309. On or about 10/28/02 Medical Supply contacted US Bancorp's retained counsel and explained that there were questions about service and that Medical Supply was seeking to schedule a hearing that week for its requested relief to stop the harm it was suffering and to avoid a terminal outcome for the company. US Bancorp's counsel said he had to travel and was unsure of his schedule but by the next day he might know of a time he could make a hearing. Without hearing from the opposing counsel, Medical Supply became concerned and sent an email on or about 10/29/02 suggesting portions of the injunctive relief it seemed likely the two parties could agree on and explaining the harm it was suffering and what delaying the relief beyond critical dates would inflict on Medical Supply, its associates and customers.

4. The Defendants' Acceptance of Liability For Medical Supply's Business Plan Damages

310. The email explained the losses as follows: the damages of failing to receive the $350,000 to $450,000 it depended on November 1st and the resulting effects of that delay on its projected financials including lost profit of $51,795,005.00, lost increase in average valuation of $155,385,015.00, Candidate lost revenue of $15,499,788.00.

311. The email explained that these injuries would be far greater if a December 1st deadline is missed. However, if the company does not recover from US Bank's denial of the escrow accounts the total third year losses of the company would be as follows: lost profits $51,795,005.00, loss of increased company avg. valuation of $155,385,015.00, Candidate lost revenue of $15,499,788.00 and Customer losses of $697,486,200.00.

312. On or about Wednesday 10/30/02, US Bancorp's counsel sent a letter to the court dismissive of Medical Supply's complaint and stating that it would oppose all requested relief.

313. On or about Thursday 10/31/02, Medical Supply called US Bancorp's counsel explaining the necessity of the relief sought and specifically the relief requested under paragraph 66 seeking to stop US Bank from reporting negative information about Medical Supply under the USA PATRIOT Act.

314. US Bancorp's counsel reiterated his belief Medical Supply needed to find another bank and that no liability existed. Medical Supply's counsel explained that Samuel Lipari will not risk a hundred million dollar company that requires high level banking services to future damage from a secret USA PATRIOT Act report that has misinformation in it and would create a black mark preventing them from ever being able to do any business.

315. US Bancorp's counsel said it would not agree to even just the relief sought in paragraph 66. Medical Supply asked US Bancorp's counsel if his firm would act as an escrow agent for accounts to be deposited in US Bank, since Shook Hardy and Bacon had declined to do so. US Bancorp's counsel refused to do so stating that US Bank did not owe any duty to Medical Supply.

5. The Defendants' Theft of Medical Supply's Intellectual Property

316. Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by Samuel Lipari in 1995 was appropriated by HSCA, Medecon and Cardinal Owen Healthcare through exploitation of a confidential business relationship and then taken later by many other GPOs.

317. On or about 11/6/02 Samuel Lipari visited US Bank, Noland road branch to retrieve the documents left by him following the meeting with Doug Lewis on 10/10/02. Doug Lewis gave the documents back to Samuel Lipari.

318. Samuel Lipari specifically ask if the documents were copied or faxed and Doug Lewis said he put all of the information in his analysis and Samuel Lipari left the bank. Upon returning to Medical Supply's office Samuel Lipari Inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents.

319. There were also tractor marks from a copy or fax machine on the back of the entire associate program and the business plan pages.

320. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied. There were no marks on the back of these documents.

321. Medical Supply became fearful of where these documents were sent and who has reviewed them. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms and financials including 5 year details, 5 year condensed and break even analysis.

322. Samuel Lipari became fearful this information would fall into the wrong hands further blocking or eliminating entry to market.

6. The Effects of the Plan To Financially Destroy Medical Supply

323. On or about 11/7/02 Samuel Lipari received a complimentary D&B report dated 10/31/02 on Medical Supply. The report indicated Medical Supply started in 2000 and has a clear credit history and a strong financial condition.

324. On November 18, 2002, Medical Supply obtained a TRO hearing on its request for preliminary injunctive relief. Medical Supply sought urgent preliminary injunctive relief from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting.

325. Medical Supply had second preliminary injunction hearing at12:00 p.m. on December 12, 2002. Medical Supply again sought urgent preliminary injunctive relief from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting, but was denied.

326. On December 17, 2002 Medical Supply filed a notice of interlocutory appeal to The Tenth Circuit Court of Appeals.

327. On June 16, 2003, the Kansas District Court dismissed Medical Supply's action for injunctive and declaratory relief.

328. After losing a motion for new trial, Medical Supply filed a timely notice for appeal on November 21, 2003.

329. On January 7th, 2004, the Tenth Circuit dismissed the interlocutory appeal as moot due to the superceding appeal of the action's dismissal.

7. US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer Realize Because Of The Prospective Injunctive Relief Action Their Antirust Liability To Medical Supply And The Requirement At Law That They Must Divest Piper Jaffray At A $750 Million Dollar Loss

330. Jerry Grundhoffer, the CEO of US Bancorp NA realized that his acquisition of Piper Jaffray in a scheme to exploit US Bank essential facilities as the eight largest national bank in America and use its deposits as a guarantor of capital in underwriting initial public offerings (IPO's) of healthcare technology and supply chain companies and to support those IPO's with Piper Jaffray's essential facility of providing investor research had made US Bank and US Bancorp NA liable under antitrust law for its injury to Medical Supply.

331. Jerry Grundhoffer attempted to sell Piper Jaffray first to Royal Bank of Canada and then to A.G. Edwards & Sons, Inc., seeking a purchase price $100 million dollars less than US Bancorp had acquired Piper Jaffray for.

332. In December of 2002 Samuel Lipari, CEO of Medical Supply communicated with Gordon M. Nixon and Irving Weiser of the Royal Bank of Canada (RBC) explaining Medical Supply's action against Piper Jaffray and offering to work with RBC if they decided to purchase Piper Jaffray in the hope that RBC would "prevent similar conflicts of interest from ever occurring and to ensure healthcare company securities are not marketed on the basis of illicit anticompetitive contracting advantages."

333. In December 2002 Samuel Lipari, CEO of Medical Supply contacted Robert L. Bagby and Douglas L. Kelly of A.G. Edwards & Sons, Inc. about the action against Piper Jaffray offering to work to resolve any claims:

> "We believe we will prevail in our antitrust and contract related claims. The portion of liability for these staggering damages that will be apportioned to US Bancorp Piper Jaffray INC causes us great concern for your company should it acquire Piper Jaffray. A.G. Edwards has responsible corporate governance standards in place and has long served its customers without reproach. I will be happy to work with you and your counsel to resolve Piper Jaffray's involvement in these anticompetitive acts."

334. Jerry Grundhoffer sought and obtained an agreement with Piper Jaffray's C level officers subrogating US Bancorp NA and US Bank's future antitrust judgment liability to Medical Supply from Jerry Grundhoffer to Piper Jaffray.

335. Having no other alternative and realizing that liability to Medical Supply in antitrust continued to accumulate as long as the two companies were commonly owned, US Bancorp announced on February 19th, 2003 that Piper Jaffray was being spun off or separated from US Bancorp NA.

336. On December 31st 2003, US Bancorp announced the completion of its spin off of Piper Jaffray, trading on the NYSE as an independent public offering January 2, 2004.

8. US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer Realize Because Of The Prospective Injunctive Relief Action Their Antirust Liability To Medical Supply And The Requirement At Law That They Must Divest Piper Jaffray At A $750 Million Dollar Loss

337. GE And GHX, LLC acted against their own short term profit interest and in knowing coordination with Neoforma, Inc. in an intentional effort to deprive Medical Supply in June 2003 of its contracted or bargained for capitalization of $350,000.00 to enter the market for hospital supplies, just as Neoforma, Inc. (Unknown Healthcare Entity) and US Bancorp, et al had through combination or conspiracy deprived Medical Supply of another $350,000.00 obtained through the contract for escrow accounts in November 2002.

338. The Defendants Foreclosure of Medical Supply's Attempt Following Attempt To Enter Into the Market For Hospital Supplies and Hospital Supplies in E-Commerce.

339. While seeking a new corporate headquarters for Medical Supply in May 2002 Mr. Lipari discovered an unused building in the same Blue Springs suburb of Kansas City, Missouri. The building had been purpose built to house information technology workers and had the infra structure including adequate communications connections and an electric plant for Medical Supply's servers.

340. GE Transportation acquired the building and its transferable lease when it bought the railroad signal company Harmon, Inc. and got rid of its employees. GE Transportation sought to escape the $5.4 million dollar liability of the remaining 7 year lease because of the $50,000.00 to $60,000.00 dollar a month payments and insurance on the building that had not been occupied for over 8 months with no sub lease offers. Previously the building had been under utilized while GE reduced Harmon's staff. The high monthly cost was making the subsidiary fail to meet GE's economic performance requirements and hurting the conglomerate's bottom line and share price.

341. On or about June 1st, 2002, Samuel Lipari, CEO of Medical Supply Chain, Inc. contacted the leasing agent Cohen & Essrey Property Management regarding a building located at 1600 N.E. Coronado Drive in Blue Springs, MO. The leasing agent indicated the building was already leased but that the lessee could and would like to sub-lease the building. The building was not occupied so Mr. Lipari made a verbal offer to sub-lease a portion of the building. The leasing agent declined his offer indicating the existing lessee would not accept anything less than leasing the entire building.

342. On or about April 1st, 2003 Mr. Lipari contacted the new leasing agent (B.A. Karbank & Company) in the event the new agent had different instructions regarding a sub-lease of the property located at 1600 N.E. Coronado Drive in Blue Springs, MO. The new leasing agent told him that GE was the lessee seeking to sub-lease the building due to their vacating the building after GE Transportation bought out of Harmon Industries. The building was still not occupied so again Mr. Lipari made a verbal offer to lease a portion of the building. The leasing agent declined his offer indicating GE Corporate Properties would not accept anything less than leasing the entire building.

343. On or about April 7th Mr. Lipari contacted GE and spoke with the GE property manager, George Frickie regarding Medical Supply's interest in sub-leasing the building. George Frickie indicated again that

GE would not be interested in sub-leasing a portion of the building but rather would be interested in leasing the entire building. Mr. Lipari requested the name of the owners and Mr. Frickie gave him the name and number of Barry Price with Cherokee Properties L.L.C. Mr. Lipari contacted Mr. Price, he was referred to Scott Asner who also had a substantial interest in the building. While speaking with Mr. Asner he provided Mr. Lipari the background and current details on the building lease with GE, terms and a price to purchase the building. The lease was transferable and GE was still obligated for 7-years out of a 10-year lease. Mr. Asner agreed to sell Medical Supply the building for the remaining balance of the GE 7-year lease ($5.4 million) and provided Mr. Lipari with a letter of intent to sell the building to Medical Supply.

344. On or about April 15th, Mr. Lipari contacted Mr. Frickie with GE Commercial Properties and indicated that he had an interest in purchasing the building. Mr. Lipari ask Mr. Frickie if GE had an interest in buying out the remainder of their lease so that Medical Supply could occupy the building following the purchase. Mr. Frickie offered GE's lease payments for the remainder of 2003 ($350,000) as a buy out offer.

345. On or about May 1st, 2003 Mr. Lipari tentatively contacted several local Banks, knowing that US Bank had threatened his company with a malicious USA PATRIOT Act report to keep Medical Supply from entering the hospital supply market where US bank was affiliated with Neoforma, an existing electronic marketplace for healthcare supplies. Mr. Lipari knew Medical Supply could not get a loan because of the threat and extortion, but knew he needed input from bankers familiar with the commercial real estate market in Blue Springs. Mr. Lipari felt Medical Supply could form a holding company to obtain the property without US Bank realizing he could enter the hospital supply market. Mr. Lipari spoke with Allen Lefko President of Grain Valley Bank, Pat Campbell branch manager of Gold's Bank and Randy Castle Senior Vice-President of Jacomo Bank. Each of the banks indicated a willingness to provide the mortgage because they felt the property was worth far more than the price offered by Cherokee Properties L.L.C., but the mortgage was too large for the regulatory size of their bank and they each suggested a national bank as an alternative. Due to US Bank's extortion and racketeering, including the pretext and very real threat of a malicious USA PATRIOT Act suspicious activity report (SAR) against Medical Supply since Mr. Lipari had tried to enter the hospital supply market in October of 2002, Mr. Lipari knew he was unable to solicit a national bank for the real estate loan.

346. On or about May 7th, Medical Supply contracted a financial consultant (Joan Mark) for advice on how to put a mortgage together to buy the building which has a 7-year revenue stream from GE in the amount of $5.4 million, the identical amount offered to purchase the building and for which Medical Supply had a letter of intent from the owner Cherokee Properties L.L.C. Mrs. Mark suggested Mr. Lipari propose a mortgage arrangement directly to George Frickie with GE Corporate. Mrs. Mark explained how a purchase of the $10 Million dollar property for $5.4 Million was a great deal for any mortgage lender. Mrs. Mark also explained if GE provided a $5.4 million dollar mortgage on a $10 million dollar property and eliminated a $5.4 million dollar lease obligation that GE would directly benefit from a $15 million dollar swing to their balance sheet.

347. Without realizing the existence of a combination and conspiracy between the Defendants, including the existence of a secret market allocating and tying agreement between Neoforma, Inc. and G.E and Premier's electronic market place, GHX, LLC. Samuel Lipari prepared an offer on the building for GE Transportation.

348. The afternoon of May 15th, Mr. Frickie responded, leaving a taped voicemail message and stating he had spoke with the business leaders at GE corporate and that they will accept Medical Supply's proposal.

> May 15th 2003-George Frickie
> "Bret, George Frickie, ah.... I know I sent you an email saying that my counsel way out ah...and I followed up with another email but I spoke to the business leaders and we will accept that transaction ah... let's start the paper work ah... if you want to do some drafting of lease termination or if you would like us to do that, give me a holler 203-431-4452."

349. The second e-mail Mr. Frickie referenced on the phone conversation explicitly stated that GE would accept Medical Supply's proposal and initialed the written acceptance in addition to the electronic signature file for the e-mail:

> From: Fricke, George (CORP) To: Bret Landrith Cc: Newell, Andrew (TRANS) ; Payne, Robert J (TRANS) ; Davis, Tom L (TRANS) ; Jakaitis, Gary (CORP)
> Sent: Thursday, May 15, 2003 6:05 PM
> Subject: RE: Lease buyout GE/Harmon building Bret, I would like to confirm our telephone conversation in that GE will accept your proposal to terminate the existing Lease. Robert Payne GE Counsel will start working on the document. He is out of the office until Monday 19th. GCF

350. On or about May 20th, 2003, Medical Supply was given a walk through of the property to inventory the buildings furniture and fixtures and discuss building maintenance and operational procedures. Tom Davis, the property manager for GE Transportation in Blue Springs and John Phillips, the GE

Transportation building maintenance engineer provided the three-hour walk through in addition to the building maintenance and operational procedures. John Philips also provided the blue prints of the building and allowed me to make copies. Mr. Lipari returned the original blue prints after he made copies. They both stated they were being dismissed from employment by GE since they would no longer be necessary.

351. On May 22nd, 2003 Mr. Lipari spoke with Doug McKay with GE Capital who had called earlier that week with regard to the mortgage outlined in Medical Supply's proposal. Doug asked that Mr. Lipari send our company information regarding the mortgage. Mr. Lipari indicated that he could meet him the following Tuesday because Medical Supply had a loan package for him that included its financials, the proposal that George Frickie and GE's business leaders accepted, the letter of intent from the owners and our Dunn &Bradstreet report showing Medical Supply's good credit and strong financial condition. Mr. Lipari gave the information to McKay and McKay indicated he needed to speak with GE Transportation to see how they wanted to handle the terms of the accepted proposal.

352. On or about June 2nd, 2003 Mr. Lipari called McKay to see how they were doing on closing and McKay indicated that the person he needed to speak with was at corporate and that he needed to speak with him before moving forward.

353. As the June 15, 2003 closing date approached, medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent George Frickie and email stating that a delay in closing would not effect the lease buyout of $350,000. Medical Supply's counsel later again called Mr. Frickie when he receive no response and Mr. Frickie became extremely angry and hung up the phone.

354. Medical Supply then proceeded to speak with GE's counsel Kate O'Leary to determine if the contract had been repudiated. Supporting statutes and the antitrust basis and damages implications were explained to Ms O'Leary.

355. Medical Supply gave GE a deadline to June 10th to clarify whether there had been a repudiation. Mrs. O'Leary later faxed a letter on the 10th requesting that Medical Supply not speak to anyone at GE and that any correspondence relating to this matter be directly to her. Medical Supply then emailed a letter stating that if no earnest money were deposited to indicate the contract was not being repudiated, Medical Supply would file on June 16th for antitrust and breach of contract.

