderson, Susan Paine and Brian Kabbes caused this

22) escrow account hosting.

23) On 10-24-02 the defendants officer Brian Kabbes communicated to MSCI and SAMUEL LIPARI

24) Becky Hainje US Bancorp (Phone Message left on MSCI answering machine 10-24-02);

25) "**Becky Hainje**: Hi Sam this is Becky Hainje with US Bank I a… visited again with Brian
concerns that the bank had a… first of all was that of course this is an unknown start up business that a…. did not have
› that's what the situation was a…I understand that your coming up with a unique way to finance and get a business off of
ne a call at 913-261-5725."

26) Brian Kabbes called back rather than Ed Higgins:

27) "**Bret Landrith MSCI**; "Yes Brian, this is Bret Landrith, returning your call.
28) **Brian Kabbes US BANCORP**; "Bret hey a…Lars Anderson wants to be on this call too, he is

29) **Bret Landrith MSCI**; " No problem."
30) **Lars Anderson US Bancorp**; "Hey Bret, I got Lars Anderson, hey Bret."
31) **Bret Landrith MSCI**; "Nice to speak to you"
32) **Lars Anderson US BANCORP**; "Susan Pane is here also here in the office a…

33) **Brian Kabbes US BANCORP**; “I report to Susan Pane and Lars is our new business

34) **Bret Landrith MSCI**; “Yes I didn't realize when I last spoke to Brian that we had already sent

35) **Lars Anderson US Bancorp**; “Who approved?”
36) **Bret Landrith MSCI**; “Brian Kabbes, he works there in your office, I think he is in front of
rket a… that became a substantial issue for us and I didn't realize that when I last spoke to Mr. Kabbes.”
37) **Lars Anderson US Bancorp**; “Yeah, we were wondering how obviously calling Andy Cesere

38) **Bret Landrith MSCI**; “well a…”
39) **Lars Anderson US Bancorp**; “as you were not happy with our decision not to move forward

40) Bret Landrith MSCI; “a… Mr. Kabbes was very helpful, he suggested that we go to some local

41) **Lars Anderson US Bancorp**; “Sure”,
42) **Brian Kabbes US BANCORP**; “I said that when I said that I said your local bank, I didn't

43) **Bret Landrith MSCI**; “Who has really accelerated there a level of customer service just

44) **Lars Anderson US Bancorp**; “Got yea...Well then no doubt nobody questions about whether
ıd what our duties were.”
45) **Bret Landrith MSCI**; “I don't think we need to go into minutia over that right now I think the

46) Lars Anderson US Bancorp; “We have not divulged your Business Plan to any body, there is

47) **Bret Landrith MSCI**; “well a…”
48) **Lars Anderson US Bancorp**; “Where did we ever accept the transaction, we never provided

49) **Bret Landrith MSCI**; “we had pricing and its oral, and this is Missouri, and this is a business

50) **Brian Kabbes US BANCORP**; “I’ll tell you what Bret, you can talk with Sam, you can get

51) **Bret Landrith MSCI**; “Sam is in the room now.”
52) **Sam Lipari MSCI**; “Hi Brian, well Brian, I also had conversations with Becky Hainje, and

53) **Bret Landrith MSCI**; “but, but before we go farther down this line, obviously you don't have

54) **Brian Kabbes US BANCORP**; “Excuse me”
55) **Lars Anderson US Bancorp**; “you do want, on what basis do you consider us to be with you

56) **Bret Landrith MSCI**; “well we have our sole banking relationship with you and we have

57) Lars Anderson US Bancorp; “We don't have a conflict of interest.”
58) **Bret Landrith MSCI**; “this comes out of left field that you are accusing us of being Arab

59) **Lars Anderson US Bancorp**; “Ok, well I think Brian’s conveyed...”
60) **Bret Landrith MSCI**; ‘well those are pretty bad reasons and those end up with a demand

61) **Lars Anderson US Bancorp**; “well we are not the right people to talk to about that, we are

62) **Bret Landrith MSCI**; “all right well, like I said earlier, I don't see any point in having a

63) **Lars Anderson US Bancorp**; “so your, what your what are you stating at this point, that you

64) **Bret Landrith MSCI**; “we got ten people that....”

65) **Lars Anderson US Bancorp**; “to force us to provide these services, or what, I don't

66) **Bret Landrith MSCI**; “your, your characterizing that as a threat, there are no threats here, our

67) **Lars Anderson US Bancorp**; “well we certainly never contracted with you or these ten

68) **Bret Landrith MSCI**; “well I think we go to a referee on that, first you get the demand letter,

69) **Sam Lipari MSCI**; “and, and if I might add something here, this patriot act, that was
background check or financial background on these individuals. I mean I am just really concerned why this patriot act

70) **Lars Anderson US Bancorp**; “we were not trying to relate the Patriot Act specifically to your

71) **Sam Lipari MSCI**; “well according to Ed Higgins, he didn't see how this, where this even

72) **Bret Landrith MSCI**; “what other customers has this been an issue with for you and maybe

73) **Lars Anderson US Bancorp**; “The patriot act, when it was put in place, caused us to have a

74) **Sam Lipari MSCI**; “well according to Ed Higgins, he doesn't think that the Patriot Act has

75) Bret Landrith MSCI; “but, since you mentioned it the other day, we started looking at who you

76) **Lars Anderson US Bancorp**; “yea, you know what...we are not sure...what's your...
77) **Bret Landrith MSCI**; “yea, it is pretty serious and it goes beyond contract damages ok.”
78) **Lars Anderson US Bancorp**; “we are not the right people to talk to if you...”
79) **Bret Landrith MSCI**; “I know you may not be the right people to talk about trust, that is why

80) **Lars Anderson US Bancorp**; “we have already spoken with him and explained the situation,

81) **Bret Landrith MSCI**; “no, I think we are going to focus on the Trust Department on US Bank

82) **Lars Anderson US Bancorp**; “do you have any other questions today?”
83) **Bret Landrith MSCI**; “No, you called us.”
84) **Lars Anderson US Bancorp**; “well we were just returning your call to Andy Ceccere”.
85) **Bret Landrith MSCI**; “well I think he ought to personally talk to us cause we are still not

86) **Lars Anderson US Bancorp**; “you are not looking for a good explanation you are looking to

87) **Bret Landrith MSCI**; “no, you guys are the ones that don't even threaten you just kill, but we

88) **Sam Lipari MSCI**; “yea, we need, the problem here is that we have these a…, we basically
in time we tried to explain the situation and in fact we spoke with Ed, now who is Ed Higgins,
89) **Brian Kabbes US BANCORP**; “He is ahead of personal trust in St. Louis.”
90) **Sam Lipari MSCI**; “Ok, well when we spoke with Ed, Ed seemed to feel as though this
to create a line of credit here at the local level, a… and everything seemed to be going in order and then all of a sudden

91) **Brian Kabbes US BANCORP**; “first off, that was a minor, that was part of our reason that

92) **Sam Lipari MSCI**; “well, if, if I quote Becky correctly this morning on her conversation, it
going to find out that we are going to constantly come back to this issue where you have a conflict of interest and because

93) **Bret Landrith MSCI**; “but they were our ten best you know, former principal of IBM, and

94) **Sam Lipari MSCI**; “so all the conversations that we have documented since last week, have

95) **Brian Kabbes US BANCORP**; “you are missing a very important part of that, twice I said to

96) **Sam Lipari MSCI**; “ok well then let me ask you this Brian, why won’t you just set the escrow

97) **Brian Kabbes US BANCORP**; “well”

98) **Sam Lipari MSCI**; “there is a conflict of interest Brian, and you know there is, and I don't to deposit and we are going to have to go back to them to try and save them if we can, and if we can't all this is really kind Commission is after them, and not Medicare and Medicaid is after these GPO's. In addition to that, I have a glass pipe line ked you people to do, instead, you guys have carried this thing farther, in other words, you want to know more a conflict, then set the escrow up.”

99) **Lars Anderson US Bancorp**; “Sam, this is Lars, Brian and I have talked about this since he

100) **Brian Kabbes US BANCORP**; “I don't have any idea what he is talking about.”

101) **Bret Landrith MSCI**; “I understand you are not admitting it yet, but you have not come up

102) **Brian Kabbes US BANCORP**; “we have to know our customers I have to have complete

103) **Bret Landrith MSCI**; “I don't think a US Bank knows too much about US Bank, but in terms

104) **Lars Anderson US Bancorp**; “we take on a trust business stand alone, and we have our own

105) **Bret Landrith MSCI**; “like I said, I don't think US Bank is a coherent entity and I am really

106) **Lars Anderson US Bancorp**; “Ok, well we are trying to explain to you today the reason why

107) **Sam Lipari MSCI**; “and what is that reason exactly, because we have gone””

108) Transcript of tape recorded telephone conference.

109) MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan

110) Paine.

111) The defendants US BANCORP NA and US BANK caused this fraudulent misrepresentation to be

112) Or, in the alternative the defendants caused this fraudulent misrepresentation to be communicated

113) US BANK and US BANCORP intentionally deceived MSCI and SAMUEL LIPARI over the

114) US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI

115) US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI

116) US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI

117) MSCI and SAMUEL LIPARI relied on the Defendants fraudulent misrepresentation to MSCI and

118) MSCI and SAMUEL LIPARI were harmed by the Defendants' actions, resulting in the immediate

119) TRADE SECRET MISAPPROPRIATION UNDER SECTION 417.450 RSMO OF THE

1 The Defendants have misappropriated MSCI's business plan and associate program containing MSCI's trade secrets.

2 The Defendants have made use of MSCI's trade secrets through unauthorized copying and transmittal.

3 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 SAMUEL 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.

4 US BANK exceeded its authorized use and copied and or transmitted the above documents to the defendant US BANCORP and its officers Lars Anderson, Susan Paine and Brian

120) Kabbes.

1 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.

2 The defendant US BANCORP NA, its officers Lars Anderson, Susan Paine and Brian Kabbes and its subsidiary US BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI's trade secrets and made use thereof.

3 The Defendants were at the time 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.

121) BREACH OF FIDUCIARY DUTY

1 Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

2 US BANCORP through its investment banking subsidiary US BANCORP PIPER JAFFRAY dominated the capitalization of health care technology companies.

3 US BANCORP through its relationship directly with Novation, LLC and through its subsidiary US BANCORP PIPER JAFFRAY's relationship with Novation, LLC dominated the access to the nationwide hospital supply market.

4 Until April 28, 2003 when US BANCORP PIPER JAFFRAY settled charges it was guilty of aiding and abetting efforts to defraud investors and manipulating investment research, US BANCORP through its investment banking subsidiary US BANCORP PIPER JAFFRAY was able to dominate investor research and exclude potential competitors to Novation, LLC's control of the market for hospital supplies from having a market for securities.

5 SAMUEL LIPARI placed his trust in US BANK and US BANCORP to provide escrow services to MSCI in his plan to alternatively capitalize MSCI's entry into the market for hospital supplies through the participation of its certification candidates who would function as MSCI's marketing representatives.

6 US BANCORP's corporate trust division acting through US BANK was a trustee of the highest order to MSCI by virtue of US BANK's contract with SAMUEL LIPARI to provide MSCI escrow services.

7 In forming the trust relationship with MSCI, US BANK and US BANCORP asked for and obtained from SAMUEL LIPARI all of MSCI's confidential information relating to the escrow accounts and MSCI's certification candidates.

8 US BANK was a trustee of the highest order to MSCI by virtue of US BANK's officer Douglas Lewis' promise to SAMUEL LIPARI that US BANK would safeguard MSCI's confidential business plan.

9 US BANCORP and US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as an escrow services provider to MSCI when US BANCORP and US BANK improperly used a change in federal law as a pretext to breach US BANCORP and US BANK's agreement to provide escrow services.

10 US BANCORP and US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as an escrow services provider to MSCI when US BANCORP and US BANK fraudulently claimed a change in federal law excused their breach US BANCORP and US BANK's agreement to provide escrow services, knowing the change did not render performance impossible and knowing that a change in law or regulations did not relieve the defendants of their duty to perform under the escrow contract.

11 US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as custodian of MSCI's confidential trade secrets contained in MSCI's business plan and MSCI's certification program when it reproduced the trade secrets and transmitted them to US BANCORP offices outside of the Independence, Missouri office of Douglas Lewis.

12 US BANCORP violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as custodian of MSCI's confidential trade secrets contained in MSCI's business plan and MSCI's certification program when it received the MSCI trade secrets transmitted to them by Douglas Lewis and disseminated them to hospital suppliers and GPO's competing with MSCI.

13 US BANCORP and US BANK violated their duty of undivided loyalty to MSCI and to the escrow beneficiaries thereof by engaging in self-dealing by requiring the escrow account funds to be invested in a fund owned by US BANCORP without disclosure of US BANCORP's interest.

1 APPENDIX FIVE

2 Plaintiff's Business Relationship With GE, GE CAPITAL and GE TRANSPORTATION

3 The following statement of facts describes the business relationship of the petitioner Samuel K. Lipari with GE, GE CAPITAL and GE TRANSPORTATION which was tortiously interfered with by the Missouri antitrust defendants as the facts were presented in the petitioner's litigation against GE, GE CAPITAL and GE TRANSPORTATION. The word "defendants" herein refers to GE, GE CAPITAL and GE TRANSPORTATION.:

4 General Electric Company, (herein "GE"), Missouri registered agent: C T Corporation System, 314 North Broadway, St. Louis, Mo 63102.

5 General Electric Capital Business Asset Funding Corporation, (herein "GE CAPITAL") Missouri registered agent: The Company Corporation 120 South Central Avenue Clayton, Mo 63105.

6 GE Transportation Systems Global Signaling, L.L.C. (herein "GE TRANSPORTATION") Missouri registered agent C T Corporation System,120 South Central Avenue, Clayton Mo 63105.

7 Samuel K. Lipari's dissolved company Medical Supply Chain, Inc. (Medical Supply) formed a written contract via email with GE and GE Transportation to buy a $10 million dollar building at 1600 N.E. Coronado Drive in Blue Springs, MO for $5 million and simultaneously to sell GE Transportation a release from its ten-year lease for a deeply discounted value.

8 The GE entities knew Medical Supply intended to use the transaction to capitalize its entry into the hospital supply market and that it was the victim of antitrust conspirators using the USA PATRIOT ACT to prevent it from getting capital by conventional means. GE corporate "business leaders" approved the transaction obligating GE Capital's underwriting based on Samuel K. Lipari's business plan and Medical Supply's ability to pay as detailed in Medical Supply's forward looking financials.

9 The e-mail was a written contract meeting the Missouri Statute of Frauds and under Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq.

10 Both the GE entities and Medical Supply partially performed the terms of the contract. GE caused the breach of the contracts when GE Medical and the electronic hospital supply marketplace GHX LLC

created by GE interfered to prevent Medical Supply from getting capitalization through the contract to enter the hospital supply marketplace. GHX, GE and GE Medical are openly part of an unlawful hospital supply cartel with Novation LLC that had previously prevented Medical Supply from capitalizing its entry into the hospital supply market.

11 Medical Supply was entitled to its contract expectations *Albrecht v. The Herald Co*., 452 F.2d 124 at 129 (8th Cir. 1971) including its business plan forward looking financials under *Anuhco, Inc. v. Westinghouse Credit Corp*., 883 S.W.2d 910 (Mo App 1994) and GE Capital has specifically been subjected to business plan expectation damages for breaching finance contracts in Missouri State Court: *Rasse v. GE Capital Small Business Finance Corp*., 2002 MO 808 (MOCA, 2002).

12 The Western District of Missouri U.S. District court decided an electronic contract/electronic signature case under federal and state electronic contract laws and the Missouri statute of frauds as Medical Supply's original pleadings advocated: *International Casings Group, Inc., v. Premium Standard Farms, Inc*., 358 F. Supp. 2d 863; 2005 U.S. Dist. LEXIS 3145, February 9, 2005.

13 Jeffrey R. Immelt, the former president of GE Medical, Inc. knew he had succeeded Jack Welch as CEO of General Electric because GE's hospital supply business units had successfully maintained an anticompetitive market in U.S. hospital supply purchasing permitting GE to pass on higher prices to the hospital consumers and because of this the General Electric Company was under a consent order with the U.S. Department of Justice requiring the corporation to sell a medical imaging unit and refrain from future anticompetitive conduct at the time Medical Supply Chain, Inc. brought its original breach of contract and antitrust complaint against the GE defendants including Jeffrey R. Immelt. Immelt made it an essential priority for the General Electric defendants, their agents and their hospital supply cartel co-conspirators to have the petitioner's complaint dismissed at all costs.

14 Under Jeffrey R. Immelt's direction and control, Immelt's personal and corporate agents made repeated misrepresentations to state and federal judicial branch staff and attempted to influence them unlawfully, largely *ex parte* and unreported to the petitioner in order to have Medical Supply, the petitioner, his cause and his counsel destroyed.

15 The petitioner appealed the district court dismissal of his antitrust claims resulting from Rule 12 (b)

6 pleadings filed by John K. Power, Jonathan I. Gleklen and Ryan Z. Watts deliberately misstating the law so that the petitioner's complaint would be erroneously thrown out for not making General Electric's independent co-conspirator Neoforma, Inc. a defendant. The dismissal was accomplished through the hostile climate in the court created *ex parte* by GE's legal representatives and Mark A. Olthoff, Steven D. Ruse, James P. O'Hara of the law firm Shughart Thomson & Kilroy, all representing Immelt's cartel co-conspirators and the cartel feared Immelt's deception would be discovered.

16 Jeffrey R. Immelt directed his legal team to file a counter appeal in an abuse of process to obtain sanctions against the petitioner that the trial court had denied. Through this overt action and an accompanying unlawful influence over Patrick J. Fisher, Jr., the Clerk of the Tenth Circuit U.S. Court of Appeals and law clerks for the court in a deliberate use of social networking between government officials in a pattern modeled after the Mississippi Sovereignty Commission and that eventually included the U.S. District Attorney for Kansas, Eric F. Melgran and Bradley J. Schlozman working in the U.S. Department of Justice and later installed as the US Attorney for the Western District of Missouri.

17 The resulting appeal decision upholding the erroneous dismissal and correctly reversing the trial court on whether sanctions could have been issued went on to vilify the petitioner and his representation for naming Jeffrey R. Immelt as an antitrust defendant an in doing so the opinion contradicted clearly established Tenth Circuit precedents on identical facts along with the controlling federal case law. The following day the US Supreme Court docketed the appeal of similar and equally unusual sanctions in the antitrust action against the cartel co-conspirators by the petitioner's attorney.

18 The two unusual opinions and the facts in the petitioner's case *Medical Supply Chain, Inc. v. Neoforma, et al*., Case No. 05-0210-CV-W-ODS in which the petitioner was again subjected to the same misconduct and worse, starting with the GE defendants' misrepresentations to Hon. Judge Ortrie D. Smith of the Western District court through John K. Power and the cartel's common defense controlled by Immelt in order to fraudulently transfer the action to Kansas "in the interest of justice" caused the Tenth Circuit on the petitioner's information and belief to conduct a second internal investigation among law clerks in the Denver court following an earlier investigation directed at Magistrate James P. O'Hara led the Tenth Circuit to conclude that the counter appeal had been an abuse of process. This resulted in the unusual trial court

order stating the Tenth Circuit had directed Hon. Judge Carlos Murguia to order Jeffrey R. Immelt by name to personally file for the sanctions Immelt had succeeded in appealing but had not pursued in the year following remand. Immelt declined to appear or resubmit himself to the jurisdiction of the court and directed a letter be sent on his behalf by his personal counsel Jonathan I. Gleklen.

19 The petitioner's state law based contract claims against the GE defendants had been dismissed without prejudice and the petitioner exercised his right to file them where the injury occurred in Jackson County Missouri. Jeffrey R. Immelt attempted to conceal the continuing contractual liability to the petitioner in Securities and Exchange Commission mandated filings from his board of directors to prevent GE's role in the unlawful hospital supply cartel to be exposed.

20 The petitioner had earlier relied on the public filings of Neoforma, Inc., enraging Immelt. Jeffrey R. Immelt had through the aid of U.S. Deputy Attorney General Paul J. McNulty and the McNulty Memo authored in December 2006 to prevent the Northern District of Texas US Attorney's office investigating Novation, LLC's theft of member hospital funds and their money laundering through the petitioner's electronic marketplace competitor from obtaining the corporate papers of Neoforma, Inc. without Main Justice and Karl Rove's approval .

21 When the investment banking and merger syndicate of Merrill Lynch & Company, Inc., Fenwick & West LLP., Innisfree Limited, Lazard, McDermott Will & Emery LLP., Wachtell Lipton Rosen & Katz, Skadden Arps Slate Meagher & Flom LLP., Sidley Austin Brown & Wood LLP., and William Blair & Company formed by Novation LLC for the purpose of solving the cartel's exposure to the petitioner through Neoforma, Inc. discovered the petitioner's claims in November 2005 that had not been disclosed in Securities and Exchange Commission required filings and began to fear the liability of taking Neoforma, Inc. private to obstruct justice in the petitioner's antitrust civil litigation and the government False Claims Act Medicare fraud investigation that were both seeking the records of where the Novation LLC member hospitals' laundered funds went; Jeffrey R. Immelt caused the defendant entity GE Capital to underwrite the loan giving the money to Novation LLC for merging Neoforma, Inc. with GHX, LLC the sole remaining competitor electronic marketplace for hospital supplies.

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22 Jeffrey R. Immelt directed his defense to attempt to unlawfully influence the Independence, Missouri court in deliberately fraudulent filings, a fraudulent removal to federal court and by acting *ex parte* to prevent the petitioner from obtaining counsel using the disbarment of the petitioner's previous counsel, the vilifying rulings and sanctions all knowingly obtained by Immelt through unlawful influence over the court and by using the Mississippi Sovereignty Commission style networking employed by Immelt to destroy the petitioner and his associates. The fear of GE's influence was so great and visibly no constitutional rights or laws could protect even officers of the court that the petitioner could not obtain counsel even when his contract claims survived dismissal.

23 Still Jeffrey R. Immelt feared the discovery of his role in the Novation LLC hospital supply cartel and when the petitioner attempted to receive an order compelling the GE defendants to mediation and to produce discovery, Jeffrey R. Immelt caused his defense counsel John K. Power Mo. Lic. #35312, Leonard L. Wagner MO. Lic. #39783 to repeatedly lie to the court, falsely stating that they had attempted to schedule mediation and falsely stating that the petitioner's discovery requests were not identified as to their relativity to the petitioner's complaint when each numbered production request was indexed to the particular paragraph of the complaint it was related to.

24 While Jeffrey R. Immelt perpetrated this misrepresentation on the court and General Electric was liable for over $60,000.00 dollars in daily interest on contract based claims he could not escape, Jeffrey R. Immelt turned to the Illinois law firm of Seyfarth Shaw LLP to take over direction of the Independence, Missouri defense through extortion of the petitioner. Seyfarth Shaw LLP obtained an order from Hon. Judge Mark Filip, of the Federal District Court in Chicago, Illinois who was nominated to replace Deputy Attorney General McNulty to force the petitioner to testify without counsel on his relationship to the financier Michael Lynch, knowingly causing the petitioner to fear for his safety and evidencing no intention to follow through on the mediation the GE defendants had promised the state court.

25 Realizing the defendants had again openly and notoriously committed fraud on the 16th Circuit, Missouri court, the day after the petitioner's settlement offer to Jeffrey R. Immelt expired, Hon. Judge Michael W. Manners granted the petitioner leave to amend his complaint to include the following racketeering and racketeering conspiracy based claims against the defendants that occurred subsequent to

previous litigation with the requisite specificity to meet the current federal RICO pleading requirements and RICO conspiracy averment requirements in light of *Bell Atlantic v. Twombly*, No. 05-1126, 2007 WL1461066 (May 21, 2007) determination that Sherman Act conspiracy on which RICO is based requires more than notice pleading.

26 The plaintiff through his now dissolved corporation made a contract with the defendants to sell GE Transportation's remaining ten year lease at a deep discount benefiting GE in exchange for GE'S funding of the plaintiff's purchase of the building through GE'S business lending subsidiary, GE Capital.

FORMATION OF A CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANTS TO EXCHANGE GE TRANSPORTATION'S REMAINING LEASE AND FUND THE PURCHASE OF 1600 N.E. CORONADO BUILDING

27 On or about June 1st, 2002, Samuel K. Lipari, in his role as CEO of Medical Supply Chain, Inc. contacted the leasing agent Cohen & Essrey Property Management ("Cohen") regarding a building located at 1600 N.E. Coronado Drive in Blue Springs, MO.

28 Cohen indicated the building was already leased but that the lessee could and would like to sub-lease the building.

29 The building was not occupied so Samuel K. Lipari made a verbal offer to sub-lease a portion of the building.

30 Cohen declined his offer indicating the existing lessee would not accept anything less than sub-leasing the entire building.

31 On or about April 1st, 2003 Samuel K. Lipari contacted the new leasing agent, B.A. Karbank & Company ("Karbank") 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.

32 The new leasing agent Karbank told Samuel K. Lipari that GE was the lessee seeking to sub-lease the building due to their vacating the building after GE Transportation bought out Harmon Industries.

33 The building was still not occupied so again Samuel K. Lipari made a verbal offer to lease a portion of the building.

34 Karbank declined his offer indicating GE corporate properties would not accept anything less than

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leasing the entire building.

35 On or about April 7th, 2003 Samuel K. Lipari contacted GE and spoke with the GE property manager, Mr. George Frickie regarding Medical Supply's interest in sub-leasing the building.

36 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.

37 Samuel K. Lipari requested the name of the owners and George Frickie gave him the name and number of Mr. Barry Price with Cherokee Properties L.L.C.

38 Samuel K. Lipari contacted Barry Price, and he was referred to Mr. Scott Asner who also had a substantial interest in the building.

39 While speaking with Mr. Asner he provided Samuel K. Lipari the background and current details on the building lease with GE, terms and a price to purchase the building.

40 The lease was transferable and GE was still obligated for 7-years out of a 10-year lease.

41 Mr. Asner agreed to sell Medical Supply the building for the remaining balance of the GE 7-year lease ($5.4 million) and provided Samuel K. Lipari with a letter of intent to sell the building to Medical Supply.

42 On or about April 15th, 2003 Samuel K. Lipari contacted George Frickie with GE Commercial Properties and indicated that he had an interest in purchasing the building. Samuel K. Lipari asked George 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.

43 George Frickie offered GE's lease payments for the remainder of 2003 ($350,000) as a buy out offer.

44 On or about May 1st, 2003 Samuel K. 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.

45 Samuel K. Lipari knew Medical Supply could not get a loan because of the threat and extortion of the USA PATRIOT ACT, but knew he needed inputs from bankers familiar with the commercial real estate

market in Blue Springs, MO.

46 Samuel K. Lipari felt Medical Supply could form a holding company to obtain the property without US Bank realizing, and could then enter the hospital supply market.

47 Samuel K. Lipari spoke with Mr. Allen Lefko President of Grain Valley Bank, Mr. Pat Campbell branch manager of Gold's Bank and Mr. Randy Castle Senior Vice-President of Jacomo Bank.

48 Each of the banks indicated a wiliness 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.

49 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 Samuel K. Lipari had tried to enter the hospital supply market in October of 2002, Samuel K. Lipari knew he was unable to solicit a national bank for the real estate loan.

50 On or about May 7th, 2003 Medical Supply contracted a financial consultant (Mrs. Joan Mark) for advice on how to structure a mortgage to buy the building which has a 7- year revenue stream from GE in the amount of $5.4 Million dollars, the identical amount offered to purchase the building and for which Medical Supply had a letter of intent from the owner Cherokee Properties LLC.

51 Mrs. Mark suggested Samuel K. Lipari propose a mortgage arrangement directly to Mr. Frickie with GE Corporate.

52 Mrs. Mark explained how a purchase of the $10 Million dollar property for $5.4 Million dollars was a great deal for any mortgage lender.

53 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 liability that GE would directly benefit from a $15 Million dollar positive swing to their balance sheet.

Offer

54 On or about May 15th, 2003, Medical Supply's corporate counsel sent a proposed transaction to George Frickie outlining the terms of Medical Supply's proposal :

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Dear Mr. Fricke:

I am writing on behalf of Medical Supply Chain, Inc. with a proposal to release GE from a seven-year 5.4 million dollar obligation on 1600 N.E. Coronado Dr., Blue Springs MO. We have spoke with the City of Blue Springs economic development officer and the city attorney. Medical Supply Chain, Inc. has also obtained a letter of intent from the building's owner, Cherokee South, L.L.C. (Barry Price/Scott Asner) to purchase the building. We offer to release GE from its lease and 5.4 million dollar obligation, providing GE pays Medical Supply Chain, Inc. at closing for the remainder of the 2003 lease and transfers title to the building's furnishings. This offer is contingent on GE's acceptance by 3pm (EST), Friday, May 23rd; the City of Blue Spring's approval of Medical Supply Chain's purchase and occupation of the building and is contingent upon GE Capital securing a twenty year mortgage on the building and the property with a first year moratorium.

Medical Supply Chain, Inc. believes this arrangement will result in a net gain in revenue for GE and GE's Capital services was our first choice for the commercial mortgage when our area bankers advised us the building and the property at 6.2 million dollars was substantially less than its market value of 7.5 million dollars, but would require a commercial lender. Medical Supply Chain, Inc. has no existing debt and a valuation of thirty two million dollars. See attachment 1.