356. George Fricke, property manager for The General Electric Company who Medical Supply had been told by Fricke and his agents, was the authority for the building at 1600 NE Coronado Dr. telephoned Medical Supply Chain's Missouri headquarters and placed a message on its answering machine stating he had been instructed by "business leaders" to accept Medical Supply's proposal and he was calling to do so. Then, George Fricke sent a written acceptance via e-mail with his initials added a signature at the end of the email message. No terms were disputed and the acceptance confirmed The General Electric Company would make its subsidiary GE Transportation LLC. pay $350,000 for the buy out of the lease and its GE Capital subsidiary provide the $6.4 million dollar mortgage and closing at 5.4% for twenty years with a first year moratorium on payments. In diversity actions, the Court applies the substantive law, including choice of law rules, that Kansas state courts would apply. See Moore v. Subaru of Am., 891 F.2d 1445, 1448 (10th Cir. 1989). Kansas courts apply the doctrine of lex loci contractus, which requires that the Court interpret the contract according to the law of the state in which the parties performed the last act necessary to form the contract. See Missouri Pac. R.R. Co. v. Kansas Gas and Elec. Co., 862 F.2d 796, 798 n.1 (10th Cir. 1988) (citing Simms v. Metropolitan Life Ins. Co., 9 Kan. App. 2d 640, 642-43, 685 P.2d 321 (1984)).

357. George Fricke's signed written acceptance referenced the proposal he had received from Medical Supply earlier that day. The set of documents then became an bilateral contract completed with the last act exchanging mutual promises (D.L. Peoples Group, Inc. v. Hawley, — So.2d — (2002 WL 63351, Ct. App., Fla., 2002) enforceable for the sale of the lease interest and the benefit of the bargain obtained by Medical Supply under its clear and complete terms meeting the writing requirements of a real estate purchase contract in Missouri and the writing and definiteness requirement of a credit agreement under Missouri statute RMS 432.045.2 .

358. The formation of an enforceable contract in a set of documents created in correspondence is well settled See Estate of Younge v. Huysmans, 127 N.H. 461, 465-66, 506 A.2d 282, 284-85 (1965). Since state law requires a writing, the e-mail acceptance and signature of George Fricke is valid and enforceable under 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, widely known as "E-SIGN." Section 101(a) of E-SIGN states that "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in

electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

359. Medical Supply had performed as required, introducing itself to the City of Blue Springs Economic Development, and committed to purchase the building from its owner in reliance on the contract with GE, GE Transportation made open partial performance of the contract by opening the building for a three hour briefing on the operation and maintenance of the building's complex systems. This briefing was made by GE Transportation's Blue Springs property manager and the building's maintenance engineer, both of whom told Medical Supply's CEO Samuel Lipari that they had been terminated and will be leaving employment with GE Transportation the following month because they were no longer needed.

360. GE Capital partially performed as required and made an appointment with Samuel Lipari in its Overland Park, Kansas office where Mr. Lipari took the building's blueprints furnished him by GE Transportation, the building's physical description and photo furnished by George Fricke of GE corporate and Medical Supply's corporate records for the loan.

361. The GE Capital loan officer Douglas McKay discussed the terms and questioned Mr. Lipari in detail about the lawsuit. Mr. Lipari explained why under the threat by US Bank of a malicious USA PATRIOT Act suspicious activity report, Medical Supply could not risk going to a bank until the lawsuit was settled. Douglas McKay agreed the USA PATRIOT Act had no valid relationship to Medical Supply's involvement with US Bank and stated he would obtain the additional requirements GE Capital required from George Fricke and GE Transportation. McKay indicated it could take longer to close but he would check into it.

362. Medical Supply communicated to its stakeholders, business associates, potential customers, and the owners of the building that it had obtained the financing and made commitments in reliance of GE's performance on the contract.

363. No letter similar to that which Mr. McKay had described was received from GE Capital by the June 15th contract deadline and no notice of rejection of credit has been received. George Fricke communicated by phone and e-mail that the GE Capital performance would be at arm's length but since the financing was the benefit bargained for by Medical Supply, this did not contradict the contract. When

doubts about GE' intent to honor the contract arose, counsel for GE, GE Transportation and GE Capital each refused to confirm the repudiation.

364. The proposal accepted by George Fricke on behalf of GE's business leaders contained the executive summary of Medical Supply's business plan, including an explanation of the antitrust lawsuit with US Bancorp, et al and the financial projections for Medical Supply's entry into market. Under Anuheo, Inc. v. Westinghouse Credit Corp., 883 S.W.2d 910 (Mo App 1994) GE is responsible for the expectation damages of the forward projections that it had accepted at the time it entered into contract with Medical Supply. Medical Supply is able to prove its projected profits with reasonable certainty. Lost future profits may be used as a method of calculating damage where no other reliable method of valuing the business is available, see Albrecht v. The Herald Co., 452 F.2d 124 at 129 (8th Cir. 1971) cited for this purpose by 10th Cir.

365. GE, the parent company of GE Transportation was a dominant medical device manufacturer and medical equipment and electrical equipment supplier to North American hospitals. GE ceased to be a manufacturer and became a distributor of parts, assemblies, products, systems and credit services to hospitals. GE established monopolies in many product lines for hospitals but feared other distributors would bypass GE and buy the same parts, assemblies, products, systems from foreign sources and sell them to North American hospitals at lower prices in competition with GE To prevent this, GE made alliances with the dominant distributors for hospitals called GPO's including the Defendant Novation, LLC because they were intended to be group purchasing cooperatives (organizations). GE and the other dominant manufacturers gave the management of these GPO's including the Defendant Novation, LLC kickbacks to prevent direct competition in distribution, preserve their loyalty and to protect the inflated prices. However, GE saw that the captive customers of these GPO's including the Defendant Novation, LLC were growing dissatisfied at the inefficiency and the failure to achieve group purchasing discounts. To protect against other market entrants, GE formed Global Health Exchange LLC. as an electronic market place promising online distribution at lower prices to hospitals. GE owns shares of stock in the privately held company and provided the initial capitalization. As an alliance of a handful of dominant manufacturers (now distributors) the actual goal was to preempt the fledgling e-commerce companies from entering the electronic distribution of hospital supplies.

366. G.E. had also formed its own electronic marketplace called Global exchange and continues to market hospital supply products over the internet from its corporate web site as a distributor of other manufacturers' hospital supply products.

367. GE found the technology of GHX, Inc. was inadequate to outperform new entrants and aligned itself with the Defendant Neoforma, Inc., the electronic marketplace co-opted by the dominant GPO's including the Defendant Novation, LLC in an alliance to exchange data among suppliers to enforce cost structures as inflated as those of the GPO's. GHX, LLC at the direction and approval of GE has retaliated against suppliers who endanger the marketplace with competitive prices. GHX, LLC. at the direction and approval of GE has excluded competitors including Retractable Technologies, Inc. and Masimo for failing to give kick backs to the cartel. Death and injury resulted from the failure of hospitals to obtain these medical devices.

368. GHX, LLC. at the direction and approval of GE in a conspiracy and combination with the Defendants has excluded Medical Supply Chain, Inc. from entering the market by not allowing Medical Supply to offer GE Capital Healthcare credit to its potential customers in April of 2002, and by refusing to offer US Bancorp Piper Jaffray services to Medical Supply in June 2002 in a conspiracy with the Defendants and by repudiating essential escrow contracts required by Medical Supply to capitalize its entry into market in October 2002. (US Bancorp has interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC.; the Defendant Novation and Premier. US Bancorp helped the Defendant Novation acquire control of the Defendant Neoforma and partner it with GHX LLC. creating a monopoly of over 80% of healthcare e-commerce).

369. GE at the direction of the Defendants including Neoforma and Novation LLC caused its subsidiary GE Transportation to repudiate the contract to buy the lease from Medical Supply, sacrificing $15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, LLC. and Neoforma. The market is worth 1.8 trillion dollars. GE acted on the tremendous windfall to preserve its monopoly. George Fricke is GE Corporate's property manager.

9. Piper Jaffray And Andrew S. Duff Realize Because Of The Prospective Injunctive Relief Action Their Antirust Liability To Medical Supply And The Requirement At Law That They Divest Their Healthcare Venture Fund, Losing $225,000,000.00 (255 Million Dollars) In Assets

370. The Defendants The Piper Jaffray Companies and Andrew S. Duff attempted to contract with the Defendant US Bancorp to guarantee the bank holding company's liability to Medical Supply but discovered it could not continue to incur liability to Medical Supply for participating in the scheme to monopolize the markets in hospital supplies and hospital supplies in e-commerce and announced it was withdrawing from the conspiracy and combination's scheme to monopolize the capitalization of healthcare technology and supply chain management companies.

371. On October 13, 2004, Piper Jaffray announced it was relinquishing its healthcare technology capitalization subsidiary, Piper Jaffray Ventures.

372. Founded in 1992, Piper Jaffray Ventures manages over $225 million in capital dedicated exclusively to funding innovative, emerging growth companies in the medical technology, biotechnology and healthcare services sectors. Through Piper Jaffray Ventures, The Piper Jaffray Companies actively participated in and held seats on the boards of directors of their client companies, facilitating the monopolization of the markets for hospital supplies and hospital supplies in e-commerce.

373. Through Piper Jaffray Ventures, The Piper Jaffray Companies was also able to extract fees for access to an extensive network of industry contacts including Novation, LLC, UHC, VHA and Neoforma.

374. The Piper Jaffray Companies also used Piper Jaffray Ventures to capitalize healthcare technology and supply chain management companies that became part of the Defendants' combination and conspiracy to restrain trade with US Bancorp NA.

10. Medical Supply Informs Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma that it has been unsuccessful in obtaining prospective injunctive and declaratory relief against their coconspirators Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer and that the conspirators are jointly and severally liable for the damages Medical Supply sought to avoid.

375. On December 14, 2004, Medical Supply served a demand letter Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma giving notice to these defendants of Medical Supply's claims against them. Medical Supply informed the defendants that it has been unsuccessful in obtaining prospective injunctive and declaratory relief against their coconspirators Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer and that the conspirators are jointly and severally liable for the damages Medical Supply sought to avoid.

11. Medical Supply is granted a Rehearing in Tenth Circuit. That Afternoon UHC and VHA Realize Because of Medical Supply's Demand Letter That They Are Required At Law To Divest

Neoforma and Both UHC and VHA Make an Emergency Announcement of An Agreement to Dispose of Neoforma at a $150,000,000.00 dollar loss.

376. On January 25th in an emergency late afternoon press announcement after hearing Medical Supply's Tenth Circuit decision would be reheard, Neoforma, Inc. stated:

"Neoforma Hires Merrill to Mull Options

Associated Press
01.11.2005, 04:52 PM

Neoforma Inc., a provider of supply-chain management solutions for the health-care industry, on Tuesday said it hired Merrill Lynch & Co. as its financial adviser to help it explore options, including a sale or merger.

Neoforma said that any transaction must be approved by VHA Inc. and the University HealthSystem Consortium - national health-care alliances which own a majority of the company's outstanding shares and own Neoforma's largest customer, the supply company Novation.

The company said that there is no assurances that any transaction will occur."

Before Medical Supply's antitrust actions were brought, Neoforma and Robert Zollars boasted of the monopolization of the e-commerce market for hospital supplies accomplished by alliances with other monopolists including the Defendant Novation, LLC:

CEO explains reasons why long-term investor should be looking at Neoforma Full article published: 12/20/2001 ROBERT J. ZOLLARS is Chairman and Chief Executive Officer of Neoforma, Inc.

Mr. Zollars: To start with, Neoforma is a 2001 Internet success story, and we're the leader in healthcare B2B. Neoforma builds and operates Internet marketplaces that empower healthcare trading partners to optimize their supply chain. So simply put, we help hospitals buy their supplies more efficiently and more effectively.

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

Mr. Zollars: About a year or so ago, there were probably 100 companies competing for this opportunity, and today you have less than a handful. As you look at the metrics that we're enjoying right now, as of October 18, Neoforma has over 700 trading partners; that includes 563 hospitals under contract, 333 live using the technology, and 130 suppliers. To give you an idea of scale, that means in our third quarter, we processed over 500,000 order documents that included 1.5 million line items. So, clearly, by any measure, we're out in front of the rest of the pack, which is exciting for us.

TWST: What were the steps you took to achieve this dominant position?

Mr. Zollars: I think the most important thing is we have great partners. First of all, we're partnered with Novation. Novation is the number one group purchasing organization in the country, or GPO. It covers roughly one-third of the market. It's members buy approximately $36 billion a year in medical supplies and equipment, and just over a year ago we signed an agreement with Novation to be it's exclusive e-commerce partner for 10 years. We're now one year into that agreement and have generated some great results together, as I just mentioned. The other great partner we have is GHX, the Global Health Exchange, an industry supplier consortium. It was founded by General Electric, Johnson & Johnson, Baxter, Abbott and Medtronic, and up until August, had been competing with

us in the market. We struck a strategic alliance agreement with GHX in August that is really exciting for us. It's the first time healthcare buyers and suppliers have really gotten on the same side of the table to work at taking healthcare costs out. The alliance gives us access to the great supplier relationships that GHX has and they, of course, get the great buyer relationships that we have with our hospitals.

12. Novation, LLC realizes Because of Medical Supply's Demand Letter That Its Relationship With Neoforma and Its Long Term Anticompetitive Contract Are Illegal Antitrust prohibited Conduct Without Redeeming Value and Announces It Will Review Neoforma's Value Creation

377. Because of this impending legal action, Novation LLC has realized it has created no competition or efficiency enhancing value to the business of its two founders VHA Inc. and University HealthSystem Consortium. Novation subsequently notified Neoforma that it will review the value created by the electronic marketplace:

"Independent Consultants Engaged to Assess Neoforma's Offering to Novation

San Jose, CA - January 26, 2005 - I n connection with Neoforma, Inc.'s (NASDAQ: NEOF) decision to evaluate strategic alternatives, Neoforma, a leading provider of supply chain management solutions for the healthcare industry, and Novation, LLC, Neoforma's principal customer, each have engaged independent consultants to assess the technology, information, services and pricing provided by Neoforma to Novation and its owners, VHA Inc. and University HealthSystem Consortium (UHC), and their member hospitals under an exclusive outsourcing agreement. Neoforma announced on January 11, 2005 that it had retained Merrill Lynch & Co. as its financial advisor to assist the Company in evaluating strategic alternatives, including a possible sale or merger of the Company, to achieve greater stockholder value. VHA and UHC own 42.4% and 10.5%, respectively, of Neoforma's outstanding common stock.

The current 10-year exclusive outsourcing agreement, which was originally entered into in March 2000, was most recently amended in August 2003 as a result of negotiations between the parties to the contract. Under the terms of that amendment, the quarterly maximum payment from Novation to Neoforma was established at $15.25 million, or $61.0 million per year, beginning in 2004. Since that time, Neoforma has documented significant value delivered by its offering to VHA and UHC hospitals. In 2004, approximately 280 VHA and UHC hospitals, representing a subset of Neoforma's customer base, documented approximately $100 million in value by using Neoforma's solutions to drive supply chain improvements within their organizations. Based on the value of its offering to Novation and to VHA and UHC hospitals, Neoforma believes that it is a valuable contributor to Novation, VHA and UHC maintaining their competitive position in the industry and to their hospitals' efforts to improve supply chain efficiency.

Neoforma believes that the current quarterly maximum payment from Novation is reasonable. Novation has advised the Company, however, that its assessment could result in a formal request to reduce the quarterly maximum payment.

Each of the consultants independently will assess the current technology, information, services and pricing that Neoforma develops and delivers under the outsourcing agreement. At this time, none of the parties to the outsourcing agreement have requested that the formal benchmarking process allowed under the terms of the agreement be undertaken; however, no assurances can be given that this process will not be requested by any of the parties at a later date. While the actual results of these assessments, which are expected to be completed within 45 days, or of any formal benchmarking process cannot be determined at this time, either process could have an impact on the structure and financial terms of the outsourcing agreement.

About Neoforma

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

378. A February 18, 2005 article in the Los Angeles Times exposed Novation, LLC and its subsidiary Cardinal's (the descendent of Owen Health that stole Medical Supply's intellectual property in 1995) extreme opposite conduct of what could legitimize a joint venture between the former competitors VHA and UHC.