GE Capital or its underwriter would need to provide Medical Supply Chain, Inc. a twenty-year
Mortgage at 5.4% on the full purchase price of 6.4 million dollars, with a moratorium on the first full year of mortgage payments. The City of Blue Springs would be paid the balance of lease payments for the land ($800,000.00) or in the alternative, the mortgage will include an escrow account to complete the lease and purchase of the land on its original terms. GE
Capital can provide or designate the closing agent and would be required to provide 5.4 million dollars to Cherokee South, L.L.C. and your division's check for the remainder of the lease payable to Medical Supply Chain, Inc. along with a bill of sale for the buildings furniture and equipment. This closing would need to be completed by June 15th, 2003. Please contact us at your receipt of this offer and provide us a contact person for GE Capital or its mortgage agent.

Bret D. Landrith

Oral Acceptance Affirming Meeting of the Minds

55 The afternoon of May 15th, 2003 George 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:

56 "Bret, George Frickie, ah.... I know I sent you an email saying that my counsel is 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."

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GE, GE CAPITAL
and GE TRANSPORTATION
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57 May 15th 2003 taped voice mail message recorded by George Frickie.

Verification, A Writing Meeting Statute of Frauds

58 The second e-mail George 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 the 19th. GCF"

Conduct Consistent With Contract

59 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.

60 Mr. Tom Davis, the property manager for GE Transportation in Blue Springs and Mr. John Phillips, the GE Transportation building maintenance engineer provided a three-hour walk through in addition to the building maintenance and operational procedures.

61 Mr. Phillips also provided the construction blueprints of the building and allowed Samuel K. Lipari to make copies.

62 Samuel K. Lipari returned the blueprints after copies were made.

63 Mr. Davis and Mr. Phillips both stated they were being dismissed from employment with GE since they would no longer be needed.

64 On May 22nd, 2003 Samuel K. Lipari spoke to Mr. Doug McKay with GE Capital who had called earlier that week with regard to the mortgage outlined in Medical Supply's proposal.

65 Mr. McKay asked that Samuel K. Lipari send his company information regarding the mortgage.

66 Samuel K. 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 Cherokee Properties LLC and Medical Supply's Dunn & Bradstreet report showing Medical Supply's good credit rating and strong financial condition.

67 Samuel K. Lipari gave the information to Mr. McKay and Mr. McKay indicated he needed to speak with GE Transportation to see how they wanted to handle the terms of the accepted proposal.

Conduct Suggesting Repudiation

68 On or about June 2nd, 2003 Samuel K. Lipari called Mr. McKay to see how they were doing on closing and Mr. McKay indicated that the person he needed to speak with was at corporate and that he needed to speak with him before moving forward.

69 As the June 15th, 2003 closing date approached, Medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent George Frickie an email stating that a delay in closing would not effect the lease buyout of $350,000.

70 Medical Supply's counsel later again called George Frickie when he received no response and George Frickie became extremely angry and hung up the phone.

71 Medical Supply then proceeded to speak with GE's counsel Mrs. Kate O'Leary to determine if the contract had been repudiated.

72 Supporting statutes and the antitrust basis including damage implications were explained to Kate O'Leary.

73 Medical Supply gave GE a deadline of June 10th, 2003 to clarify whether there had been contract repudiation. Kate O'Leary later faxed a letter on June 10th, requesting that Medical Supply not speak to anyone at GE or its affiliates and that any correspondence relating to this matter be directed to her.

74 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 its claims on June 16th, 2003 for antitrust and breach of contract.

75 GE repudiated its contract, sacrificing $15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, L.L.C. and Neoforma in the market for hospital supplies.

76 Samuel K. Lipari filed a *lis pendens* in the Jackson County Register of Deeds office based on his state law claims in the US District Court.

77 The defendant Carpet n' More Inc. Stewart Foster placed the building up for sale with actual or imputed knowledge of Medical Supply's claims.

78 The defendants have occupied the building at 1600 NE Coronado preventing plaintiff from receiving the value of his bargain and with actual or imputed knowledge of Medical Supply's claims.

79 In March 2006 GE CAPITAL funded the purchase of Neoforma, an electronic marketplace competitor of Medical Supply Chain, Inc.

80 Neoforma has never been profitable: "Neoforma's balance sheet shows a cumulative loss of nearly $739 million dollars as of Sept. 30, 2004." Healthcare Purchasing News March 2005.

81 "In 2005, in accordance with GAAP, Neoforma's net loss and net loss per share were $35.9 million dollars and $1.81 per share respectively, an improvement from the $61.2 million dollar net loss and $3.17 net loss per share recorded in the prior year." Neoforma, Inc. press release San Jose, CA, USA 02/26/2003.

GENERAL ELECTRIC DEFENDANTS' INTERFERENCE WITH SUBSEQUENT ATTEMPTS TO CAPITALIZE PETITIONER'S ENTRY INTO HOSPITAL SUPPLY MARKET

82 The petitioner attempting to obtain capital inputs a third time to enter the hospital supply market through a Chicago Illinois financier named Michael W. Lynch was stopped again by the GE defendants. Hon. Judge Eugene R. Wedoff, the Chief Bankruptcy Judge of the Northern District of Illinois has revealed to the Federal Bureau of Investigation the defendants' widespread use of offshore funds in the continuation of a "Greylord" racketeering enterprise effecting the outcomes of federal court cases in several states where General Electric's interest in a cartel member's monopoly market share is at stake. The evidence shows GE Capital, a defendant in this case and its financial client Alcoa furthered General Electric's interests by influencing the outcome of any action threatening General Electric's monopolies or actions to retaliate against witnesses who threatened General Electric's monopolies.

83 Michael W. Lynch provided evidence to Western District US Attorney Bradley J. Schlozman discovered in April 2006 that a $39,000,000.00 bribery fund was being used to secure outcomes in court

cases including the shift of unfunded pension obligations of McCook Metals, Inc. to the Pension Benefit Guaranty Board (PBGC) at the expense of US taxpayers despite the obligation of Alcoa Aluminum financed by General Electric, pursuant to Alcoa's acquisition of Reynolds Metals, under ERISA law.

84 On July 1st, 2007 Hon. Judge Eugene R. Wedoff stepped down as Chief Bankruptcy Judge of the Northern District of Illinois. As a result of federal government investigations of illegal conduct that the petitioner believes was a protection selling racketeering scheme, Bradley J. Schlozman has resigned his current position at main justice, Deputy Attorney General Paul McNulty who authored the memo used by the GE CEO Jeffrey R. Immelt and the General Electric defendants to conceal the financial records of Neoforma and defeat the Sarbanes - Oxley Act of 2002 as described in the petitioner's underlying complaint has also resigned.

GENERAL ELECTRIC DEFENDANTS' INTERFERENCE WITH RECOVERY OF PETITIONER'S CAPITALIZATION FOR ENTRY INTO HOSPITAL SUPPLY MARKET FROM US BANK DEFENDANTS

85 The GE defendants Jeffrey R. Immelt, GE Capital and GE Transportation coordinated their defense of Medical Supply's action with the US Bank defendants US Bancorp and US Bank along with Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff to defeat the petitioner's claims for injunctive and declaratory relief resulting from his first attempt to enter the market for hospital supplies.

86 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. The GE Defendants 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 and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, originating from US Bancorp and US Bank's agent Shughart Thomson and Kilroy's past and current share holders.

87 The former eighteen year Shughart Thomson & Kilroy, P.C. 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.

APPENDIX FIVE

GE, GE CAPITAL
and GE TRANSPORTATION
Relationship

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA and THE STATE OF TEXAS, *ex rel* CYNTHIA I. FITZGERALD,	§	
Plaintiffs	§	
vs.	§	**CIVIL ACTION NO.**
NOVATION, LLC, VHA, INC., UNIVERSITY HEALTHSYSTEM CONSORTIUM, and HEALTHCARE PURCHASING PARTNERS INTERNATIONAL, LLC,	§	**FILED IN CAMERA AND UNDER SEAL**
Defendants.	§	3 03CV1589 D

COMPLAINT FOR VIOLATION OF FEDERAL FALSE CLAIMS ACT
31 U.S.C. § 3730 AND TEXAS MEDICAID FRAUD PREVENTION ACT

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ATTORNEYS FOR RELATOR/PLAINTIFF

I. INTRODUCTION

1. This is an action to recover damages and civil penalties on behalf of the United States of America and the State of Texas arising from false statements and claims made, presented, and caused to be presented by the defendants and/or their agents, employees and co-conspirators in violation of the Federal Civil False Claims Act, 31 U.S.C. §§ 3729 et seq., as amended ("the Federal FCA"), and the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code §§ 36.001 et seq. ("the Texas MFPA").

2. The Federal FCA and Texas MFPA each provide that any person who knowingly submits or causes to be submitted a false or fraudulent claim to the government[1] for payment or approval is liable for a civil penalty of up to $11,000 for each such claim submitted or paid, plus three times the amount of the damages sustained by the government. Liability attaches both when a defendant knowingly seeks payment that is unwarranted from the government and when false records or statements are knowingly created or caused to be used to conceal, avoid or decrease an obligation to pay or transmit money to the government. The Federal FCA and Texas MFPA each allow any person having information regarding a false or fraudulent claim against the government to bring an action for herself (the "relator" or "qui tam plaintiff") and for the government and to share in any recovery. The Complaint is filed under seal for at least 60 days (without service on the defendants during that period) to enable the government: (a) to conduct its own investigation without the defendants' knowledge, and (b) to determine whether to join the action.

3. Defendants in this action are VHA, Inc. ("VHA") and University HealthSystem Consortium ("UHC"), two nation-wide hospital networks consisting of 2,200 community-owned hospitals and 100 teaching hospitals, Novation, LLC ("Novation"), the nation's largest group purchasing organization founded and wholly owned by VHA and UHC to provide purchasing services to their collective 2,300 member health care organizations, and HealthCare Purchasing Partners International, LLC ("HPPI"), another VHA-UHC joint venture and group purchasing

[1] As used herein, the term "government" shall refer to both the federal government and the government of the State of Texas.

organization that markets Novation purchasing agreements to over 5,000 health care organizations (primarily physician groups, clinics, long-term care facilities, and home health agencies) that do not belong to the VHA or UHC hospital networks.

4. At all times relevant to this Complaint, meaning from 1993 to present, the member hospitals of Defendants VHA and UHC ("VHA and UHC Members") and the health care organizations that were customers of Defendant HPPI ("HPPI customers") purchased under the Novation group contracts supplies and services that were used in providing medical care to beneficiaries of state and federally-funded health insurance programs and sought reimbursement for the cost of these supplies and services from the government health insurance programs, including Medicare, Medicaid, and TRICARE/CHAMPUS. Medicare is a federally-funded health insurance program primarily for the elderly. Medicaid is a state and federally-funded health insurance program for low-income patients. In Texas, the Medicaid program – known as the Texas Medicaid Program -- is funded with 60% federal funds and 40% state funds. The Civilian Health And Medical Program of the Uniformed Services, now known as TRICARE ("TRICARE/CHAMPUS"), is a federally-funded health insurance program for individuals with family affiliations to the military services.

5. At all times relevant to this Complaint, defendant Novation (and its predecessor VHA Supply Company), was in the business of securing on behalf of the VHA and UHC Members and HPPI customers group contracts with manufacturers, suppliers, and distributors (collectively "vendors"[2]) for supplies and services. Since the VHA and UHC Members and HPPI customers purchase more than $19.6 billion in supplies and services annually under Novation's group contracts and collectively comprise 22% of the national market of staffed beds, 29% of total admissions, and 30% of total surgeries, Novation wields considerable power in determining which manufacturer will be awarded one of its more than 600 group contracts and which distributors will be authorized to distribute products under these contracts. Throughout the period from at least 1993 to present, defendant Novation, with the assistance of VHA, UHC and HPPI, used this power to secure

[2] As used herein, the term "vendor" shall refer to manufacturers, distributors, and/or suppliers.

kickbacks and other illegal remuneration from the vendors as payment for awarding them coveted Novation contracts.

6. Defendant Novation, with the assistance of VHA, UHC, and HPPI, engaged in these fraudulent practices knowing that such payments would inflate the costs of the contracted supplies that the VHA and UHC Members and HPPI customers purchased and would ultimately cause them to submit to the government health insurance programs – in their invoices and annual cost reports – claims for reimbursement for supplies and services that were higher than they would have been had Novation not solicited and received these illegal payments. Defendant Novation, with the assistance of VHA, UHC, and HPPI, also engaged in these fraudulent practices knowing that, by awarding contracts to those vendors willing to pay Novation the biggest kickback (and not necessarily those able to supply the best product at the lowest price), it routinely excluded smaller manufacturers with safer and more innovative products that would have obviated or reduced the need for treatment of Medicare, Medicaid, and TRICARE/CHAMPUS beneficiaries and, in so doing, caused the government health insurance programs to incur increased health care costs.

7. Under the Federal FCA and Texas MFPA, Qui Tam Plaintiff/Relator Cynthia I. Fitzgerald ("Relator") seeks to recover damages and civil penalties arising from defendants' actions in soliciting and receiving kickbacks and thereby causing the VHA and UHC Members and HPPI customers to present false records, claims, and statements to the United States Government, the state governments (including the State of Texas) and their respective agents in connection with the VHA and UHC Members' and HPPI customers' claims for excessive reimbursement for supplies and services provided to beneficiaries of the Medicare, Medicaid, and TRICARE/CHAMPUS programs.

8. Relator has information and believes that the fraudulent practices described herein were typical of defendant Novation and Novation's predecessor VHA Supply Company at all times material to this action and that VHA, UHC and HPPI aided and abetted Novation and VHA Supply in these activities. Relator has information and believes that defendants have engaged in these fraudulent practices from at least 1993 to present.

II. PARTIES

9. Qui tam plaintiff and relator, Cynthia I. Fitzgerald ("Relator"), is a resident of Plano, Texas and was employed by Novation from July 1998 to February 1999 as a Senior Product Manager for Medical/Surgical products in their Irving, Texas office. Shortly after Ms. Fitzgerald began to complain to senior management at Novation about these fraudulent practices, Novation terminated her employment in retaliation for her questioning their propriety. Ms. Fitzgerald files this action for violations of 31 U.S.C. §§ 3729 et seq. on behalf of herself, the United States Government pursuant to 31 U.S.C. § 3730(b)(1), and the State of Texas pursuant to Texas Human Resources Code §§ 36.101. Ms. Fitzgerald has personal knowledge of the false records, statements and/or claims that defendant Novation – aided and abetted by VHA, UHC, and HPPI – caused the VHA and UHC Members and HPPI customers to submit to the government health insurance programs.

10. Defendant Novation, LLC ("Novation"), the nation's largest group purchasing organization ("GPO"), is a Delaware corporation with its principal place of business at 125 E. John Carpenter Freeway in Irving, Texas. Novation was founded in January 1998 by combining VHA Supply Company and UHC Supply, the former purchasing arms of the 2,300-member VHA and UHC hospital networks. Novation is a for-profit company jointly owned by VHA and UHC whose core business is negotiating and managing contracts for supplies and services on behalf of the 2,300 VHA and UHC Members as well as the over 5,000 HPPI customers who access those contracts. Novation manages more than $19 billion in group purchasing volume. Under Novation's portfolio of over 600 contracts with hundreds of vendors, VHA and UHC Members and HPPI customers can purchase nearly all of their supply and service needs, including such diverse product lines as medical/surgical supplies, pharmaceuticals, diagnostic imaging products, laboratory products, business products, capital equipment and dietary and food products. As its controlling shareholder (with a 77% ownership interest), VHA has populated Novation largely with staff from its former purchasing company, VHA Supply Company. Most, if not all, of the fraudulent practices in which Novation has engaged originated at VHA and VHA Supply Company. Novation's stated mission is to use VHA's and UHC's considerable combined purchasing power "to deliver comprehensive

value and the industry's best pricing to its customers."

11. Defendant VHA Inc. ("VHA"), formerly known as Voluntary Hospitals of America Inc., is a Delaware corporation, with its principal place of business located at 220 E. Las Colinas Boulevard in Irving, Texas. VHA is a nationwide network of community-owned health care systems and their physicians and includes such leading health care organizations as Baylor Health Care System in Dallas, Mayo Foundation in Rochester, Minnesota, and Cedars-Sinai Health System in Los Angeles. VHA has more than 2,200 members in 48 states (excluding Nevada and Utah). A list of VHA's membership is attached as Exhibit 1 and incorporated herein. VHA is a for-profit cooperative that was formed in 1977 to pool the resources and purchasing power of several formerly disparate community-owned hospitals. VHA's member organizations purchase a large percentage of their supplies and services under the more than 600 Novation contracts. From 1985 until January 1998, VHA had its own group purchasing organization, VHA Supply Company ("VHA Supply"), that negotiated supply contracts on its members' behalf. VHA Supply was a wholly-owned subsidiary of VHA. In January 1998, VHA joined its purchasing business with UHC's to form Novation, VHA and UHC's jointly-owned GPO. VHA has a 77% ownership interest in Novation. Many of the fraudulent practices described herein originated from VHA Supply Company, which employed these tactics throughout its existence. Novation – which was created by combining UHC and VHA Supply and is largely staffed by former employees of VHA Supply – continued to perpetrate and expand the fraudulent practices of VHA Supply.

12. Defendant University HealthSystem Consortium ("UHC") is an Illinois corporation with its principal place of business at 2001 Spring Road, Suite 700 in Oak Brook, Illinois. UHC is an alliance of approximately 100 academic health centers nationwide and includes as its members such leading teaching hospitals as NYU Medical Center, Yale-New Haven Hospital, Johns Hopkins Hospital, and Emory University Hospital. A complete list of UHC's members is attached as Exhibit 2 and incorporated herein. Like VHA, UHC was formed to aggregate the resources and purchasing power of teaching hospitals and achieve operational efficiencies and other economies of scale. In January 1998, UHC combined its purchasing business with that of VHA's to form Novation, a VHA

and UHC jointly-owned GPO. UHC has a 23% ownership interest in Novation. Prior to 1998, UHC operated its own GPO – UHC Supply -- and negotiated supply contracts on behalf of its members. Because many of UHC's member hospitals are part of publicly-funded universities, UHC -- and now Novation – uses a public competitive bid process in soliciting bids and awarding contracts. (In contrast, before joining with UHC to form Novation, VHA and VHA Supply Company did not subject its contracts to public competitive bid.) UHC's member hospitals purchase a large percentage of their supplies and services under the more than 600 Novation contracts.

13. Defendant Healthcare Purchasing Partners International ("HPPI") is a Delaware corporation with headquarters located at 220 East Las Colinas Boulevard in Irving, Texas. Like Novation, HPPI is a group purchasing organization that is jointly owned by VHA and UHC. HPPI is engaged in the business of providing access to Novation contracts (and subsequently managing the contracts) for those health care organizations who are not members of VHA and UHC and otherwise served by Novation. Rather than community-owned and teaching hospitals, HPPI's over 5,000 customers consist largely of physician offices, clinics, home health agencies, ambulatory care, and long-term care facilities. A list of HPPI's customers is attached as Exhibit 3 and incorporated herein. HPPI was purchased by VHA in 1994. In January 1998, at the same time that Novation was formed, UHC acquired a partial ownership interest in HPPI from VHA and became a joint owner (with VHA) of HPPI.

III. JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of the Federal FCA action pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3732(a), which specifically confers jurisdiction on this Court for actions brought pursuant to 31 U.S.C. §§ 3729 and 3730. This Court has jurisdiction over the subject matter of the Texas Medicaid Fraud Prevention Act ("Texas MFPA") action pursuant to 28 U.S.C. § 1367 and 31 U.S.C. § 3732(b) because the Texas MFPA action arises from the same transactions or occurrences as the Federal FCA action.

15. This Court has personal jurisdiction over the defendants pursuant to 31 U.S.C. § 3732(a), which provides that "[a]ny action under section 3730 may be brought in any judicial district in which

the defendant, or in the case of multiple defendants, any one defendant can be found, resides, transacts business or in which any act proscribed by section 3729 occurred." Section 3732(a) also authorizes nationwide service of process. During the relevant period, defendants Novation, VHA, UHC, and HPPI resided and/or transacted business in the Northern District of Texas.

16. Venue is proper in this district pursuant to 31 U.S.C. § 3732(a) because defendants Novation, VHA, UHC, and HPPI each can be found in, resides in, and/or transacts business in the Northern District of Texas and because many of the violations of 31 U.S.C. § 3729 described herein occurred within this judicial district.

IV. BACKGROUND ON GROUP PURCHASING ORGANIZATIONS

17. In the mid-to-late 1980s, mergers among several of the large hospital suppliers increased their market power and helped drive up the costs of medical supplies and services. In response, individual hospitals and health systems sought to increase their bargaining power by joining together to form hospital buying cooperatives, known as group purchasing organizations ("GPOs"). By pooling the purchases of their member hospitals and negotiating group contracts for supplies and services, GPOs could use volume purchasing as leverage to negotiate lower prices with suppliers. Member hospitals would also be able to reduce their purchasing staffs, thereby lowering operating costs, as the GPO assumed their contracting functions.

18. As the primary purchasing agent for its member hospitals, the GPO handles all aspects of group contracting -- from drafting the request for proposal, soliciting and evaluating bids to awarding and subsequently managing the group contracts. Once it has awarded a group contract to a vendor, the GPO notifies hospital members of its terms (Novation issues members a "Launch Packet") and hospital members buy directly from the vendor for the price specified in the group contract. The GPO does not purchase any of the contracted supplies or services for its members nor does it take custody of the supplies.

19. Although they have an ownership interest in the GPOs and are the beneficiaries of the contracting services GPOs provide, neither the member hospitals nor their hospital network pays the GPOs' operating costs. Instead, GPOs are primarily financed by the vendors with whom the GPOs

contract through the use of "administrative fees." Administrative fees are typically calculated as a percentage of each hospital member's purchases from a vendor.

20. To prevent these fees from being treated as a 'kickback' or illegal payment under the Anti-Kickback Act, the GPO-industry convinced Congress to amend the Act in 1986 to include a safe harbor for administrative fees paid to a GPO by a vendor. See 42 U.S.C. § 1320a-7b(b). In defining what constitutes an appropriate administrative fee, the regulations require that the following criteria be satisfied: (1) the GPO must have a written agreement with each of its members under which the fees (and its terms) are disclosed; (2) the agreement must state that the fees are to be 3 percent or less of the purchase price of the supplies to be provided, or for fees above 3 percent, the amount or maximum amount to be paid by each vendor; and (3) the GPO must provide each member with an annual report listing the amount the GPO received from each vendor in administrative fees based on that member's purchases. 42 C.F.R. § 1001.952(j).

21. To enable GPOs to calculate their administrative fee, vendors provide GPOs with monthly reports listing, for each of its members, the amount of supplies and services the member purchased from the vendor the previous month under a particular group contract or set of contracts.

22. After paying its operating expenses, GPOs typically distribute any revenue they earn to their hospital members or hospital networks in the form of annual dividends. Where the administrative fees the GPO receives from vendors exceed its operating costs, a GPO should return the surplus fees to the member hospitals/networks in proportion to the amount of purchases each member made under the group contracts.

V. DEFENDANTS' FRAUDULENT SCHEMES

23. Federal law makes it a felony to "solicit[ ] or receive[ ] any remuneration (including any kickbacks, bribe or rebate) directly or indirectly, overtly or covertly, . . . in return for purchasing, . . . ordering, or *arranging for or recommending* purchasing, . . . or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program [Medicare, Medicaid or TRICARE/CHAMPUS]." 42 U.S.C. § 1302a-7b(b) (emphasis added).

24. As the nation's largest GPO, Novation negotiates contracts on behalf of – and thereby arranges for and recommends the purchasing of supplies and services for -- more than 7,300 health care providers (2,300 VHA and UHC Members and more than 5,000 HPPI customers) who constitute 22% of the national market of staffed beds, 29% of total admissions, and 30% of total surgeries. As Novation informs potential bidders in its Invitations-to-Bid, Novation's customers represent greater than $19.6 billion in actual annual purchasing volume and $32 billion in purchasing potential. As these figures demonstrate, a contract with Novation can mean millions of dollars in sales and increased market share for the successful vendor who is awarded the group contract.

25. Rather than use its considerable collective purchasing power to serve its customers (the VHA and UHC Members and HPPI customers) by awarding group contracts to vendors offering the best product at the lowest price, Novation (and its predecessor VHA Supply) – with the assistance of VHA, UHC and HPPI -- has often acted to increase its profits, and those of its officers and executives, by awarding contracts to vendors who pay Novation the largest kickback, irrespective of the quality or price of their supplies/services.

26. At all times relevant to this Complaint, meaning from at least 1993 to present, Novation (and its predecessor VHA Supply) has solicited and received from the vendors to whom it awards contracts kickbacks and other illegal remuneration as payment for awarding them group contracts. Unlike the administrative fees vendors pay to GPOs, which are condoned by Congress, these kickbacks and other illegal remuneration are in no way tied to the administrative costs Novation incurs in managing the contract. Nor are they calculated based on clearly defined, objective criteria such as the volume of purchases made under the contract by Novation's customers. Instead, they are simply payments Novation requires vendors to pay up-front or throughout the life of the contract for the privilege of being awarded a group contract and thereby gaining access to Novation's 7,300 customers.

27. Since these payments bear no relationship to the performance of the underlying contracts (or the administrative costs incurred in managing those contracts), Novation regularly chooses among the competing vendors based on who is willing to pay the most. Under this guiding business

"principle," Novation has awarded the majority of its over 600 contracts to large vendors, who have been able to pay the biggest kickbacks. (The vendors, in turn, inflate the prices they charge under the contract in order to recoup the costs of paying Novation the kickbacks and other illegal remuneration necessary to win the contract. These increased costs are ultimately borne by the insurers, both government and private, who reimburse the VHA and UHC Members and HPPI customers for the costs of treating their insureds/beneficiaries.) Small vendors, possessing fewer financial resources but safer and more innovative products, have often been unwilling or unable to make such up-front payments and consequently are routinely shut out of Novation contracts.

28. At all times relevant to this Complaint, Novation (and its predecessor VHA Supply) has concealed the existence of these kickbacks and other remuneration from the VHA and UHC Members and HPPI customers, disguising the proceeds in "slush funds," secret accounts and unrelated business ventures. The overwhelming majority of the monies/remuneration received from these kickbacks is retained by Novation, typically as lavish bonuses and "incentive" compensation for its officers and executives[3] or as capital for financing new ventures, such as the e-commerce company Neoforma, Inc. Novation distributes a modicum of its ill-gotten gains to the VHA and UHC Members in annual dividends of its revenue as a way of lulling the Members into believing Novation performs properly on their behalf and persuading them to continue to utilize its services.

29. As a Senior Product Manager at Novation from July 1998 to February 1999, Relator was responsible for negotiating and managing a portfolio of group contracts for medical/surgical supplies and services that was worth $243 million. During her six months in this position, Relator was privy to the inner workings of Novation's contracting process, including the criteria Novation utilized to determine the vendors to whom it would award contracts. From her interactions with her superiors Sherry Woodcock and John Burks, among others, Relator quickly came to understand that her performance would be judged not merely by her ability to deliver to the VHA and UHC Members

[3] In 2002, Novation's President Mark McKenna earned $928,000 ($403,000 in annual base salary; $357,000 under Novation's Retention Long-Term Incentive Program; $145,000 under Novation's Annual Incentive Plan; and $23,000 under Novation's Rewarding Excellence Incentive Plan).

contracts for the best supplies at the lowest prices, but also by the amount of revenue she was able to generate for Novation in the form of up-front payments and other illegal remuneration, of which the Members were not apprised. After raising concerns about these practices with Novation's Human Resources staff, Senior Management and In-House Legal Counsel and having those concerns summarily dismissed, Relator realized that these fraudulent practices were not unique to the Medical/Surgical Division but instead pervaded Novation's business. As described below, these illegal payments/remuneration took a wide variety of forms.

A. Up-Front Payments to "Buy the Contracts"

1. Johnson & Johnson's Attempt to Buy the IV Catheter Contract

30. One of the first medical/surgical contracts to which Relator was assigned in her position as Senior Contract Manager at Novation was Contract No. MS8020B, a three-year contract for "IV Standard and Safety Catheters and NOVAPLUS® IV Start Kits." Under this contract, Novation was seeking a vendor to supply IV Catheters as well as IV Start Kits under Novation's private label brand, NOVAPLUS®, to the VHA and UHC Members and HPPI customers. This was the first contract for IV Catheters and Start Kits put out for public competitive bid since Novation was formed.

31. Shortly after Relator received and opened the bids on the IV Catheter Contract, sales representatives from Johnson & Johnson called Relator to request a meeting with her to discuss Johnson & Johnson's bid. Relator agreed to such a meeting at Novation. During the meeting, it quickly became clear that the Johnson & Johnson sales representatives had no substantive questions regarding the contract but rather had convened the meeting simply to inquire about Johnson & Johnson's prospects of receiving the bid award. Unwilling to provide this information, Relator called an abrupt end to the meeting.

32. Having had their lobbying efforts rebuffed by Relator, the Johnson & Johnson sales staff contacted Relator's supervisor, Sherry Woodcock, and arranged a private meeting with Woodcock to which Relator was not invited. When Relator later learned of the meeting, she became concerned as to why she was being excluded and decided that, as the Senior Product Manager responsible for

awarding this contract, she would attend. Early on in the meeting, while discussing Contract No. MS8020B, "IV Standard and Safety Catheters and NOVAPLUS® IV Start Kits," one of the Johnson & Johnson sales representatives asked Relator "How much will it take to get the contract?" When Relator appeared startled and did not have a ready response, the sales representative added, "Others before you have done it."