379. Los Angeles Times columnist Michael Hiltzik on Thursday profiled the experience of John Glaspy, professor of medicine at the University of California-Los Angeles Medical Center and medical director of UCLA's Bowyer Oncology Center, who attempted to reduce his university's $13 million annual bill for chemotherapy drugs. According to Hiltzik, the issue raises questions about whether the University of California system received the "best value from a contract" with purchasing groups Cardinal Health and Novation, and it "shed[s] a glimmer of light on a deal whose key terms ... are secret."

380. Changes to Medicare reimbursement rates for oncology medications adversely affected the budgets for the four community cancer clinics Glaspy runs, prompting him to seek information about the contract with Cardinal and Novation, which "presumably leveraged the vast buying power of the five UC medical centers to obtain enormous discounts," Hiltzik writes. According to Hiltzik, Glaspy made a "few phone calls" and discovered he could "beat the Cardinal/Novation price" on oncology medications by about $800,000 annually.

381. However, UC officials "told him to back off," and his discovery set off "months of conflict between UC headquarters and UCLA, where campus purchasing agents were sufficiently intrigued to wonder whether they could do better without Cardinal/Novation," Hiltzik writes. UC officials did not allow UCLA officials to see the contract terms but did tell the school that removing the oncology medications from the contract "would threaten discounts for the whole [UC] system," according to Hiltzik.

382. Eventually, UC allowed the clinics to purchase their own chemotherapy medications, matching savings found by Glaspy. Hiltzik writes that despite the resolution, the "question remains: Has the University of California been overpaying for all its chemo drugs for the last four years? ... And what about

the other pharmacy purchases at the five UC medical centers, which total about $200 million a year?" Michael Hiltzik "A Valuable Drug Discovery at UC" LA Times, February 18, 2005

383. Novation is a limited-liability corporation formed in 1998 by VHA Inc. and University HealthSystem Consortium and was the subject of Senate antitrust hearings in 2002, 2003 and 2004. 2,200 healthcare providers that are part of the Novation distribution system.

384. The Senate Judiciary antitrust subcommittee encouraged the two dominant GPOs, Premier and Novation, the largest GPO to voluntarily implement codes of conduct to stop their antitrust prohibited conduct of bundling, charging large administrative fees, sole- sourcing goods and demanding a high percentage of purchases before rebates kick in.

385. Several hospitals testified in the first hearings that they saved money when they withdrew from the purchasing groups, while medical suppliers have sued Novation over freezing them out of the market.

386. On August 24th, 2004, The Connecticut Attorney General Richard Blumenthal stated; "Novation has a position of very definite market dominance and potentially has misused that power to bundle products and force hospitals to buy supplies that perhaps they would not have done." Mary E. O'Leary," Yale New Haven Executive has Ties to Company in Probe," New Haven Register 08/24/2004.

387. Novation uses its dominance in the market to favor certain medical suppliers and stop competition by smaller manufacturers.

388. Manufacturers and suppliers make rebates and payments to Novation as industrial bribes and kickbacks that influence Novation's decision to carry their products.

389. Novation has actively solicited and obtained rebates, bribes, kickbacks and equity in healthcare technology companies in exchange for distributing the products of manufacturers and suppliers.

390. Novation has required and obtained rebates, bribes, kickbacks and equity in healthcare technology companies before allowing products to be purchased by its member hospitals.

391. Novation and related companies including Neoforma, Inc. use ties and affiliations with hospital executives that receive payments and incentives personally for making decisions regarding their hospital's participation in Novation's system. The hospital executives are on "both sides of the sale transaction involving Novation and their hospital."

392. Novation switched its practice of awarding anticompetitive contracts to the market leader when a subsidiary of Tyco was able to pay kickbacks and bribes greater than Ethicon, the current market leader in sutures. Tyco has been the subject of accounting fraud and securities investigations and CNN reported on February 8th, 2005 Tyco is being investigated in the UN Arms for food scandal where illegal kickbacks and bribes were utilized in the sale of Iraq's oil during the UN embargo.

393. On December 20, 2004, U.S. Surgical, a business unit of Tyco Healthcare, was awarded suture contracts by Novation. The long-term exclusive contracts run from April 1, 2005 through March 31, 2008. The contracts announcement stated VHA and UHC have the potential to purchase as much as $900 million in the eight product categories that make up Novation's complete wound closure and endomechanical offering.

394. The competing company Ethicon has approximately 90 percent of the suture market and bundles better discounts on sutures to its endomechanical product line. This time US Surgical (a division of Tyco) won both awards.

395. Novation provided a suture conversion calculator to validate for its members that they would save 20 – 25% using the new US Surgical contract. A hospital member of Novation used the aforementioned suture conversion calculator and found that their actual prices for sutures on the new contract are going to be 36% higher the previous contract, yet the hospital was told by Novation that they will realize the above stated savings (20-25% savings).

396. Novation fraudulently deceived its member hospitals into believing the new US Surgical suture contract would save them 20-25 percent. Instead of delivering savings, Novation and Tyco increased the list or book price for the sutures. The hospitals were given a fraudulent means to calculate their "savings" the suture conversion calculator that showed savings in the range of 20-25%. However, when the prices for Ethicon products, the sutures that had been used by the hospital were run through the same calculator, the hospital realized the new US Surgical contract prices were actually 36% higher.

13. Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma decide to continue to rely on Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer's corrupt scheme to influence the court

397. Only counsel for Neoforma, Inc., responded to Medical Supply's demand letter and the response merely a plea to delay action until the attorney could reach everyone after the Christmas holidays. The follow up response never came.

398. No Defendant repudiated its participation in the monopoly or made any overt declaration of withdraw from the conspiracy except for the announced divestitures stated above.

14. Robert J. Baker, UHC, Curt Nonomaque, VHA, Novation LLC, Bob Zollars And Neoforma's Utilization of Ongoing Sham Petitioning By Shughart, Thomson & Kilroy, Piper Jaffray, US Bancorp, US Bank, Andrew Cesere And Jerry Grundhoffer To Deprive Medical Supply of Counsel

399. On November 20, 2003, The former managing partner and Shughart Thomson & Kilroy shareholder acting as magistrate in Kansas District Court action *Bolden v. City of Topeka, et al,* Case No. 02-CV-2635, where the African American plaintiff was being represented by Medical Supply's counsel repeatedly told the plaintiff that he should sue his attorney for malpractice. The magistrate also stated Bolden would be better off representing himself. Bolden testified he was thankful to have his counsel, three previous ones had abandoned him after being intimidated and retaliated against by the City. Bolden's previous counsel still has not been located. Affidavits were furnished that many witnesses and process servers had been retaliated against, threatened with criminal prosecution if they testified in federal court and harassed. The magistrate also denied Bolden discovery in the action.

400. The transcript of the hearing which was also taped reveals that the magistrate was obsessed with legal malpractice insurance as a result of his firm's mishandling of Medical Supply's action against the US Bancorp defendants and Unknown Healthcare Supplier, amply documented in the record, and the aborted disclosures of the firm's malpractice liability insurance as the party in interest and guarantor of US Bancorp's certain antitrust losses.

401. During the *Bolden v. City of Topeka, et al* pretrial conference the former Shughart Thomson & Kilroy managing partner and shareholder acting as magistrate expressed his disturbance over "stealth lawsuits" where parties don't even know they are subject to them. While wholly inapplicable to Bolden's case where the City was liable for the officials regardless of whether they remained in the case, the subject of the deliberate pretext used to attack Medical Supply's counsel for his representation of Bolden, the magistrate is clearly troubled over the failure of his firm to consider its responsibilities to the identified coconspirators in *Medical Supply v. US Bancorp, et al.*

402. The attack on Medical Supply's counsel was overtly pretextual. The civil rights liability of the city for the conduct of its officers in their official capacity is based on law the magistrate well knew and in an unrelated pretrial order conference the following day accepted the voluntary stipulation of parties that all officials be voluntarily dismissed. The magistrate also stated that there was unlikely any difference in damages in a footnote to his report and recommendation.

403. The magistrate reiterated his criticism of Medical Supply's counsel in the Bolden v. City of Topeka, et al pretrial order conference report and recommendation, stating Bolden should consider representing himself if Medical Supply's counsel is the only attorney he can get. On December 3, 2003, the magistrate's report and recommendation was submitted as an attachment and the basis for an ethics complaint filed by the assistant city attorney Sherri Price against Medical Supply's counsel for his representation of Bolden. The Kansas Office of the Disciplinary Administrator investigated the complaint by having dinner with the magistrate. The magistrate used to be work for the office prior to starting at Shughart Thomson & Kilroy and continued to serve on various Kansas state ethics committees while a managing partner for at Shughart Thomson & Kilroy. Bolden was never contacted during the investigation and during the prosecution appeared only as a witness for Medical Supply's counsel.

404. The defendants US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff coordinated their defense of Medical Supply's action for injunctive and declaratory relief with the coconspirators Jeffrey R. Immelt, GE, GHX, GE Healthcare, GE Capital and GE Transportation who inconceivably attached the Medical Supply complaint and order to their 12(b)6 motion to dismiss in Medical Supply's separate action against Jeffrey R. Immelt, GE, GHX, GE Capital and GE Transportation. The former eighteen year Shughart Thomson & Kilroy shareholder acting as magistrate on the GE case denied Medical Supply discovery and the court did not even permit discovery when the dismissal attachments necessitated conversion of the GE motion to one for summary judgment.

405. On January 29, 2004, March 4, 2004, April 2, 2004 US Bancorp's counsel, Nicholas A.J. Vlietstra and Piper Jaffray's counsel Reed coordinated their appeal (10th C.C.A. 03-3342) with the GE defense. The GE defendants included the action against the US Bancorp defendants and Unknown Healthcare Provider as a related appellate case in (10th C.C.A. 04-3075) and used the US Bancorp order as a basis for a cross

appeal (10th C.C.A. 04-3102) challenging the failure of the trial court to grant sanctions against Medical Supply.

406. The coconspirators UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars did however renew their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US Bancorp and consulting with representatives for US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth Circuit Court of Appeals to uphold the trial court's erroneous ruling. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US Bancorp and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, all originating from the cartel's agents Shughart Thomson and Kilroy's past and current share holders.

407. The Shughart Thomson & Kilroy counsel, Andrew DeMarea failed to file a reply brief in the interlocutory appeal for the US Bancorp appellees. The Tenth Circuit court clerk called him two days later to remind him and urged him to file for an extension one day beyond the date the brief was due and seven days beyond the deadline for a motion for extension of time under 10th Cir. R. 27.4(F).

408. Andrew DeMarea also refused to turn in a parties case management conference report on the form required by local rule in the Kansas District Court. He repeatedly assured the magistrate during the first case management conference that the Medical Supply case would be dismissed.

409. Mark Olthoff, an attorney for Shughart Thomson & Kilroy in their Kansas City, MO office appeared to write all pleadings and briefs for the defendants until the second appeal where he appears to have been replaced by Susan C. Hascall of the Kansas City, MO office who was a Tenth Circuit Court of Appeals law clerk through 2000.

410. Mark Olthoff's trial pleadings repeatedly misstated and misrepresented Medical Supply's Amended Complaint and pleadings to the court, even after it had been repeatedly drawn to the court's attention that Mr. Olthoff was exploiting the court's reliance on the experience of Shughart Thomson &

Kilroy and was neglecting to read or consider Medical Supply's pleadings. In its order, the court even admonished Medical Supply's for failing to research law and facts that the record evidences had been researched. The negligence was entirely that of Mr. Olthoff and the court's or a result of the court's misplaced reliance on Mr. Olthoff.

411. The Medical Supply action against US Bancorp was dismissed but not on arguments or authorities presented by Shughart Thomson & Kilroy's dismissal memorandum. The first findings of law and fact made by the court in the case were *sua sponte* and both were clearly erroneous.

412. The court did not respond to Medical Supply's arguments for reconsideration or correct its factual errors. It is believed that the Shughart Thomson & Kilroy former managing partner obtained the magistrate assignment to Medical Supply's case against General Electric because of his relationship to Shughart Thomson & Kilroy and it provided an opportunity to address the same fact pattern as the earlier case because GE breached its contract with Medical Supply once the electronic marketplace GHX created by GE and its hospital supplier competitors discovered Medical Supply was attempting again to enter the market for hospital supplies.

413. On January 14th, 2005, Andrew DeMarea was directed to file an ethics complaint against Medical Supply. Like the "complaint" filed by Sherri Price, no allegations of misconduct appear in DeMarea's complaint, it merely incorporates by reference attached Medical Supply filings in the District Court and the Tenth Circuit and the appellate panel's sanction of Medical Supply's counsel for a "frivolous appeal." The "complaint" also contained Medical Supply's motion for en banc review of the sanctions. The sanction order itself admitted the trial court and the hearing panels were mistaken in stating there was no private right of action contained in the USA PATRIOT Act.

414. The former Shughart Thomson & Kilroy managing partner used his position as magistrate assigned to the Medical Supply action against General Electric to deny Medical Supply discovery. A decision he also made in the Bolden case. On January 20, 2005 the magistrate testified under oath in the disciplinary prosecution of Medical Supply's counsel that he had only denied discovery in a few cases. He stated he was unaware of any other case he was assigned where the respondent was an attorney. He visibly winced when he was then questioned if he was a magistrate in Medical Supply v. General Electric et al. where the respondent was the sole counsel for the plaintiff.

415. On January 19th, 2005, the state disciplinary tribunal heard arguments that the magistrate was the complaining witness in fact for the complaint made by the assistant city attorney against Medical Supply's counsel. Sherri Price made no independent allegations or observations of misconduct against the respondent and merely incorporated by reference Magistrate O'Hara's report and recommendation from Bolden's pretrial conference. The disciplinary tribunal ordered the magistrate to drive to Topeka and testify under oath.

416. The former Shughart Thomson & Kilroy managing partner acting as magistrate added to his attacks against Medical Supply's counsel with further statements impugning the respondent's competence. . The magistrate testified that Bolden's counsel was the worst attorney he had seen in 20 years. The magistrate alleged that Medical Supply's counsel did not have the skill or knowledge of the law a first year law student would possess.

417. The former Shughart Thomson & Kilroy managing partner acting as magistrate made a point of addressing facts that weakened the Kansas Disciplinary Administrator's case from the previous two days and made these assertions unsolicited from the questioning of the Disciplinary Administrator and demonstrated a pre appearance coaching or consultation with the Disciplinary Administrator, especially on the point about Medical Supply's competence being less than that of a first year law student. The magistrate could not have known that Medical Supply's counsel had testified the previous day that many states permit law students to represent clients in civil rights actions because of the shortage of counsel willing to undertake this difficult and unlucrative work.

418. The former Shughart Thomson & Milroy managing partner acting as magistrate impugned the professional ability of Medical Supply's counsel in an order where he was neither a party or attorney, The magistrate stated unequivocally that Medical Supply's counsel was incompetent. During testimony under oath on January 20th, 2005, the magistrate stated he could not recall ever stating in an order where the respondent was not an attorney that the respondent was incompetent.

15. The Impending Threat Of Monopolization of the Market For Hospital Supplies In E-Commerce

419. Industry insiders and investment message boards are communicating that it is likely Neoforma, Inc, with its 1,500 hospitals $4.1 billion in gross transaction volume and $6.8 billion in supply chain data will be acquired by GHX, LLC this year.

420. The purpose of the merger is to restrain trade in the e-commerce market for hospital supplies and increase the market power of both companies, which is 80% to the entire control of the single company GHX. A second purpose of the merger is to conceal the loss of funds belonging to Novation's member hospitals in the Neoforma venture.

421. Neoforma, Inc. and GHX, LLC have already integrated their electronic marketplaces, sharing data to control prices by preserving the Novation and Premier imposed fees and contracts on manufacturers for internet sales of hospital supplies and pooling electronic marketplace infrastructures to eliminate competition between the two marketplaces and have done so since 2001.

422. GHX connects over 2,200 hospitals to more than 140 suppliers, creating the largest trading exchange in healthcare. The company proclaims; "GHX is the leader in the healthcare trading exchange segment. "On average, GHX processed more than 12,000 purchase orders and $23 million in volume daily at the end of 2004.

SUMMARY OF CLAIMS

423. Medical Supply Chain, Inc., in its antitrust litigation opposing trade restraint in the electronic market for hospital supplies. Medical Supply has experienced substantial antitrust injury from the actions of Novation, a joint venture created by UHC and VHA, Inc. in support of the electronic marketplace entity Neoforma, Inc. which is believed to be an instrumentality of UHC and VHA, Inc. which were both in an alliance to eliminate competition among member competitors in a scheme to inflate prices similar to the alliance of Shell and Texaco to create two joint ventures, Equilon Enterprises LLC and Motiva Enterprises condemned for per se Sherman I prohibited conduct in *Dagher v Saudi Refining Inc*, 369 F.3d 1108, 1114 (9th Cir. 2004).

424. Medical Supply Chain, Inc. has been excluded from the hospital supply market with agreements between UHA and VHA's Novation in combination with their electronic marketplace Neoforma, Inc. US Bancorp NA, and The Piper Jaffray Companies exchanged directors with Novation and participated in exclusive agreements with Novation and Neoforma to keep hospitals using technology products from companies US Bancorp NA and Piper Jaffray had an interest in. The purpose of these agreements was to injure the hospital supply consumers with artificially inflated prices.

425. Because of these illegal anticompetitive agreements with Novation and Neoforma, Inc., Piper Jaffray and then US Bancorp refused to deal with Medical Supply Chain, Inc. US Bancorp broke a contract with Medical Supply Chain, Inc. to provide escrow accounts needed to capitalize Medical Supply's entry into the hospital supply marketplace, using the pretext of the USA PATRIOT Act. US Bancorp and Piper Jaffray simultaneously stole Medical Supply's intellectual property, which has since been openly used by Novation and Neoforma. US Bancorp and Piper Jaffray have continued to extort property from Medical Supply Chain on behalf of the hospital supply cartel by obstructing entry to the market for hospital supplies through the threat of malicious USA PATRIOT Act reports.

426. Medical Supply attempted to obtain preliminary injunctive relief against US Bancorp, The Piper Jaffray Companies and an Unknown Healthcare Supplier to prevent them from using the USA PATRIOT Act as a sham petition designed to prevent Medical Supply from entering the market and to stop the theft of its intellectual property. To date, Medical Supply has not been successful.

427. In June of 2004, Novation/ Neoforma, Inc. again stopped Medical Supply from entering the market for hospital supplies using exclusive dealing agreements with General Electric and GE's electronic marketplace cartel GHX, LLC. These agreements caused GE to break a written contract to purchase a commercial real estate lease from Medical Supply. The contract included Medical Supply's requirement to use the proceeds to capitalize Medical Supply's entry to market since it was under the extortion of US Bancorp threatened and malicious USA PATRIOT Act reporting. Medical Supply is currently attempting to resolve its contract with GE and obtain injunctive relief and treble damages under Sherman I and II.

428. On December 14, 2004 Medical Supply served notice on UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars that Medical Supply had not succeeded in obtaining prospective injunctive relief against the US Bancorp and Piper Jaffray defendants to prevent antitrust injuries from being obstructed from entering the market for hospital supplies or the theft of Medical Supply's intellectual property. The notice informed the UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars that if they did not provide a substantiated response denying their responsibility for the hospital supply cartel's actions against Medical Supply, they would be held jointly and severally liable:

> "If you dispute that any of these actions were taken against Medical Supply, or that your company is liable as an antitrust coconspirator, please promptly provide a *substantiated* basis for Medical

Supply's reliance on the same to me at the address provided below. Since your company has not refuted the publicized events and relationships described herein, a constructive use of the time remaining between now and our anticipated filing of February 1, 2005 might be to reach an agreement on the platform and electronic format the millions of recorded transactions, hospital supply contracts, kickbacks and equity shares that will be exchanged through discovery as we collectively document the injuries to America's hospitals and our company from your concerted refusals to deal and group boycotts."

429. Only counsel for Neoforma responded and the purpose of the communication was to have Medical Supply await their answer till after the holidays, an answer that never came.

430. The coconspirators UHC, Robert J. Baker, VHA, Inc., Curt Nonomaque, Novation LLC, Neoforma, Inc. and Robert J. Zollars did however renew their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US Bancorp and consulting with representatives for US Bancorp, US Bank, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth Circuit Court of Appeals to uphold the trial court's erroneous ruling. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US Bancorp and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, all originating from the cartel's agents Shughart Thomson and Kilroy's past and current share holders.

CLAIMS FOR RELIEF

431. Medical Supply seeks the following relief based on continuing anticompetitive conduct by the defendants in an ongoing unlawful enterprise to overcharge Medicare, Medicaid, Champus and private insurance companies with artificially inflated claims and to control the capitalization of healthcare technology companies and supply chain management companies to prevent web based competition from lowering the prices for hospital supplies.

432. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff targeted Medical Supply Chain as a potential competitor that would bypass their monopolized distribution

system for hospital supplies and cause price competition and destroy the anticompetitive advantage held by healthcare technology and supply chain management companies controlled by the defendants in obtaining capitalization.

433. The defendant Novation LLC is the largest Hospital Group Purchasing Organization selling over 30 billion dollars in hospital supplies a year and controlling the purchasing in 2000 hospitals nationwide.

434. The defendants possess market power having the power to exclude competitors from 2000 of the nation's hospitals, which Novation controls under long term purchasing contracts. The defendants possess market power in the ability to charge manufacturers and suppliers fees to have their products sold to Novation's members and additional fees to manufacturers and suppliers for allowing their products to be sold though the web where member hospitals are required to purchase products through Neoforma, Inc. The defendants possess market power in having exclusive access to Piper Jaffray's investor research coverage and annual healthcare conferences, elements essential to effectively obtain capitalization through an initial public offering. The defendants possess market power in having exclusive access to the commercial banking facilities of US Bancorp NA.

COUNT I
DAMAGES FOR COMBINATION AND CONSPIRACY
IN RESTRAINT OF TRADE OR COMMERCE
(15 U.S.C. §§ 1,15)

435. Plaintiff realleges paragraphs 1 through 434.

436. 15 U.S.C. § 1 provides that "Every ... combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States... is hereby declared to be illegal."

437. Beginning at least as early as 1998, and continuing until the present date, Defendants entered into a combinations and or conspiracies in unreasonable restraint of trade or commerce among the several States of the United States, in the markets for hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies.

438. These combinations and or conspiracies took the form of Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements, and their respective annual shows. Said Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements were instigated and conducted by Defendants Novation, LLC, Neoforma, Inc.,

Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker who had and have market power over, i.e. a controlling percentage of market share of, the sale of hospital supplies, and the sale of hospital supplies sold in e-commerce; and by Defendants US Bancorp, NA, US Bank , Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff who had and have market power over, i.e. a controlling percentage of market share of, the capitalization of healthcare technology and supply management companies including healthcare venture funds, private placement and public offering underwriting, commercial banking, trust facilities and market research analyst coverage necessary for Medical Supply to obtain external capital and necessary for Medical Supply to self capitalize its entry into the hospital supply market and the market for hospital supplies in e-commerce. Said Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements had the purpose and effect of severely impairing the ability of Medical Supply to sell hospital supplies to hospitals conventionally or through e-commerce and to obtain capital it had self raised to enter the market for hospital supplies in the several States of the United States; and was further intended to eliminate or greatly reduce the availability of hospital supplies through e-commerce regardless of hospital demand in the several States of United States, and impose a burdensome fees on manufacturers and suppliers for selling hospital supplies through web based electronic marketplaces to hospitals and health systems in the several States of the United States.

439. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker are and were direct competitors of Medical Supply in the sale of hospital supplies and the sale of hospital supplies in e-commerce.

440. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker have and have had significant interests in the market for capitalization of healthcare technology and supply chain management companies.

441. The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff competed and compete directly with Medical Supply in the market for capitalization of healthcare technology and supply chain management companies because Medical

Supply was forced by the defendants conspiracies and combinations to self capitalize its entry into market with unique trust accounts from it had solicited from its sales representative candidates.

442. The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have and have had significant interests in the market for hospital supplies and hospital supplies sold in e-commerce where US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have concentrated 70% of their investment and have marketed IPO shares based on exclusive dealing contracts obtained for their client companies with Novation, LLC. , Neoforma, Inc., Volunteer Hospital Association and University Healthsystem Consortium.

443. The defendant Shughart Thomson & Kilroy as a latecomer in October 2002 to the conspiracies and combinations had a significant interest in the markets for hospital supplies and hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies where they were agents for US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff. Shughart Thomson & Kilroy was coerced or voluntarily took unlawful actions to protect and assist the defendants in monopolization and monopoly of the markets for hospital supplies and hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies.

444. The Defendants committed the following per se violations of section 1 of the Sherman Antitrust Act:

Novation, LLC, Neoforma, Inc., Robert J. Zollars,
Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium,
Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere,
The Piper Jaffray Companies and Andrew S. Duff's Group Boycott Under Sherman 1

445. (1) Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff had agreements to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization.

446. a. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA,

US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff created and enforced agreements to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization with a unity of purpose and a common design and understanding, having a meeting of minds in unlawful plans to limit competition and thereby increase the defendants profitability from overcharging Medicare, Medicaid, Champus and private insurance companies for healthcare costs based on artificially inflated hospital supply costs. The defendants created and enforced unlawful plans to prevent healthcare technology and supply chain management companies from being capitalized and from marketing products and services to healthcare companies without the defendants' participation, approval and profit.

447. **b.** The defendants The Piper Jaffray Companies and Andrew S. Duff refused to offer Medical Supply investment banking services or to respond to Medical Supply's correspondence pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization.

448. **c.** The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer and Andrew Cesere, broke their contract to provide quarterly escrow account deposits of $350,000.00 Medical Supply had relied upon to capitalize its entry into the market for hospital supplies pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization.

449. **(2)** Medical Supply was injured as a direct and proximate result of Novation, LLC, Neoforma,Inc, Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff's agreements to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization.

450. **(3)** Medical Supply's damages from Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US

Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff's agreements to restrain trade in the market for hospital supplies, and agreements to restrain trade in the market for healthcare technology company capitalization are capable of ascertainment and not speculative.

Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff's Allocation of Customers Under Sherman 1

451. (1) Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff had agreements to allocate customers in the market for hospital supplies, and agreements to allocate customers in the market for healthcare technology company capitalization.

452. **a.** The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff created and enforced agreements to allocate customers in the market for hospital supplies, and agreements to allocate customers in the market for healthcare technology company capitalization with a unity of purpose and a common design and understanding, having a meeting of minds in unlawful plans to limit competition by allocating customers and thereby increase the defendants profitability from overcharging Medicare, Medicaid, Champus and private insurance companies for healthcare costs based on artificially inflated hospital supply costs. The defendants created and enforced unlawful plans to allocate customers in long term anticompetitive contracts between healthcare technology and supply chain management companies and group purchasing organizations to guarantee companies marketing products and services to healthcare companies with the defendants' participation, approval and profit were being capitalized and that competitors were being excluded from capitalization.

453. **b.** The defendants The Piper Jaffray Companies and Andrew S. Duff refused to offer Medical Supply investment banking services or to respond to Medical Supply's correspondence pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to allocate customers among the

group purchasing organizations to healthcare technology company and supply chain management companies in which the defendants' cartel had a participatory interest.

454. **c.** The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer and Andrew Cesere, broke their contract to provide quarterly escrow account deposits of $350,000.00 Medical Supply had relied upon to capitalize its entry into the market for hospital supplies pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to allocate customers among the group purchasing organizations to healthcare technology company and supply chain management companies in which the defendants' cartel had a participatory interest.

**Novation, LLC, Neoforma, Inc., Robert J. Zollars,
Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium,
Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere,
The Piper Jaffray Companies and Andrew S. Duff's Horizontal Price Restraint Under Sherman 1**

455. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium formed the joint venture Novation, LLC for the illegal purpose of eliminating competition between the two cooperatives, leveraging their market power established with long term anticompetitive and exclusive dealing contracts to restrain trade in a larger percentage of the US hospital market. The Defendants used the combinations and conspiracies to set prices for every member hospital in Novation and Neoforma's markets.

**Novation, LLC, Neoforma, Inc., Robert J. Zollars,
Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium,
Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere,
The Piper Jaffray Companies and Andrew S. Duff's Vertical Price Restraint Under Sherman 1**

456. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium formed the joint venture Novation, LLC for the illegal purpose of eliminating competition between the two cooperatives, leveraging their market power established with long term anticompetitive contracts to restrain trade in a larger percentage of the US hospital market. The new company managed all of the distribution for both competitors, set prices, artificially inflating the costs of all products sold to both hospital member groups and pooled the profits from the sale of hospital supplies.

457. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium eliminated competition by marketing products under the Novation, LLC private brand.

458. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium also retained rebates belonging to both groups of member hospitals and pooled them in a web based electronic marketplace company- Neoforma, Inc. which the defendants Novation, LLC, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff gained control of, suppressed and used to forestall competition from an independent web based electronic marketplace for hospital supplies utilizing Medical Supply's business model.

Maintaining Minimum Prices

459. **(1)** Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff had agreements to maintain minimum prices in the market for hospital supplies, and agreements to maintain minimum prices in the market for healthcare technology company and supply chain management company capitalization.

460. **a.** The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium, Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff created and enforced agreements to maintain minimum prices in the market for hospital supplies, and agreements to allocate maintain minimum prices in the market for healthcare technology company capitalization with a unity of purpose and a common design and understanding, having a meeting of minds in unlawful plans to limit competition by maintain minimum prices and thereby increase the defendants profitability from overcharging Medicare, Medicaid, Champus and private insurance companies for healthcare costs based on artificially inflated hospital supply costs. The defendants created and enforced unlawful plans to maintain minimum prices in long term anticompetitive contracts between healthcare technology and supply chain management companies and group purchasing organizations to guarantee companies marketing products

and services to healthcare companies with the defendants' participation, approval and profit were being capitalized and that competitors who would not maintain minimum prices were being excluded from capitalization.

461. **b.** The defendants The Piper Jaffray Companies and Andrew S. Duff refused to offer Medical Supply investment banking services or to respond to Medical Supply's correspondence pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to maintain minimum prices among the group purchasing organizations to healthcare technology company and supply chain management companies in which the defendants' cartel had a participatory interest and exclude companies that would not maintain minimum prices.

462. **c.** The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer and Andrew Cesere, broke their contract to provide quarterly escrow account deposits of $350,000.00 Medical Supply had relied upon to capitalize its entry into the market for hospital supplies pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to pursuant to agreements with Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker to allocate customers among the group purchasing organizations to healthcare technology company and supply chain management companies in which the defendants' cartel had a participatory interest and exclude companies that would not maintain minimum prices.

463. **d.** The defendants' anticompetitive conduct to maintain prices included using the US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff underwritten company Omnicell's software and later Neoforma, Inc.'s to monitor pricing and fulfillment of products sold throughout the distribution channels of Novation, LLC, Volunteer Hospital Association and University Healthsystem Consortium to enforce the defendant's scheme to artificially inflate prices of hospital supplies.

464. **e.** Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker utilized an electronic reporting

arrangement facilitated by Neoforma, Inc. to foster parallel pricing with the competitor GPO Premier and throughout the competing electronic marketplace GHX, LLC to fix prices of hospital supplies.

465. **f.** (1) Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker has contracted, combined, and conspired (2) with a separate economic entity supplier and manufacturers (3) to set the price at which the products are resold (4) in an independent commercial transaction with a subsequent hospital purchasers.

**Novation, LLC, Neoforma, Inc., Robert J. Zollars,
Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium,
Robert J. Baker, US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere,
The Piper Jaffray Companies and Andrew S. Duff's Tying Agreements Under Sherman 1**

466. The competing hospital cooperative purchasing organizations Volunteer Hospital Association and University Healthsystem Consortium formed the joint venture Novation, LLC for the illegal purpose of eliminating competition between the two cooperatives, leveraging their market power established with long term anticompetitive and exclusive dealing contracts to restrain trade in a larger percentage of the US hospital market. The Defendants used the combinations and conspiracies to tie products and lines of products so that hospitals were unable to chose between vendors.

467. The Defendants tied membership in their electronic marketplace, Neoforma, Inc. with their competitor Premier's electronic marketplace GHX, LLC so that every hospital that enrolled in GHX, LLC was required to also enroll in Neoforma so that the Defendants could exclude electronic marketplaces outside of the combination and conspiracy.

15 U.S.C. § 15 provides that

> "... any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore... without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

468. As a direct result of Defendants' unlawful activity, Plaintiff has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

469. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, for the denial of the escrow accounts and approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, for the denial of the second capitalization attempt through the sale of the

lease to GE Transportation. The plaintiff is entitled to recover total Sherman I damages of $3,000,000,000.00 and the cost of suit including a reasonable attorney's fee.