33. Offended by the request that she agree to accept a kickback (the price tag of which she was expected to name) in exchange for awarding the contract to Johnson & Johnson, Relator turned to her supervisor, Sherry Woodcock, and said "Oh, no. This is illegal, and I don't look good in orange and I don't look good in stripes." Shortly thereafter, when the meeting had concluded, Relator repeated her concerns to Sherry Woodcock about what had just transpired (i.e., Johnson & Johnson's offer to pay Novation a kickback to obtain the IV Catheter business) and asked Woodcock whether she would like Relator to notify John Burks, the former Head of Novation's Medical/Surgical Division, or whether Woodcock would rather do it. Woodcock assured Relator that she would inform Burks.

34. Over the ensuing seven to ten days, when Relator would ask Woodcock if she had spoken with Burks yet, Woodcock's standard reply was that she had been unable to get to it. Frustrated by Woodcock's apparent unwillingness to address the issue, Relator spoke with Burks herself. According to Burks, while Johnson & Johnson's actions may have been unethical, he did not consider them to be illegal. Burks believed that Relator's suggested action -- disqualifying Johnson & Johnson's bid -- was too harsh a punishment. After Burks refused to take action against Johnson & Johnson, Relator next took the matter to Novation's Human Resources staff, William Laws, Jr. and Shirley Lopez, and in-house counsel, Gerry Rubin, but was similarly rebuffed.

35. At the same time that she was being stonewalled by her superiors on this front, Relator also was beginning to have concerns about the way in which other Novation contracts, including the Can-Liner Contract (discussed below), had been awarded. Shortly after voicing these concerns, Relator began to receive criticism about her job performance, was ostracized by her co-workers, and quickly terminated.

36. With the newfound perspective on Novation's contracting process gained from her work on the IV Catheter and Can-Liner Contracts, Relator came to realize what was evident from Johnson & Johnson's question/comment ("How much will it take to get the contract? Others before you have done it."), i.e., that it had been, and continued to be, the practice of Novation (and its predecessor VHA Supply) to award contracts to large vendors like Johnson & Johnson because of the amount they were willing to pay Novation in up-front payments and other illegal remuneration. Under this standard operating procedure, Novation (and its predecessor VHA Supply) would suggest to vendors the amount of money it needed to receive up-front to award them the contract; the vendors, who were typically larger companies like Johnson & Johnson capable of paying such sums, paid Novation these monies to obtain the contract; and Novation ultimately awarded the contracts to these vendors.

37. Relator's refusal to play by these rules in the course of her work negotiating the IV Catheter Contract (and later the Can-Liner Contract) represented an unexpected (albeit short-lived) departure from the norm. Although Relator did not award the IV Catheter Contract to Johnson & Johnson in exchange for a kickback as had been the prior practice of Novation/VHA Supply (as discussed below, Relator awarded the Contract to Becton Dickinson), this was the first and last contract Relator ever negotiated for Novation. Novation fired her before she could interfere with any further contracts.

38. At no time did Novation or its predecessor VHA Supply inform the VHA and UHC Members and HPPI customers that it was their standard practice to solicit and receive kickbacks from vendors, as they had done with Johnson & Johnson on several previous occasions, in exchange for awarding them contracts.

2. Becton Dickinson's $100,000 "Donation" to Novation in Connection with Winning the IV Catheter Contract

39. In addition to Johnson & Johnson, the other primary vendor to submit a bid on the IV Catheter Contract was Becton Dickinson and Company ("Becton Dickinson"). While evaluating the Johnson & Johnson and Becton Dickinson bids under the traditional criteria of price and product quality to determine which vendor to recommend to Novation management, Relator was pressured

by her managers to consider what revenue each bidder would be able to provide Novation.

40. In response to this pressure, Relator implemented a revenue-generating plan that had recently been initiated by other Senior Product Managers at Novation. Under this plan, Relator solicited from bidders bronze, silver, and gold-level "sponsorships" of Novation's latest Information-Technology project, "VHAseCURE.net," an intranet developed by VHA to enable VHA members to communicate with one another over the Internet. Although to the objective observer these sponsorship payments appear wholly unconnected to the underlying contract, both Novation and the bidders understood that such "sponsorships" would buy favorable consideration from Novation in making its bid award. Such "sponsorship" payments were over and above the administrative/marketing fee (expressed as a %-of-total sales made under the contract) that vendors like Becton Dickinson had agreed to pay Novation to cover its costs for administering the contract.

41. In response to Relator's request for VHAseCURE.net donations, Becton Dickinson agreed to pay Novation $100,000. Becton Dickinson's willingness to make such a payment was one of the factors Relator considered in deciding to recommend Becton Dickinson as the proposed recipient of the IV Catheter and Start Kit contract. Shortly after approving Relator's recommendation, Novation awarded Becton Dickinson the contract and Becton Dickinson sent Novation a check for $100,000 . See Exhibit 4 ($100,000 check), which is incorporated herein. Senior management at Novation commended Relator for her work in procuring this and another "sponsorship" payment from vendors. See Exhibit 5 (e-mail from Novation I-T Manager to Relator), which is incorporated herein.

42. As its characterization of the payment on the face of the check – "Marketing Fee/Sole Award" – reveals, Becton Dickinson made this payment to Novation in order to receive the bid award. Id. At no time did Novation ever disclose the existence, amount or purpose of these "sponsorship" payments to the VHA and UHC Members and HPPI customers.

3. *Becton Dickinson's $1 Million Payment In Connection with Winning the Needle Contract*

43. In the course of negotiating Contract No. MS8020B, "IV Standard and Safety Catheters and NOVAPLUS® IV Start Kits," Relator had frequent dealings with Kevin Mooneyham, a sales manager at Becton Dickinson, and had earned his trust and respect. In late 1998, shortly after Relator awarded the IV Catheter Contract to Becton Dickinson, Mooneyham called Relator at work and asked her to meet him for lunch to discuss concerns he was having about activities taking place between Becton Dickinson and Novation regarding another upcoming contract. Over lunch, Mooneyham complained to Relator that Becton Dickinson had agreed to pay Novation large sums of money in order to secure "a huge Novation contract" that was coming up for bid. In short, Mooneyham claimed, Becton Dickinson was "buying the business," i.e., paying Novation an up-front fee to guarantee that it will be awarded the contract.

44. From the goings-on in Novation's Medical/Surgical Division, Relator knew that the contract to which Mooneyham was referring was Novation's upcoming three-year contract for hypodermic needles and syringes, a big ticket item for most hospitals and therefore a highly valuable contract. Relator later learned that Novation had, in fact, awarded the needles and syringes contract to Becton Dickinson and Becton Dickinson had paid Novation $1 million in advance as a "special marketing fee." This $1 million fee was over and above the administrative/marketing fee Becton Dickinson had agreed to pay Novation over the life of the contract based on a percentage (3%) of the total sales made by VHA and UHC Members under the contract.

45. Relator has information and believes that Novation never disclosed to the VHA and UHC Members and HPPI customers the fact that it had received this payment from Becton Dickinson in connection with awarding Becton Dickinson the needle contract.

4. "Fee Enhancements" By Distributors

46. In addition to choosing the manufacturers to whom it will award contracts, Novation also controls the distribution channels for the products purchased under its contracts. For each of its product lines, e.g., medical/surgical supplies, dietary and food services, Novation awards an exclusive right to distribute the products purchased under its contracts to a few select distributors whom Novation calls "Authorized Distributors." For their services in distributing the products, Authorized Distributors are paid "distribution service fees" by the VHA and UHC Members and HPPI customers. The distribution service fees, also known as "the Distribution Mark-Up Fees," are added to the price of the products/services and are calculated based on the total volume of distributed purchases made by the Novation customer.

47. Like its Invitations-to-Bid to manufacturers, Novation's Invitations-to-Bid to distributors are supposed to be a public competitive bid process. However, as is the case with manufacturers, Novation awards the distribution contracts based on which distributors are willing to pay Novation the largest kickback or other illegal remuneration. Relator has information and believes that Novation has failed to inform the VHA and UHC Members and HPPI customers of the existence or amount of these illicit payments.

48. Like the "administrative/marketing" fees it charges manufacturers for the cost of administering the contract (described below), Novation also requires distributors to pay it a monthly fee based on the total purchases of products made by its customers. Although Novation provides distributors with a minimum percentage for what this fee must be, Novation leaves it to the distributor's discretion to propose the amount of the percentage. See Exhibit 6 at 7 & 13 (Invitation-to-Bid Long Term Care Distribution Services), which is incorporated herein. Under such liberal contracting guidelines, Novation regularly solicited and accepted lavish fees from distributors in

exchange for awarding them an authorized-distributor contract.

49. In addition to the monthly fee, Novation also encouraged bidders to propose fee enhancements – ways for distributors "to enhance the fee paid to Novation" -- and additional fees. Id. at 13. These enhancements and additional fees had no relationship to the underlying contract and were just another way for Novation to increase its revenue. Id. Relator has information and believes that Novation routinely awarded distribution contracts to large distributors like Cardinal Health, Inc., Allegiance Corporation, and Owens & Minor, Inc., who were willing and able to pay Novation the largest fee enhancement, "additional fees," or other illegal remuneration.

50. Like manufacturers, distributors also seek to recoup the costs of making these illegal payments to Novation. While manufacturers do so by increasing the price of the products/services themselves, distributors recoup the costs by building them into the distributor mark-up fee that is added to the price of the goods and services, which further inflates the price paid by the Novation customers and ultimately borne by the private insurers and government health insurance programs.

B. "Administrative/Marketing Fees"

51. In its Invitations-to-Bid, Novation requires all prospective bidders to include information on "marketing fees" to be paid to Novation and to calculate these fees as a percentage of sales made under the contract. See Exhibit 7 ("Novation 2001 Invitation to Bid, Enteral Products Bid") at 10, which is incorporated herein. Novation does not prescribe any limits on the size of the marketing fee that it is willing to accept (or that bidders may offer). Id. Contrary to the safe harbor requirements regarding appropriate GPO fees, Novation routinely has solicited and accepted marketing fees that greatly exceed the 3%-of-sales threshold and failed to inform the VHA and UHC Members or HPPI customers of the amount of the marketing fee they have agreed to receive.

52. According to a Novation "Contract Administration Fee Report," as of November 18, 1999, Novation had accepted administrative/marketing fees above 3% on at least 186 or 31% of its 600 contracts. See Exhibit 8 (Contract Administration Fee Report), which is incorporated herein. For many of these contracts, Novation received administrative/marketing fees as high as 30% of total sales made by Novation's customers under the contract. For instance, Novation received 30% administrative/marketing fees on Contract No. RX 132 (NOVAPLUS® Omnipaque, Nonionic Contrast Media, Hypaque) with Nycomed, Inc. and Contract No. RX84160 (NOVAPLUS® Diltiazem) with Ben Venue Laboratories – Bedford Laboratories. Id. at 20 & 28.

1. Major Pharmaceutical Manufacturers Pay Novation Some of the Highest "Administrative/Marketing Fees"

53. Pharmaceuticals are the largest product line in Novation's contract portfolio. Of Novation's 600 contracts, 275 or 46% are contracts with major pharmaceutical manufacturers for the sale of a wide array of pharmaceutical products. Id. at 17-31. Relative to other manufacturers, pharmaceutical manufacturers also paid Novation some of the highest administrative/marketing fees. In addition to the two pharmaceutical manufacturers listed above (Nycomed, Inc. and Bedford Laboratories) as having paid 30% administrative/marketing fees, the following are examples of some of the other pharmaceutical manufacturers from whom Novation received excessive administrative/marketing fees: Dupont Nuclear (Novation Contract No. RX64140) "NOVAPLUS® Dipyridamole," 25% administrative/marketing fee; Bristol-Myers (Novation Contract No. RX019) "Multisource Antibiotics," 18% administrative/marketing fee; Abbott Laboratories (Novation Contract No. RX80010) "Small Volume Injectibles Including Carpuject," 14.5% administrative/marketing fee; and Merck & Company (Novation Contract No. RX81080) "Cozaar, Fosamax, Hyzaar, Mefoxin, Mevacor, Pepcid, Primaxin, Prinivil, Proscar, Recombivax, Timoptic,

Trusopt, Vasotec, Vaccines, Zocor," 20% administrative/marketing fee. Id.

54. Relator has information and believes that Novation has failed to inform the VHA and UHC Members and HPPI customers of the amount of any of these administrative/marketing fees that it has received and continues to receive from pharmaceutical companies.

2. Other Excessive "Administrative/Marketing Fees" Paid by Becton Dickinson and Heritage Bag

55. Before awarding a contract, it was the customary practice of Novation's Senior Contract Managers to prepare an "Executive Summary" setting forth their recommendation on and supporting rationale for which vendor should receive the bid award. The Summary was distributed exclusively to top management at Novation, including the head of the Division in which the Senior Contract Manager worked and Novation's Vice-President, for their approval. At no time was the Executive Summary given to the VHA and UHC Members and HPPI customers.

56. Once the contract was awarded, the Senior Contract Manager distributes a "Launch Packet" to the VHA and UHC Members announcing the recipient of the bid award, describing the supplies being offered and providing other information necessary for making purchases under the contract. At no time is any mention made of either Novation's receipt of or the amount of the "marketing fees" and other remuneration paid/to be paid to Novation by the successful vendors.

57. Attached as Exhibits 9 and 10 to this Complaint, and incorporated herein, are copies of two Executive Summaries Novation prepared that demonstrate Novation's and VHA's receipt of marketing fees well above 3% of total sales on four contracts. In the Executive Summary for Contract No. MS8020B, "IV Catheters and Start Kits," it is noted that Becton Dickinson – the recommended bidder – has offered to provide Novation a marketing fee of 9% of total sales of the NOVAPLUS® products, Novation's private label brand. Exhibit 9 at 4. After receiving approval

for this recommendation from John Burks, Novation's former Head of Medical/Surgical Contracts, and Mark McKenna, Novation's former Vice-President, the contract was awarded to Becton Dickinson under the terms of its bid, which included paying Novation a 9% marketing fee. Novation never informed the VHA and UHC Members or HPPI customers, either orally or in writing, of the amount of this marketing fee.

58. In describing the marketing fee to be paid by Becton Dickinson, the author[4] of the Executive Summary also notes that Becton Dickinson's 9% fee represented an increase of between 1 to 4% above the marketing fee VHA had received under its prior contract for "IV Catheters and Start Kits" of between 5 and 8%. Exhibit 9 at 4. Accordingly, as this document illustrates, before the advent of Novation, VHA had also been receiving marketing fees above the 3% threshold as part of the VHA contract for "IV Catheters and Start Kits" that preceded Novation Contract No. MS8020B. Relator has information and believes that neither VHA nor VHA Supply ever informed the VHA Members, either orally or in writing, of the amount of this marketing fee.

59. After its formation in January 1998, Novation experienced a transition period during which it phased out current VHA and UHC contracts and replaced them with new Novation contracts. With Contract No. MS80310, "NOVAPLUS® Can Liners," Novation sought to consolidate VHA and UHC's separate can liner contracts into a new Novation contract. In the Executive Summary for this contract, the author recommends that the Novation contract – available to both VHA and UHC Members (and HPPI customers) – be awarded to Heritage Bag under the same terms as those in VHA Supply's current can-liner contract with Heritage Bag. Exhibit 10 at 1-3. Among the reasons cited for recommending Heritage Bag is that the marketing fee Heritage Bag

[4] Although qui tam plaintiff/relator is listed as the author of this document, every Executive Summary she wrote at Novation, including this one, was thoroughly revised by her manager, Sherry Woodcock, before it was distributed to Novation management.

was offering – 8.19% of total sales -- is 6% higher than that being provided by UHC's supplier, Baxter Tennaco, under UHC's contract. Id. at 2.

60. After receiving approval for this recommendation from John Burks and Mark McKenna, Novation awarded Contract No. MS80310 to Heritage Bag under the same terms as the contract with VHA, which included the payment to Novation of an 8.19% marketing fee. Novation never informed the VHA and UHC Members or HPPI customers, either orally or in writing, of the amount of this marketing fee.

61. The Executive Summary for Contract No. MS80310 also makes clear that, like Novation, VHA Supply had also been receiving a marketing fee from Heritage Bag of 8.19% under its contract with Heritage Bag -- the predecessor to Novation Contract No. MS80310. See Exhibit 10 at 1-3. Relator has information and believes that neither VHA nor VHA Supply ever informed the VHA Members, either orally or in writing, of the amount of this marketing fee.

62. Relator also has information and believes that since 1995 Novation's predecessor VHA Supply routinely solicited and received marketing fees of at least 10% on its committed programs, including the "Opportunity I" and "Opportunity II" Programs. (Under these programs, a VHA Member could receive discounts off of the contract's base price by committing to buy a large fixed percentage of its supplies – typically between 80 and 95% -- under the contract.) Relator has information and believes that neither VHA nor VHA Supply ever informed the VHA Members, either orally or in writing, of the amount of these marketing fees.

3. *Novation's Preference for Higher Priced Goods Because They Serve To Increase Its "Administrative/Marketing Fees"*

63. By requiring that its administrative/marketing fees be expressed as a percentage of the total sales made under the contract (and routinely suggesting to bidders that the percentage should

exceed 3%), Novation has an interest in awarding contracts to the bidder with the highest priced goods because higher prices yield higher marketing fees. At all times relevant to this Complaint, Novation routinely chose to award contracts to vendors offering the largest marketing fee (either by virtue of the percentage of sales, higher prices or combination of the two) over competing vendors offering goods of comparable quality and lower prices than those of the chosen vendor.

64. For example, during the Summer of 2001, Novation issued an Invitation-to-Bid on a Novation contract to supply endo-mechanical products to its customers. Among the vendors who submitted bids to Novation were Johnson & Johnson and United States Surgical ("U.S. Surgical"). In its bid, U.S. Surgical offered the endo-mechanical products at prices significantly lower than those offered by Johnson & Johnson. After performing market research, Novation found U.S. Surgical's products were of comparable quality to that of Johnson & Johnson's. Despite the potential cost-savings to its customers, however, Novation awarded the contract to Johnson & Johnson.

65. Primary among Novation's reasons for choosing Johnson & Johnson over U.S. Surgical was the fact that U.S. Surgical's significantly lower prices would have greatly diminished the marketing fee that Novation would receive. Relator has information and believes that Novation never informed the VHA and UHC Members or HPPI customers of the specific details of the vendors' bids (including U.S. Surgical's significantly lower prices and comparable quality) or the real reason for its decision to choose Johnson & Johnson over U.S. Surgical – a feared reduction in its marketing fee.

C. Payments for Products Offered Under Novation's Private Label Brand, "NOVAPLUS®"

66. As Senior Product Manager in Novation's Medical/Surgical Division, Relator was also responsible for increasing vendors' participation in Novation's private label brand program,

NOVAPLUS®. NOVAPLUS® was an outgrowth of a similar private label program, VHA PLUS ("Prices Lowered Utilizing Standardization"), started by VHA Supply in the 1980s. Like VHA PLUS, the stated goals of NOVAPLUS® are to help the VHA and UHC Members and HPPI customers achieve cost savings and the benefits of product standardization by having vendors sell their products under Novation's private "NOVAPLUS®" label. In practice, however, NOVAPLUS® is simply another Novation scheme to generate more revenue without the knowledge of, and often at the expense of, the VHA and UHC Members and HPPI customers, whose interests it is supposed to serve.

67. Although made to sound like generics, the NOVAPLUS® products differ from generic products in a number of important ways. With generics, cost savings are achieved because a manufacturer is able to produce an equivalent product more cheaply than the name-brand manufacturer. However, neither Novation nor its predecessor VHA Supply manufactures any products. Instead, Novation (like VHA Supply before it) simply supplies the name. After manufacturing the products, the manufacturers simply affix the NOVAPLUS® label (in lieu of their own label) to their products. As explained in more detail below, rather than save Novation's customers money, the addition of the NOVAPLUS® name does little more than create additional costs, such as "trademark and licensing" fees, that cause the prices of the NOVAPLUS® products to exceed those of the identical products without the NOVAPLUS® label.

68. Rather than providing the VHA and UHC Members and HPPI customers with cost savings, Novation routinely convinced vendors to sell their product under the NOVAPLUS® label at a price significantly higher than what they were offering for the same product under their own label. For their participation in this scheme, Novation routinely offered to share with the vendors a percentage of the profits gained by charging the Members the increased NOVAPLUS® price.

69. For instance, after it had received and opened bids on a recent contract for blood collection tubes, Novation approached Retractable Technologies Inc. ("RTI"), one of the bidders, about the possibility of selling its blood collection tube holder to the VHA and UHC Members and HPPI customers under Novation's private "NOVAPLUS®" label. Although, in its bid, RTI had offered to sell its tube holders for 27 cents per unit, Novation proposed that RTI could sell the same tube holders to Novation's customers for $1 per unit -- a 270% mark-up -- simply by changing the label to Novation's NOVAPLUS® brand. In exchange for RTI's cooperation in this joint venture, Novation agreed to share with RTI a percentage of the profits from the 270% mark-up.

70. Although RTI rejected Novation's offer, Relator has information and believes that Novation consummated many similar deals with other, less scrupulous vendors. Relator has information and believes that Novation never informed the VHA and UHC Members or HPPI customers of the terms of these deals, including the fact that Novation had arranged to have vendors sell the NOVAPLUS® products at prices higher than those charged for the same product without the NOVAPLUS® label and kept the profits.

71. To participate in Novation's private label program and sell products under its NOVAPLUS® brand, manufacturers are required to pay Novation a "trademark and licensing" fee. Despite its name, the "trademark and licensing" fee is not a fixed fee that corresponds to the costs Novation will incur obtaining a trademark and license for a manufacturer's product. Instead, like its "administrative/marketing" fees, Novation requires vendors to offer Novation a percentage of the total purchases of NOVAPLUS® products made by Novation's customers under the NOVAPLUS® contract. The "trademark and licensing" fee is in addition to the "administrative/marketing" fee Novation charges. By giving manufacturers the ability to name the amount of this fee, Novation encouraged manufacturers to bid up the percentage of total sales they were willing to provide as a

trademark and licensing fee and routinely awarded the NOVAPLUS® contract to the highest bidder. Qui tam plaintiff has information and believes that Novation failed to inform the VHA and UHC Members and HPPI customers of either the existence or amount of these fees, let alone the method by which they were calculated.

72. Like the mark-up described in paragraphs 26, 27 and 50 above, the costs of such "trademark and licensing" and "administrative/marketing" fees are built into the prices of the NOVAPLUS® products. Therefore, contrary to their purported cost-savings benefits, the NOVAPLUS® products routinely are more expensive than identical products sold without the NOVAPLUS® label. In her position as Senior Product Manager at Novation, Relator had the opportunity to speak with Novation's Authorized Distributors. Because they carry a wide range of products and could draw direct price comparisons, many of these distributors remarked to Relator how the NOVAPLUS products were more expensive than the same products offered under the manufacturer's label. For instance, one distributor observed that its costs for a case of American Health Products ("AHP") gloves sold under the NOVAPLUS® label were $1 more than those for a case of the same gloves sold under AHP's label.

73. Because these practices are so lucrative, Novation has been aggressive in trying to get manufacturers to agree to sell their products under the NOVAPLUS® brand. In its Invitations-to-Bid on contracts, Novation informs prospective bidders that their willingness to consider "a private label strategy under the NOVAPLUS label" is a plus factor that Novation will consider – along with other "Non-Financial Award Criteria" -- in determining who will receive the bid award. See Exhibit 7 at 12 & Attachment B at 6. However, Novation's internal documents show that a bidder's willingness to sell products under the NOVAPLUS® label is given much more weight in choosing the successful bidder. In a slideshow presentation to its Senior Product Managers describing

Novation's "Supplier Selection Criteria," Novation includes "Private Label" in with Price, Marketing Fees, and Committed programs, as one of the Financial Criteria it will consider. See Exhibit 11 (Novation Slides), which is incorporated herein. As of September 28, 2001, Novation claimed to have 75 agreements with 42 vendors to sell products under the NOVAPLUS® label, representing $1.2 billion in annual sales.

D. Conflicts of Interest/Beneficial Business Relationships

1. Nepotism/Cronyism with Heritage Bag

74. Another one of the first medical/surgical contracts to which Relator was assigned in her position as Senior Contract Manager at Novation was Contract No. MS00210, a three-year contract for "NOVAPLUS® Can Liners." Under this contract, Novation was seeking a vendor to supply trash can liners to the VHA and UHC Members and HPPI customers under Novation's private label brand, NOVAPLUS®. This contract was the first can-liner contract put out for public competitive bid since Novation was formed. (Novation Contract No. MS80310, the predecessor to MS00210, was an interim contract under which Novation extended the terms of VHA Supply's previous can-liner contract to the UHC Members until the above-referenced contract could be awarded by public competitive bid.)

75. Shortly after starting at Novation, Relator met with her supervisor Sherry Woodcock to discuss the contracts she had been assigned. When their discussions turned to Contract No. MS00210, "NOVAPLUS® Can Liners," Woodcock started to laugh and told Relator that this contract had always belonged to and would always belong to Heritage Bag Company ("Heritage Bag") and that the last person who tried to remove it from Heritage Bag almost lost his job. When Relator asked why Heritage Bag deserved such special treatment, Woodcock replied that Heritage Bag was represented by John M. Doyle, the founder and former President of VHA Supply.

76. At first, Relator tried ignoring the comment and went about the business of preparing to put the contract out for bid. Relator conducted some preliminary market research and discovered that at least three vendors had can liners with prices lower than Heritage Bag. During Relator's interviews with these vendors, each expressed surprise at her interest in their can-liners and stated that, since Heritage Bag has had VHA Supply/Novation's can-liner contract for the last 13 years, they had little hope of ever getting it away from Heritage Bag. In the meantime, Sherry Woodcock continued to make comments to Relator that the upcoming can-liner contract should be awarded to Heritage Bag.

77. Increasingly concerned by these comments (particularly in light of her discovery that competitors' can liners were cheaper), Relator went to speak with Brad Mohler, the Novation contracting officer reputed to have almost lost his job for trying to wrest the can-liner contract away from Heritage Bag. Mohler confirmed that the can-liner contract belonged to Heritage Bag because its representative, John M. Doyle, was the founder and former President of VHA Supply and advised Relator not to "rock the boat" (i.e., recommend awarding the contract to another vendor) because "you cannot win."

78. In December 1998, John M. Doyle, his son, and other representatives of Heritage Bag took Relator to dinner at Newport's Seafood in Dallas. At this dinner, John Doyle asked Relator what its competitors were bidding on the upcoming can-liner contract and sought confirmation that, given its history with VHA Supply, Heritage Bag would, in fact, be awarded the contract. When Relator refused to answer, stating that these were improper questions, Doyle's son became visibly angry, at which point John Doyle reassured him Heritage Bag had been around for a long time (as compared to Relator's short tenure at Novation) and that he would "take care of her [Relator]."

79. Convinced by these events that Novation would reject her recommendation to award the Can-Liner Contract to any vendor other than Heritage Bag irrespective of a vendor's more competitive pricing, Relator informed her supervisor Sherry Woodcock – in front of the entire contracting staff of the Medical/Surgical Division (gathered at a holiday dinner) – that she no longer wanted to manage the Can-Liner Contract since she had been informed that she would be fired if she did not award it to Heritage Bag. Woodcock agreed to take over the contract.

80. Shortly after raising these (and other) concerns about Novation's contracting process and rebuffing John Doyle over dinner, Relator experienced a dramatic change in her work environment. Among other things, where before she had received praise and camaraderie, she started receiving criticism about her work performance (including a detailed "performance improvement plan"), was alienated by her co-workers and quickly terminated.

81. Novation ultimately awarded the Can-Liner Contract to Heritage Bag. See Exhibit 12 (Novation Launch Packet for Contract No. MS00210), which is incorporated herein. Relator has information and believes that the basis for awarding Heritage Bag this and every other can-liner contract for the past 16 years was as a pay-off to John Doyle (who received a commission for every liner sold under the contract) for his having agreed in 1986 to resign as President of VHA Supply amidst accusations by three female employees of sexual harassment and sex discrimination. Heritage Bag won its first can-liner contract from VHA Supply shortly after John Doyle began work as its representative and has held the Can-Liner Contract uninterrupted over the succeeding 16 years while Doyle has continued as its representative.

82. Relator has information and believes that neither Novation nor VHA has ever informed the VHA and UHC Members and HPPI customers of the deal that VHA Supply struck with John Doyle, Doyle's current ties to Heritage Bag and previous affiliation with VHA Supply, or the role

these factors have played in guaranteeing Heritage Bag each of the can-liner contracts since 1986, despite the fact that there have been other bidders with less expensive can liners. In its Launch Packet for the most recent contract, which was distributed to its customers, Novation failed to include among the reasons listed under "Award Rationale" for awarding Contract No. MS00210 to Heritage Bag either its commitment to Doyle or the existence of other vendors with prices lower than Heritage Bag. See id.

2. Owning Stock in Vendors to Whom Novation Awarded Contracts

83. At all times relevant to this Complaint, Novation, VHA, and UHC, as well as top executives at these companies with considerable influence over contracting decisions, owned significant stock holdings in and had mutually beneficial business dealings with the vendors to whom Novation awarded contracts. Several of these executives also sat on the vendors' Board of Directors. Rather than award contracts based on objective criteria like quality and price, Novation routinely awarded contracts to vendors in which Novation, its parent companies VHA and UHC, and officers of these companies had a personal financial and/or business interest. Relator has information and believes that Novation, VHA and UHC failed to inform the VHA and UHC Members and HPPI customers of these ownership interests or business dealings and the role such interests/dealings played in awarding contracts to these vendors.

84. At all times relevant to this Complaint, Novation has had significant stock holdings in vendors to whom Novation has awarded contracts, including Johnson & Johnson and Tyco International Ltd. ("Tyco"). As of November 18, 1999, some of the contracts Novation awarded to Johnson & Johnson while it held Johnson & Johnson stock were as follows: Novation Contract Nos. CE116 (Portable Blood Pressure Monitoring Systems), HPM035 (Baby Products), LAB409 (Chemistry Analyzers), MS607 (Sutures, Endo-Mechanicals), MS80142 (Reusable Surgical

Instruments), and RX86100 (Baby Bath, Shampoo, Powder).

85. Kendall Sherwood-Davis & Geck ("Sherwood"), Sherwood Medical, and Kendall Healthcare Products Company ("Kendall") are all subsidiaries of Tyco. As of November 18, 1999, some of the contracts Novation awarded to Sherwood while it held Tyco stock were as follows: Novation Contract Nos. CE195 (Thermometers), HPM053 (Needles & Syringes), and MS644 (Needles & Syringes). As of November 18, 1999, some of the contracts Novation awarded to Sherwood Medical while it held Tyco stock were as follows: Novation Contract Nos. RX146 (Thermazene Cream) and RX81460 (Silver Sulfadiazine & Petrolatum Gauze). As of November 18, 1999, some of the contracts Novation awarded to Kendall while it held Tyco stock were as follows: Novation Contract Nos. MS153 (NOVAPLUS® Endotracheal Tubes, Tracheostomey Care Kits, Open Suction Catheters), MS609 (Vascular Therapy Products), MS642 (Wound Care Products), and MS80010 (Bandages, Dressings, Sponges, Gauze).

86. At all times relevant to this Complaint, VHA and UHC have had significant stock holdings in vendors to whom Novation has awarded contracts, including Neoforma, Inc. ("Neoforma"). On July 26, 2000, VHA, UHC and Novation entered into an outsourcing and operating agreement with Neoforma, under which VHA and UHC collectively received 45% of Neoforma's outstanding common stock and Neoforma agreed to create and manage an on-line marketplace – called Marketplace@Novation™ -- through which the VHA and UHC Members and HPPI customers can order products under the Novation contracts. On January 25, 2001, VHA and UHC increased their holdings to 60.9% of Neoforma's total outstanding common stock.

87. Although Neoforma describes itself as an e-commerce company that creates and manages on-line marketplaces for GPOs, Integrated Delivery Networks, and other health care systems, Novation and its customers and vendors have been the primary source of Neoforma's business. In

July 2000, Novation awarded Neoforma a sole source contract, which was never put out for public competitive bid, to establish and provide Novation's customers with the on-line ordering service, Marketplace@Novation™. In 2001 alone, Novation paid Neoforma approximately $21 million in fees for these services. In addition, Novation and Neoforma have an agreement under which Neoforma shares with Novation revenue related to transactions made through Marketplace@Novation.

88. C. Thomas Smith, who until recently was the President of VHA and had the ability to influence Novation's contracting decisions, held stock throughout his tenure at VHA in several vendors with whom Novation had contracts. Smith had significant stock holdings in Genetech and also sat on its Board of Directors from 1986 until 1999. During the time that Smith was both President of VHA, a Genentech stockholder and a member of Genetech's Board of Directors, Genetech was awarded several Novation Contracts, including Contract Nos. RX 163 and RX 81830 under which Genetech supplied the drug activase to the VHA and UHC Members and HPPI customers. As President of VHA, Smith also held at least 3,500 shares in Neoforma and sat on its Board of Directors. Smith also owned stock in Sysco Corporation, to whom Novation had awarded several food services contracts.

89. Curt Nonomaque, who has succeeded Smith as VHA's President and previously served as VHA's Vice-President and Chief Financial Officer, also has owned stock in Neoforma and other vendors to whom Novation has awarded contracts during his tenure at VHA. Nonomaque also sat on Neoforma's Board of Directors. Relator has information and believes that Nonomaque has created a fictitious corporation, called NBI, LLC, through which he purchases stock in vendors to whom Novation has awarded contracts.

90. Mark McKenna, Novation's current President and a former Vice-President, also owned stock in vendors to whom Novation has awarded contracts, including Neoforma, and served on Neoforma's Board of Directors during his tenure at Novation. The following VHA and Novation executive-level employees, with influence over Novation's contracting decisions, also own stock in Neoforma: Daniel Bourque and John Collins, Senior Vice-Presidents at VHA, Donald Caccia, a VHA executive, and Marcea Bland Lloyd, in-house counsel for Novation.

91. Novation requires the vendors to whom it awards contracts to agree to use Marketplace@Novation. In its Invitations-to-Bid, Novation lists as a "basic qualifying factor" to receiving a contract that a vendor be willing to commit to participate in Marketplace@Novation. See Exhibit 7 (Enteral Products Invitation to Bid) at 10 & Attachment C at 10. In so doing, Novation is serving its own financial interests and those of VHA, UHC and their executives since they all have a financial stake in ensuring Neoforma's success.

3. Excessive Conference Fees

92. At all times relevant to this Complaint, Novation (and its predecessor VHA Supply) regularly organized and hosted conferences on topics of interest to the VHA and UHC Members and HPPI customers. In connection with these conferences, Novation routinely would approach large vendors whom it expected to be bidding on upcoming contracts and solicit from them exorbitant fees to attend segments of the conference at which the VHA and UHC Members would be present or sponsor high-profile keynote speakers. These fees typically were well in excess of the costs Novation incurred in putting on the conference. Relator has information and believes that Novation failed to inform the VHA and UHC Members and HPPI customers about the existence or amount of these fees and charges.

4. Travel & Entertainment Costs

93. At all times relevant to this Complaint, Novation (and its predecessor VHA Supply) accepted lavish trips, meals and other entertainment from vendors who regularly bid on Novation contracts and to whom Novation subsequently awarded contracts. These trips, meals and other entertainment had little if any legitimate business purpose. For example, shortly before Novation was expected to issue Invitations-to-Bid for its NOVAPLUS® exam glove contract, American Health Products – a large manufacturer of gloves for medical use -- hosted a Riverboat cruise on Lake Michigan with drinks, dinner and dancing for Relator, Relator's supervisor Sherry Woodcock, and other members of the Novation contracting staff responsible for awarding this contract. Edward Marteka, President of AHP, Rick Feady, an AHP sales representative, and several other members of the AHP sales staff were present. Throughout the evening, little to no business was conducted. Relator has information and believes that Novation failed to inform the VHA and UHC Members and HPPI customers about any of these vendor-sponsored trips, meals and other entertainment, the fact that such events had little to no legitimate business purpose, or the role these events played in awarding contracts.

VI. DAMAGES

A. Inflating Costs of Supplies Reimbursed by Government Health Insurance Programs

94. In order to recoup the often considerable costs of paying Novation the kickbacks and other illegal remuneration described above, vendors build these costs into the prices they charge Novation's customers under the contracts for the supplies and services, thereby inflating the prices. A large percentage of these supplies and services are utilized in the treatment of beneficiaries of the government health insurance programs. The government reimburses health care providers for certain

of the costs of these supplies based on cost-reimbursement calculations the providers include in cost reports filed annually with insurance companies the United States and Texas respectively have retained to act as their program fiscal intermediaries ("F.I.'s"). Under the federal cost-reporting regulations, there are several ways in which the vendors' inflated prices are borne by the government health insurance programs.

95. First, several areas of a hospital, such as rehabilitation and psychiatric units, are reimbursed by the government based on the actual costs incurred therein for treating Medicare/Medicaid/CHAMPUS/TRICARE beneficiaries. When a Novation customer uses an overpriced supply/service (i.e., one that includes the hidden costs of the Novation kickbacks) in one of these hospital areas, the inflated costs will cause a corresponding increase in the amount of the government's reimbursement to that customer.

96. For the majority of the time relevant to this Complaint, the two types/areas of a health care provider that were reimbursed based on the actual costs incurred therein are distinct part units and outpatient ancillary cost centers. As its name suggests, distinct part units are portions of the hospital (or free-standing facilities) that provide services that differ from the hospital's typical inpatient services. The four most typical types of distinct part units are psychiatric units/hospitals, rehabilitation units/hospitals, skilled nursing facilities ("SNFs"), and home health agencies ("HHAs"). Like the hospital itself, distinct part units have their own Medicare provider number under which all Medicare/Medicaid/TRICARE/CHAMPUS billing is processed.

97. The majority of Novation's customers are either free-standing distinct part units or have distinct part units associated with their hospitals. For instance, the 5,000 HPPI customers are largely comprised of alternate care providers such as free-standing rehabilitation hospitals, psychiatric hospitals, SNFs and HHAs. In addition, many of the 2,200 VHA and UHC Members, which consist

largely of community and teaching hospitals, have distinct part units associated with their hospitals. Accordingly, distinct part units account for a large percentage of the $19.6 billion in total purchases that the Novation customers make each year. Since the actual costs of the supplies and services purchased by these units are reimbursed in whole or part by the government health insurance programs, by causing vendors to inflate the prices for such goods/services, defendants have caused the government to overstate its reimbursement to the large population of Novation customers with distinct part units, which has resulted in profound financial harm to the government health insurance programs.

98. The other primary area in which the government reimburses a health care provider based on actual costs incurred therein in treating Medicare/Medicaid/TRICARE/CHAMPUS beneficiaries is outpatient ancillary cost centers. As its name suggests, these are areas of the hospital that provide outpatient services that are ancillary to the hospital's typical inpatient services. Unlike distinct part units, however, services provided in outpatient ancillary cost centers are billed under the hospital's Medicare provider number and do not have their own provider numbers.

99. Examples of outpatient ancillary cost centers are the Operating Room, Recovery Room, Radiology Department, Emergency Room, Electrocardiogram Department, and Laboratory. The 2,200 VHA and UHC Members, which consist largely of community and teaching hospitals, have several such outpatient ancillary cost centers in each of their hospitals. Although largely comprised of alternate care providers, some of the HPPI customers are traditional hospitals with the above-mentioned outpatient ancillary cost centers. Since the actual costs of the supplies/services purchased by these cost centers are reimbursed in whole or part by the government health insurance programs, by causing vendors to inflate the prices for such goods/services, defendants have caused the government to overstate its reimbursement to the many VHA and UHC Members and HPPI

customers who have these cost centers, which has resulted in profound financial harm to the government health insurance programs.

100. Second, the overpriced supplies/services resulting from Novation's fraudulent practices also have served to improperly increase the amount of government reimbursement in areas of the hospital, like general acute care/Adults & Pediatrics, that are reimbursed under the "Prospective Payment System" or "PPS". Under PPS, the Medicare program uses payment schedules based on Diagnosis-Related Groups ("DRGs"), under which hospitals are paid pre-determined amounts for inpatient care in certain areas of the hospital based on the patients' diagnosis. The diagnosis-based DRG payments reflect the average costs an efficiently-run hospital would be expected to incur to treat such a patient. To determine the payment schedule that corresponds to each diagnosis, the government relies on pricing and other data from hospitals within the various geographic regions of the country as well as nationwide. Because Novation's 7,300 customers represent close to a third of the nation's health care providers, the government has necessarily relied on the inflated pricing information from many of Novation's customers in setting its DRG payments. Accordingly, the inflated prices incurred by the VHA and UHC Members and HPPI customers have, in turn, increased the amount of the DRG rate on which the government bases its reimbursement.

101. Third, for the majority of the time relevant to this Complaint, there was a category of products called "moveable capital equipment" that the government reimbursed based on the cost of the product, irrespective of the part of the hospital in which they were used. Examples of moveable capital equipment are ultrasound devices, CAT scanners, x-ray machines, hospital beds, and operating room tables. Capital equipment was one of Novation's primary product lines and Novation regularly negotiated capital-equipment contracts for its customers. As with Novation's other product lines, Relator has information and believes that several capital-equipment vendors paid

Novation kickbacks to obtain the contracts and increased the prices charged in Novation contracts for this equipment in order to recoup the illegal payments. Because such equipment is subject to cost-based reimbursement, the vendors' inflated prices on capital equipment also caused the government to overstate its reimbursement to the VHA and UHC Members and HPPI customers who purchased and later sought government reimbursement for the costs of this equipment.

B. Precluding Manufacturers of Safer, More Innovative Products That Would Have Reduced Health care Costs

102. As a result of its practice of requiring vendors to pay large kickbacks and other illegal remuneration to obtain contracts, Novation routinely awarded contracts to large, well-established vendors, like Johnson & Johnson, who were capable of making such large payments. Smaller vendors, who often have safer, cheaper and more innovative products, were routinely denied contracts because they were unable or unwilling to offer Novation the up-front payments necessary to obtain the business.

103. For example, Novation awarded the most recent contract for needles and syringes to Becton Dickinson, a large, well-established medical product manufacturer. As discussed above, in connection with this contract, Becton Dickinson paid Novation a $1 million "special marketing fee." Novation awarded the contract to Becton Dickinson despite contemporaneous market research showing that ECRI, a respected testing laboratory, had rated as "unacceptable" one of the Becton Dickinson needles to be supplied under the contract. Another bidder, Retractable Technologies, Inc. ("RTI"), who manufactures an innovative safety syringe and needle system with a demonstrated record of preventing needle sticks, was shut out of the contract largely because it was unable and unwilling to pay Novation kickbacks and other illegal remuneration.

104. By regularly shutting out the smaller vendors like RTI and awarding contracts to larger vendors who build the costs of the kickbacks into their prices, Novation caused the VHA and UHC Members and HPPI customers to submit to the government health insurance programs claims for medical supplies that were higher than they would have been had Novation awarded the contracts without such improper financial considerations as kickbacks and other illegal remuneration. In

addition, by favoring larger manufacturers over smaller ones like RTI with safer, more innovative products, Novation caused the VHA and UHC Members and HPPI customers to submit to the government health insurance programs claims for additional treatment related to injuries caused or exacerbated by the use of the larger manufacturers' products, such as needle stick injuries caused by the use of less safe needles. In many instances, these injuries and additional treatment costs would have been preventable had Novation awarded the contracts based on quality and price rather than other improper financial considerations.

VII. EMPLOYMENT DISCRIMINATION FOR ACTS IN FURTHERANCE OF FALSE CLAIMS ACT ACTION

105. Relator began working for Novation on July 27, 1998 as a Senior Product Manager for Medical/Surgical Products with an annual salary of $63,500.04. From the beginning of her six months of employment at Novation until she started complaining to her superiors about the impropriety of the fraudulent practices described above, Relator was regularly commended by her superiors on her job performance.

106. For instance, upon completion of one of her first assignments – putting out to bid and awarding Contract No. MS8020B, "IV Catheters and Start Kits" – Relator received a hand-written note from Novation's then President, James Hersma, complimenting her on her "[g]reat work." See Exhibit 9 at 1. As described above, this was also the contract pursuant to which Relator secured from Becton Dickinson a $100,000 "donation" to VHAseCURE.net. For her work in obtaining this donation as well as a similar donation from another vendor, the Head of Novation's Information Technology Department (who oversaw the VHAseCURE.net program) sent Relator an e-mail congratulating her on her success and thanking her for her efforts. See Exhibit 5. A copy of this e-mail was also sent to John Burks, the former Head of the Medical/Surgical Products Division. Id.

107. By the end of 1998/beginning of 1999, as a result of the experiences described above, Relator had come to realize that the kickbacks and other illegal remuneration were not isolated indiscretions by a few rogue vendors but instead were part of a larger Novation scheme that pervaded its business. Faced with two choices -- play by Novation's rules and be complicit in fraud or refuse and try to effect change from within -- Relator took the latter course. As described above, she

informed her supervisor Sherry Woodcock that she could no longer manage the can-liner contract because of the favoritism being shown to Heritage Bag, and she rebuffed Johnson & Johnson's attempts to pay Novation a kickback to obtain the IV Catheter Contract. Relator also raised her concerns about the impropriety of these practices with Novation senior management, including the Head of the Medical/Surgical Products Division, Human Resources staff, and Novation's in-house counsel. Her concerns were largely ignored.

108. Shortly after she took these corrective measures, Relator began to experience a dramatic change in her employment conditions. Where previously she had been treated as part of the team, Relator now was being alienated by her co-workers. For instance, Relator's administrative assistant, who had previously worked cooperatively with her (while also serving the other members of the Medical/Surgical contracting staff to whom she was jointly assigned), now refused to do any work for her.

109. Relator's supervisor Sherry Woodcock issued Relator a 6-page "Performance Improvement Plan" chronicling a laundry list of serious alleged lapses in her job performance and placing her on a 90-day probationary period. See Exhibit 13, which is incorporated herein. Although the vast majority of these alleged failings had supposedly occurred many months earlier, Relator had never before been informed of these "problems" and no reference to them had been made in her personnel file. Relator was only now hearing about them for the first time, a matter of days after she had first voiced concerns to management about Novation's contracting practices. Because of her supervisor's frequent fabrication and gross mischaracterization of the events described therein, Relator refused to sign the Performance Improvement Plan or agree to the conditions set forth therein. Fifteen days later, on February 5, 1999, Novation fired Relator for alleged problems related to her "performance/judgment."

110. Despite her supposed failings as an employee, Novation nevertheless chose to pay Relator – an at-will employee – a severance package of $7,949.69. Novation conditioned Relator's receipt of these monies on her signing a severance agreement containing a confidentiality provision that prohibited her from revealing any of Novation's confidential information or information about

Novation's "business and opportunities" for three years. Relator signed the agreement and accepted the severance package.

111. As these circumstances clearly demonstrate, the reasons Novation gave for terminating Relator – "performance/judgment" – were a pretext. The real reason Novation fired Relator – as is belied by the close proximity between her complaints and Novation's belated criticism of her job performance – was in retaliation for her investigating and raising concerns about Novation's fraudulent contracting practices.

COUNT I
Substantive Violations of the Federal False Claims Act
[31 U.S.C. §§ 3729(a)(1), (a)(2), (a)(7) and 3732(b)]

112. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 111 of this Complaint.

113. This is a claim for treble damages and forfeitures under the Federal False Claims Act, 31 U.S.C. §§ 3729 et seq., as amended.

114. Through the acts described above, defendants Novation, VHA, UHC, and HPPI knowingly caused VHA and UHC Members and HPPI customers to present to the United States Government, through the Medicare, Medicaid, and TRICARE/CHAMPUS programs, false and fraudulent claims, records, and statements for reimbursement for health care supplies and services provided under Medicare, Medicaid, and TRICARE/CHAMPUS.

115. Through the acts described above and otherwise, defendants Novation, VHA, UHC, and HPPI knowingly caused the VHA and UHC Members and HPPI customers to make or use false records and statements, which also omitted material facts, in order to induce the United States Government and its F.I.'s to approve and pay such false and fraudulent claims.

116. Through the acts described above and otherwise, defendants Novation, VHA, UHC, and HPPI knowingly caused the VHA and UHC Members and HPPI customers to make or use false records and statements to conceal, avoid, and/or decrease the VHA and UHC Members' and HPPI customers' obligation to repay money to the United States Government that the defendants improperly and/or fraudulently received. Defendants Novation, VHA, UHC and HPPI also failed

to disclose to the United States Government and its F.I.'s material facts that would have resulted in substantial repayments by the VHA and UHC Members and HPPI customers to the federal government.

117. The United States, through the Medicare, Medicaid, and TRICARE/CHAMPUS programs and their respective F.I.'s, unaware of the falsity of the records, statements, and claims made or submitted by defendants Novation, VHA, UHC, and HPPI and the VHA and UHC Members and HPPI customers, paid and continue to pay the VHA and UHC members and HPPI customers for claims that would not be paid if the truth were known.

118. The Medicare, Medicaid, and TRICARE/CHAMPUSprograms and their respective F.I.'s, unaware of the falsity of the records, statements, and claims made or submitted by defendants Novation, VHA, UHC, and HPPI (and the VHA and UHC Members and HPPI customers) -- or of defendants' failure to disclose material facts that would have reduced government obligations -- have not recovered Medicare, Medicaid, and TRICARE/CHAMPUS funds that would have been recovered otherwise.

119. By reason of the defendants' false records, statements, claims, and omissions and defendants' misconduct in causing the VHA and UHC Members and HPPI customers to make and submit false records, statements, claims and omissions, the United Stateshas been damaged in the amount of many millions of dollars in Medicare, Medicaid, and TRICARE/CHAMPUS funds.

COUNT II
Federal False Claims Act Conspiracy
[31 U.S.C. §§ 3729(a)(3) and 3732(b)]

120. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 119 of this Complaint.

121. This is a claim for treble damages and forfeitures under the Federal False Claims Act, 31 U.S.C. §§ 3729 et seq., as amended.

122. Through the acts described above and otherwise, defendants entered into a conspiracy or conspiracies with each other and with others to defraud the United States by getting false and fraudulent claims allowed or paid. Defendants have also conspired with each other and with others

to omit disclosing or to actively conceal facts which, if known, would have reduced government obligations to the VHA and UHC Members and HPPI customers or resulted in repayments from the VHA and UHC Members and HPPI customers to government health insurance programs. Defendants have taken substantial steps in furtherance of those conspiracies, inter alia, by soliciting and accepting kickbacks and other monies from vendors as payment for awarding them Novation contracts knowing that these activities increased the cost of supplies and services ordered by the VHA and UHC Members and HPPI customers under these contracts and caused Novation's customers to submit false bills, cost reports and other records to the government and its F.I.'s for payment or approval that contained these improper costs, and by directing their agentsand personnel not to disclose and/or to conceal their fraudulent practices or those of their co-defendants, as well.

123. The Medicare, Medicaid, and TRICARE/CHAMPUS programs and their respective F.I.'s, unaware of defendants' conspiracies or the falsity of the records, statements and claims caused to be made by defendants Novation, VHA, UHC, and HPPI and made by the VHA and UHC Members and HPPI customers, and as a result thereof, have paid and continue to pay millions of dollars in Medicare, Medicaid, and TRICARE/CHAMPUS interim and final reimbursement that they would not otherwise have paid. Furthermore, because of the false records, statements, claims, and omissions caused to be made by defendants Novation, VHA, UHC and HPPI and made by the VHA and UHC Members and HPPI customers, the United States has not recovered Medicare, Medicaid, and TRICARE/CHAMPUS funds from the VHA and UHC Members and HPPI customers that otherwise would have been recovered.

124. By reason of defendants' conspiracies and the acts taken in furtherance thereof, the United States has been damaged in the amount of many millions of dollars in Medicare, Medicaid, and TRICARE/CHAMPUS funds.

COUNT III
Substantive Violations of the Texas Medicaid Fraud Prevention Act
[Texas Human Resources Code §§ 36.002 (1)(A), (2)(B) & (4)(B)]

125. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 124 of this Complaint.

126. This is a claim for restitution, double damages and penalties under the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code, §§ 36.001 et seq.

127. Through the acts described above, defendants Novation, VHA, UHC, and HPPI knowingly have caused the VHA and UHC Members and HPPI customers to present to the Texas Medicaid program and its F.I.'s false and fraudulent claims, records, and statements for reimbursement for health care supplies and services provided under Medicaid.

128. Through the acts described above and otherwise, defendants Novation, VHA, UHC, and HPPI knowingly made, used, and/or caused the VHA and UHC Members and HPPI customers to make or use false records and statements, which also omitted material facts, in order to induce the Texas Medicaid program and its F.I.'s to approve and pay such false and fraudulent claims.

129. Through the acts described above and otherwise, defendants Novation, VHA, UHC, and HPPI knowingly made, used, and caused the VHA and UHC Members to make or use false records and statements to conceal, avoid, and/or decrease the VHA and UHC Members' and HPPI customers' obligation to repay money to the Texas Medicaid program and its F.I's that the VHA and UHC Members and HPPI customers improperly and/or fraudulently received. Defendants Novation, VHA, UHC, and HPPI also failed to disclose to the Texas Medicaid program and its F.I.'s material facts that would have resulted in substantial repayments by the VHA and UHC Members and HPPI customers to the Texas government.

130. The Texas Medicaid program and its F.I.'s, unaware of the falsity of the records, statements, and claims made or submitted by defendants and the VHA and UHC Members and HPPI customers, paid and continue to pay the VHA and UHC Members and HPPI customers for claims that would not be paid if the truth were known.

131. The Texas Medicaid program and its F.I.'s, unaware of the falsity of the records, statements, and claims made or submitted by defendants or the VHA and UHC Members and HPPI customers -- or of their failure to disclose material facts which would have reduced government obligations -- have not recovered Medicaid funds that would have been recovered otherwise.

132. By reason of the defendants' false records, statements, claims, and omissions and defendants' misconduct in causing the VHA and UHC Members and HPPI customers to make or submit false records, statements, claims, and omissions, the State of Texas and the Texas Medicaid program have been damaged in the amount of many millions of dollars in Medicaid funds.

COUNT IV
Texas Medicaid Fraud Prevention Act Conspiracy
[Tex. Human Resources Code § 36.002(9)]

133. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 132 of this Complaint.

134. This is a claim for restitution, double damages and penalties under the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code §§ 36.001 et seq.

135. Through the acts described above and otherwise, defendants entered into a conspiracy or conspiracies with each of the other defendants and with others to defraud the Texas Medicaid program by getting false and fraudulent claims allowed or paid. Defendants have also conspired with each other and with others to omit disclosing or to actively conceal facts which, if known, would have reduced the Texas Medicaid program's obligations to the VHA and UHC Members and HPPI customers or resulted in repayments from the VHA and UHC Members and HPPI customers to the Texas Medicaid program. Defendants Novation, VHA, UHC and HPPI have taken substantial steps in furtherance of those conspiracies, inter alia, by soliciting and accepting kickbacks and other monies from vendors as payment for awarding them Novation contracts knowing that these activities increased the cost of supplies and services ordered by the VHA and UHC Members and HPPI customers under these contracts and caused Novation's customers to submit false bills, cost reports and other records to the Texas Medicaid program and its F.I.'s for payment or approval that contained these improper costs, and by directing their agentsand personnel not to disclose and/or to conceal their fraudulent practices or those of their co-defendants, as well.

136. The Texas Medicaid program and its F.I.'s, unaware of defendants' conspiracies or the falsity of the records, statements and claims caused to be made by defendants Novation, VHA, UHC

and HPPI and made by the VHA and UHC Members and HPPI customers, and as a result thereof, have paid and continue to pay millions of dollars in Medicaid interim and final reimbursement that they would not otherwise have paid. Furthermore, because of the false records, statements, claims, and omissions caused to be made by defendants Novation, VHA, UHC and HPPI and made by the VHA and UHC Members and HPPI customers, the Texas Medicaid program has not recovered Medicaid funds from the VHA and UHC Members and HPPI customers that otherwise would have been recovered.

137. By reason of defendants' conspiracies and the acts taken in furtherance thereof, the State of Texas and the Texas Medicaid program have been damaged in the amount of many millions of dollars in Medicaid funds.

COUNT V
Federal False Claims Act -- Employment Discrimination
[31 U.S.C. § 3730(h)]

138. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 137 of this Complaint.

139. This is a claim for damages under the Federal False Claims Act, 31 U.S.C. § 3730(h).

140. Through the acts described above and otherwise, defendant Novation discriminated against Relator in the terms and conditions of her employment at Novation by, among other things, terminating her employment. Novation's stated reasons for terminating Relator regarding deficiencies in her job performance were baseless and simply a pretext for the real reason for her termination -- to retaliate against Relator for her investigation of defendants' fraudulent practices in preparation for filing the above-captioned False Claims Act lawsuit.

141. By reason of defendant Novation's actions, Relator has been damaged in the amount of many thousands of dollars.

COUNT VI
Texas Medicaid Fraud Prevention Act – Employment Discrimination
[Texas Human Resources Code § 36.115]

142. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 141 of this Complaint.

143. This is a claim for damages under the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code § 36.115.

144. Through the acts described above and otherwise, defendant Novation discriminated against Relator in the terms and conditions of her employment at Novation by, among other things, terminating her employment. Novation's stated reasons for terminating Relator regarding deficiencies in her job performance were baseless and simply a pretext for the real reason for her termination -- to retaliate against Relator for her investigation of defendants' fraudulent practices in preparation for filing the above-captioned False Claims Act lawsuit.

145. By reason of defendant Novation's actions, Relator has been damaged in the amount of many thousands of dollars.

PRAYER

WHEREFORE, Relator prays for judgment against defendants as follows:

1. That defendants cease and desist from violating 31 U.S.C. §§ 3729 et seq. and Texas Human Resources Code §§ 36.001 et seq.;

2. That the Court enter judgment against defendants in an amount equal to three times the amount of damages the United States has sustained as a result of defendants' actions in violation of the Federal FCA, as well as a civil penalty against each defendant of $11,000 for each violation of 31 U.S.C. § 3729;

3. That the Court enter judgment against defendants in an amount equal to two times the amount of damages Texas has sustained as a result of defendants' actions in violation of the Texas Medicaid Fraud Prevention Act, as well as a civil penalty against each defendant of $10,000 for each violation of Texas Human Resources Code § 36.052(3).

4. That Relator be awarded the maximum amount allowed pursuant to 31 U.S.C. § 3730(d) and Texas Human Resources Code § 36.110;

5. That Relator be awarded all costs and expenses of this action, including attorneys' fees;

6. That the Court enter judgment against defendant Novation as a result of its actions in violation of 31 U.S.C. § 3730(h) and Texas Human Resources Code § 36.115 as well as all relief necessary to make Relator whole, including reinstatement with the same seniority status Relator would have had but for the discrimination, not less than two times the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of Novation's employment discrimination, including litigation costs and reasonable attorney's fees; and

7. That the United States, the State of Texas, and Relator receive all such other relief as the Court deems just and proper.