COUNT II
INJUNCTIVE RELIEF FOR COMBINATION AND CONSPIRACY
IN RESTRAINT OF TRADE OR COMMERCE
(15 U.S.C. §§ 1,26)

470. Plaintiff realleges paragraphs 1 through 469.

471. 15 U.S.C. § 26 provides that "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief... against threatened loss or damage by a violation of the antitrust laws... [and] the cost of suit, including a reasonable attorney's fee."

472. Unless enjoined from doing so, Defendants will continue to violate 15 U.S.C. § 1.

473. Plaintiff is also entitled to recover their cost of suit, including a reasonable attorney's fee.

COUNT III
DAMAGES FOR MONOPOLIZATION
(15 U.S.C. §§ 2,15)

474. Plaintiff realleges paragraphs 1 through 473.

475. 15 U.S.C. § 2 provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade of commerce among the several States... shall be deemed guilty" of an offense against the antitrust laws of the United State.

476. Defendants collectively have at all times material to this complaint maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies in the several Stated of the United States; and have used, attempted to use, or combined and conspired to use, their monopoly power to affect competition in the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies sale of the same in the several States of the United States in violation of 15 U.S.C. § 2.

477. As a direct result of Defendants' unlawful activities, Plaintiff has suffered and will continue suffer substantial injuries and damages to their businesses and property.

478. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

Threat of USA PATRIOT Act Suspicious Activity Reporting

479. The Defendants repeatedly used the USA Patriot Act to deny services of US Bank and US Bancorp to Medical Supply, causing the loss of Medical Supply property. The Defendants, despite their regulated status as financial institutions and corporate officers of financial institutions responsible for providing a professional service; denied Medical Supply, a known domestic corporation in good standing with its Secretary of State and State Department of Revenue an escrow account service on the basis of increased reporting requirements for new accounts under the USA PATRIOT Act even though The US Treasury Department had previously announced it was delaying the date account opening requirements become issued and effective and Us Bancorp was under no reporting requirements for Medical Supply's escrow accounts.

480. The Defendants continue to endanger the plaintiff Medical Supply and its associates with wrongful denial of services and facilities of US Bancorp where Medical Supply has its accounts or at other national and state banks where Medical Supply may be denied services based on erroneous or bad faith reporting by the Defendants.

481. The Defendants continue to endanger the plaintiff Medical Supply its associates and customers with wrongful denial of services and facilities of national and state banks where Medical Supply may be denied services based on the Defendants unprofessional and bad faith denial of escrow accounts based on the USA PATRIOT Act. The Defendants action prevents Medical Supply from escaping the denial of escrow accounts history and banking references in all new financial arrangements.

482. On October 22, 2002 Medical Supply approached an attorney of Shook, Hardy and Bacon for the purpose of acting as escrow agent in substitute accounts to be set up at a national bank. After asking why Medical Supply's existing bank did not provide the accounts, the attorney declined to act as escrow agent out of a justified fear his firm would also receive a malicious suspicious activity report.

Violation of §802 of The USA PATRIOT Act

483. The Defendants continue to endanger the plaintiff Medical Supply, its associates and customers with illegal conduct that prevents them from or threatens to prevent them providing a market solution to this governmental healthcare policy issue.

484. The US Senate Judiciary Committee's Antitrust Subcommittee has held three consecutive hearings on the anticompetitive practices in the national market for hospital supplies. The illegal actions of the defendants have prevented Medical Supply from having the resources to appear and testify.

485. The Defendants through their illegal obstruction of Medical Supply's entry into the markets for hospital supplies and hospital supplies in e-commerce have attempted to influence the national policy debate on group purchasing organization regulation by denying legislators statistics and data from a functioning independent electronic marketplace.

The Filing of a Malicious USA PATRIOT Act Suspicious Activity Report (SAR)

486. On information and belief, Medical Supply has discovered that the Defendants have filed malicious suspicious activity reports against Medical Supply and its founder Samuel Lipari.

487. The Defendants have deliberately and intentionally filed a baseless USA PATRIOT Act suspicious activity report as part of a conspiracy and or combination to keep Medical Supply out of the market place for hospital supplies and hospital supplies sold in e-commerce and to keep Medical Supply from being able to self fund its entry into market by destroying Medical Supply's ability to capitalize healthcare technology and supply chain management companies.

Harassing Medical Supply and its Agents Outside of This Action

488. The Defendants through Neoforma and Robert Zollars, acting for the other defendants and in a conspiracy and combination with the unnamed coconspirators GE, GE Healthcare, GE Capital and GHX caused Medical Supply and its counsel to be threatened with sanctions for filing an action to prevent GE from restraining trade in the market for hospital supplies and hospital supplies in e-commerce.

489. Neither GE or its counsel furnished a reason why Medical Supply would be sanctioned for filing the suit and intended to intimidate or harass Medical Supply by implying that GE and Neoforma have illegal influence and control over the legal system.

490. The Defendant Shughart Thomson & Kilroy has acted outside of litigation in defense of the Defendants and repeatedly sough to deprive Medical Supply of counsel under color of state law by causing

Medical Supply's counsel to have multiple ethics complaints filed and prosecuted for the sole purpose of preventing Medical Supply from having effective representation.

491. The Defendants knew Shughart Thomson & Kilroy was succeeding in extra legal influencing of Medical Supply's case against the US Bancorp defendants and the action against GE and its subsidiaries and overtly ratified said conduct for the purpose of monopolizing the markets in the sale of hospital supplies and hospital supplies in e-commerce and the market in capitalizing healthcare technology and supply chain management companies.

Unilateral Refusal To Deal

492. The Piper Jaffray Companies and Andrew S. Duff unilaterally as a single firm refused to provide investment banking services to Medical Supply to monopolize the market in capitalizing healthcare technology and supply chain management companies because Medical Supply was not seeking underwriting and to control the downstream markets in the sale of hospital supplies and hospital supplies in e-commerce where The Piper Jaffray Companies and Andrew S. Duff have substantial interests.

493. US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere as a single firm unilaterally refused to provide trust escrow accounts and other banking services to Medical Supply to monopolize the market in capitalizing healthcare technology and supply chain management companies because Medical Supply was not seeking underwriting from US Bancorp and Piper Jaffray and to control the downstream markets in the sale of hospital supplies and hospital supplies in e-commerce where The Piper Jaffray Companies and Andrew S. Duff have substantial interests.

494. As a direct result of Defendants' unlawful activities, Plaintiff has suffered and will continue suffer substantial injuries and damages to their businesses and property.

495. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

COUNT IV
INJUNCTIVE RELIEF FOR MONOPOLIZATION
(15 U.S.C. §§ 2,26)

496. Plaintiff realleges paragraphs 1 through 495.

497. Unless enjoined from doing so, Defendants will continue to violate 15 U.S.C. §2.

498. Plaintiff is also entitled to recover their cost of suit, including a reasonable attorney's fee.

COUNT V
DAMAGES FOR INTERLOCKING DIRECTORS
(15 U.S.C. § 19)

499. Plaintiff realleges paragraphs 1 through 498.

500. The Defendants use of interlocking directors in joint ventures and LLC's formed by competing suppliers, manufacturers and distributors and use of interlocking directors on the boards of healthcare technology and supply chain management companies violate Section 8 of the Clayton Act, 15 U.S.C. § 19.

501. The fourth paragraph of Section 8 provides:

> "No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."

502. Defendants through the use of interlocking directors collectively have at all times material to this complaint maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies in the several Stated of the United States; and have used, attempted to use, or combined and conspired to use, their monopoly power and interlocking directors to affect competition in the sale of hospital supplies, the sale of hospital supplies in e-commerce, and over the capitalization of healthcare technology companies and supply chain management companies sale of the same in the several States of the United States in violation of 15 U.S.C. § 19.

503. As a direct result of Defendants' unlawful activities, Plaintiff has suffered and will continue suffer substantial injuries and damages to their businesses and property.

504. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fees.

COUNT VI
DAMAGES FOR COMBINATION AND CONSPIRACY
IN RESTRAINT OF TRADE OR COMMERCE
(26 MO. § 416.031(1), § 416.121(1),(1))

505. Plaintiff realleges paragraphs 1 through 504.

506. 26 Mo § 416.031 (1) provides that "Every... combination or conspiracy in restraint of trade or commerce in this state is unlawful."

507. Beginning at least as early as 1998, and continuing until the present date, Defendants entered into a combinations and or conspiracies in unreasonable restraint of trade or commerce among the several States of the United States, in the markets for hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies.

508. These combinations and or conspiracies took the form of Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements, and their respective annual shows. Said Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements were instigated and conducted by Defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker who had and have market power over, i.e. a controlling percentage of market share of, the sale of hospital supplies, and the sale of hospital supplies sold in e-commerce; and by Defendants US Bancorp, NA, US Bank , Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff who had and have market power over, i.e. a controlling percentage of market share of, the capitalization of healthcare technology and supply management companies including healthcare venture funds, private placement and public offering underwriting, commercial banking, trust facilities and market research analyst coverage necessary for Medical Supply to obtain external capital and necessary for Medical Supply to self capitalize its entry into the hospital supply market and the market for hospital supplies in e-commerce. Said Group Boycott, Allocation of Customers, Horizontal Price Restraint, Vertical Price Restraint and Tying Agreements had the purpose and effect of severely impairing the ability of Medical Supply to sell hospital supplies to hospitals conventionally or through e-commerce and to obtain capital it had self raised to enter the market for hospital supplies in the several States of the United States; and was further intended to eliminate or greatly reduce the availability of hospital supplies through e-commerce regardless of hospital demand in the several States of United States, and impose a burdensome fees on manufacturers and suppliers for selling hospital supplies through web based electronic marketplaces to hospitals and health systems in the several States of the United States.

509. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker are and were direct competitors of Medical Supply in the sale of hospital supplies and the sale of hospital supplies in e-commerce.

510. The defendants Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Healthsystem Consortium and Robert J. Baker have and have had significant interests in the market for capitalization of healthcare technology and supply chain management companies.

511. The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff competed and compete directly with Medical Supply in the market for capitalization of healthcare technology and supply chain management companies because Medical Supply was forced by the defendants conspiracies and combinations to self capitalize its entry into market with unique trust accounts from it had solicited from its sales representative candidates.

511. The defendants US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have and have had significant interests in the market for hospital supplies and hospital supplies sold in e-commerce where US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff have concentrated 70% of their investment and have marketed IPO shares based on exclusive dealing contracts obtained for their client companies with Novation, LLC. , Neoforma, Inc., Volunteer Hospital Association and University Healthsystem Consortium.

512. The defendant Shughart Thomson & Kilroy as a latecomer in October 2002 to the conspiracies and combinations had a significant interest in the markets for hospital supplies and hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies where they were agents for US Bancorp, NA, US Bank, Jerry A. Grundhoffer, Andrew Cesere, The Piper Jaffray Companies and Andrew S. Duff. Shughart Thomson & Kilroy was coerced or voluntarily took unlawful actions to protect and assist the defendants in monopolization and monopoly of the markets for hospital supplies and hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies.

513. 26 Mo. § 416. 121 provides that:

1. "Any person... who is injured in his business or property by reason of anything forbidden or declared unlawful by section [416.031(1)] ... may:

(1) Sue for damages sustained by him, and... shall be awarded threefold damages by him sustained and reasonable attorneys' fees... together with the costs of suit."

514. As a direct result of Defendants' unlawful activity, Plaintiff has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

515. Plaintiff is entitled to recover their actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

COUNT VII
INJUNCTIVE RELIEF FOR COMBINATION AND CONSPIRACY
IN RESTRAINT OF TRADE OR COMMERCE
(26 MO. § 416.031(1), § 416.071(1), (2), § 416.121(1)(1))

516. Plaintiff realleages paragraphs 1 through 515.

517. 26 Mo. § 416.071 provides for:

1. "... such preliminary or permanent injunctive relief and ... such temporary restraining orders as are necessary to prevent and restrain violations of section 416.031... [and]

2. ... such prohibitory injunctions and other restraints as [the court] deems expedient to deter ...and secure against... committing a future violation of section [416.031(1)]... [and] such mandatory relief as is reasonably necessary to restore or preserve fair competition in the trade or commerce affected by the violation."

518. 26 Mo. § 416.121 provides that:

1. "Any person... who is injured in his business or property by reason of anything forbidden or declared unlawful by section [416.031(1)] ... may:

(2) Bring proceedings to enjoin the unlawful practices, and... shall be awarded reasonable attorneys' fees... together with the costs of the suit."

519. Unless enjoined from doing so, Defendants will continue to violate 26 Mo. § 416. 031(1).

520. Plaintiffs are also to recover their costs of suit and reasonable attorneys' fees.

COUNT VIII
DAMAGES FOR MONOPOLIZATION
(26 MO. § 416.031(2), § 416.121(1),(1))

521. Plaintiff realleages paragraphs 1 through 520.

522. 26 Mo. § 416.031(2) provides that "It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state."

523. Defendants collectively have at all times material to this complaint maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies, the sale of hospital supplies sold in e-commerce and the capitalization of healthcare technology companies and supply chain management companies.

524. As a direct result Defendants' unlawful activities, Plaintiff has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

525. Plaintiff is entitled to recover actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

COUNT IX
INJUNCTIVE RELIEF FOR MONOPOLIZATION
(26 MO. § 416.031(2), § 416.071(1), (2), § 416.121(1),(2))

526. Plaintiff realleges paragraphs 1 through 525.

527. Unless enjoined from doing so, Defendants will continue to violate 26 Mo. § 416.031(2).

528. Plaintiff is also entitled to recover their costs of suit and reasonable attorneys' fees.

COUNT X
DAMAGES FOR TORTIOUS INTERFERENCE WITH
CONTRACT OR BUSINESS EXPECTANCY

529. Plaintiff realleges paragraphs 1 through 528.

530. Plaintiff's individual representative candidate trust accounts with US Bank and its contract to sale the office building lease to General Electric Transportation Co. were required for Medical Supply to enter the markets for hospital supplies and hospital supplies for e-commerce and were contracts or business expectancies Said activities were intended by Defendants and performed by Defendants.

531. Defendants knew of said contracts or business expectancies.

532. Having such knowledge, Defendants intentionally conspired to interfere and did interfere with such contracts or business expectancies, so as to cause breach of the same.

533. Defendants did so without justification and stated pretextual reasons for their actions.

534. As a direct and proximate result of said actions of Defendants, Plaintiff has suffered and will continue to suffer injuries and damages to its business and properties.

535. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

536. Defendants' actions were willful, wanton, malicious and oppressive.

537. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XI
DAMAGES FOR BREACH OF CONTRACT

538. Plaintiff realleges paragraph 1 through 537.

539. The Defendant US Bank breached an enforceable contract with Medical Supply that was a written contract under Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq.

540. The Defendants US Bank and Shughart Thomson & Kilroy caused the breach of US Bank's contractual duty to Medical Supply to provide trust accounts based on a deliberately false reason, the USA PATRIOT Act.

541. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

542. Defendants' actions were willful, wanton, malicious and oppressive.

543. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XII
DAMAGES FOR BREACH OF FIDUCIARY DUTY

544. Plaintiff realleges paragraph 1 through 543.

545. The Defendant US Bank owed a duty to Medical Supply to know the USA PATRIOT Act was not a bar to providing Medical Supply its trust accounts.

546. The Defendant US Bank owed a duty to Medical Supply to not disclose confidential information to Medical Supply's competitors, the defendants in this action.

547. The Defendant US Bank breached its fiduciary duty to Medical Supply without justification and stated pretextual reasons for their actions.

548. The Defendant US Bank and Shughart Thomson & Kilroy breached US Bank's fiduciary duty to Medical Supply by denying the existence of a valid contract and without providing a basis in fact or law for the contract to be void.

549. The Defendants US Bank and Shughart Thomson & Kilroy caused the breach of US Bank's fiduciary duty to Medical Supply in conspiracy with the other defendants.

550. As a direct and proximate result of said actions of Defendants, Plaintiff has suffered and will continue to suffer injuries and damages to its business and properties.

551. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

552. Defendants' actions were willful, wanton, malicious and oppressive.

553. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XIII
DAMAGES FOR FRAUD AND DECEIT

554. Plaintiff realleges paragraph 1 through 553.

555. Each of the acts, practices, misrepresentations, violations and other wrongs complained of above have been engaged in by Defendants with malice and with specific and deliberate intent to oppress, defraud, deceive and injure Plaintiff.