Jury Demand

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Relator hereby demands trial by jury.

Dated: July 15, 2003

Respectfully submitted:

PHILLIPS & COHEN LLP
Stephen L. Meagher
CA Bar No. 118188
Mary A. Inman
CA Bar No. 176059
Michael Brown
CA Bar No. 183609
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GOODE CASSEB JONES
RIKLIN CHOATE & WATSON
A PROFESSIONAL CORPORATION

By: _____
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Rand J. Riklin
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LAW OFFICE OF GLENN GROSSENBACHER
Glenn Grossenbacher
TX Bar No. 08541100
1800 McCullough
San Antonio, Texas 78212
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Fax: (210) 271-3980

ATTORNEYS FOR RELATOR/PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing complaint has been served by certified mail or hand delivery this 11th day of July 2003, as follows:

Mr. John Ashcroft
Attorney General
U. S. Department of Justice
Civil Division
P.O. Box 261, Ben Franklin Station
Washington, DC 20044

Certified Mail No.70022410000415006110
Return Receipt Requested

Ms. Jane J. Boyle
United States Attorney
Northern District of Texas
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699

Hand Delivery

Mr. Greg Abbott
Texas Attorney General
300 W. 15th Street
Austin, Texas 78701

Certified Mail No.70022410000415006127
Return Receipt Requested

John E. Clark

JS 44
(Rev. 3/99)

CIVIL COVER SHEET

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I. (a) PLAINTIFFS

United States of America ex rel. (under seal)
AND
State of Texas ex rel. (under seal)

DEFENDANTS

(Under seal)

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

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See Attachment

ATTORNEYS (IF KNOWN)

N/A

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- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

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Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
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Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

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- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
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- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
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The False Claims Act, 31 U.S.C. Sect. 3729, et seq. and the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code Sect. 36.001 et seq.

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DEMAND $ Treble damages/penalties

CHECK YES only if demanded in complaint:
JURY DEMAND: XX YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
15 July 2003

SIGNATURE OF ATTORNEY OF RECORD
John E. Clark

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

JS 44
(Rev. 3/99)

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Cynthia I. Fitzgerald
AND State of Texas ex rel.
Cynthia I. Fitzgerald

DEFENDANTS
Novation,LLC, VHA,Inc., University Healthsystem Consortium and Healthcare Purchasing Partners International, LLC

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(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT County of Dallas
(IN U.S. PLAINTIFF CASES ONLY)
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DATE: 15 July 2003
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FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

CIVIL COVER SHEET
Attachment

I.(c) Attorneys (Firm Name, Address, and Telephone Number)

Stephen L. Meagher (Cal. State Bar No. 118188)
Mary A. Inman (Cal. State Bar No. 176059)
Michael Brown (Cal. State Bar No. 183609)
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John E. Clark (Texas Bar Card No. 04287000)
Rand J. Riklin (Texas Bar Card No. 16924275)
GOODE CASSEB JONES RIKLIN CHOATE & WATSON
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Texas Bar Card No. 08541100
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Fax: (210) 271-3980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,
et al.,

Plaintiffs,

v. Case No. 05-cv-2299-CM-GLR

NOVATION, LLC,
et al.,

Defendants.

ORDER

This matter comes before the Court on the Corrected Motion to Withdraw (doc. 121) filed by Dennis Hawver, counsel for Plaintiff Medical Supply Chain, Inc. Mr. Hawver requests leave to withdraw from representing plaintiff Medical Supply Chain, Inc. ("Medical Supply") in the above-captioned matter in accordance with D. Kan. Rule 83.5.5. Previously, on January 29, 2008, the Court sustained in part and overruled in part Mr. Hawver's first motion to withdraw as to both plaintiffs Medical Supply and Samuel Lapari. The motion was overruled without prejudice as to plaintiff Medical Supply because the "Acknowledgement of Service" signed by Samuel K. Lipari provided no indication that Mr. Lipari is signing on behalf of, or as a representative of, Plaintiff Medical Supply.

The current motion includes a signed Notice of Responsibility of Client that is signed by Samuel K. Lipari, on behalf of plaintiff Medical Supply. The Court will therefore sustain Mr. Hawver's Corrected Motion to Withdraw. Attorney Dennis Hawver is hereby withdrawn as counsel for Plaintiff Medical Supply.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 4th day of March, 2008.

s/ Gerald L. Rushfelt
Gerald L. Rushfelt
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 05-2299-CM**
	)	
NEOFORMA, INC., et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

The history of this case is lengthy and complicated. It has been discussed in detail in previous orders of this court and by the Tenth Circuit (Docs. 78, 104, 118). The case resurfaces before the court on Mr. Lipari's "Rule 60(b) Motion" (Doc. 122). Because Mr. Lipari remains unable to represent plaintiff, the motion is stricken from the record.

On August 7, 2006, this court struck four motions filed by Mr. Lipari. In that order, the court stated:

> Because Medical Supply was incorporated under the laws of Missouri, the effect of corporate dissolution on pending litigation is governed by Missouri law. Pursuant to Mo. Ann. Stat. § 351.476.2(6), "[d]issolution of a corporation does not: . . . (6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." *See also Reben v. Wilson*, 861 S.W.2d 171, 176 (Mo. App. E.D. 1993). Therefore, even though Medical Supply was dissolved, its corporate existence continues for purposes of proceeding with this litigation. Medical Supply remains the sole plaintiff in this case.
>
> Moreover, Mr. Lipari cannot proceed *pro se* on behalf of Medical Supply because a *pro se* individual may not represent a corporation. *See Nato Indian Nation v. State of Utah*, 76 Fed. Appx. 854, 856 (10th Cir. 2003) ("Individuals may appear in court pro se, but a corporation, other business entity, or non-profit organization may only appear through a licensed attorney.") (citations omitted).
>
> The court also finds that Mr. Lipari may not substitute himself for Medical Supply. Federal Rule of Civil Procedure 25(c), which governs the procedural

> substitution of a party after a transfer of interest, states: "In case of any transfer of interest, the action *may* be continued by or against the original party, *unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action*." Fed. R. Civ. P. 25(c) (emphasis added). As evidenced by the plain language of Rule 25(c), the court has discretion to allow Mr. Lipari to substitute. *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1324 (10th Cir. 1978). The court declines to exercise its discretion, however, because this case has been dismissed, and substitution will not change that outcome.

(Doc. 104).

Since that filing the status of the parties has not changed. Mr. Lipari is not a plaintiff. The court does not have any notice that Mr. Lipari is now a licensed attorney. Without any intervening change in the interim, the previous conclusions regarding Mr. Lipari's ability to represent plaintiff apply to the present motion. For the above-mentioned reasons, the court strikes Mr. Lipari's pending motion (Doc. 122).

Another portion of the court's previous order is also relevant. At that time, the court warned Mr. Lipari, stating "[c]onsistent with this ruling, the court cautions Mr. Lipari against filling additional motions. Of course, plaintiff may allow Mr. Hawver or other counsel to represent it . . . Future attempts to resurrect this case could result in the court imposing additional sanctions." Mr. Lipari's recent filings (Docs. 122, 125) appear to violate this warning.

Additionally, Mr. Lipari's "Rule 60(b) Motion" misstates several resolved issues, making his arguments frivolous. Mr. Lipari accuses this court of having "bias against the plaintiff" that "clearly results from the court's disbelief that the conduct complained of by the plaintiff occurred." Mr. Lipari challenges the court by noting, "[t]he plaintiff's Missouri state law antitrust claims will be filed in Independence, Missouri unnecessarily duplicating the present litigation if the present federal claims are not reopened." Before the court addressed whether the present federal case should be reopened, Mr. Lipari filed a notice that he filed a "concurrent Missouri antitrust action [on] February

25, 2008 in . . . Independence Missouri." (Doc. 125).

Mr. Lipari's actions and filings appear to violate Federal Rule of Civil Procedure 11(b). Under Rule 11(c)(1)(B), Mr. Lipari is directed to show cause within twelve days of this order why he has not violated Rule 11(b). **If Mr. Lipari fails to demonstrate that he has not violated Rule 11(b), this court will sanction Mr. Lipari by fine and filing restrictions.**

IT IS THEREFORE ORDERED that Mr. Lipari's "Rule 60(b) Motion" (Doc. 122) is stricken from the record.

IT IS FURTHER ORDERED that Mr. Lipari is directed to show cause within twelve days of this order why he has not violated Federal Rule of Civil Procedure 11(b).

Dated this 28th day of March 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
(Through assignee Samuel K. Lipari)	)
SAMUEL K. LIPARI	)
Plaintiff,	)
v.	) Case No. 05-2299
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. GRUNDHOFER	)
ANDREW CECERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY, P.C.	)
Defendants.	)

PLAINTIFF'S FED. R. CIV. P. 59(e), TO ALTER OR AMEND THE JUDGMENT AND ANSWER TO ORDER TO SHOW CAUSE

Comes now the plaintiff Samuel K. Lipari in his individual capacity and as an assignee of all rights of Medical Supply Chain, Inc. a dissolved Missouri corporation and respectfully submits this motion under Fed.R.Civ.P. 59(e), to alter or amend the judgment. The plaintiff seeks to alter or amend the court's order striking the plaintiff's motion to reopen the present action under F.R.Civ. P. Rule 60(b). The plaintiff also answer's the court Show Cause Order.

Statement of Facts

1. The plaintiff filed a *pro se* motion on February 13, 2008 for new trial on this court's dismissal order denying the plaintiff's *pro se* standing and dismissing the plaintiff's federal claims with prejudice under F.R.Civ. P. Rule 60(b). See Exb 1 Motion for New Trial and Exb 2 Plaintiff's Response to Defendant's Opposition.

2. The plaintiff filed his motion after this court recognized his standing to proceed *pro se* as the assignee of his dissolved corporation's claims under Missouri State Law governing corporations in styled *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW, the same case or controversy as Case No. 05-2299 as defined by Article III of the U.S. Constitution and 28 U.S.C. § 1367:

"Missouri law does, however, allow a dissolved corporation to assign its claims to a third

party. *See, e.g., Smith v. Taylor-Morley, Inc.*, 929 S.W.2d 918 (Mo. Ct. App. 1996) (upholding dissolved corporation's written assignment of rights to a purchase contract). The assignee may sue to recover damages for the dissolved corporation's claims. *Id.* (holding assignee of dissolved corporation's rights under a purchase contract could sue for injuries to dissolved corporation for breach of the purchase contract). Here, plaintiff alleges that he is the assignee of all rights and interests of Medical Supply, including the claims in this lawsuit. Accepting as true all material allegations of the complaint and construing the complaint in favor of plaintiff, the court finds that plaintiff has met his burden at this stage of the proceeding. Defendant's motion is denied with respect to standing."

Order signed by Judge Carlos Murguia recognizing plaintiff's standing as assignee of MSC's claims. Exb 3 Order *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW at page 2.

3. This court's order recognizing the plaintiff's status as assignee of his federal claims occurred after this court's decision on August 7, 2006, striking four motions filed by the plaintiff.

4. A reasonable conclusion can be drawn by a reviewing court that the plaintiff's materially identical arguments supporting *pro se* standing as an assignee of MSC's claims produced two different results because of the intervening decision of the US Supreme Court in *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007) overruling the Tenth Circuit and requiring facts pled in a complaint to be accepted as true.

5. The February 13, 2008 Rule 60(b) filing was a motion and not a pleading.

6. This court ordered the plaintiff's F.R.Civ. P. Rule 60(b) motion struck without a hearing.

7. This court's order to show cause threatens sanctions against the plaintiff that violate the court's authority and jurisdiction under the Federal Rules of Civil Procedure.

8. The court's void order striking the plaintiff's Rule 60(b) if not reversed is a participation in the defendants' unlawful actions to deprive the plaintiff of the representation of an unimpaired attorney documented at length in the plaintiff's complaint dismissed by the court.

9. Judge Carlos Murguia's repeated sanctioning of the plaintiff for being correct on the application of controlling law of this circuit and in direct contradiction of the express language of Congress providing multiple private rights of action in the USA PATRIOT Act and in contradicting the US Supreme Court on the lack of preclusion for subsequent antitrust and RICO acts in the Medical Supply litigation has the foreseeable *ad terrorem* effect of depriving the plaintiff of counsel and of capital to enter the market for hospital supplies monopolized by the Novation LLC cartel.

MEMORANDUM IN SUPPORT

The plaintiff's motion is within ten days of the court's order striking the plaintiff's Rule 60(b) motion and therefore is properly a motion pursuant to Fed.R.Civ.P. 59(e), to alter or amend the judgment:

> "A motion to alter or amend presents the court with the opportunity to rectify manifest errors of law or fact and to review evidence newly discovered. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450-51, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982); *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1461, 137 L.Ed.2d 564 (1997); *Barrett v. Fields*, 941 F.Supp. 980, 984-85 (D.Kan. 1996)."

Fields v. Atchison, Topeka, and Santa Fe Railway Company, 5 F.Supp.2d 1160 at 1161 (D. Kan., 1998).

The plaintiff has conformed to Rule 7.3 of the local rules for the District of Kansas.

A Rule 59(e) motion may be granted if any of the following three conditions are presented to the court: (1) an intervening change in the controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir.1995).

The plaintiff seeks relief from the striking of his motion for new trial based on (3) "the need to correct clear error or prevent manifest injustice."

The plaintiff answer's this court's Show Cause Order by citing to controlling case law that the plaintiff's Rule 60(b) motion is proper.

I. Standard of review

The Tenth Circuit will review the district court's denial of a Rule 60(b)(6) motion for abuse of discretion. *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir.1996) Simply stated, for the appeals court to find an abuse of district court's discretion and reverse, the appellate court must have a definite and firm conviction that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. Moreover, relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances. *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991), cert. denied, 506 U.S. 828, 113 S.Ct. 89, 121 L.Ed.2d 51 (1992).

Denial of the plaintiff's Motion for New Trial over changes in law since the dismissal of the plaintiff's federal claims can be appealed. See *John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co.*, 239 F.2d 815 at 816-817 (3rd Cir., 1956).

II. Clear Errors of the Court

The court lacks the authority or power to strike the plaintiff's motion under Rule 12(f) and Rule 37. The striking violates the plaintiff's fourteenth amendment right to a hearing, and a judgment of sanctions in such a case would be void for want of jurisdiction.

A. Plaintiff's Motion For New Trial Properly Before The Court

The plaintiff sought a new trial on the order dismissing his claims based on intervening decisions by this court and the US Supreme Court, including Judge Carlos Murguia's determination he had standing as the assignee of Medical Supply Chain's Claims in this same case or controversy.:

> "A Rule 60(b) motion addresses the district court's judgment and must be presented initially to the district court. 12 James Wm. Moore, et al., Moore's Federal Practice § 60.60[1] and authorities cited therein. Thus, the Respondent's Rule 60(b) motion challenges a judgment of this Court and is properly before this Court."

Mitchell v. Rees, 430 F.Supp.2d 717 at 721 (M.D. Tenn., 2006). Also "...a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. E.g., *Dunlap v. Litscher*, 301 F.3d 873, 876 (C.A.7 2002)." *Mitchell v. Rees, id* 430 F.Supp.2d 717 at 722 (M.D. Tenn., 2006).

Under Rule 60(b), a court may set aside a default judgment "on motion and under such terms as are just" for any of the following reasons:

> "(1) mistake, inadvertence, surprise, or excusable neglect;(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) or any other reason justifying relief from the operation of the judgment. Fed.R.Civ.P. 60(b)."

In re Wallace, 298 B.R. 435 at 439 (B.A.P. 10th Cir., 2003)

The difference in rulings regarding the plaintiff's standing to pursue his claims pro se are exactly the exceptional or "extraordinary circumstances" in which a New Trial under Rule 60(b) is appropriate:

> "Moreover, **an inconsistent application of the law that deprives a party of a right accorded to other similarly situated parties presents, "extraordinary circumstances" warranting post-judgment relief, including under Rule 60(b)(6).** See e.g., *Gondeck v. Pan American World Airways Inc.*, 382 U.S. 25, 26-27, 86 S.Ct. 153, 15 L.Ed.2d 21 (1965)(granting post-judgment relief on rehearing, in the interest of justice **to remedy a misinterpretation of the**

law); *Cincinnati Insurance Co. v. Byers*, 151 F.3d 574, 580 (6th Cir.1998)(extraordinary circumstances based upon a post-judgment change in the law); *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir.1985)(finding **extraordinary circumstances and granting relief from judgment based on intervening decision of Ohio Supreme Court**); *Jackson v. Sok*, 65 Fed. Appx. 46, 49 (6th Cir.2003)(per curiam)(upholding grant of Rule 60(b) **motion based on intervening change in the applicable law**)." [Emphasis added]

Mitchell v. Rees, 430 F.Supp.2d 717 at 725 (M.D. Tenn., 2006).

This action is the same case or controversy currently before the court in *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW under Article III of the U.S. Constitution and 28 U.S.C. § 1367 and which this court continued to exercise jurisdiction over even during the plaintiff's appeal as this court also did during the interlocutory appeal in *Medical Supply I.*

By dismissing Medical Supply's state claims without prejudice, a determination not opposed or appealed at the time by the defendants, the trial court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the Memorandum & Order granting dismissal was a mere interim order. *Id.*

B. Court Lacked Power to Strike Plaintiff's Motion Under Rule 12(f)

The court lacks the authority or power to strike the plaintiff's motion under Rule 12(f). Rule 12(f) of the Federal Rules of Civil Procedure ("Rule 12(f)") provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). According to the language of Rule 12(f), motions to strike apply only to pleadings and not to motions. See *Knight v. United States*. 845 F. Supp. 1372, 1374 (D. Ariz. 1993); *Krass v. Thomson-CGR Med. Corp.*, 665 F. Supp. 844, 847 (N.D. Cal. 1987).

It is clearly established that the plaintiff's motion was not a pleading the court could strike:

"On its own initiative or on a party's motion, the court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter in order to avoid the time, effort, and expense necessary to litigate spurious issues. FED.R.CIV.P. 12(f); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), rev'd on other grounds, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). A "pleading" includes a complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, or third-party answer. FED.R.CIV.P. 7(a). Motions to strike are a drastic remedy, which courts generally disfavor. *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 201 (D.C.Cir.1981) (citing 5 C FED. PRAC. & PROC. 2d § 1380 at 783); *Morse v. Weingarten*, 777 F.Supp. 312, 319 (S.D.N.Y.1991); *Mirshak v. Joyce*, 652 F.Supp. 359, 370 (N.D.Ill.1987); *Schramm v. Krischell*, 84 F.R.D. 294, 299 (D.Conn.1979)."

Naegele v. Albers, 355 F.Supp.2d 129 (D.D.C., 2005).

Judge Carlos Murguia is responsible for knowing this is the controlling law of this circuit:

> "Moreover, there is no provision in the Federal Rules of Civil Procedure for motions to strike motions and memoranda; only motions to strike unsigned papers under Rule 11, third-party claims under Rule 14(a), and certain matters in pleadings under Rule 12(f) are contemplated by the Federal Rules of Civil Procedure. Motions and memoranda are not included within the definition of "pleading" under F.R.C.P. 7(a). See James Moore & Jo Desha Lucas, 2A Moore's Federal Practice p 12.21 at 12-164 (Matthew Bender, 2d ed 1991) ("a Rule 12(f) motion to strike is not appropriate with regard to affidavits, parties, or any other matter other than that contained in the actual pleadings")."

Searcy v. Social Sec. Admin.(Unpublished), 956 F.2d 278 (C.A.10 (Utah), 1993). See Exb. 4

C. Court Lacked Power to Strike Plaintiff's Motion Under Rule 37

The other source for a court's striking authority under the Federal Rules of Civil Procedure is Rule 37. Rule 37(b), Federal Rules of Civil Procedure, authorizes courts to employ various sanctions, including "striking out pleadings or parts thereof ... or rendering a judgment by default," Rule 37(b)(2)(C), when "a party ... fails to obey an order to permit or provide discovery, including an order made under subdivision (a) of this rule," Rule 37(b)(2). But, there has been no discovery in this case or controversy (the defendants have not even produced requested documents in the continuing state contract claims litigation).

In similar circumstances as this case, the US Supreme Court found a trial court could not strike a filing to punish a party. In *Hovey v. Elliott*, 167 U.S. 409, 413, 444, 17 S.Ct. 841, 843, 854, 42 L.Ed. 215 (1897), the court held that a court may not strike an answer and enter a default merely to punish a contempt of court. The contempt involved in that case was the failure to pay into the registry of the court a fund which was the subject of the litigation. The Court held that the entry of default in those circumstances violated the defendant's fourteenth amendment right to a hearing, and held further that the judgment in such a case would be "void for want of jurisdiction, and may therefore be collaterally attacked," *id.* at 444, 446-47, 17 S.Ct. at 854, 855.

Hovey v. Elliott was subsequently limited by the decision *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 349-54, 29 S.Ct. 370, 379-81, 53 L.Ed. 530 (1909). Hammond only held, however, that a court had the power to strike an answer and enter default when a party failed to produce evidence. "(T)he

generating source of the power (to strike the answer and enter default) was the right to create a presumption flowing from the failure to produce." *Id.* at 351, 29 S.Ct. at 380. See also *Norman v. Young* :

> "*Hammond* pared the *Hovey* decision by holding that a court could properly strike an answer and enter default judgment under circumstances where a party fails to produce documents as ordered. The court stated that trial courts have inherent power to presume the bad faith and untruth of an answer where the proof was suppressed provided it was essential to the disposition of the case."
>
> *Norman v. Young*, 422 F.2d 470 at 473 (10th Cir., 1970)

Here the court was not resolving a dispute over discovery which has not yet occurred in the Medical Supply Chain litigation and could make no competent judgments on facts in dispute.

III. Court's Order Striking Rule 60(b) is Void

The court's denial or striking of plaintiff's Rule 60(b) motion deprives the plaintiff of an important federal right, warranting a certificate of probable cause. See *Smith*, 50 F.3d at 821 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)).

This court's order striking the plaintiff's Rule 60(b) motion is void:

> "For a judgment to be void under Rule 60(b)(4), it must be determined that the rendering court was powerless to enter it. If found at all, voidness usually arises for lack of subject matter jurisdiction or jurisdiction over the parties. It may also arise if the court's action involves a plain usurpation of power or if the court has acted in a manner inconsistent with due process of law. 11 In the interest of finality, the concept of setting aside a judgment on voidness grounds is narrowly restricted. "

V. T. A., Inc. v. Airco, Inc., 597 F.2d 220 at 224-225 (C.A.10 (Colo.), 1979)

Judge Carlos Murguia has usurped power denied him under the Federal Rules of Civil Procedure. The plaintiff has the clearly established right to seek relief from any post judgment order including an award of attorney fees that might result from the court's previous sanctions or threatened show cause sanctions:

> "Here, the judgment against Pinckney was void. Thus, Pinckney was entitled to restitution under Section 60(b)(4). *Jordan v. Gilligan*, 500 F.2d 701, 704 (6th Cir.1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975) (a Rule 60(b) motion is proper where appellants failed to object to an award of attorney's fees and expenses until after the judgment is entered and execution proceedings were undertaken); *Vander Zee v. Karabatsos*, 683 F.2d 832 (4th Cir.1982) (garnisher entitled to restitution of payment made on void judgment)."
>
> *Watts v. Pinckney*, 752 F.2d 406 at 410 (C.A.9 (Ariz.), 1985).

IV. Court Must Vacate Strike and Show Cause Order

Judge Carlos Murguia unlawfully instructed the Kansas District Court Clerk to violate the established policies of the Kansas District Court and not to give the plaintiff notice of its present Show Cause Order through service by mail or by emailing the order to the plaintiff's email address included by the plaintiff in every filing expressly for the purpose of taking property from the plaintiff without Due Process and to violate his oath of office and become a participant in the defendants' conspiracy to artificially inflate hospital supplies through the Novation LLC cartel and to commit racketeering acts to extrinsically deprive the plaintiff of the opportunity to present hiss evidence.

Judge Carlos Murguia unlawfully instructed the Kansas District Court Clerk not to mail the plaintiff notice after the plaintiff observed that the failure to give notice of a minute order accelerating the deadline to respond to the defendants' motion to dismiss in *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW would have similarly deprived the plaintiff of his property. It is now recognized Judge Carlos Murguia unlawfully instructed the Kansas District Court Clerk to violate the established policies of the Kansas District Court and not to give the plaintiff notice of its Minute Order through service by mail or by email in *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW.

When Judge Carlos Murguia acts overtly to deny the plaintiff of Due Process whether by violating the Federal Rules of Civil Procedure and striking the plaintiff's Rule 60(b) Motion or by depriving the plaintiff of notice and an opportunity to oppose sanctions, Judge Carlos Murguia's orders are void and must be set aside as a consequence of the plaintiff's present Motion for Reconsideration.

"A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside." 7 J. Moore, Moore's Federal Practice, p 60.25 at 301 (2d ed. 1973). See also *Barkley v. Toland*:

> "Rule 60(b)(4) authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b), that the moving party show that he has a meritorious defense. Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly."
>
> *Barkley v. Toland*, 7 Kan.App.2d 625, 646 P.2d 1124 at 1127-1128 (Kan. App., 1982).

Judge Carlos Murguia's prior decisions in this litigation appear to be the product of similar unlawful conduct against the plaintiff who was sanctioned previously in the order dismissing his federal claims on conduct subsequent to *Medical Supply I* that violated clearly established law on preclusion:

> "The preclusion of claims that "could have been brought" does not include claims that arose after the original complaint was filed in the prior action, unless the plaintiff actually asserted the claim in an amended pleading, but res judicata does not bar the claim simply because the plaintiff elected not to amend his complaint. *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1357 (11th Cir. 1998). This is true even if the plaintiff discussed the facts supporting the subsequent claim in support of his claims in the prior case. *Id.* at 1358-59."

Sherrod v. School Board of Palm Beach County, No. 07-13747 (11th Cir. 4/7/2008) (11th Cir., 2008).

Judge Carlos Murguia violated the show cause notice requirement. The Rule to Show Cause requires a reasonable opportunity to respond. "Under Federal Rule of Civil Procedure 11(c), a court may, after notice and reasonable opportunity to respond, impose an "appropriate sanction" upon attorneys, law firms, or parties if the court finds they have violated subdivision (b) of that Rule. Fed.R.Civ.P. 11(c). Rule 11(b) provides that by presenting a motion to the court, the attorney is certifying that the document (1) "is not being presented for any improper purpose, such as to harass;" and (2) the legal claims made are nonfrivolous. Fed.R.Civ.P. 11(b). An attorney's conduct is evaluated objectively when it is challenged under Rule 11: the applicable standard is that of the reasonable attorney admitted to practice before this court. See *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988).

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests that the court grant the plaintiff relief from the order striking the plaintiff's Motion to reopen its Memorandum and Order dismissing the plaintiff's claims, and from the Order to Show Cause recognizing the plaintiff had standing and properly filed a motion for New Trial.

Respectfully Submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

I certify I have caused a copy to be sent via electronic case filing to the undersigned opposing counsel on 4/8/08.

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S/ Samuel K. Lipari
Samuel K. Lipari

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
(Through assignee Samuel K. Lipari)	)	
SAMUEL K. LIPARI	)	
Plaintiff,	)	
v.	)	Case No. 05-2299
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. GRUNDHOFER	)	
ANDREW CECERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY, P.C.	)	
Defendants.	)	

RULE 60(B) MOTION

Comes now the plaintiff Samuel K. Lipari in his individual capacity and as an assignee of all rights of Medical Supply Chain, Inc. a dissolved Missouri corporation and respectfully submits this motion to reopen the present action under F.R.Civ. P. Rule 60(b). The plaintiff respectfully requests that this case be reopened for the following reasons:

Statement of Facts

1. The US Supreme Court over ruled this court's controlling circuit's sufficiency of pleading standard shortly after the present memorandum and order were issued *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007).

2. This court overruled its determination of the plaintiff Samuel K. Lipari's standing as an assignee of the dissolved Medical Supply Chain, Inc. appearing *pro se* in the same matter which continues under the styled *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW.

3. This court did not consider the timely motion for reconsideration brought by Samuel K. Lipari bringing attention to elements of each claim that the complaint sufficiently stated due to the now overruled determination Samuel K. Lipari did not have standing to appear *pro se.*

Exb. 1

4. The elements of each claim and their place in the complaint are also identified in the plaintiff's appeal brief at pgs. 18-32. See Appeal Brief excerpt Statement of Facts incorporated herein as **Exb. 1**

5. The Tenth Circuit Court of Appeals declined to exercise jurisdiction over the plaintiff's appeal due to untimeliness.

6. The Memorandum & Order of this court expressly states the bias this court has against this plaintiff and his representatives for vindicating the policies of the US Congress and seeking relief from the Novation LLC hospital supply cartel.

7. The court through its order threatens to injure the plaintiff and his representation if he seeks to exercise his rights in this matter which has deprived the plaintiff of meaningful representation.

8. The court's bias against the plaintiff clearly results from the court's disbelief that the conduct complained of by the plaintiff occurred.

9. The New York Times on November 18, 2007 printed a feature story of a Novation manager who witnessed all the forms of conduct of the cartel alleged in the plaintiff's complaint. See **Exb 2.**

10. The plaintiff's Missouri state law antitrust claims will be filed in Independence, Missouri unnecessarily duplicating the present litigation if the present federal claims are not reopened.

Memorandum of Law

Rule 60(b)(6) of the Federal Rules of Civil Procedure permits a court to relieve a party from final judgment as justice demands, but such relief is limited to "extraordinary situations." See *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1533 (10th Cir. 1992). An intervening change in controlling law can provide the basis of an exception to the mandate rule. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1520 (10th Cir. 1997).

Here, the court of appeals declined to exercise jurisdiction over the appeal so the issues determined by the trial court have not been reviewed. Also this matter still is in the pretrial phase and styled as *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW. The mandate is not a bar to reopening the trial court's decision: ("the 'mandate rule,' provides that a district court must comply strictly with the mandate rendered by the reviewing court.") (quotations omitted), cert. denied, 118 S.Ct. 1034 (1998) specifically where the mandate applied to a matter *sub judice*. *Ute Indian Tribe*, 114 F.3d at 1521.

This action has never ended for *sub judice* purposes because the underlying state court claims over the same conduct have not been tried. For purposes of determining the finality of an order, it must dispose of all claims. (Ordinarily, a judgment is not final unless it disposes of all claims against all parties) *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 (Fed. 1st Cir., 2005).

The Supreme Court case most often cited for preclusion effect of a prior 12(b)(6) dismissal was a dismissal in entirety:

> "2. The Rule 12(b)(6) dismissal that was the source of the Supreme Court's oft-cited footnote in Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), stating that "[t]he dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a `judgment on the merits,'" id. at 399 n. 3, 101 S.Ct. 2424, was likewise a dismissal of "all of the actions `in their entirety,'" id. at 396, 101 S.Ct. 2424."

Avx Corp. v. Cabot Corp., 424 F.3d 28 at fn 2 (Fed. 1st Cir., 2005).

By dismissing Medical Supply's state claims without prejudice, a determination not opposed or appealed at the time by the defendants, the trial court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the Memorandum & Order granting dismissal was a mere interim order. *Id.*

The disbelief articulated by the court in its decision toward the plaintiff and his claims contradicts the publicly available securities filings on the sale of Neoforma, Inc, the repeated New York Time's articles on the national market power over hospital supplies exerted by Novation LLC and the entire monopolization of hospital supplies distributed through an electronic marketplace when during the litigation, Neoforma, Inc. was combined with General Electric's GHX, LLC. See **Exb. 3**

The disbelief articulated by the court also contradicts the testimony of Ms. Elizabeth A. Weatherman, managing director of Warburg Pincus LLC before the US Senate Judiciary Committee's Sub-committee on Antitrust (See **Exb. 4**) over the effect of Novation LLC's anticompetitive conduct in preventing healthcare technology companies from receiving venture capital, confirming the averments of the plaintiff's complaint.

The Tenth Circuit itself was overruled for imposing an impermissible heightened standard of pleading and for not treating the plaintiff's averments as truthful in the pre-discovery phase:

> "Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need

only "`give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U. S. ___, ___ (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U. S. 41, 47 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, supra, at ___ (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); *Neitzke v. Williams*, 490 U. S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974)).

Erickson v. Pardus, No. 06-7317 (U.S. 6/4/2007) (2007).

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests that the court reopen its Memorandum and Order dismissing the plaintiff's claims, granting sanctions and reinstate the plaintiff's claims.

Respectfully Submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

I certify I have sent a copy via electronic case filing to the undersigned opposing counsel and via email on 2/13/08.

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S/ Samuel K. Lipari

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BRIEF OF THE APPELLANT

STATEMENT OF THE CASE

Medical Supply, having lost a prospective injunctive relief action against a subset of alleged hospital supply co-conspirators brought the present action for damages against the same and additional co-conspirators resulting from their subsequent conduct, including conduct to interfere with Medical Supply's litigation.

STATEMENT OF FACTS

Medical Supply's complaint begins with a three-page outline that states the specific numbered sections where averments of facts supporting the required elements of Medical Supply's claims are stated.

At ¶¶107-108 aplt. app. at pgs. 36-39 Medical Supply states the controlling case law giving legal jurisdiction for Medical Supply's current action for damages after earlier failing to obtain prospective relief.

Medical Supply's current action does not seek to undo orders made in *Medical Supply I.*

No final judgment on Medical Supply's claims was entered in *Medical*

Supply I, the earlier action for prospective relief. Pg. 1952.

The trial court in *Medical Supply I* expressly dismissed supplemental Medical Supply claims related to contract and theft of trade secrets without prejudice and those claims were brought in Missouri state court by Samuel Lipari pro se and were subsequently removed by the defendants to Western District of Missouri, the court where they were previously filed as part of the current claim or controversy. Aplt. App. at 2432.

Lipari is seeking remand based on the argument removal was improper. Aplt. App. at 2511.

The trial court dismissed Medical Supply's current federal claims for failing to sufficiently plead the elements. No discovery has been granted in this or the preceding actions.

The following is an incomplete set of averments from the complaint (Aplt. App. at 36-151) that are listed relative to the subheadings identified by controlling precedent as the elements for sufficiently pleading the underlined claims:

Sherman Act § 1:

(1) a contract, combination, or conspiracy among two or more indep. actors;

Medical Supply's complaint alleges with detailed facts the formation of a cartel in the combination of the former competitors Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association and University Healthsystem Consortium for the purpose of creating Exclusionary Contracts and Loyalty Agreements to restrain trade in ¶¶178-220 pgs. 86-95.

(2) that unreasonably restrains trade;

In ¶¶ 255 –309 pgs. 86-109 Medical Supply's complaint describes the defendants' concerted refusal to deal in denying the agreed escrow accounts Medical Supply and the Independence, Missouri US Bank branch had planned to capitalize Medical Supply's entry into the hospital supply market (alleged to be group boycott a *per se* unreasonable restraint of trade).

In ¶¶ 337-369 pgs. 98-107 Medical Supply's complaint describes the defendants' concerted refusal to deal in concerted effort with the non defendant alleged co-conspirators GE And GHX, LLC to act 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 (alleged to be group boycott a *per se* unreasonable restraint of trade).

In ¶¶ 203-210, pgs. 74-76 ¶¶ 386-396 pgs. 112-113 Medical Supply's complaint describes the defendants' product tying arrangements (alleged illegal product tying arrangements a *per se* unreasonable restraint of trade).

In ¶¶ 419-422 pgs. 118-119 Medical Supply's complaint describes the defendants' plans to merge the direct competitors Neoforma with GHX LLC to monopolize all of the product market for hospital supplies delivered though electronic supply chain systems in the nation (alleged to be combination to restrain trade horizontally a *per se* unreasonable restraint of trade).

(3) is in, or substantially affects, interstate commerce

Medical Supply's complaint alleges a substantial harm to consumers, hospitals, nursing homes, state governments, national health insurance plans and thousands of lost lives from decreased access to healthcare resulting from artificially inflated prices, ¶¶59-89 pgs. 46-51.

Sherman Act § 2: Monopolization

(1) the possession of monopoly power

Medical Supply Chain's complaint at ¶¶ 380, 438 pgs. 111, 122 alleged power over a controlling market share of hospital supplies, ¶ 455 pg. 127 power through long term exclusive dealing contracts to maintain higher prices.

Medical Supply Chain's complaint at ¶¶ 36, 50, 502 alleged power to dominate early stage capitalization.

Medical Supply Chain's complaint at ¶¶ 420, 467, 502 alleged power over 80% of hospital supplies through supply chain systems by merging Neoforma with GHX LLC.

a. ability to control prices

Medical Supply Chain's complaint at ¶¶ 122, 208, 216 alleged power to extract kickbacks.

Medical Supply Chain's complaint at ¶¶ 116, 120, 129, 137, 139, 149, 152, 161, 221, 365, 380, 438, 455 alleged power to maintain higher prices.

b. exclude competition

Medical Supply Chain's complaint at ¶¶ 56, 148, 181, 208 386, 387, 434 alleged power to exclude competition.

Medical Supply Chain's complaint at ¶207 alleged power to force tying arrangements .

(2) in the relevant market

Medical Supply Chain's complaint under heading # 2 "The Relative Markets" at pg. 41 identified two relevant product markets and the upstream capitalization services market:

i. relevant products

Medical Supply's complaint alleges the first relevant product market in ¶¶ 33-36 pg. 24 as goods in the 1.8 trillion dollar hospital supply market.

Medical Supply's complaint alleges the second relevant product market in ¶¶ 37-41 pg. 24 as hospital supply products distributed through artificial intelligence enhanced supply chain systems utilizing the internet.

Medical Supply's complaint alleges the third relevant product market in ¶¶ 42-46 pg. 43 as capitalization services for new technology companies seeking to finance entry into the hospital supply market.

ii. geographic markets

Medical Supply's complaint alleges all three relevant product markets to be national; sub heading a and ¶¶ 33, 36 on pg. 42 for the first relevant market of hospital supplies and sub headings b, c and ¶¶ 46 on pg. 43 for the second and

third relevant markets of hospital supplies through electronic supply chain management systems and new healthcare technology companies respectively.

(2) the willful acquisition or maintenance of that power

Medical Supply alleges ongoing conduct to acquire and maintain monopoly power through anticompetitive practices by the defendants nationwide in the three identified relevant product markets in ¶¶ 47-56 pgs. 43-45 through a scheme to falsely state price savings to member hospitals annually to conceal increased costs from kickbacks that originated October 24,1979 and continues to the present ¶¶ 109-133 pgs.55-60; through a marketing scheme by the named defendants using commercial bribes through remunerations to healthcare systems under contracts in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b ¶¶ 134-145; through combination and conspiracies among the defendants to exclude competitors from the market for hospital supplies and the market for hospital supplies through electronic supply chain systems; through using the data obtained to enforce the cartel's increased prices among suppliers allowed in to the cartel's distribution network ¶¶ 146-151; through syndicates to make markets in initial offerings to capitalize healthcare technology companies, control which firms would be allowed into the distribution network and consequently be attractive to stock investors, to extort equity from new firms entering the hospital supply market and to force the management of Neoforma to compromise the interests of its investors, violate its prospectus and not to compete with Novation, VHA and

UHC ¶¶ 151-161 pgs.45-47; and illegal tying arrangements ¶¶ 203-210, ¶¶ 386-396.

Sherman 2 Unilateral refusal to deal ¶¶ 492-495;

Sherman Act § 2: Conspiracy to Monopolize

(1) a combination or conspiracy to monopolize;

Medical Supply alleged specific agreements in paragraphs ¶¶ 178-218 to combine forces between competitors in a conspiracy to monopolize hospital supplies, hospital supplies delivered through electronic supply chain systems and the upstream capitalization of new technology suppliers entering the market for hospital supplies.

(2) overt acts done in furtherance of the combination or conspiracy;

Medical Supply alleged specific acts in paragraphs ¶¶ 455-465 to further the conspiracy or combination.

(3) an effect upon an appreciable amount of interstate commerce;

Medical Supply alleged a staggering effect on interstate commerce from the monopolization in paragraphs ¶¶ 47-94.

(4) a specific intent to monopolize

Medical Supply alleged a specific intent to monopolize in ¶¶ 419-422 describes the planned merger between Neoforma and GHX LLC to monopolize hospital supplies distributed through electronic supply chain systems.

Section 8 of the Clayton Act, 15 U.S.C. § 19

(1) one person serves as a director of two or more corporations;

Medical Supply alleged specific information about exchange of directors. Including the in ¶176 non defendant co-conspirator (defendant Novation subsidiary ¶378) Cardinal Health, Inc.'s Robert Zollars, and joined Neoforma, Inc as CEO (¶13). In ¶ 235 Medical Supply's complaint describes the defendants' placement of defendant VHA designees on two of the seven seats on the defendant Neoforma board of directors, ¶ 368 describes US Bancorp's interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC the Defendant Novation and Premier, ¶ 372 describes how the defendants through The Piper Jaffray Companies subsidiary Piper Jaffray Ventures 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, ¶ 424 describes how The Piper Jaffray Companies exchanged directors with Novation.

(2) the combined capital of any corporation exceeds $1 million;

Medical Supply's complaint at ¶ 55 states that two of the companies the complaint alleges defendants exchanged directors with Premier and Novation negotiated contracts worth more than $30 billion, ¶376 states Novation does $36 billion dollars in sales annually, ¶372 states that Piper Jaffray Ventures had $225 million dollars under management, ¶377 states that Neoforma has $10 billion in sales and receives $ 62 Million a year from Novation. Subheading 11 states

Neoforma is worth $150 Million dollars. Subheading 11 states Piper Jaffray is worth $750 Million dollars.

(3) each corporation is engaged in whole or in part in interstate commerce;

Medical Supply's complaint alleges the defendants engage in interstate commerce ¶¶ 33, 36 and sub headings b, c and ¶ 46 sub heading f , ¶ 376.

(4) the corporations compete with one another

Medical Supply's complaint describes the defendants' elimination of competition amongst each other after exchanging directors in ¶¶ 40, 147, 378, 150, 181, 191, 376, 378, 455, 457, 458, 464, 466, 500.

18 U.S.C. § 1962(c) (RICO)

(1) participated in the conduct

Medical Supply's complaint alleges at ¶¶430, 488, 507, 573, 574, that specifically named defendants participated in the operation and management of the hospital group purchasing enterprise to artificially inflate prices paid by Medicare, Medicaid and Champus. The complaint alleges that the defendants created agreements through unlawful acts and that Shughart Thomson & Kilroy later became part of that enterprise ¶512.

(2) of an enterprise

Medical Supply's complaint alleges at ¶¶151-152, 159-161 that US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff took over Neoforma, Inc. and ran it counter to Neoforma's business plan and prospectus and against the interests of its investors for the purposes of

furthering the RICO enterpise scheme to overcharge government and private insurers for hospital supply costs.

(3) through a pattern

Medical Supply's complaint alleges more than two predicate acts in furtherance of the Defendants' enterprise. Over 14 acts are listed *infra*:

(4) of racketeering activity:

i. 18 U.S.C. § 1962(c) Hobbs Act Prohibited Extortion

Medical Supply's complaint alleges theft of trade secrets at ¶¶297, 316-322 theft of trade secrets to obstruct Medical Supply's entry into the hospital supply market in violation Hobbs Act.

Medical Supply's complaint alleges extortion at ¶¶171, 180, 198, 210, 211, 213, 215, 219, 368, 369, 399-406, 414, 416-418, 479-482-485, 488, 490.

i. 18 U.S.C. § 1962(c) Commercial Bribery

Medical Supply's complaint alleges commercial bribes ¶¶ 141-143 (HRDI scheme)184, 210, 211.

In ¶143 Medical Supply's complaint alleges 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 through Healthcare Research and Development Institute ("HRDI")

ii. 18 U.S.C. § 1962(c) Fraud based Allegations subject to Rule 9

Medical Supply pled fraudulent RICO predicate acts describing who, what, where and when misrepresentations were made and how they materially deceived to further the enterprise and injure Medical Supply in ¶ 268 Fraudulent failure to reveal US Bancorp's ownership of the treasury fund selected for escrow accounts, despite fiduciary relationship; ¶¶275, 278 Fraud pretext of USA PATRIOT ACT; and ¶¶392-396 Novation's creation and use of a fraudulent Surgical Instrument savings calculator software program, ¶ 126 Novation's inflated system wide savings report for 2005.

In ¶ 152 the complaint identified US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff benefit from Piper Jaffray's false recommendations on Neoforma that 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.

Association in Fact Enterprise

(1) union or group of individuals associated in fact although not a legal entity

The group purchasing enterprise alleged was different than the defendants' corporate and subsidiary relationships and included the companies Novation LLC, Neoforma, Inc. VHA and UHC that had partial ownership in each other, but also included US Bancorp, US Bank and the Piper Jaffray companies which were independent legally of the first set of companies. Medical Supply also alleged the enterprise to include General Electric, HRDI and Shughart Thomson & Kilroy

which had no common ownership with the other entities. See ¶¶ 141-143, 151-153, and 365-369.

(2) some type of organizational structure

Medical Supply at ¶¶147-153 describes the organizational structure of the group purchasing enterprise. Each defendant's role in the group purchasing enterprise is described throughout the complaint.

(3) operation and control of the Enterprise

Medical Supply's complaint alleges at ¶¶580-581 that Shughart Thomson & Kilroy created the plan to retaliate against Medical Supply outside of the courtroom and implemented the plan, carrying out operations to assist in accomplishing the group purchasing enterprise's objectives.

18 U.S.C. § 1962(d) (RICO) Conspiracy:

(1) independent violation of subsections (a), (b), or (c)

Medical Supply's complaint alleges the above independent violations of 18 U.S.C. § 1962(c) theft of trade secrets at ¶¶297, 316-322 theft of trade secrets to obstruct Medical Supply's entry into the hospital supply market in violation Hobbs Act. Medical Supply's complaint alleges extortion at ¶¶171, 180, 198, 210, 211, 213, 215, 219, 368, 369, 399-406, 414, 416-418, 479-482-485, 488, 490. Medical Supply's complaint alleges commercial bribes ¶¶ 141-143 (HRDI scheme)184, 210, 211.

(2) conspiracy to violate

Medical Supply's complaint alleges conspiracy to violate RICO at ¶¶ 347, 370, 374, 398, 404-407, 428, 430, 487, 549.

(3) knowing participation

Medical Supply's complaint alleges knowing participation at ¶¶ 410, 425, 427, 430, 488, and 549.

(4) at the direction of defendant co-conspirators:

Medical Supply's complaint alleges conduct directed by coconspirators at ¶¶ 405, 413, and 488.

(5) specificity what the agreement was,

Medical Supply's complaint alleges specifically the agreement or scheme- the over arching plan to illegally inflate hospital supply costs to overcharge government and private health insurers was at ¶¶ 109-130, 430, 573.

(6) who entered into the agreement,

Medical Supply's complaint alleges what persons and entities entered into the agreement at ¶¶ 141-143, 151-153, 365-369, and at ¶¶ 410, 425, 427, 430, 488, and 549.

(7) the agreement commenced,

Medical Supply's complaint alleges at ¶ 573 that "The Defendants targeted Medical Supply's founder in 1995 and targeted Medical Supply upon its incorporation in 2000" and that the coconspirators renewed their agreement commencing at ¶ 430 "...in the period from December 14, 2004 to February 3rd, 2005."

(8) what actions were taken in furtherance of it

Medical Supply's complaint alleges actions in furtherance of the conspiracy at ¶¶ 413-418, 580-592.

Medical Supply's supplemental state law claims against GE from Medical Supply II were improperly removed from Missouri 16th Circuit State Court at Independence, Missouri to the Western District of Missouri court of Hon. Judge Fernando J. Gaitan, Jr. whose disclosure stated was on the board of St. Luke's Healthcare System, a Lee's Summit Missouri hospital that co-owns the defendant VHA and the defendant Novation. See pg. 2523.

Hon. Senator Mike DeWine, the chair of the US Senate Judiciary Committee's Antitrust Subcommittee hearing that during the fourth year of antitrust hearings on the defendant Novation's anticompetitive conduct in the hospital supply market concluded Novation's abuses could be better corrected with private antitrust litigation than with new legislation ¶95 on pg.52. Senator Mike DeWine lost his re-election on November 4, 2006. The senator from Missouri, Hon. Jim Talent also lost his seat in part because of the healthcare issue. See KC Star Buzz Blog Sept 29, 2006 CAMPAIGN AD BUZZ | McCaskill criticizes Talent on Medicaid.

On December 12, 2006 Hon. Judge Fernando J. Gaitan, Jr. remanded the action back to state court for lack of federal jurisdiction. A jury trial is scheduled for October 29th, 2007.

President George Bush who has observed that there is an absence of competition in healthcare (¶47 on pg.43) came to St. Luke's Health System in Lee's Summit, Missouri with Secretary of Health and Human Services Michael Leavitt, two days after the State of the Union speech to personally initiate the administration's plan to make healthcare affordable. Office of the President, January 25, 2007 press release.

Governor Matt Blunt described in the complaint ¶85 at pg. 50 as having to cut Missouri citizens from Medicaid because of hospital supply cost increases, made healthcare the central priority of his State of the State speech but on January 25th chose to speak about healthcare at other Missouri communities rather than appear with President George Bush in Lee's Summit. Office of the President, January 25, 2007 press release Comments of Secretary Leavitt.

On the same day, the New York Times reported that the Attorney General for the State of Connecticut, Richard Blumenthal reached a settlement with H.R.D.I. that Medical Supply identified as a co-conspirator but did not name as a defendant over the commercial bribes given to hospital administrators ¶¶ 141-143 pg. 61. H.R.D.I. agreed to end operations as a for profit company. "Group Settles Health Sales Conflict Case", NY Times Jan. 25, 2007

US Bancorp and US Bank NA removed the supplemental state claims in the present action to the Western District of Missouri court of Hon. Judge Fernando J. Gaitan, Jr.. Medical Supply filed a timely motion for remand alleging improper removal which is awaiting a decision. See pg. 2511.

SUMMARY OF ARGUMENTS

Medical Supply and Samuel Lipari argue that earlier litigation prior to the breach of the contracts with US Bank had no claim preclusion effect on the current claims for damages under clearly established Tenth Circuit applications of Restatement (Second), Judgments § 24 Transactional Analysis to pre-breach litigation. Medical Supply and Samuel Lipari also argue each required element of each count was pled and that Samuel Lipari had standing to seek reconsideration pro se as the assignee of a dissolved Missouri corporation.

I. Whether The Trial Court Erred By Failing To Apply Transactional Analysis And Lawlor To Determine If Medical Supply And Lipari's Claims Were Precluded By *Medical Supply I*.

Standard of Review. "We apply a de novo standard of review to questions of res judicata." *May v. Parker-Abbott Transfer and Storage, Inc.*, 899 F.2d 1007 (C.A.10 (Colo.), 1990).

At page 20 of the trial court Memorandum and Order pg. 1508, the trial court states Medical Supply's claims summarily as causes of action by statute number without examining the different transactions the claims are based on.

The clear error of the court is strikingly revealed in the court's concise recitation of ***causes of action*** the court had dismissed in the earlier *Medical Supply I* action simply because they are again ***causes of action*** in the present complaint. The court was mistaken over the third element of Claim Preclusion that while still using the language "cause of action" has been refined in the Tenth Circuit to reflect The Restatement (Second), Judgments § 24 and cannot be satisfied unless

The New York Times

November 18, 2007

Blowing The Whistle, Many Times

By MARY WILLIAMS WALSH

WHEN Cynthia Fitzgerald started out in pharmaceutical sales 20 years ago, she received ample training on the right and wrong ways to sell medical products. Right was selling on the merits. Wrong was luring customers with perks and freebies. It was O.K. to buy doctors lunch or dinner, for example, but tempting them with lavish gifts was taboo.

"There were pretty stringent rules back then," recalls Ms. Fitzgerald, now 50 and a grandmother living in Dallas. "It was really clinically driven."

But she says those early lessons didn't serve her so well when she went to work on the other side of the table in 1998, in health care purchasing. Going by the book, and expecting her colleagues and employer to do the same, cost her a job, most of her friendships and several years of her life, she says.

Eventually, Ms. Fitzgerald decided to file what could become one of the largest whistle-blower lawsuits on record. And her case, which names more than a dozen companies as defendants -- some with well-known names like Johnson & Johnson, Becton Dickinson and Merck -- offers a window onto a little-known world, where billions of dollars' worth of medical products are sold each year to institutional buyers like hospitals.

The suit, filed in 2003 in federal court in Dallas, and unsealed this year, argues that improper sales practices, together with erroneous accounting, are invisibly draining millions of dollars out of vital public programs like Medicare through overcharges or unauthorized uses. While whistle-blower cases typically involve, at most, a handful of companies, Ms. Fitzgerald's alleges systemic fraud across a whole network of companies and more than 7,000 health care institutions.

Her contentions are set against a complex backdrop: spiraling health care costs and debates about Medicare. State and federal authorities in Texas are investigating Ms. Fitzgerald's allegations, and any decision by them to join her case may give the suit momentum in the courts. But her corporate adversaries dispute her accusations.

"Cynthia Fitzgerald is rehashing old rumors and suspicions," said Jody Hatcher, senior vice president of Novation, the company in Irving, Tex., at the heart of her lawsuit. "These allegations have been examined in depth by a variety of different authorities, and no one has proven any of them to be true. The simple fact is that Ms. Fitzgerald's allegations are false."

For her part, Ms. Fitzgerald bristles at the idea that her lawsuit is without merit or, in response to common critiques of whistle-blower cases, about easy money. "I thought they were really nice people," she says. "I was so grateful and thankful to have a steady income again. I wouldn't have rocked the boat for any small thing to save my life."

So why did she rock the boat?

"It was wrong," she says of the behavior she asserts she has witnessed. "And I knew it was wrong."

NINE years ago, while still recovering from a financially ruinous divorce, Ms. Fitzgerald decided to move to Dallas from her native Omaha. She knew almost no one in her new city. She graduated from the University of Nebraska 13 years earlier with a communications degree, then worked in sales and marketing in the food, pharmaceutical and insurance industries.

When she moved to Texas, she says, "It was pretty bleak." She adds, "I went from having Thanksgiving dinners in a house with my family to living in an apartment that was so small that every time I turned around I ran into myself."

More than anything, she said, she wanted stability -- a steady job at a company where she could climb the ladder and work until she retired. After months of looking, she joined Novation. The company helped thousands of hospitals, rehabilitation centers, home health agencies and doctors' offices nationwide negotiate

prices for medical supplies -- a wide range of items as diverse as saline solution and huge imaging machines.

Novation assigned her a portfolio of medical and surgical products for which its member hospitals were spending an estimated $240 million a year: rubber gloves, surgical tools and so forth. The company sent her to a training class where, among other things, she says she learned once again about ethical purchasing procedures.

"I cannot overemphasize in the beginning how excited I was and really feeling blessed," she says. "I felt like I got a second chance. Even though it was on the other side of sales, it was still sales."

But as she settled in, she says, not everything in her new workplace squared with what she had been told in training, a situation that came to a head one day in 1998, when she was still just a few months into the job. According to her complaint, she and her boss met with a Johnson & Johnson sales team that was vying for an exclusive, three-year contract to sell $130 million worth of IV equipment to Novation's clients. It was a valuable contract, and Ms. Fitzgerald had the power to decide who would get it.

The bids were already in. Ms. Fitzgerald understood this to be a mandatory "silent period," when she was not supposed to meet privately with any of the bidding companies. All communications with vendors were supposed to be in writing, and if Ms. Fitzgerald disclosed any information to any bidder, she was required to tell them all.

In a deposition in a separate lawsuit filed against Novation by a medical supplier, a former Novation executive, John M. Burks, did not dispute that the Johnson & Johnson meeting took place. But he said that Ms. Fitzgerald misunderstood the rules, and that Novation permitted such meetings at that point. (When reached for comment, Mr. Burks said his views haven't changed since his deposition.)

Ms. Fitzgerald says she had a very different understanding of the meeting. Discussions behind closed doors, tipping off a company on how to structure a winning bid, naming her price -- this could be a felony, she recalls thinking :bid-rigging.

"How much will it take to get the contract?" she says one of the salesmen asked her, according to her complaint. "Others before you have done it."

She says she chose not to do so. "Oh, no!" she recalls blurting out, bringing the meeting to a halt. "This is illegal, and I don't look good in orange."

A spokesman for Johnson & Johnson, Marc Monseau, said, "We vigorously deny the allegations and will defend ourselves against them in court."

Ms. Fitzgerald did not stop there. After the salesmen left, she says, she confronted her boss in the women's room. Shouldn't they report the incident to the legal department? Hadn't they just been told that someone at Novation had taken a bribe?

Her boss offered no satisfaction, Ms. Fitzgerald says in her complaint. Concerned about the integrity of a bidding process she was responsible for, she began pursuing the matter herself.

OVER the following weeks, she says, she scoured her portfolio for contracting anomalies. She told colleagues about what had happened; some confided that similar things had happened to them. Others left anonymous notes on her desk. She began to think that Johnson & Johnson should be excluded from the bidding as a penalty for what she considered a serious ethical breach.

She says she took her concerns to Novation's legal department, human resources and even the company's president. In his deposition, Mr. Burks confirmed her activities, but called her "an employee who doesn't simply understand that when a supplier asks an inappropriate question, you simply say no and move on."

Ms. Fitzgerald says she passed over Johnson & Johnson for the IV contract, awarding it instead to Becton Dickinson. She said Becton had a superior bid, which provided a number of opportunities for Novation and member hospitals to be rewarded with rebates and other payments.

Becton said it believes that Ms. Fitzgerald's accusations of improprieties in how contracts were awarded are baseless and that her complaint is "without merit."

She turned to the next contract, for trash bags -- and the same thing started to happen, according to her complaint. When Ms. Fitzgerald told representatives of one vendor, Heritage Bag, that she was planning to put that contract up for bid, she says, one representative told her at dinner with several people that he would

"take care of" her. Heritage Bag did not respond to repeated requests for an interview.

Ms. Fitzgerald asked her supervisor if she could be taken off the trash-bag contract. Her supervisor agreed, but then gave her a negative performance review. It said that among other things, she was rude, unable to meet deadlines and kept trying to "overhaul" parts of Novation that were outside her job description, according to a copy of the review. Ms. Fitzgerald refused to sign it. Relations deteriorated, and 15 days later, she was fired for "nonperformance of duties that were clearly identified as part of her job description," according to Mr. Burks's deposition.

Ms. Fitzgerald says she believes she was shown the door because she had stumbled onto illegal behavior involving hundreds of millions of dollars and had refused to look the other way.