556. Said activities aforementioned by Defendants were done in concert and in secret with the intention to injure Plaintiff all the while knowing that the lack of candor and disclosure of the true acts and activities by Defendants would give Defendants an economic advantage over Plaintiff. Defendants were engaged in concealed fraudulent conduct. Defendants, and each of them, had a duty under the antitrust and anticompetitive which Defendants breached constituting a fraud and deceit upon Plaintiff.

557. Said activities were intended by Defendants to cause injury to Plaintiff by and through intentional misrepresentations to Plaintiff and third parties concerning Plaintiff.

558. Said activities did directly and proximately cause injury to Plaintiff.

559. Said activities were and are unjustified.

560. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

561. Defendants' actions were willful, wanton, malicious and oppressive.

562. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XIV
DAMAGES FOR PRIMA FACIE TORT

563. Plaintiff realleges paragraphs 1 through 562.

564. To whatever extent said activities of Defendants may not violate antitrust laws or tortuously interfere with contract or business expectancy, said acts and activities of Defendants are still unlawful and fraudulent.

565. Said activities were intended by Defendants and performed by Defendants.

566. Said activities were intended by Defendants to cause injury to Plaintiff.

567. Said activities did directly and proximately cause injury to Plaintiff.

568. Said activities were and are unjustified.

569. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

570. Defendants' actions were willful, wanton, malicious and oppressive.

571. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

COUNT XV
DAMAGES FOR RACKETEERING
INFLUENCED CORRUPT ORGANIZATION (RICO) CONDUCT
(18 U.S.C. § 1962(c), 18 U.S.C. § 1962(d))

572. Plaintiff realleges paragraph 1 through 571.

573. On January 21, 2005 Medical Supply discovered the Defendants' pattern of inflicting injuries on the plaintiff to obstruct its entry into the market for hospital supplies and hospital supplies in e-commerce. An important component of the Defendants' scheme was to interdict capital required by Medical Supply to

enter the market. The Defendants targeted Medical Supply's founder in 1995 and targeted Medical Supply upon its incorporation in 2000. From the outset, the Defendants have maintained a continuous pattern of preventing an independent clearinghouse electronic market place from interfering with their common enterprise to to artificially inflate prices paid by Medicare, Medicaid and Champus.

574. The Defendants violated 18 U.S.C. § 1962(c) by conducting a RICO enterprise (the hospital group purchasing enterprise to artificially inflate prices paid by Medicare, Medicaid and Champus) through a pattern of racketeering activity.

575. The Defendants violated 18 U.S.C. § 1962(d) through participation in a RICO conspiracy.

576. The Defendants engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

577. The Defendants participated in the operation and management of the hospital group purchasing enterprise to artificially inflate prices paid by Medicare, Medicaid and Champus itself.

578. When Medical Supply sought to appeal the outcomes in the Kansas District Court, the Defendants sought the assistance of Shughart Thomson & Kilroy to intimidate, harass and obstruct Medical Supply and prevent Medical Supply and its agents from testifying and preventing evidence in federal court.

579. To realize that goal the Defendants directly and tacitly caused Shughart Thomson & Kilroy to create and arrange for Medical Supply's counsel to receive repeated ethics complaints and to be prosecuted by the State of Kansas Disciplinary Administrator based on the false and misleading testimony of Shughart Thomson & Kilroy's former managing partner, a federal magistrate judge and a sham complaint made by the Shughart Thomson & Kilroy counsel defending US Bancorp and Piper Jaffray.

580. Shughart Thomson & Kilroy through its employees and past employees created the plan to retaliate against and intimidate and harass Medical Supply's counsel when they discovered Medical Supply could not obtain outside counsel due to conflicts of interest in law firms the plaintiff had approached.

581. Shughart Thomson & Kilroy through its employees and past employees implemented the plan and carried out its operations with the intent and motive of making sure that the Defendants could continue the enterprise to monopolize the markets in hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies without challenge by the US District Court.

582. The Defendants implicitly ratified Shughart Thomson & Kilroy's conduct on their behalf and relied on the conduct to attempt to avoid Medical Supply's intention to seek redress. Shughart Thomson & Kilroy engaged in "racketeering activity" as that term has been defined by Congress, see 18 U.S.C. § 1961(1).

583. The Defendant Shughart Thomson & Kilroy through its officers, employees and agents injured Medical Supply in violation of 18 USC § 1503 when it caused false and misleading testimony to be given against Medical Supply's counsel and again when it caused its employee to file a facially void ethics complaint against Medical Supply's counsel. The purpose of the Defendant Shughart Thomson & Kilroy's complaint was intimidation and harassment of Medical Supply's counsel to interfere with the administration of justice in the federal antitrust action against the Defendants.

584. 18 USC § 1503 entitled "Influencing or injuring officer or juror generally" provides:

> "(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States,... in the discharge of his duty...or injures any such officer,... in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b)."

585. The Defendant Shughart Thomson & Kilroy through its officers, employees and agents injured Medical Supply in violation of 18 USC § 1513 when it caused false and misleading testimony to be given against Medical Supply's counsel and again when it caused its employee to file a facially void ethics complaint against Medical Supply's counsel to deprive him of property in the form of his license to practice law. The purpose of the Defendant Shughart Thomson & Kilroy's retaliation against Medical Supply's counsel was to interfere with the administration of justice in the federal antitrust action against the Defendants.

586. 18 USC § 1513 entitled "Retaliating against a witness, victim, or an informant" provides:

> "(e) [2] Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.
>
> (b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation [1] supervised release,.[1] parole, or release pending judicial proceedings given by a person to a law enforcement officer;"

587. In furtherance of their enterprise to artificially inflate healthcare costs, the Defendants stole copyrighted works to keep Medical Supply from realizing its plan to enter the market for hospital supplies. The Defendants stole copyrighted works that included business plans, algorithms, confidential proprietary business models, customer and associate lists from Medical Supply Chain, Inc. in 2002 and from its predecessor company Medical Supply Management in 1995 and 1996 in violation of 17 USC § 506 entitled "Criminal offenses" providing:

> "(a) Criminal Infringement.— Any person who infringes a copyright willfully either— for purposes of commercial advantage or private financial gain, or
> by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000, shall be punished as provided under section 2319 of title 18, United States Code. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement."

588. The Defendants violation falls under 18 USC § 2319 entitled "Criminal infringement of a copyright" which provides:

> "(a) Whoever violates section 506 (a) (relating to criminal offenses) of title 17 shall be punished as provided in subsections (b) and (c) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law."

589. Defendants violated The Hobbs Act prohibition against racketeering by preventing Medical Supply's entry into commerce under color of official right in violation of 18 U.S.C. 1951, which states:

> "Section 1951. Interference with commerce by threats or violence
>
> Whoever in any way or degree obstructs, delays, or affects
> commerce or the movement of any article or commodity in commerce,
> by robbery or extortion or attempts or conspires so to do, or
> commits or threatens physical violence to any person or property in
> furtherance of a plan or purpose to do anything in violation of
> this section shall be fined under this title or imprisoned not more
> than twenty years, or both.
> b) As used in this section – The term "extortion" means the obtaining of property from another,
> with his consent, induced by wrongful use of actual or
> threatened force, violence, or fear, or under color of official
> right."

590. Defendants interfered with and obstructed Medical Supply's entry into market by threatening the plaintiff with the filing of a USA PATRIOT Act suspicious activity report which would destroy the

plaintiff's ability to make financial wire transactions with corresponding banks required to effectively compete in the market for hospital supplies.

591. As a direct result Defendants' unlawful activities, Plaintiff has suffered and will continue to suffer substantial injuries and damages to their businesses and property.

592. Plaintiff is entitled to recover actual damages in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00, and the cost of suit including a reasonable attorney's fee.

COUNT XVI
DAMAGES FOR MALICIOUS FILING OF A SUSPICIOUS ACTIVITY
REPORT (SAR) UNDER THE USA PATRIOT ACT
(Pub. L. No. 107-56 (2001),18 U.S.C.§1030 (e), 31 U.S.C. § 5318 (g)(3))

593. Plaintiff realleges paragraphs 1 through 592.

594. On information and belief the Defendants through US Bank and US Bancorp NA and maliciously filed a suspicious activity report ("SAR") concerning Medical Supply and its founder Samuel Lipari with federal authorities for the purpose of securing a financial benefit for the Defendants including US Bank and US Bancorp NA and were not protected by the safe harbor provisions of 31 U.S.C. § 5318 (g)(3).

595. The USA PATRIOT Act § 310. Financial Crimes Enforcement Network requires the maintenance of a government wide data access service and data banks for financial crime reporting including suspicious activity reports. In threatening to cause a malicious suspicious activity report or in causing a malicious suspicious activity report t be filed against Medical Supply, the defendants have violated 18 U.S.C.§1030.

596. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (The USA PATRIOT Act) Pub. L. No. 107-56 (2001), 115 Stat. 272. at § 814 of the USA PATRIOT Act entitled DETERRENCE AND PREVENTION OF CYBERTERRORISM created a private right of action for Medical Supply to address the conduct of the Defendants in gaining access to the FINCEN network for the purpose of filing a suspicious activity report to prevent Medical Supply from providing hospital supplies and reducing healthcare costs.

597. The USA PATRIOT Act amended 18 U.S.C.§1030 to include a cause of action for impairment, or potential impairment of medical diagnosis, treatment or care, physical injury, a threat to public health or safety.

598. The USA PATRIOT Act reaffirmed the civil liability and private rights of action provisions of 18 U.S.C.§1030 (e) DAMAGES IN CIVIL ACTIONS- to include civil liability for any person may maintain a civil action for damages and injunctive relief.

599. 18 U.S.C.§1030 provides:

> 18 U.S.C.§1030. Fraud and related activity in connection with computers
>
> Whoever - knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value,
> (5)
> (iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and
> (B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused) -
> (ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;
> (iii) physical injury to any person;
> (iv) a threat to public health or safety;
> (g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage."

600. The USA PATRIOT Act) Pub. L. No. 107-56 (2001), 115 Stat. 272. at § 351 modified 31 U.S.C. § 5318 (g)(3) to eliminate immunity from civil liability for malicious suspicious activity reporting:

> "(g) Reporting of suspicious transactions.--
> In General.-The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.
> * *
> Liability for disclosures.--
> In general.-Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable under law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement),

for such disclosure or for any failure to provide notice of such disclosure to the person who is subject of such disclosure or any other person identified in the disclosure."

601. The Act specifies that financial institutions are to report" any possible violation of law or regulation." Congress did not intend the Act's safe harbor to give banks blanket immunity for malicious, willful criminal and civil violations of law.

602. Importantly, the Act requires there to be a "possible" violation of law-"possible" being the operative word-before a financial institution can claim protection of the statute.

603. The Defendants knew there was no possible violation and that the USA PATRIOT Act know your customer provision did not apply to the subject escrow accounts.

604. US Bank and US Bancorp did not file a report of a "possible violation" of the law but rather acted maliciously and willfully in an attempt to have Medical Supply deprived of high level banking services including international wire fund transactions on information the defendants knew to be false.

605. Said activities aforementioned by Defendants were done in concert and in secret with the intention to injure Plaintiff all the while knowing that the lack of candor and disclosure of the true acts and activities by Defendants would give Defendants an economic advantage over Plaintiff. Defendants were engaged in concealed fraudulent conduct.

606. Said malicious suspicious activity reporting against Medical Supply and its founder Samuel Lipari was done with the purpose of restricting the availability of and access to hospital supplies and resulted in impairment and potential impairment of medical diagnosis, treatment and care, along with physical injury, and constituted a threat to public health and safety

607. Said activities were intended by Defendants to cause injury to Plaintiff by and through intentional misrepresentations to third parties concerning Plaintiff.

608. Said activities did directly and proximately cause injury to Plaintiff.

609. Said activities were and are unjustified.

610. Plaintiff is entitled to recover their actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of trust accounts, and actual damages in the amount of in excess of $500,000,000.00 for their actions resulting in the loss of the lease sale together with the costs of suit, and attorney fees.

611. Defendants' actions were willful, wanton, malicious and oppressive.

612. Plaintiff is also entitled to recover punitive damages in an amount in excess of $10,000.00.

TOLLING OF APPLICABLE STATUTES OF LIMITATIONS

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

PRAYER FOR RELIEF

WHEREFORE Plaintiff demands:

(1) That Defendants, their agents and servants, be enjoined during the pungency of this action and permanently from their activities in unreasonable restraint of trade or commerce and in monopolizing, attempting to monopolize, or combining or conspiring to monopolize.

(2) That Defendants be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' activities in unreasonable restraint of trade or commerce and in monopolizing, attempting to monopolize, or combing or conspiring to monopolize, in the amount of approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00 for the conduct related to the refusal to provide trust accounts and approximately $500,000,000.00, multiplied by three for total damages of approximately $1,500,000,000.00 for the conduct related to preventing Medical Supply from selling the office building lease to General Electric Transportation Co. for a total of approximately $3,000,000,000.00.

(3) That Defendants be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' activities in tortuous interference with contract or business expectancy and/or in prima facie tort, in the amount of approximately $1,000,000.00, together with punitive or exemplary damages for the same, in an amount in excess of $10,000.00.

(4) Medical Supply Chain, Inc. seeks damages for the injury of its business associates and stakeholders, including Blue Springs, Missouri, loss of good will and the injury of the 2000 hospitals loosing money due to high supply costs under *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir.1994)'s interpretation of standing on a RICO statutes having a common antitrust basis.

(5) That Defendants be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' activities in violation of civil racketeering laws, in the amount of approximately $500,000.00, multiplied by three for total damages of approximately $1,500,000.00.

(6) That Defendants be required to pay to Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' activities in violation of the USA PATRIOT Act, in the amount of approximately $500,000.00.

(7) That Defendants pay to Plaintiff the costs of this action and reasonable attorney's fees to be allowed to the Plaintiff by the Court.

(8) That Plaintiffs have such other and further relief as is just.

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully request that the court award damages and provide other relief, attorneys fees and costs.

Respectfully Submitted

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

DEMAND FOR TRIAL BY JURY

Comes now plaintiff and makes demand for a trial before 8 jurors.

S/Bret D. Landrith

Bret D. Landrith
Kansas Supreme Court Number 20380

DESIGNATION OF PLACE OF TRIAL

Comes now plaintiff and designates Kansas City, Missouri as the place of trial.

S/Bret D. Landrith

Bret D. Landrith
Kansas Supreme Court Number 20380

6. Medical Supply's counsel contact Samuel K. Lipari, CEO of Medical Supply Chain and advised him that this action was in danger of being dismissed for lack of counsel.

7. Samuel K. Lipari called the office of the Kansas District Court Clerk questioning why he would now be facing having his action dismissed when a motion before the court seeks to substitute Samuel K. Lipari for the soon to be dissolved or forfeited corporation and which has not been ruled on.

8. The order to show cause was not issued.

9. The court ordered plaintiff's counsel to withdraw from the action (Doc.71) on January 19, 2006.

10. Samuel K. Lipari dissolved the Missouri incorporation of his sole proprietary business Medical Supply Chain on Friday January 27th, 2006. See Exb. 2.

11. Under Missouri law, a corporation ceases existence at the day of dissolution:

> "...defendant was dissolved as a corporation August 2, 2001. Its corporate existence was forfeited on that date. A corporation's very being as a legal entity is destroyed the day forfeiture occurs. *Phillips v. Hoke Const., Inc.*, 834 S.W.2d 785, 787 (Mo.App. 1992). § 506.150.1(3) relates to service on a corporation, not a former corporation "that has been dissolved according to law," to which § 506.150.1(4) applies."
>
> *Finnigan v. KNG Investments, Inc.*, No. 26309 at fn 3 (MO 3/25/2005) (Mo, 2005).

12. Samuel K. Lipari has experienced the informal sanctions described in Doc. 30 Attachment 1. And, when those were failed to cause him to dismiss this action, he suffered additional informal sanctions against his family's trucking business and the Office Complex where Medical Supply Chain was headquartered, which was pressured to evict him. Mr. Lipari is up to the increased retribution that will result from taking over the representation of his interests in this action.

13. Samuel K. Lipari, acting *pro se* in state court is also prosecuting the contract claim against the defendant's coconspirator the General Electric Company described in the complaint at ¶¶ 339-369.

14. Mr.. Lipari's address and telephone number is:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, Missouri 64064,
816-365-1306

15. Samuel K. Lipari will accept electronic service of all documents via e-mail addressed to: saml@medicalsupplychain.com

16. Samuel K. Lipari's acknowledgement:

STATE OF MISSOURI

Robin Carnahan
Secretary of State

CERTIFICATE OF TERMINATION

WHEREAS, a Request for Termination of

MEDICAL SUPPLY CHAIN, INC.
00493214

a corporation organized and existing under the General and Business Corporation Law, has been received, found to conform to law, and filed.