"It's hilarious how stupid I was," she says. "I knew that it was wrong, but I thought that if I just went to the right people, they would correct it. I was very naïve. I didn't realize that it was systemic."

The False Claims Act is a federal law that allows private individuals to sue on behalf of the United States if they believe that they have inside knowledge of a fraud. Their lawsuits stay under court seal at first, to give federal and state investigators time to look into the accusations quietly and to decide whether to join the case. If the government recovers money, the whistle-blower gets 15 to 30 percent of the amount.

Though enacted to fight war profiteering, the False Claims Act has become a potent weapon in the battle against escalating health care costs. Of the 20 largest False Claims Act recoveries listed on the Web site of Taxpayers Against Fraud, a group that supports whistle-blowers and their lawyers, 19 involved health care companies. (The other involved municipal bonds.)

The size of recoveries has soared in recent years. All told, the government has recovered more than $20 billion since 1986, when the False Claims Act was last amended, with $5 billion of it in the last two years.

The biggest single whistle-blower settlement to date was the $900 million that Tenet Healthcare, a hospital company, paid last year to settle accusations of overbilling the Medicare program. That settlement is dwarfed by the $1.7 billion that HCA, another big hospital chain, paid between 2000 and 2003 to settle a number of fraud suits.

Companies and their lawyers say the growing caseload is a sign that the False Claims Act, with its promise of a payout for whistle-blowers, is motivating disgruntled employees to file nuisance suits that can tie up law-abiding companies for years.

Proponents of the law say that $20 billion of recoveries is proof that contracting fraud is real, and that offering whistle-blowers a percentage is a good way to compensate them for the near-certainty that they will be fired.

"Protection for people who are willing to risk their lives and livelihoods, their careers and reputations, is critical," said Richard Blumenthal, the attorney general of Connecticut, in Senate hearings last year.

As Ms. Fitzgerald sees it, Medicare's losses grow out of the way that Novation and the vendor companies negotiate contracts.

When companies submitted bids to Novation, she recalled, they did not typically quote a simple price. Rather, they proposed package deals with opportunities for rebates, frequent-buyer discounts, "loyalty" rewards and baskets of products tied together. They might throw in free training for hospital staff, chances to participate in clinical trials, shares of stock, project sponsorships, sometimes even cash. The vendors also paid Novation for administering their contracts and for other services.

Ms. Fitzgerald says her compensation rewarded her for closing deals that maximized these payments -- not for simply finding the lowest bid. Vendors preferred to combine higher upfront prices with rebates or other cash-back rewards, she says, because that obscured the net unit price of their products, making it harder for hospitals to comparison-shop.

But this also allowed millions of dollars to become "lost" in the system, she says. Novation passed on many of the payments to hospitals, she says, but not in a way that hospitals could accurately report them to the government. Thus they ended up overstating their supply costs, she says, and getting larger Medicare reimbursements than they were entitled to. The lawsuit does not contend that the hospitals did this deliberately, but that Novation knew it was happening.

A 2005 audit by Daniel R. Levinson, the inspector general of the federal Department of Health and Human Services, appears to bear her out. After studying the finances of three unnamed purchasing consortiums in

response to repeated questions from Congress, federal agencies and the news media about their business practices, Mr. Levinson reported that their member hospitals "did not fully account" for such flows of money. In just five years, the discrepancies ran into the hundreds of millions of dollars.

Novation said that there was no evidence that any underreporting was intentional. It cited the complexity of how hospitals are required to report costs and said it believed that hospitals met all legal requirements in how they reported Novation's distributions to them.

In the past, a prosecutor's decision whether or not to join a whistle-blower lawsuit could be a make-or-break moment. If the government became involved, defendants often settled right away. The announcement usually coincided with the unsealing of the whistle-blower's complaint.

But now that the lawsuits have become so complex, and investigations so slow, judges have become impatient with sealed lawsuits moldering in their courts. Some are ordering the complaints unsealed before investigators finish examining the claims.

That is what happened in Ms. Fitzgerald's case. Last May, a federal judge in Dallas unsealed her suit, which had languished for four years. The assistant United States attorney for the Northern District of Texas , Sean R. McKenna, and the Texas attorney general, Greg Abbott, notified the court that they were still investigating and would decide later whether to join the case.

THAT leaves Ms. Fitzgerald on her own for now. After Novation fired her, she was contractually forbidden from disclosing information about the company or filing lawsuits against it for three years, she says. Once that period lapsed, she gradually became aware she was eligible to file a suit under the False Claims Act. That led her to Phillips & Cohen, a law firm involved in whistle-blower cases.

Her firing, meanwhile, left her unable to get another job in her field; word of her demise at Novation seemed to precede her wherever she went. Former colleagues stopped speaking to her. "I was probably at one of the lowest points in my life," she says.

She eventually founded her own business, Dimension Medical Supply. But she regrets the contentious departure from Novation, a company that made her feel as if she "was coming home" when it hired her. Deciding to speak out about the company's dealings was difficult, she says.

"I warred with myself," she says. "There weren't any blacks in upper management. I knew that there were opportunities there, and I could rise to those opportunities."

She was tempted, she says, to follow the status quo at Novation. And a little voice in her head kept saying, "Why can't you just take the money and run? Buck up, girl, this is the system. You can take it and go places."

In the end, the place she decided to go was court.

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News/Media » 2006 Press Releases

Global Healthcare Exchange Completes Acquisition of Neoforma

WESTMINSTER, Colo. — March 6, 2006 — Global Healthcare Exchange, LLC (GHX) has completed the acquisition of Neoforma, Inc. (NASDAQ: NEOF), having satisfied all of the conditions outlined in the definitive merger agreement announced in October, 2005. The merger officially closed on March 3, 2006. Immediately prio to the merger, both VHA Inc. (VHA) and University HealthSystem Consortium (UHC), which collectively owned th majority of Neoforma's outstanding shares, exchanged a portion of their Neoforma shares for equity positions wit GHX. This brings the number of owners of GHX to 20 and further expands the breadth and balance of the ownership base, which includes representatives of the entire healthcare supply chain.

GHX will immediately begin migrating Neoforma customers to the GHX exchange, while ensuring all customers of both exchanges continue to have access to existing functionality. The merger adds a significant number of new customers to GHX, bringing the total participants to approximately 2500 acute care hospitals, 800 non-acute facilities and 200 supplier organizations.

The merger is anticipated to drive opportunities for greater customer value by enhancing existing services. For example, combining Neoforma Data Management Solutions with GHX Content Center will create advanced data services expected to improve business processes, such as procurement and contracting. Additionally, GHX will continue to provide business intelligence services through Healthcare Products Information Services (HPIS). Thes include market share data, as well as contract management and sales analysis tools, for healthcare suppliers.

Prior to the merger, both GHX and Neoforma offered similar, yet complementary, products and services designed to improve efficiencies, accuracy and collaboration. "By combining the two companies, we will deliver a comprehensive suite of products and services to a greater percentage of the healthcare supply chain," says Michael Mahoney, chief executive officer of GHX. "Eliminating redundant operations will enable GHX to devote more resources to technology development and consultation that help our customers improve current business processes."

To meet the needs of its expanded customer base, GHX is hiring an additional 150 employees, including approximately 80 Neoforma employees who have accepted full-time positions with GHX.

GHX will continue to be headquartered in Westminster, Colo., with North American operations in Nashville, Tenn., San Jose, Calif., Ambler, Pa. and Toronto, Canada. Supply chain management services from GHX will be open to all participants in the healthcare supply chain, regardless of size, GPO affiliation or for-profit status.

GHX has also executed a separate outsourcing agreement with VHA, UHC and Novation, LLC to provide supply chain management products and services for VHA and UHC hospital members. Novation is the contracting arm of VHA and UHC.

About Global Healthcare Exchange
Global Healthcare Exchange (GHX) provides an open and neutral electronic trading exchange, as well as complementary products and services, designed to improve the procurement-to-payment process in the healthcare supply chain. Service offerings include:

- Exchange services that support trading partner connectivity and provide electronic transaction sets, order validation and reporting tools
- Content services which utilize the GHX AllSource® product content repository to build the foundation for data synchronization and advanced content services
- Contract services that allow users to maximize contract utilization
- Procurement services that enable automation of the requisitioning process
- Business Intelligence reports designed to provide strategic decision-making data

Through these services, healthcare providers and suppliers can improve efficiencies, automate processes and reduce operating expenses.

Ex

Equity owners of GHX are Johnson & Johnson Health Care Systems Inc.; GE Healthcare; Baxter Healthcare Corp.; Medtronic USA, Inc.; Abbott Exchange, Inc.; Siemens; Becton, Dickinson & Co.; Boston Scientific Corp.; Tyco Healthcare Group, LP; Guidant Corp.; C.R. Bard, Inc.; AmerisourceBergen Corp.; Cardinal Health, Inc.; Fisher Scientific International, Inc.; McKesson Corp.; B Braun Medical Inc.; Premier, Inc.; HCA; VHA Inc. and University HealthSystem Consortium. For more information, visit www.ghx.com.

Posted on Monday, March 06, 2006
Posted by host

Return

Testimony of
Ms. Elizabeth A. Weatherman
Managing Director
Warburg Pincus, LLC

April 30, 2002

PRINTABLE VERSION

Good Morning. My name is Bess Weatherman and I am Vice Chair of the Medical Group of the National Venture Capital Association. I am here today on behalf of the more than 475 professional venture capital and private equity firms dedicated to stimulating the flow of equity capital to emerging growth and developing companies. Our members currently invest more than $36 billion per year in such companies and have invested nearly $210 billion in aggregate over the past 20 years, funding nearly all of the most important technological breakthroughs of that period. A substantial number of these firms invest heavily in the life sciences field that includes biotechnology, drug development, medical devices and therapeutics and health care services. In 2001, the venture capital community invested more than $4.2 billion, or more than 10% of all venture investing last year, in these medical industries.

Venture investment in the life sciences has given new hope to people who suffer maladies across virtually the entire spectrum of diseases and afflictions. In fact, without patient investment from venture capitalists, the biotechnology and medical technology industry, for example, would be virtually nonexistent. Almost every biotechnology product that has been approved for sale by the Food and Drug Administration has been financed by the venture capital community. The venture community also provided financing for many of the medical devices and therapeutics we take for granted today, including the entire interventional cardiology or stent industry. These now standard medical treatments allow patients to lead longer and healthier lives. The venture community's dedication to the medical technology industry exists despite heavy government regulation and the longer-term investing strategy required for successful development of new medical technology, even when compared to other emerging market investments.

Few can argue that what these companies do is critically important to the well being of the American public and the world at large. However, the results of the debate we are holding today on reforming group purchasing organizations to ensure a competitive and open market for all medical industry producers will directly affect the future of emerging life science companies and in turn impact the availability of the important medical products these companies are

developing.

Let me be clear, 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. Permitting this innovation stifling practice is unnecessary and counter to what we believe should be a fundamental role of the government: enhancing health by making new or improved products widely available as quickly and efficiently as possible.

THE ROLE OF VENTURE CAPITAL IN IMPROVING AMERICA'S HEALTH

Venture capital plays an integral, often-unsung role in the development of medical technology. In fact, venture capital is the single most important source of early stage financing to new and emerging health-focused companies. During the past 30 years, the venture community financed 1,324 innovative medical companies with more than $20 billion in start up capital. These companies now have sales of tens of billions of dollars, employ more than 2 million people and most importantly, have revolutionized medical care for nearly all Americans. It is fair to say that virtually every U.S. citizen born during the last thirty years has benefited or will benefit, in his or her lifetime, personally and significantly from one or more of the drugs or medical devices developed with U.S. venture capital. These include MR imaging, ultrasound, angioplasty / stents, implantable defibrillators, spinal implants, pulse oximetry and drugs for cancer, heart attacks, and anemia, to name a very few. It is also important to note that the real medical impact of venture investments is also significantly greater than even these numbers would suggest, since our investments are normally focused only on ground breaking or revolutionary technology by the very nature of our investment selection process. Many of these companies' names are now synonymous with progressive medical technology including Guidant, Amgen, and Genentech.

WHY MEDICAL DEVICE AND BIOTECHNOLOGY COMPANIES NEED VENTURE CAPITAL

Medical device and biotechnology companies need venture capital because their capital needs are so large, their time to market so long – due in large part to regulatory compliance—and their risks so high. There are enormous entrepreneurial risks in bringing medical products to market—risks that include proving product safety and efficacy, securing patent protection, securing a good distribution channel, facing entrenched competition, and possibly running out of money before the product can reach a significant portion of the market – to name just a few. Such characteristics make these young companies ineligible for bank financing or other sources of private capital.

It is important to note that venture capitalists will accept these legitimate risks

that traditional financial institutions and government supported programs cannot — it's part of our function. But, VCs do not, cannot, and will not accept unnecessary and unfair risks. We need to provide our investors with justification that substantial capital investment can result in successful product development and financial gain. Thus, we have no interest in products that can be blocked from fairly competing for a share of a market, even after a long, expensive and risky product development cycle. Simply put, venture capitalists will increasingly stay away from many investments in long-term, high-risk medical breakthroughs if the government continues to allow anticompetitive business practices to artificially limit access to medical market.

STANDARD BUSINESS PRATICES BY GROUP PURCHASING ORGANIZATIONS AFFECT VENTURE CAPITAL INVESTMENT EMERGING MEDICAL COMPANIES, AND PATIENT CARE

GPO roadblocks have greatly diminished the attractiveness of medical device and biotechnology investments because they reduce the confidence of venture capitalists that they will have fair access to medical markets and thereby will achieve a return on very risky investments. To put this in perspective, between 1990 and 1994 at least 22% of all companies financed by venture capitalists were medical device or biotechnology companies, with medical device companies accounting for approximately 9% and biotechnology companies accounting for 13% of the 22%. By comparison, during the period 1999 to 2001 these companies made up only 8.9% of all companies receiving venture capital financing. Of this 8.9%, device companies received 5.0% and biotechnology companies receive 3.9%.

These numbers dropped dramatically from 1999 – 2001 when 9.8%, 7.1% and 11% respectively of the companies funded were medical device or biotechnology companies. For these years, medical device companies dropped more, making up only 5.5%, 3.9% and 6.2% of the combined totals.

One of the reasons for this relative decline new investment is a lack of market access brought about by the business practices and the increasing power of GPOs. GPO practices such as contract exclusivity, substantial fee structures, and product bundling, if allowed to continue, will so constrict potential markets that product segments where these practices are widely adopted will simply not be considered for venture capital backing. This investment drain will result in a stagnation of product innovation and stymie improved patient care across these product sectors.

The arguments made by GPOs about the "administrative" savings they provide to members could be applied to every single sector of the economy and are virtually identical to the arguments made by the anticompetitive "trusts" of the early 1900s, which led to the landmark Sherman Antitrust laws. The idea that the GPOs "save" money for hospitals by extracting larger price discounts from producers than they could achieve by themselves, is unprovable and most likely wrong – unprovable because no one knows what the "real" market price would

be in a truly competitive market among producers (in the absence of GPO gatekeeping). In fact, in product areas where GPOs collude with producers who already have virtual monopolies, the "discounted" price that the GPOs claim to achieve is almost certainly well above what the market price would be in an open and competitive marketplace. The impact of the GPOs in healthcare is equally anticompetitive and stifling of innovation, and there is no special reason why the healthcare system should be the only sector of the economy where such practices are tolerated.

The venture capital industry exists, in part, because the antitrust philosophy of the United States prevents entrenched, unmoveable competitors from abusing their market power to unfairly restrain competition. By their very nature, virtually every company we finance is a "revolutionary" and a threat to the established order. The technological innovations they develop, whether in computers, electronics, software, telecommunications or medicine, are inevitably threats to some existing larger competitor who will use all means at its disposal to defend itself. It is hard enough to overcome that kind of power in an open and competitive market place. It is nearly impossible when monopolistic producers collude with monopsonistic buyers such as GPO to suppress competition. This is precisely what is now happening in healthcare.

As the GPOs become more powerful and add more technologically sophisticated products to their portfolios (instead of the more commodity-like products such as rubber gloves, syringes and cotton swabs that they originally focused on) the adverse impact on innovation will increase. There will be fewer and fewer areas in which venture capital will invest. The current trend is not encouraging.

The venture capital community believes that collusion between GPOs and providers of medical products to limit market access to competitors is extremely anticompetitive and not justified by any peculiarities of the medical sector. On the contrary, while the government would not tolerate such practices in any other sector of the economy, for it to tolerate (and even encourage) this situation in medicine is disturbing, because one of the clear effects of these practices is to impede innovation. In medicine, in contrast to any other sector, reduced innovation ultimately affects patients' lives and health. There is no doubt that patients' lives have been lost and other harm done as a result of GPO's activities. In light of this, the special exemptions from the normal operation of the antitrust laws granted to the GPOs should be viewed with even greater, not less skepticism.

Conclusion

The venture capital community believes that there are enormous opportunities to continue to improve the health of the American public through the development and application of new technology. These efforts are already very time consuming, expensive and risky, particularly given recent increases and uncertainties in the U.S. regulatory environment. Despite this, the venture

capital community is committed to further investment in U.S. healthcare technology. We welcome open and competitive marketplaces, and we believe that competition has served the American public well by stimulating fair prices and vast technological innovation. The increasing power of GPOs, and their collusive and anticompetitive activities with larger medical companies, threatens to undermine the open and competitive markets that have produced such obvious benefits for the American public, not only in healthcare, but also across the entire economy. We would strongly encourage the committee to consider legislation to correct these abuses and again open these markets to fair and vigorous competition. Thank you.

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PRINTABLE VERSION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
(Through assignee Samuel K. Lipari)	)
SAMUEL K. LIPARI	)
Plaintiff,	)
v.	) Case No. 05-2299
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. GRUNDHOFER	)
ANDREW CECERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY, P.C.	)
Defendants.	)

PLAINTIFF'S RULE 60(B) MOTION RESPONSE MEMORANDUM

Comes now the plaintiff Samuel K. Lipari in his individual capacity and as an assignee of all rights of Medical Supply Chain, Inc. a dissolved Missouri corporation and respectfully submits this memorandum in response to the defendants' opposition to reopen the present action under F.R.Civ. P. Rule 60(b). The plaintiff respectfully requests that this case be reopened for the following reasons:

Memorandum

1.The defendants' counsel have by their response to the Rule 60b motion unanimously elected to litigate the plaintiffs' state antitrust claims against the defendants and additional named Missouri hospital VHA and Novation, LLC co-conspirators in the 16th Circuit at Independence, Missouri action *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217.

2. The Missouri state law claims were expressly dismissed without prejudice by this court and not opposed by the defendants or counter appealed. *Lipari v. Novation LLC et al;* 0816-CV04217 also includes subsequent antitrust conduct by the defendants including acts as recently as February 2008.

3. This court's memorandum and order granted a dismissal the plaintiff opposed citing US Supreme Court authority in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 75 S.Ct. 865, 99 L.Ed.

Exb. 2

1122 supporting the plaintiff's right to bring new claims based on subsequent conduct of previous defendants:

> *"Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122,. In *Lawlor* five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged."

Engelhardt, v.Bell & Howell Co., 327 F.2d 30 at ¶ 42 (8th Cir, 1964).

4. This court's dismissal of the plaintiff's case contradicted the state of antitrust conspiracy pleading articulated by the US Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 U.S. 2197, 127 S. Ct. 1955 (2007) on May 21, 2007:

> "In *Twombly*, the Supreme Court held that the plaintiffs failed to state a claim under § 1 of the Sherman Antitrust Act. **The plaintiffs had alleged that defendants had engaged in parallel conduct, but had pleaded no set of facts making it plausible that such conduct was the product of a conspiracy**. In reaching this decision, the Supreme Court rejected language that long had formed part of the Rule 12(b)(6) standard, namely the statement *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46." [emphasis added]

Phillips v. County of Allegheny, No. 06-2869 at page 7 (3rd Cir. 2/5/2008) (3rd Cir., 2008).

5. In an act of clear error by Hon. Judge Carlos Murguia's memorandum and order sanctioned the plaintiff for pleading the additional facts necessary to show the antitrust conspiracy was plausible.

6. The intervening change in controlling law for the Tenth Circuit and this court was *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007) and *Erickson* concerns the discussion of plausibility in *Twombly*:

> "What makes *Twombly's* impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new "plausibility" paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting Conley's "no set of facts" language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. Therefore, our review of how *Twombly* altered review of Rule 12(b)(6) cases must begin by recognizing the § 1 antitrust context in which it was decided. See e.g., *Twombly*, 127 S. Ct. at 1963 ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.")."

Phillips v. County of Allegheny, No. 06-2869 at page 7-8 (3rd Cir. 2/5/2008) (3rd Cir., 2008).

7. The Eight Circuit has adopted the plausibility change after Erickson as a necessity to plead the sufficient additional facts as the plaintiff's complaint was sanctioned for:

> "The plaintiffs need not provide specific facts in support of their allegations, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam), but they must include sufficient factual information to provide the "grounds" on which the claim rests, and to raise a right to relief above a speculative level. *Twombly*, 127 S. Ct. at 1964-65 & n.3."

Schaaf v. Residential Funding Corporation, No. 06-3694 at pg 5-6 (8th Cir. 2/22/2008) (8th Cir., 2008).

8. The Tenth Circuit described the effect of *Twombly* in *Ton Services*:

> "Prior to the Supreme Court's recent decision *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007), we reviewed the sufficiency of a complaint de novo and upheld dismissal only when it appeared the plaintiff could prove no set of facts in support of the claims that would entitle him to relief. *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924 (10th Cir.1994). In *Bell Atlantic*, the Supreme Court articulated a new "plausibility" standard under which a complaint must include "enough facts to state a claim to relief that is plausible on its face." 127 S.Ct. at 194; *Alvarado v. KOB-TV, LLC*, ___ F.3d ___, ___, 2007 WL 2019752 at *3 (10th Cir. July 13, 2007) ("We look for plausibility in th[e] complaint.").13 Under either standard, all well-pleaded factual allegations are accepted as true and construed in the light most favorable to the plaintiff. *Alvarado*, 2007 WL 2019752 at *3."

Ton Services, Inc. v. Qwest Corp., 493 F.3d 1225 at 1235-1236 (10th Cir., 2007).

9. The court also described the effect of Twombly and Erickson in more detail along with the decision by this circuit to change its Rule 12 b6 pleading standard in footnote 2 to *Alvarado v. Kob-Tv, L.L.C.*, 493 F.3d 1210 (10th Cir., 2007).

> "2. In *Bell Atlantic*, the Supreme Court stated that the old standard, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" is "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atlantic Corp.*, 127 S.Ct. at 1968-69. Although the Supreme Court was not clear on the articulation of the proper standard for a Rule 12(b)(6) dismissal, its opinion in Bell Atlantic and its subsequent opinion in *Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007), suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief. See *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir.2007) (considering Bell Atlantic and Erickson and concluding that a "plausibility" standard was what the Supreme Court intended).
>
> Although we now restate our Rule 12(b)(6) standard in order to bring it into compliance with Bell Atlantic, we emphasize that in this case our decision would be the same regardless of whether we used the old "no set of facts" standard, see, e.g., *David*, 101 F.3d at 1352, or adopt either a plausibility standard or a requirement that the complaint include factual allegations sufficient to "raise a right to relief above the speculative level." Bell Atlantic Corp., 127 S.Ct. at 1965."

Alvarado v. Kob-Tv, L.L.C., 493 F.3d 1210 (10th Cir., 2007).

10. The new Rule12(b)(6) standard which this court's memorandum and order conflicts with is precisely this plausibility. The memorandum and order faults the plaintiff's complaint as unbelievable and frivolous. The plaintiff's claims against new defendants and co-conspirators of US Bank and US Bancorp were based on subsequent conduct and separate and later transactions and therefore were plausible under *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 75 S.Ct. 865, 99 L.Ed. 1122. This court's memorandum and order has been contradicted by the intervening change of law in *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007), fleshing out the plausibility standard of *Bell Atlantic Corp. v. Twombly*,

127 U.S. 2197, 127 S. Ct. 1955 (2007) decided two weeks earlier on May 21, 2007 and directly over ruling this Circuit.

11. The plaintiff's action continues in the form of contract claims against US Bank and US Bancorp in this court as *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW and continues in the form of state law antitrust claims in 16th Circuit at Independence, Missouri action *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217. There has not been a dismissal of actions in their entirety as pointed out in *Avx Corp. v. Cabot Corp.*, 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). Therefore the matter *sub judice* has not reached finality permitting relief due to intervening change in controlling law. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1521 (10th Cir. 1997).

12. The plaintiff appears for himself as assignee, the Tenth Circuit order declining jurisdiction for lack of timeliness stated the plaintiff who is not an attorney does not have to make a separate entry of appearance, *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW and *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217 will likely result in discovery and a jury determining what the defendants did to deprive the petitioner of his original attorney and to deprive the plaintiff of unimpeded representation by other attorneys.

13. A determination to deny this motion to reopen based on failing to recognize the plaintiff's pro se appearance as assignee would instantly result in a cause of action to accrue to the plaintiff for the value of the federal claims against the defendants in this action.

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests that the court reopen its Memorandum and Order dismissing the plaintiff's claims, granting sanctions and reinstate the plaintiff's claims.

Respectfully Submitted,

S/ Samuel K. Lipari

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Pro se

CERTIFICATE OF SERVICE

I certify I have caused a copy to be sent via electronic case filing to the undersigned opposing counsel on 2/26/08.

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S/ Samuel K. Lipari

Samuel K. Lipari

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**No. 05-2299-CM**
	)	
NEOFORMA, INC., et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

The history of this case is lengthy and complicated. It has been discussed in detail in previous orders of this court and by the Tenth Circuit (Docs. 78, 104, 118). The case resurfaces before the court on Mr. Lipari's "Rule 60(b) Motion" (Doc. 122). Because Mr. Lipari remains unable to represent plaintiff, the motion is stricken from the record.

On August 7, 2006, this court struck four motions filed by Mr. Lipari. In that order, the cour stated:

> Because Medical Supply was incorporated under the laws of Missouri, the effect of corporate dissolution on pending litigation is governed by Missouri law. Pursuant to Mo. Ann. Stat. § 351.476.2(6), "[d]issolution of a corporation does not: . . . (6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution." *See also Reben v. Wilson*, 861 S.W.2d 171, 176 (Mo. App. E.D. 1993). Therefore, even though Medical Supply was dissolved, its corporate existence continues for purposes of proceeding with this litigation. Medical Supply remains the sole plaintiff in this case.
>
> Moreover, Mr. Lipari cannot proceed *pro se* on behalf of Medical Supply because a *pro se* individual may not represent a corporation. *See Nato Indian Nation v. State of Utah*, 76 Fed. Appx. 854, 856 (10th Cir. 2003) ("Individuals may appear in court pro se, but a corporation, other business entity, or non-profit organization may only appear through a licensed attorney.") (citations omitted).
>
> The court also finds that Mr. Lipari may not substitute himself for Medical Supply. Federal Rule of Civil Procedure 25(c), which governs the procedural

Exb. 3

> substitution of a party after a transfer of interest, states: "In case of any transfer of interest, the action *may* be continued by or against the original party, *unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action*." Fed. R. Civ. P. 25(c) (emphasis added). As evidenced by the plain language of Rule 25(c), the court has discretion to allow Mr. Lipari to substitute. *Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1324 (10th Cir. 1978). The court declines to exercise its discretion, however, because this case has been dismissed, and substitution will not change that outcome.

(Doc. 104).

Since that filing the status of the parties has not changed. Mr. Lipari is not a plaintiff. The court does not have any notice that Mr. Lipari is now a licensed attorney. Without any intervening change in the interim, the previous conclusions regarding Mr. Lipari's ability to represent plaintiff apply to the present motion. For the above-mentioned reasons, the court strikes Mr. Lipari's pending motion (Doc. 122).

Another portion of the court's previous order is also relevant. At that time, the court warned Mr. Lipari, stating "[c]onsistent with this ruling, the court cautions Mr. Lipari against filling additional motions. Of course, plaintiff may allow Mr. Hawver or other counsel to represent it . . . Future attempts to resurrect this case could result in the court imposing additional sanctions." Mr. Lipari's recent filings (Docs. 122, 125) appear to violate this warning.

Additionally, Mr. Lipari's "Rule 60(b) Motion" misstates several resolved issues, making his arguments frivolous. Mr. Lipari accuses this court of having "bias against the plaintiff" that "clearly results from the court's disbelief that the conduct complained of by the plaintiff occurred." Mr. Lipari challenges the court by noting, "[t]he plaintiff's Missouri state law antitrust claims will be filed in Independence, Missouri unnecessarily duplicating the present litigation if the present federal claims are not reopened." Before the court addressed whether the present federal case should be reopened, Mr. Lipari filed a notice that he filed a "concurrent Missouri antitrust action [on] February

25, 2008 in . . . Independence Missouri." (Doc. 125).

Mr. Lipari's actions and filings appear to violate Federal Rule of Civil Procedure 11(b). Under Rule 11(c)(1)(B), Mr. Lipari is directed to show cause within twelve days of this order why he has not violated Rule 11(b). **If Mr. Lipari fails to demonstrate that he has not violated Rule 11(b), this court will sanction Mr. Lipari by fine and filing restrictions.**

IT IS THEREFORE ORDERED that Mr. Lipari's "Rule 60(b) Motion" (Doc. 122) is stricken from the record.

IT IS FURTHER ORDERED that Mr. Lipari is directed to show cause within twelve days of this order why he has not violated Federal Rule of Civil Procedure 11(b).