NOW, THEREFORE, I, ROBIN CARNAHAN, Secretary of State of the State of Missouri, issue this Certificate of Termination of the aforenamed corporation, certifying that the existence of said corporation has this date ceased.

IN TESTIMONY WHEREOF, I have set my hand and imprinted the GREAT SEAL of the State of Missouri, on this, the 27th day of January, 2006.

Robin Carnahan
Secretary of State

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.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Kansas City)

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff,*	)	
v.	)	Case No. 07-CV-02146-CM-DJW
US BANCORP and US BANK NATIONAL ASSOCIATION *Defendants,*	)	

MOTION TO STRIKE DEFENDANTS' MOTION TO DISMISS

Comes now the plaintiff Samuel K. Lipari and makes the following motion to strike the defendants' second or fifth motion to dismiss this case or controversy as being prohibited under the rules. Samuel K. Lipari respectfully reserves his right to answer the motion to dismiss should the court not strike the motion.

STATEMENT OF FACTS

1. The defendants lost their motion to dismiss the plaintiff's complaint on identical grounds on April 4, 2007 in the order of the Western District of Missouri Court Case No. 06-1012-CV-W-FJG transferring this controversy to this court instead of granting dismissal.

2. The defendants did not seek reconsideration or otherwise appeal the Western District of Missouri order in Case No. 06-1012-CV-W-FJG failing to grant their dismissal.

3. The defendants in this same case or controversy variously styled *Medical Supply Chain v. US Bancorp N A, et al, Medical Supply Chain v. Novation, et al* KS Case No. 02-cv-02539-CM, W. Dist. Mo. Case No. 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-KHV-GLR made more than three separate motions for dismissal (Docs. 6,7, 13 and 32). which did not result in the plaintiff's state claims being dismissed with prejudice.

4. The defendants did not seek reconsideration or appeal this court's denial of a dismissal with prejudice of the plaintiff's state law claims in *Medical Supply Chain v. Novation, et al* 05-cv-02299-CM-GLR, Document 78, filed 03/07/2006.

5. The Tenth Circuit Court of Appeals in *Medical Supply Chain v. Novation, et al* Case No. 06-3331 (10th Cir.) has sole exclusive federal jurisdiction over this case or controversy including the state law claims in the complaint currently before this court.

MOTION IN SUPPORT

The defendants' current dismissal is a prohibited second Rule 12 motion to dismiss. Palermo, Federal Pretrial Practice: Basic Procedure & Strategy 2001 states at page 21; "Rules 12(g) and 12(h), read together, provide in general, there shall not be more than one Rule 12 motion to dismiss....All defenses and grounds "then available" shall be asserted in the one motion; certain defenses shall be asserted in the Rule 12 motion, or in the initial responsive pleading (or amendment thereof) under threat of waiver."

After the order by Judge Carlos Murguia permitting the plaintiff to file his contract and fiduciary claims in state court (Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19), the defendants were required to appeal the decision to retain the state claims in federal court:

> "Here, Cannondale sought final disposition on the merits as to all claims, but the district court granted summary judgment only on the federal claim. The court dismissed without prejudice the state law claims. As a result, Cannondale received only a part of what it sought. This disposition left Cannondale open to precisely what happened in this case, a second litigation. Cannondale was sufficiently aggrieved by this result, and consequently has standing to appeal. See *Jarvis*, 985 F.2d at 1425 ("In this case, a successful appeal by Nobel would eliminate any possible re-filing . . . in state court[, and because] avoiding a state court suit would substantially reduce Nobel's future litigation costs, we find that Nobel has the requisite stake in this appeal."); *Disher v. Information Res., Inc.*, 873 F.2d 136, 138-39 (7th Cir. 1989) (defendant prevailing on summary judgment on all but two claims may appeal dismissal without prejudice because the decision is not entirely in the defendant's favor by exposing the defendant to further litigation). Accordingly, we have jurisdiction over this appeal under 28 U.S.C. § 1291."

Amazon Inc. v. Dirt Camp Inc., 273 F.3d 1271at 1276 (10th Cir., 2001).

The necessity of appeal to thwart a follow on state court action has been established in the Tenth Circuit since 1992:

> "(FN1). Although dismissals without prejudice are not usually considered final decisions, and therefore not appealable, "where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." Amazon, Inc. v. Dirt Camp, Inc., 273 F.3d 1271, 1275 (10th Cir. 2001). Where, as here, the district court dismissed a state claim without prejudice after granting summary judgment on the federal claims, and where the dismissal without prejudice was not sought by plaintiff for purposes of manufacturing finality, we may exercise appellate jurisdiction. See id. & n.4 (citing Jarvis v. Nobel/Sysco Food Servs. Co., 985 F.2d 1419, 1424 (10th Cir. 1993) and Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992))."

BUI v. IBP Inc. at fn 1 (2002).

The Tenth Circuit in which this action currently has its federal existence has exclusive jurisdiction over the current state law based claims. A district court loses all jurisdiction over matters brought to the court of appeals upon the filing of a notice of appeal. . . . Once 'an appeal is taken, the district court is divested of jurisdiction except to take action in aid of the appeal until the case is remanded to it by the appellate court, or to correct clerical errors under Rule 60(a)." *Travelers Ins. Co. v. Lileberg Enters., Inc.*, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994).

The defendants prohibited second motion for dismissal seeks relief violating the plaintiff's clearly established constitutional guaranteed right to redress and to property rights from the assigned contract action when it is settled law that this court cannot change the dismissal without prejudice into one with prejudice during the pendency of appellate jurisdiction:

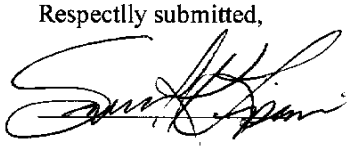
> "On May 17, 2000, one day after Logan filed its notice of appeal to this Court, the district court attempted, in an order, to correct its earlier statement that Logan could pursue his patent infringement claims by stating that its dismissal of those claims had been with prejudice. However, because Logan had already filed his notice of appeal, the district court was without jurisdiction to issue the May 17th order. *Rutherford v. Harris County, Tex.*, 197 F.3d 173,189-90 (5th Cir. 1999)."

Logan v. Burgers Ozark Country Cured Hams Inc., 263 F.3d 447 at 454 (5th Cir., 2001). See also Graham by *Graham v. Wyeth Laboratories, Div. of American Home Products Corp.*, 906 F.2d 1399 at fn 23 (C.A.10 (Kan.), 1990).

CONCLUSION

The defendants second or fifth motion to dismiss is prohibited under the rules of civil procedure. The defendants' motion seeks for this court to trespass upon the plaintiff's clearly established constitutional rights and to do so when this court is clearly without jurisdiction to do so. Therefore the plaintiff respectfully requests that this court strike the defendants' motion for dismissal. Should the court decide otherwise, the plaintiff respectfully requests the court give him notice and the opportunity to respond.

Respectlly submitted,



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

CERTIFICATE OF SERVICE

I certify I have served a copy of this FRCP 26(a)(1), disclosure to the opposing counsel listed below via U.S. Mail on May 3rd, 2007.

Mark A. Olthoff
Shughart Thomson & Kilroy, PC--Kansas City
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
816-421-3355
Fax: 816-374-0509
Email: molthoff@stklaw.com

SAMUEL K. LIPARI,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Kansas City)

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*,	)))))
v.	) Case No. 07-CV-02146-CM-DJW)
US BANCORP and US BANK NATIONAL ASSOCIATION *Defendants,*	)))

NOTICE OF SERVICE OF DISCOVERY

Comes now the plaintiff Samuel K. Lipari and gives notice of service of discovery pursuant to FRCP 26(a) (1). Plaintiff made his mandatory service of initial disclosures of the following witnesses and documents on April 20th, 2007:

A. WITNESSES

Bob Bissell	GPO Workings
Lawton Burns	GPO Workings
Allen Caudle	GPO Workings
Kevin Connor	GPO Workings
Eric Norman	GPO Workings
Joe Kiani	GPO Contracting
Patti King	GPO Contracting
Mark Leahey	GPO Contracting
Jerry Leong	GPO Contracting
Bill McFaul	GPO Contracting
Phil Profeta	GPO Contracting
Marvin Smart	GPO Contracting
Nick Toscano	GPO Contracting
James Graff	GPO Contracting
Jonathan Yarowsky	GPO Safe Harbor
Einer Elhauge	Antitrust
Melissa Osborne	FBI
Kristin Teen	Securities
Elizabeth Weatherman	Healthcare Investment
Lynn Everard	Healthcare Market

Howard Fullman	Healthcare Market
Thomas Farb	Funding
Mary Suther	Funding
Suzanne Passalacqua	Funding
Chuck Frary	Funding
Ken Aldrich	Funding
Neil Marsh	Funding
Richard Heard	Funding
Craig Evans	Funding
Ron Sheffron	Funding
Susan Paine	Funding
Lars Anderson	Funding
Brian Kabbes	Funding
Doug Lewis	Funding
Becky Hainje	Funding
Ed Higgins	Funding
Gene Schroer	Funding
Charlie Smith	E-Commerce Origins
Martin Taylor	E-Commerce Origins
Phil Perry	E-Commerce Origins
Ray Latus	Technology
Mike Patton	Technology
Rob Rennie	Technology
John Haggard	Technology
David Taylor	Technology
George Puckett	Technology
David Dresner	Technology
Jon Yost	Technology
Mark Assi	Technology
Mark Fowls	PMG
Curt Nonomaque	Defendant
Robert J. Baker	Defendant
Mark McKenna	Defendant
Robert J. Zollars	Defendant
Jerry Grundhofer	Defendant
Andrew S. Duff	Defendant
Steven Ruse	Defendant
Susan Hascall	Defendant
Patrick Fisher	Clerk
James O'hara	Judge
David Waxes	Judge
Stephanie Dillon	Witness
Bret Duncan	Witness
David Williams	Witness
Toni Williams	Witness
Jeff Keal	Witness
Fred Rapp	Witness

John Biagioli	Witness
Michael Lynch McCook Metals	Witness
Sidney J. Perceful	Witness

B. DOCUMENTS

Ken Aldrich Intro	000001
Ken Aldrich ND/NC	000004
Ken Aldrich Marketing & Implementation Program	000007
Ken Aldrich MSM Intro	000012
Ken Aldrich MSM Financing Options	000015
Ken Aldrich Travel to KC	000019
Amerinet's Purchasing Programs	000020
Ken Aldrich Travel Schedule	000025
Ken Aldrich Follow Up To Meeting	000028
Proactive Medical Assessment	000034
Encompass ILC	000042
Ken Aldrich Update	000048
Ken Aldrich Supply Chain Update	000053
Ken Aldrich Supply Chain Concept Development	000054
Ken Aldrich Visionary Statement	000055
Thomas Farb Contact Information	000057
Thomas Farb Funding Outline	000060
Thomas Farb Document Request	000062
Thomas Farb Promissory Note	000065
Thomas Farb Notice Of Stop Payment	000073
Thomas Farb Update Private Placement	000076
Thomas Farb Review Ken Aldrich Financing Options	000078
Thomas Farb Request For Financials	000082
Thomas Farb Promissory Note	000087
Thomas Farb Peter Brown DH Blair Investment Bank	000089
Thomas Farb Fax Explaining Kimberley-Clark Model	000091
Thomas Farb MSM Projections	000093
Thomas Farb MSM Request For Information	000095
Thomas Farb MSM Update on Lenders	000097
Thomas Farb MSM Request For Information	000098
Thomas Farb MSM Request For Information	000100
Thomas Farb D&B Reports	000103
Thomas Farb MSM Request For Information On Sun capital	000114
Thomas Farb MSM Update	000115

PMG Disclosure	001167
PMG Opportunity	001187
PMG Time Sheet	001192
PMG Expense Report	001193
PMG Business Log	001194
PMG Prospect Profile	001195
PMG Mike Kirby	001196
PMG Vernon Wilke	001197
PMG Mark Fowls	001199
PMG Commissions Paid	001200
PMG Paula Daily ND/NC	001202
PMG Joan Hill Distributors	001204
PMG Bob Grossman ND/NC	001205
PMG Bill Smith	001209
PMG Ralph DeMetz Distributor Agreement	001212
PMG Frank Palazzo ND/NC	001214
PMG Laurie Duda ND/NC	001216
PMG Frank Finach ND/NC	001217
PMG Lori Scardina ND/NC	001219
PMG Fred Mindermann ND/NC	001221
PMG Judy Dr. Carlson Sales Kit	001226
PMG Tom Whelan ND/NC	001227
PMG Patrick Cogburn ND/NC	001228
PMG Al Adkins ND/NC	001229
PMG Jeff Wiggins ND/NC	001230
PMG Steve Jolly ND/NC	001231
PMG Warren Dawson ND/NC	001233
PMG Value Med ND/NC	001234
PMG James Harmount ND/NC	001235
PMG Training Preparation	001236
PMG James Posch	001237
PMG Michael McCrossen ND/NC	001240
PMG Ronald Rogos	001241
PMG Mary Griffin	001242
PMG Ron Rogos	001243
PMG Joy Cohen	001244
PMG Kathryn Erlandson ND/NC	001245
PMG Byron Jordan ND/NC	001247
PMG Business Log	001249
PMG Reports & Utilities	001265
PMG Physicians Catalog System	001266
PMG Usage Reference	001269
PMG System Suzanne	001281
PMG No Minimum Shipping	001282
PMG MSIS	001283
PMG Pricing Established Up Front	001284
PMG MSIS Utility	001285

PMG Main Menu		001286
PMG Active Inventory		001287
PMG Creating Template		001288
PMG Active Location		001289
PMG Purchase Order		001290
PMG Receive Order		001291
PMG Inventory Changes		001292
PMG Sales Kit Order Form		001293
PMG ND/NC		001295
Dos Key Strokes		001297
Word Perfect Key Strokes		001303
Microsoft Word Mouse & Key Strokes		001308
MSM D&B		001314
MSM Sun Capital		001318
MSM Process Introduction		001322
MSM Business Plan		001383
MSM Private Placement		001418
MSM Network Blue Print		001471
MSM Touch Screen		001472
MSM MSMS Tutorial		001484
MSM Lower Procurement Cost		001508
MSC Pure Play Marketplace		001517
MSM Program Development		001530
MSM Consultant Program		001551
MSM Presentation		001569
MSM Administrative Consulting		001579
MSM Client Service Agreement		001583
MSM Consultant Intro		001584
MSM Consultant Add		001585
MSM MPS Add Contract		001586
MSM Consultant ADD		001591
MSM MPS Add Contract		001592
MSM Sales Rep Add		001602
MSM Consultant PR/Notice		001603
American Association of Healthcare Consultants		001606
John Abendshien	Abendshien Associates	001619
Frank Kittredge	The Bristol Group	001620
Curtis Olson	Centech System	001621
Marchita Butler	Comprehensive Health	001622
Robert McGowan	Costello Phalen & McGowan	001623
David Damberg	Damberg Limited	001624
Dianne Ahern	Elan Systems	001625
Ellan Goldman	Earnst & young	001626
Joseph Fitch	Fitch & Associates	001627
Frances Fowler	Fowler Healthcare	001628
James Grobmyer	Grobmyer Associates	001629
Robert Hrypel	Healthcare Management	001630