Dated this 28th day of March 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

Ricki Gene SEARCY, Plaintiff-Appellant,

v.

SOCIAL SECURITY ADMINISTRATION, Defendant-Appellee.

No. 91-4181.

United States Court of Appeals, Tenth Circuit.

March 2, 1992.

Before JOHN P. MOORE, TACHA and BRORBY, Circuit Judges.

ORDER AND JUDGMENT *

BRORBY, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Searcy appeals the decision of the district court dismissing his complaint without prejudice.

Mr. Searcy filed a pro se complaint asking for the right to copy and inspect "all documents in the agency files pertaining to ... Ricki G. Searcy" (R. and asking for damages and attorney fees for Defendant's failure to produce the documents.

The matter was subsequently referred to a Magistrate Judge who reviewed Mr. Searcy's Motion for Summary Judgment and Defendant's Motion to Dismiss for Failure to State a Claim, in addition to numerous other motions filed by Mr. Searcy. This report concluded Mr. Searcy's lawsuit was premature. The district court adopted the Magistrate Judge's report and held that Defendant had failed to comply with either the Privacy Act or the Freedom of Information Act. The district court dismissed Mr. Searcy's complaint without prejudice to again maintain the suit after compliance. The district court overruled Mr. Searcy's remaining motions.

Mr. Searcy appeals this decision pro se arguing it is wrong as a matter of law and fact.

The Magistrate Judge's Report and Recommendation as filed on June 25, 1991, accurately sets forth the "facts" and applicable law. It serves little purpose to reiterate both here.

We have reviewed the record on appeal and both of Mr. Searcy's briefs filed with this Court. This review leads us to the conclusion the judgment of the district court was correct and should be affirmed.

The judgment of the district court is AFFIRMED for substantially the same reasons set forth in the Magistrate Judge's Report and Recommendation of June 25, 1991, and the district court's order of September 19, 1991, copies of both being attached. The mandate shall issue forthwith.

ATTACHMENT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Ricki Gene Searcy, Plaintiff,

Ex b. 4

v.

Social Security Administration, Defendant.

Case No. 91-C-26 J

June 25, 1991

REPORT & RECOMMENDATION

This is a pro se action under the Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a. Plaintiff seeks an order that the Social Security Administration (SSA) produce all documents in its files pertaining to the plaintiff, Ricki G. Searcy, and an award of attorney's fees.

Two dispositive motions are pending: Defendant filed a motion to dismiss and the plaintiff filed a motion for summary judgment (actually a motion for default judgment). Plaintiff has also filed a motion for attorney's fees and a motion styled, "Motion under Vaughn v. Rosen to Require Detailed Justification, Itemization and Indexing."

This case has been referred to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge has determined that oral argument would not be of material assistance. D Utah Rule 202(d).

I. Default Judgment

Searcy moves for summary judgment and to strike defendant's motion to dismiss and memorandum on the grounds that defendant did not timely answer or otherwise respond to the complaint.

The complaint was filed January 8, 1991, and served personally on the United States Attorney on the same day, according to the return of service in the record. The defendant filed the motion to dismiss on February 7, 1991. Searcy asserts that he didn't receive the motion and accompanying memorandum until April 21, 1991. See Plaintiff's Affidavit attached to Plaintiff's Motion to Strike. (4/9/91). However, the certificate of service attached to the motion to dismiss indicates the motion and memorandum were mailed on February 7, 1991. Service by mail is complete upon mailing. Fed.R.Civ.Pro. 5(b).

Under the Freedom of Information Act, the agency has thirty days after service of the complaint to file an answer. 1 Thus the responsive pleading was timely served on February 7, 1991.

Moreover, there is no provision in the Federal Rules of Civil Procedure for motions to strike motions and memoranda; only motions to strike unsigned papers under Rule 11, third-party claims under Rule 14(a), and certain matters in pleadings under Rule 12(f) are contemplated by the Federal Rules of Civil Procedure. Motions and memoranda are not included within the definition of "pleading" under F.R.C.P. 7(a). See James Moore & Jo Desha Lucas, 2A Moore's Federal Practice p 12.21 at 12-164 (Matthew Bender, 2d ed 1991) ("a Rule 12(f) motion to strike is not appropriate with regard to affidavits, parties, or any other matter other than that contained in the actual pleadings").

Finally, F.R.C.P. 55(e) provides that an evidentiary hearing on the merits of the claim must be held before default judgment can be entered against an agency of the United States. 2 James Moore, Walter Taggart, and Jeremy Wicker, 6 Moore's Federal Practice p 55.12 at 55-75, 55-76 (Matthew Bender, 2d ed 1991). Plaintiff has now had full opportunity to respond to the motion to dismiss. It makes more sense to the magistrate to proceed on the merits of the suit than to schedule an evidentiary hearing under F.R.C.P. 55(e).

Plaintiff's motion to strike the defendant's motion to dismiss and memorandum in support is DENIED. The magistrate judge recommends that plaintiff's motion for summary judgment be DENIED.

II. The Motion to Dismiss

Defendant's main argument is that the Searcy has not exhausted his administrative remedies because he failed to supply sufficient

information to enable the SSA to respond to Searcy's request for his own records under the Privacy Act: 1) Searcy failed to specify which records he wanted, or which system of records he wanted searched; and 2) Searcy failed to designate a physician who could review his medical records.

Searcy seems to be arguing that he has complied with the SSA regulations under the Privacy Act for obtaining his own records; Searcy also seems to be saying that he made a proper request under FOIA, and he is not required to comply with the Privacy Act.

BACKGROUND

The background facts are mostly derived from the complaint and copies of the correspondence between Searcy and the SSA attached to the complaint. In connection with the motion to dismiss, the SSA has filed an affidavit from an officer of the SSA containing a chronology of the events (mostly describing the same letters Searcy attached to his complaint) and also attaching copies of the correspondence.

On March 3, 1990, Searcy sent a copy of a notarized letter to the District Director of the SSA, 461 South 4th East, Salt Lake City, requesting "all documents in agency files pertaining to the requestor, Ricki G. Searcy." Complaint, Exhibit H. Apparently the SSA sent the letter back to Searcy with a post-it note attached to the front; the post-it note bears a handwritten message saying that the SSA needs an original letter with original signatures. Complaint, Exhibit B.

On March 14, 1990, the branch manager of the Murray SSA office sent Searcy a letter saying that the Murray Office does not have any documents or files relating to him.

Searcy claims he tried sending his request to the Salt Lake SSA office again on March 20, 1990; the photocopy attached to the complaint shows that the second request is identical to the first, except the notary public is different. Complaint, Exhibit D. The magistrate judge infers the copy sent to the SSA included Searcy's original signature. The SSA claims it has no record of the second request. Declaration of Jack Gallagher, p 3.

Having received no answer to his last request, on May 3, 1990, Searcy wrote to the Assistant Secretary of Public Affairs in Washington, D.C. Complaint, Exhibit E. The letter is styled as a FOIA appeal of the SSA's failure to provide the documents Searcy had previously requested at least twice in March of 1990.

On May 23, 1990, the HHS Office of Public Inquiries sent Searcy a letter purporting to respond to Searcy's letter of May 3, but actually does not address the question of access to his SSA records, except to say that Searcy can get a copy of his application for a Social Security number and a list of all his reported earnings from any Social Security office, and suggesting that Searcy visit the nearest Social Security office:

To determine which other records you want us to search, you might want to visit the nearest Social Security office to review a list of our systems of records. The people there will be glad to help you.

Emphasis added. Complaint, Exhibit F.

The SSA located Searcy's disability claims file. Affidavit of Jack Gallagher, p 6. On July 13, 1991, the Salt Lake District Manager sent Searcy a letter informing him that HHS regulations required Searcy to designate a physician to review Searcy's medical records before the medical records could be released. Complaint, Exhibit G. The letter also asked Searcy to send a request bearing his original signature, and attached a form for him to fill in the name and address of his physician and return to the SSA. Searcy did not return the form.

Searcy filed this complaint on January 8, 1991. On January 24, 1991, two weeks after the complaint was filed and nearly ten months after Searcy sent his first request to the SSA Salt Lake office, the SSA Freedom of Information Officer sent him a letter explaining the procedures for

obtaining different types of records maintained by the SSA, and informing him of the HHS regulation requiring an individual desiring information to specify which system of records he wants HHS to search.

DISCUSSION

Congress intended that the Freedom of Information Act and the Privacy Act complement each other in providing access to government records: the Freedom of Information Act was designed to enable the public to obtain information about government processes and practices, while the Privacy Act was intended to help individuals gain access to government records about themselves, to correct erroneous information in those records, and to ensure the confidentiality of records pertaining to individuals. Robert F. Bouchard and Justin D. Franklin, Guidebook to the Freedom of Information and Privacy Acts at 21-22, 90-91 (Clark Boardman Co, Ltd, 1980). An individual who requests access to information about herself in agency records using both the Privacy Act and FOIA is entitled to the cumulative total of access rights under the two Acts. Clarkson v. IRS, 678 F.2d 1368, 1377 (11th Cir.1982) (quoting Bouchard and Franklin, Guidebook at 21). When an individual requests information about herself using both Acts, the agency may employee Privacy Act procedures to process the request. See Porter v. U.S. Dept. of Justice, 717 F.2d 787 at 799 (3rd Cir.1983) (quoting 40 FR 56742-43 (1975)).

HHS has ruled that an individual's request for her own records, to the extent the records are contained in a "system of records," will be handled under the Privacy Act and HHS regulations under the Privacy Act. 45 C.F.R. § 5.4(b) (1990). If a record need not be released under the Privacy Act, then HHS will consider the request under FOIA. Id.

An individual making a request under the Privacy Act must address the request to the systems manager of a given system of records and specify which systems of records she wishes to have searched and the records to which she wishes to have access. 45 C.F.R. § 5b.5(a)(2). Pursuant to the authority given it in 5 U.S.C. § 552a(f)(3), HHS has promulgated a rule establishing "special procedures" for obtaining medical records. 45 C.F.R. § 5b.6. The rule requires that the individual seeking access to her medical records designate in writing, at the time of the request, a physician, other health professional, or other responsible individual willing to review the record and inform the individual of its contents. § 5b.6(b)(1)(ii). However, the SSA official may grant an individual direct access to her medical records if the official decides that direct access is unlikely to adversely affect the individual. § 5b.6(b)(2).

Unless the individual is personally known to the SSA official, an individual making a request for access to a record must verify her identity. 5 U.S.C. § 552a(f)(2); 45 C.F.R. § 5b.5(b). An individual who does not make the request in person or by telephone must submit a notarized request or certify in her request that she is the individual who she claims to be and that she understands that a request for records under false pretenses is a criminal offense subject to a $5,000 fine. 45 C.F.R. § 5b.5(b)(2)(ii).

This is a case where the SSA's bungling of Searcy's request has brought on an unnecessary lawsuit. First, the SSA never informed Searcy that it was handling his combined FOIA and Privacy Act request under the Privacy Act, and that he must first comply with the SSA regulations and procedures under the Privacy Act. Second, the SSA did not tell Searcy, until after the lawsuit was filed, that he must specify the systems of records he wants searched, nor outline the specific procedures for complying with the Privacy Act regulations. Third, the SSA has been very dilatory in responding to Searcy's letters, even though the Privacy Act, unlike FOIA, does not require the agency to respond to an individual's request for access to her record within a specified time. (However, a request for amendment of a record under the Privacy Act must be acknowledged within 10 days. 5 U.S.C. § 552a(d)(2)(A)). It is easy to see how Searcy

could have thought that the SSA was refusing or ignoring his request.

Nevertheless, this lawsuit is premature because the SSA never actually refused to comply with a properly framed request under the Privacy Act. The agency is justified in treating his request as one under the Privacy Act. Requests under the Privacy Act must specify a system of records; requests for all records held by the SSA under an individual's name or social security number are too broad.

Nor has Searcy has indicated a valid reason the court should grant him relief from the SSA's requirement that he designate a physician or "other responsible individual" to review his medical records. The phrase, "other responsible individual" obviously refers to a third person, not Searcy himself.

The magistrate judge concludes that it would be inappropriate for the court to exercise jurisdiction at this juncture: pursuit along the proper administrative avenues will probably snag the documents plaintiff desires.

Plaintiff's motion for statutory damages and attorney's fees is moot since he has not substantially prevailed. In any case, the Tenth Circuit has ruled that pro se litigants are not entitled to attorney's fees under FOIA. Burke v. Dept. of Justice, 432 F.Supp. 251 (D.Kan.1976), aff'd 559 F.2d 1182 (10th Cir.1977). Nor are pro se plaintiffs eligible for attorney's fees under the Privacy Act. Barrett v. U.S. Customs Service and Dept of Treasury, 482 F.Supp. 779 (ED La.1980). The Supreme Court has recently ruled that even a lawyer who represents himself in a successful civil rights action may not recover attorney's fees under 42 U.S.C. § 1988:

A rule that authorizes awards of counsel fees to pro se litigants ... would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

Kay v. Ehrler & Kentucky Board of Elections, 111 S.Ct. 1435, 1438 (1991). The statutory policy of § 1988 in favor of encouraging plaintiffs to hire attorneys to litigate meritorious claims applies to FOIA and Privacy Act claims as well.

Plaintiff's motion for detailed justification, itemization, and indexing under Vaughn v. Rosen is premature and irrelevant to the issues in this case: this type of motion is appropriate when the agency denies a request under FOIA because the requested information is claimed to be exempt. Keese v. U.S., 632 F.Supp. 85, 91-92 (SD Texas 1985).

Recommendation

THEREFORE, IT IS RECOMMENDED that the plaintiff's motion for summary judgment be DENIED, and the defendant's motion to dismiss be GRANTED without prejudice to the plaintiff should the defendant refuse to comply with a proper request under the Privacy Act and HHS regulations under the Privacy Act, or withhold records that would be available under FOIA, though not the Privacy Act.

IT IS FURTHER RECOMMENDED that the plaintiff's motion for statutory damages and attorney fees be DENIED, and that the plaintiff's motion for a detailed justification, itemization, and indexing under Vaughn v. Rosen be DENIED.

Copies of the foregoing report and recommendation are being mailed to the parties. They are hereby notified of their right to file objections hereto within 10 days from the receipt hereof.

/s/Calvin Gould

United States Magistrate Judge

Ricki Gene Searcy, Plaintiff,

vs.

Social Security Administration, Defendant.

Case No. 91-C-0026J

Sept. 19, 1991

ORDER

The plaintiff, Ricki Gene Searcy,

filed an action with this court under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552(a). Plaintiff seeks an order requiring the Social Security Administration to produce all documents in its files pertaining to the plaintiff and awarding plaintiff attorneys fees. Plaintiff has filed a Motion For Summary Judgment and defendant has filed a Motion To Dismiss. Additionally, plaintiff has filed a Motion For Statutory Damages And Attorneys Fees and a Motion Under Vaughn v. Rosen For A Detailed Justification, Itemization And Indexing.

The court referred the matter to the magistrate pursuant to 28 U.S.C. § 636(b)(1)(B). After determining that oral argument would not be of material assistance, the magistrate issued a report recommending that plaintiff's Motion For Summary Judgment be denied. The magistrate's report further recommended that defendant's Motion To Dismiss be granted without prejudice to the plaintiff should the defendant refuse to comply with a proper request under the Privacy Act and HHS regulations under the Privacy Act, or withhold records that would be available under the Freedom of Information Act, though not the Privacy Act. Additionally, the magistrate's report recommended that plaintiff's Motion For Statutory Damages And Attorneys Fees be denied and that plaintiff's Motion Under Vaughn v. Rosen For A Detailed Justification, Itemization And Indexing be denied.

The plaintiff has filed an objection to the magistrate's Report and Recommendation. After reviewing the file and carefully considering the magistrate's Report and Recommendation and the plaintiff's objection, the court adopts the magistrate's Report and Recommendation. Therefore, plaintiff's Motion For Summary Judgment is hereby DENIED. Additionally defendant's Motion To Dismiss is hereby GRANTED without prejudice to the plaintiff should the defendant refuse to comply with a proper request under the Privacy Act and HHS regulations under the Privacy Act, or withhold records that would be available under the Freedom of Information Act, though not the Privacy Act. Furthermore, plaintiff's Motion For Statutory Damages And Attorneys Fees is hereby DENIED and plaintiff's Motion Under Vaughn v. Rosen For A Detailed Justification, Itemization And Indexing is hereby DENIED.

IT IS SO ORDERED.

/s/Bruce S. Jenkins, Chief Judge

United States District Court

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

1 5 USC § 552(a)(4)(C) reads:

Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs, for good cause shown.

2 F.R.C.P. 56(e) provides:

No judgment by default shall be entered against the United States or an officer of agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

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KANSAS CITY, KANSAS 66101
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APR 18 2008
CLERK, U.S. DISTRICT COURT
KANSAS CITY, KANSAS

FIRST NOTICE
SECOND NOTICE
4/5

Samuel K. Lipari
Medical Supply Chain,
297 Bayview
Lee Summit, Mo 64064

NIXIE 641 4C 1 70 04/15/08
RETURN TO SENDER
UNCLAIMED
UNABLE TO FORWARD
BC: 66101 *2460-00136-31-42

CM 4-1-08

64064B3100 R007

FILED
APR 22 2008
Clerk, U.S. District Court
By: _____ Deputy Clerk

05-2299-CM

SENDER:

- ☐ Complete items 1 and/or 2 for additional services. Complete items 3, 4a, and 4b.
- ☐ Print your name and address on the reverse of this form so that we can return this card to you.
- ☐ Attach this form to the front of the mailpiece, or on the back if space does not permit.
- ☐ Write *"Return Receipt Requested"* on the mailpiece below the article number.
- ☐ The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

3. Article Addressed to:

Samuel K. Lipari
[redacted]
Medical Supply Chain, Inc.
297 Dayview
Lee Summit, Mo 64064

4a. Article Number
7002 2030 0001 2207 8361

4b. Service Type
☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery

5. Received By: *(Print Name)*

8. Addressee's Address *(Only if requested and fee is paid)*

6. Signature *(Addressee or Agent)*

PS Form **3811,** December 1994 102595-99-B-0223 Domestic Return Receipt

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Thank you for using Return Receipt Service.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 05-2299-CM**
NEOFORMA, INC., et al.,	)	
	)	
Defendants.	)	

SHOW CAUSE ORDER

On April 8, 2008, plaintiff filed a Motion to Alter or Amend Judgment and Answer to Order to Show Cause (Doc. 128). Defendants have failed to timely submit a response to the pending motion. Rule 7.4 of the Rules of Practice provides that the "failure to file a brief or response within the time specified within [Rules 6.1 and 7.1(c)] shall constitute the waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect." D. Kan R.7.4.

Defendants are therefore directed to show cause, in writing, on or before May 23, 2008, why plaintiff's motion (Doc. 128) should not be granted. Defendants are further directed to file a response to plaintiff's motion on or before May 27, 2008. Where defendants fail to respond to this order, the court will consider plaintiff's motion (Doc. 128) without the benefit of defendants' response, as set out in Rule 7.4.

IT IS SO ORDERED.

Dated this 16th day of May 2008, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

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

MEDICAL SUPPLY CHAIN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-2299-CM**
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' JOINT RESPONSE TO SAMUEL LIPARI'S MOTION TO ALTER OR AMEND JUDGMENT (DOC. NO. 128) AND RESPONSE TO SHOW CAUSE ORDER (DOC. NO. 130)

Defendants, through their respective attorneys of record, file this response to Samuel Lipari's Motion to Alter or Amend Judgment, and answer the Court's May 16, 2008 Show Cause Order.

As discussed herein, the Court's March 31, 2008 ruling striking Mr. Lipari's Rule 60(b) motion is well-founded and supported in both law and fact. As a consequence, the present Rule 59(e) motion likewise should be stricken. Medical Supply Chain, Inc. sought to appeal this Court's earlier rulings, including the denial of its Motion to Substitute Mr. Lipari as party plaintiff. That appeal was dismissed. 508 F.3d 572 (10th Cir. 2007). The Court of Appeals thereafter rejected Medical Supply's further request for relief from the judgment. No facts or laws have changed since either this Court's dismissal or the Tenth Circuit's ruling that in any fashion suggest Medical Supply Chain, Inc. (or its sole shareholder) can reassert the now-twice dismissed federal claims. Because Mr. Lipari is not the plaintiff, he lacks standing to pursue relief on behalf of Medical Supply Chain, Inc. and there is no authority for the Court to consider his Rule 59(e) or 60(b) motions. But even on its merits, Mr. Lipari's present motion should be denied for the following reasons:

1. The Court's Order striking Lipari's Rule 60(b) motion is not a "Judgment" subject to a Rule 59(e) motion; and

2. There has been no intervening change of law to support the motion.

3. The Court has inherent authority to strike Mr. Lipari's motions.

For these reasons, the Court should strike plaintiff's Rule 59(e) Motion to Alter Or Amend Judgment or, in the alternative, deny it on its merits.

I. Response to Show Cause Order (Doc. No. 130)

On March 31, 2008, this Court, sua sponte, struck Lipari's "Rule 60(b) Motion" (Doc. 122) and directed Lipari to show cause why he has not violated Rule 11(b). The Court further ruled that if Lipari failed to demonstrate that he has not violated Rule 11(b), the Court would sanction Lipari with both a fine and filing restrictions (Doc. 127 at p. 3). Lipari's Rule 59(e) Motion was filed in response to the Court's March 31 Order. Thus, the defendants believed the Court would determine whether Lipari had complied with its sua sponte Order and that they no right to weigh in on the matter. In other words, because Lipari's Rule 59(e) motion did not involve any issue presented by any party to the case, and because the Court had previously held that Lipari was not authorized to file pleadings in this case, defendants did not believe that the Court desired a response to that motion. In light of such circumstances, defendants suggest any neglect was inadvertent and excusable.

Pursuant to the Court's May 16, 2008 Order (Doc. 130), the defendants hereby object to Lipari's Rule 59(e) Motion.

II. Argument Opposing Mr. Lipari's Rule 59(e) Motion (Doc. No. 128)

A. Lipari lacks standing to litigate on behalf of Medical Supply Company, Inc. Therefore, like the previous Rule 60(b) motion, his Rule 59(e) motion should be stricken from the record.

Mr. Lipari continues his attempt to re-litigate this matter as a *pro se* "interested person" on behalf of his corporation even though he has never been substituted as the plaintiff and Medical Supply's appeal was dismissed. As noted in the Court's March 31, 2008 Order, as well as in numerous other pleadings and Orders in this litigation, the plaintiff in this action is Medical Supply Chain, Inc. The fact that Mr. Lipari voluntarily dissolved his corporation (after his prior lawyer was disbarred) does not automatically entitle him the right to prosecute these claims or file pleadings in his personal capacity. *See Reben v. Wilson*, 861 S.W.2d 171, 176 (Mo. App. E.D. 1993) (holding that dissolution of a corporation does not abate or suspend pending proceedings by the corporation); *Nato Indian Nation v. State of Utah*, 76 Fed. Appx. 854, 856 (10th Cir. 2003) (prohibiting corporations from appearing *pro se* and holding that a corporation must appear through a licensed attorney).

While Mr. Lipari attempted to substitute himself as the plaintiff in this action, the Court declined in its discretion to do so. *See* Doc. No. 104. In that Order, the Court noted that the substitution of Mr. Lipari would serve no purpose because the claims had been dismissed and a substitution of party would not change the outcome. *Id.* p.4. That reasoning still applies. Moreover, that ruling is the law of the case in light of plaintiff's dismissed appeal. The plaintiff in this action remains Medical Supply Chain, Inc. and there is no authority for any motion filed by Mr. Lipari, including the pending motion to alter or amend judgment. *See Phelps v. Hamilton*, 122 F.3d 1309, 1315 (10th Cir. 1997) (recognizing that "a plaintiff must maintain standing at all times throughout the litigation for a court to retain jurisdiction."). As it did with the Rule 60(b) motion, Mr. Lipari's Rule 59(e) motion should also be stricken by the Court.

B. There is no "judgment" for the Court to alter or amend and Lipari is attempting to re-litigate settled issues.

If the Court declines to strike Mr. Lipari's Rule 59(e) motion, then it should deny it on its merits. Motions to alter or amend judgments pursuant to Rule 59(e) are extreme remedies and should only be granted to correct manifest errors of law or present newly discovered evidence. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). Neither is applicable here.

The Court's decision to strike Lipari's Rule 60(b) motion based on lack of standing is not a judgment subject to a Rule 59(e) motion. Rule 54(a) of the Federal Rules of Civil Procedure defines judgment as "a decree and any order which from an appeal lies." The Court's March 31 Order did not deny Lipari's Rule 60(b) motion, but rather struck it from the record due to Lipari's lack of standing. Therefore, the Court's March 31 Order is not an order "from which an appeal lies" because it did not determine any new issue as to Lipari's standing.

While Mr. Lipari argues that he may proceed *pro se* as the alleged assignee of Medical Supply's claims, this assertion is neither an assignment of error in law nor newly discovered evidence. Medical Supply has already made this same argument based on the same evidence. The Court rejected its position and Medical Supply's appeal was dismissed. Mr. Lipari cannot re-litigate the issue through successive motions under Rules 59(e) or 60(b), particularly where he is not a party in the case. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (holding that motions under Rules 59(e) and 60(b) "are inappropriate vehicles to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion."); *see also Borrero v. City of Chicago*, 456 F.3d 698 (7th Cir. 2005).[1]

[1] Following the Court's dismissal of this case, Mr. Lipari filed a "Motion for Reconsideration." That motion was denied and Medical Supply Chain appealed, though its appeal was dismissed as untimely. There is simply no reason – or legal or factual basis – to keep litigating issues the plaintiff has repeatedly lost.

Notwithstanding this bar to the motions, Mr. Lipari constructs his argument upon this Court's decision in *Lipari v. US Bancorp, et al*, Case No. 07-CV-02146 wherein the Court has allowed that Lipari to proceed *pro se* on Medical Supply Chain, Inc.'s state law claims as the alleged assignee of all assets from Medical Supply Chain. According to Mr. Lipari, this result is different than the one in this case that denied substitution of parties, and was brought about due to the June 4, 2007 Supreme Court decision in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (discussing Rule 8 pleading standards in a *pro se* prisoner case).

But there is no intervening change in law based upon *Erickson* or the decision in *Lipari* that compels re-litigation of the issues here. Mr. Lipari, himself, is the named plaintiff in the most recent case and the Court found there existed sufficient factual allegations for Mr. Lipari, as alleged assignee of corporate assets, to appear *pro se* as the named plaintiff in that action. Mr. Lipari originated that action and there was no motion, order, or appeal concerning substitution of parties. In contrast, this lawsuit was filed by a then-licensed lawyer in the name of the corporate entity Medical Supply Chain, Inc. and the dissolution of Medical Supply Chain (during the case) does not automatically substitute Lipari as the plaintiff. Medical Supply remains the plaintiff in this action and it must be represented by a licensed attorney–and only a licensed attorney may file pleadings on its behalf.

There is no change in law that would allow Mr. Lipari to now step into Medical Supply's place to pursue federal claims that were dismissed (twice) on the merits. Mr. Lipari is attempting to re-litigate issues that have been settled by this Court and the Court of Appeals. Therefore, his

Motion to Alter or Amend Judgment pursuant to Rule 59(e) should be denied if it is not stricken.[2]

C. The Court may strike Lipari's Rule 60(b) motion through its inherent authority to control its docket.

Every court is granted the inherent authority to control its docket as it sees fit. *In re Calder*, 973 F.2d 862, 868 (10th Cir. 1992) ("The court has the inherent power 'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'") quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). This inherent power includes the authority to strike motions as well as pleadings. *See Lynn v. Roberts*, 2006 WL 2850273 (D. Kan., Oct. 4, 2006); *see also Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005).

While Mr. Lipari argues that the Court does not have authority under either Rule 12 or Rule 37 of the Federal Rules of Civil Procedure to strike his Rule 60(b) motion, these rules apply only to parties, and pleadings filed by parties in civil litigation. Mr. Lipari is not a party to the action, and motions as an interested person are not authorized pleadings in this action. As noted above, Mr. Lipari has no standing in this case to litigate on behalf of his company. Therefore, the Court may strike his filings through its inherent power to control its own docket. Moreover, the Court has authority under Rule 11(b) to *sua sponte* issue sanctions, including striking motions and any other discipline the Court in its discretion deems appropriate. *See Lynn*, 2006 WL 2850273, *5-6.

Because the Court properly struck Mr. Lipari's Rule 60(b) motion, his Motion to Alter or Amend Judgment pursuant to Rule 59(e) should be denied.

[2] To the extent the Court may now consider the merits of Mr. Lipari's Rule 60(b) motion, these same arguments defeat that motion. Defendants also hereby incorporate their prior arguments with respect to the Rule 60(b) motion. (Doc. No. 123).

WHEREFORE, for the above stated reasons, defendants request this Court strike plaintiff's Rule 59(e) Motion to Alter or Amend Judgment or, in the alternative, deny it on its merits, and grant defendants whatever other relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the above item was filed in PDF format with the Court pursuant to its *Case Management / Electronic Case Files* program and thereby a notice of filing was e-mailed to counsel of record herein, all on the 23rd day of May, 2008.

A copy was also served via United States mail, postage prepaid, to:

Mr. Samuel K. Lipari
297 NE Bayview Drive
Lee's Summit, MO 64064-3400

/s/ Mark A. Olthoff
Attorney for Defendants

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Medical Supply Chain, Inc.
297 NE Bayview
Lee Summit, Mo 64064

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