Barry Badner	HLA Systems	001631
Paul Hysen	The Hysen Group	001632
Kenneth Kaufman	Kaufman Hall	001633
Jamie Kowalski	Kowalski-Dickow Associates	001634
Earl Wivell	Medco	001635
Joseph Beisel	Medical Planning	001636
James Morell	Morell & Associates	001637
Dennis Moser	Moser & Associates	001638
Christopher Newman	Metis Associates	001639
Rodger Nutter	Nutter Consulting	001640
Thomas Osborn	Osborn Associates	001641
Domenic Pesce	Pesce Associates	001642
Edwin Parkhurst	Prism Healthcare	001643
Teresa Owens	Resource Consulting Group	001644
Michael Rindler	The Rindler Group	001645
Martha Hauser	Spencer Stewart	001646
John Templin	Templin Management	001647
Ruth Tucker	Theken associates	001648
Douglas rich	Tribrook Group	001649
Larry Tyler	Tyler & Company	001650
Consultants	Over Night Packages	001651
David Allen	McGladrey Pullen	001654
Dudley Morris	APM Incorporated	001656
Vivian Carrion	APM Incorporated	001658
Robert Tschetter	APM Incorporated	001660
Robert McDonald	Coopers & Lybrand	001662
Michael Boling	Coopers & Lybrand	001664
Richard Rollind	Coopers & Lybrand	001666
Dianne Ahern	Elan Systems	001668
Ellen Goldman	Ernst & Young	001670
David Ennis	Ernst & Young	001672
Mark Dubow	Ernst & Young	001674
Terrell Warnberg	Ernst & Young	001676
Frances Flower	Flower Healthcare	001678
James Grobmyer	Gorbmyer Associates	001680
Lawrence Bassett	Grobmyer Associates	001682
Cathy Idema	HS Management	001684
Lyle Austin	HS Management	001686
Howard Gershon	Lammers & Gershon	001688
Charles Heinemann	Lammers & Gershon	001690
William Morrison	Longshore & Simmons	001692
James Phalen	McGowan Phalen & Wilson	001694
Barry Fewson	Med Plus Advisors	001696
Edwin Parkhurst	Prisom Healthcare	001693
John Templin	Templin Management	001700
Dudley Morris	APM Incorporated	001702
Robert Tschetter	APM Incorporated	001704

Neil Fogel	Argus Associates	001706
Arthur Shorr	Arther Shorr & Assoc.	001708
John Abendshien	Abendshien Associates	001710
John Duffy	APM Incorporated	001712
James Bolinger	Argus Associates	001714
Larry Anderson	Anderson & Associates	001716
Hospital Groups		001718
Pharmacy		001719
Medical Supplies		001720
Pharmacy Supplies		001722
Food Supplies		001723
Investing by Quicken		001724
MPS Advertisers Index		001742
Investing by Quicken		001753
SK&A		001821
MSC Business & Investment		001853
MSC Applications		001857
C.L. Financial NC/ND		001957
Joan Mark		001965
Carl Moore		001979
Financial Summary		001983
Venture Reporter		001984
MSC Resumes/Applications		001986
MSC PR		003011
MSC PR		003013
MSC PR		003015
MSC PR		003018
MSC PR		003020
MSC PR		003022
MSC PR		003023
MSC PR		003025
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Article When Private Goes Public		003032
Article Rob Rennie		003035
Article E-Business		003039
Article Private Trade Exchanges		003041
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Article Supply Chain Planning Optimization		003051
Article GHX and Lawson Join Forces		003067
Article Lawson and Neoforma Collaborate		003069
Article Lawson as Dominate Enterprise E-Business		003071
Article Lawson to Power Medibuy Marketplace		003073
Article Dot-com Trial and Error		003075
Article Is B2B Over?		003079

HPN Agency Listing	003422
BPA International	003425
HPN Industry Guide	003430
GAO Report	003462
Defining and Measuring Product-Based Cost	003485
The Impact of Group Purchasing	003505
USA Hospitals World Wide Web	003530
Wharton Health Care Management Alumni	003585
The Value of eCommerce	003604
Article When a Buyer Has a Stake in Drugs it Buys	003653
Article Empowering Efficiency in the Healthcare SC	003659
Vendor Rating A GPO Model	003690
Netspan Solutions	003694
Supply Solution	003718
Virtua Health	003752
The Supply Chain	003769
Funding Post	003779
Gene Schroer	003785
Healthcare Purchasing Partners	003786
Lynn Everard	003787
Mark Assi	003795
Senator Judd Gregg	003798
Mark Assi	003799
Lamar Software	003806
Catalysts	003831
Catalysts NC/ND	003839
US Senate Committee Testimony Trisha Barrett	003841
US Senate Committee Testimony Lynn Detlor	003843
US Senate Committee Testimony Mitchell Goldstein	003845
US Senate Committee Testimony Joe Kiani	003848
US Senate Committee Testimony Mark McKenna	003858
US Senate Committee Testimony Richard Norling	003868
US Senate Committee Testimony Elizabeth Weatherman	003881
US Senate Committee Testimony Sen. Herb Kohl	003885
US Senate Committee Testimony Sen. Patrick Leahy	003887
US Senate Committee Testimony Sen. Orrin Hatch	003889
US Senate Committee Testimony Sen. Charles Schumer	003891
US Senate Committee Testimony Sen. Strom Thurmond	003892
US Senate Committee Testimony Mark Mckenna	003894
US Senate Committee Testimony Richard Norling	003904
US Senate Committee Testimony Said Hial	003910
US Senate Committee Testimony Thomas Brown	003921
US Senate Committee Testimony Gary Heiman	003927
US Senate Committee Testimony Lynn Everard	003929
US Senate Committee Testimony Elizabeth Weatherman	003936
US Senate Committee Testimony Sen. Orrin Hatch	003939
US Senate Committee Testimony Sen. Patrick Leahy	003941

08/30/00 E-mail from Irene A. Schmidt to Michael Lynch
Task List Longview transaction
09/01/00 E-mail from Irene A. Schmidt to Michael Lynch
08/31/00 Letter from Department of Energy to customers
11/09/00 E-mail from Irene A. Schmidt to Lawrence V. Castner
12/12/00 E-mail from Irene A. Schmidt to Lawrence V. Castner
03/01/01 E-mail from Max W. Laun to Jack A. Speer
03/01/01 E-mail from Max W. Laun to Jack A. Speer
02/28/01 E-mail from Mark Miller to Jack Speer
02/21/01 Department of Energy Draft
01/26/01 Department of Energy Letter to Ken Younger
02/14/01 USWA to Joe Quaglia
01/31/01 E-mail from Bonita A. Cersosimo to Irene A. Schmidt
02/26/01 E-mail from Barbara S. Jaremiah to Irene A. Schmidt
09/05/00 E-mail from Jack A. Speer to Mark Miller
09/05/00 Letter from Department of Energy to Mark Miller
01/25/01 E-mail from J. Smith to Lawrence V. Castner
01/23/01 Draft Assignment
11/22/00 E-mail from Jack A. Speer to Lawrence V. Castner
02/13/01 E-mail from Max W. Laun to J. Smith
01/13/01 Alcoa Draft Assignment
02/16/01 E-mail from Max W. Laun to J. Smith
02/16/01 Alcoa Draft Assignment
02/16/01 E-mail from Kurt W. Runzler to Max W. Laun
02/17/01 E-mail from Max W. Laun to Kurt W. Runzler
02/19/01 E-mail from J. Smith to Max W. Laun
02/18/01 Alcoa Draft Assignment
02/19/01 E-mail from Max W. Laun to Kurt W. Runzler
Assignment
02/20/01 E-mail from Max W. Laun to J. Smith
02/20/01 Draft Marked to show changes from Patton Boggs
02/20/01 E-mail from J. Smith to Max W. Laun
02/20/01 Draft Marked to show changes from Alcoa
02/20/01 E-mail from Max W. Laun to J. Smith
02/20/01 E-mail from J. Smith to Max W. Laun
02/20/01 Draft Marked to show changes from Alcoa
02/21/01 E-mail from Kurt W. Runzler to J. Smith
02/21/01 Draft Marked to show changes from Alcoa
02/21/01 E-mail from Kurt W. Runzler to Max W. Laun
02/21/01 Draft Marked to show changes from Alcoa
02/21/01 E-mail from Mark Miller to Max W. Laun
02/22/01 E-mail from Max W. Laun to Mark Miller
03/04/01 E-mail from Max W. Laun to Mark Miller
03/27/01 E-mail from Jack A Speer to Mark Miller
February Reynolds Power Purchases
04/17/01 E-mail from Max W. Laun to Jack A Speer
Revision #1 Exhibit F – Unrecoverable costs and Transfer Costs

05/14/01 E-mail from Mark Miller to Randal M. Overbey
04/24/01 Department of Energy Reply to Alan Renken on PT 5
05/07/01 Department of Energy Reply to Kevin Anton on PT 5
05/15/01 E-mail from Mark Miller to Max W. Laun
10/30/00 E-mail from Jack A Speer to Irene A. Schmidt
Block Power Sales Agreement by Bonneville Power Administration and Alcoa Inc
06/23/00 Fax from Steve Weidman to Nick Storm
06/05/00 Letter from Clyde D. Rundle to Steve Weidman
06/21/00 Letter from Steve Weidman to Clyde D. Rundle
02/14/01 E-mail from Max W. Laun to Jack A Speer
02/16/01 E-mail from Max W. Laun to Randal M. Overbey
02/04/01 E-mail from Kimberlee Lynch to Irene A. Schmidt
02/04/01 Letter from Michael Lynch to Irene A. Schmidt
12/12/00 Letter from Alcoa to Michael Lynch
10/16/00 Letter from Alcoa to Michael Lynch
01/26/01 Letter from Alcoa to Michael Lynch
01/11/01 E-mail from Robert T. Tanner to USWA and Longview
01/11/01 Memo from Buddy Keenum Q&A on Plant sale
10/06/00 E-mail from Jack A Speer to Randal M. Overbey
10/05/00 Dept. of Energy to customers on PS 6
06/26/01 Fax from James P. Williams to Sharine K. Taylor etc. Charter Title Corporation
03/26/01 Memo from Sharine K. Taylor to Ted Cornell
Ground Lease Renolds Metal Co. Longview Aluminum
02/19/01 E-mail from Lawrence V. Castner to Ted Cornell
02/01/01 E-mail from Lawrence V. Castner to Ted Cornell
Ground Lease
02/01/01 E-mail from Lawrence V. Castner to Irene A. Schmidt
02/22/01 E-mail from Ted Cornell to Lawrence V. Castner
02/21/01 E-mail from Sharine K. Taylor to Lawrence V. Castner
01/15/01 E-mail from Lawrence V. Castner to Mike Arthur
02/19/01 E-mail from Lawrence V. Castner to Ted Cornell
02/02/01 E-mail from Mike Arthur to Lawrence V. Castner
02/16/01 E-mail from Mike Arthur to R. Talley
02/20/01 E-mail from Ted Cornell to Lawrence V. Castner
11/04/02 Letter from Eric A. Kauffman to Channing Blair Hesse Esq
Privilege Log
Redaction Log
02/08/01 E-mail from Joe Quaglia to Al Renken
Longview Sale/Shutdown discussion and options
09/27/00 E-mail from Randal M. Overbey to Jack Speer
12/07/00 E-mail from Mike F. Rousseau to Irene A. Schmidt
01/31/01 E-mail from Irene A. Schmidt to Lawrence V. Castner
02/08/01 E-mail from Joe Quaglia to Al Renken
Longview Sale/Shutdown discussion and options
02/11/01 E-mail from Al Renken to Dale C. Perdue

02/11/01 E-mail from Joe Quaglia to Al Renken
02/11/01 E-mail from Joe Quaglia to Al Renken
02/26/01 E-mail from Irene L. Jacobson to Irene A. Schmidt
Longview Sale/Shutdown discussion and options
02/26/01 E-mail from Joe Quaglia to Irene L. Jacobson
02/20/01 E-mail from Irene A. Schmidt to Al Renken
02/15/01 E-mail from Peter J. McKee to Max W. Laun
03/01/01 E-mail from Jack A. Speer to Max W. Laun
03/01/01 E-mail from Jack A. Speer to Max W. Laun
03/09/01 Fax from James P. Williams to Lawrence V. Castner
03/09/01 Fax from James P. Williams to Lawrence V. Castner
Template of a signature page
Template of an Affidavit page
Exhibit A
Exhibit B
02/27/01 E-mail from Shariane M. Taylor to Lawrence V. Castner
Michael E. Arthur Memorandum of ground lease and subleases
02/18/01 E-mail from Michael E. Arthur to Lawrence V. Castner
12/19/00 E-mail from John P. Holsinger to Lawrence V. Castner
12/18/00 E-mail from Patrick R. Atkins to Lawrence V. Castner
12/14/00 E-mail from Patricia Gonzales to Lawrence V. Castner
12/20/00 E-mail from Irene A. Schmidt to Lawrence V. Castner
12/14/00 E-mail from Patricia Gonzales to Lawrence V. Castner
12/31/00 E-mail from John P. Holsinger to Lawrence V. Castner
03/01/01 E-mail from Joyce A. Saltzman to Dale C Purdue
McCook Metals reaches ground breaking agreements with Bonneville
Power Authority and
Steelworkers Union
01/30/01 E-mail from Michael E. Arthur to Lawrence V. Castner
02/12/96 Memo from Executive Committee to all Attorney's
09/24/01 Memo from Seyfarth Shaw Peter Woodford to all lawyers
Sample Memo for Dectecting new attorneys with conflicts of
interest
05/13/99 Memo from Executive Committee to all Attorney's
05/31/96 Memo from Stefanni Francis to all Attorney's and
Secretarys
Seyfarth, Shaw, Fairweather, & Geraldson client matter form
10/31/02 Memo from Barbara Morse-Quinn in regards to management
procedures
Automated records
Manual system procedures
02/12/92 Operating procedures
Finance department
Seyfarth, Shaw, Fairweather, & Geraldson secretary training
manual
Michigan Avenue Partners Senior Management
12/30/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to

Morgan Guaranty
Trust Co.
05/26/99 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Mellon Bank
2001 Seyfarth, Shaw annual review
06/04/98 Letter from Ted Cornell to Michael Lynch
08/06/01 Fax from Gus A. Paloian to Joel L. Klein
11/30/01 E-mail from John F. Krupinski to Joseph Baldi
Memo from Craig Bloomfield to Joseph Baldi
12/10/99 Default Guaranty
12/10/99 Default Guaranty
11/22/99 Default Guaranty
07/12/01 Letter from Michael Lynch to McCook Metals LLC
02/19/02 Complaint in Bankruptcy court filed by General Electric Capitol Corp.
Organizational chart of McCook entities
06/04/98 Letter from Ted Cornell to Michael Lynch
01/09/03 Seyfarth, Shaw, Fairweather, & Geraldson work detail
01/09/01 Seyfarth, Shaw, Fairweather, & Geraldson work detail
Handwritten notes to Gus
Handwritten notes on meeting
08/22/01 letter from Ted Cornell to David Heller and David Missner
01/24/03 Answers of Defendants to first set of admissions
Affidavit of Gus A. Paloian for rentention of Seyfarth, Shaw as Special Counsel
03/21/01 Memo from Conflicts Dept. Fran Sweet to Jennifer McManus
08/21/01 Affidavit of Gus A. Paloian for rentention of Seyfarth, Shaw as Special
Counsel
08/21/01 Affidavit of Gus A. Paloian for rentention of Seyfarth, Shaw as Special
Counsel
08/06/01 Memo from Conflicts Dept. to Jennifer McManus
08/08/01 Memo from Conflicts Dept. to William Factor
08/14/01 Memo from Conflicts Dept. to William Factor
07/02/01 Handwritten notes on clients
11/29/01 Letter from Pete Miller to Robert McDole & Joseph Baldi
01/09/03 Seyfarth, Shaw, Fairweather, & Geraldson work detail
01/09/01 Seyfarth, Shaw, Fairweather, & Geraldson work detail
12/17/01 Letter from Ted Cornell to John Kennedy
10/23/01 Letter from Ted Cornell to Gerald B. Curran
Metro Metals Corp Order and notice to withdraw Gus A. Paloian & Seyfarth, Shaw as
Special counsel
07/16/01 Letter from Michael Lynch to Karen Austin
07/17/01 Letter from Michael Lynch to Karen Austin

07/25/01 Default notice by General Electric Capitol Corp.
07/27/01 Letter from Michael Lynch to Karen Austin
07/25/01 Letter from Michael Lynch to Karen Austin
07/30/01 Default notice by General Electric Capitol Corp.
08/02/01 fax from Ted Cornell to David Heller
08/03/01 fax from Gus A. Paloian to Douglas Tabler
12/11/01 Affidavit of Gus A. Paloian for rentention of Seyfarth, Shaw
02/18/02 E-mail from Ted Cornell to Richard Levy
08/16/01 Supplemental Affidavit of Gus A. Paloian for rentention of Seyfarth, Shaw
08/10/01 Affidavit of Gus A. Paloian for rentention of Seyfarth, Shaw
08/13/01 Debtors Application for order for rentention of Seyfarth, Shaw as counsel
08/21/01 Application for for order for rentention of Seyfarth, Shaw as counsel
04/02/01 Affidavit of Gus A. Paloian for rentention of Seyfarth, Shaw
Baldi time for first debtors fee application
08/24/01 Letter from Peter Miller to PBGC Insurance Operations Dept.
09/27/01 Memo from Ted Novy to Peter Miller
McCook PBGC E-mails
09/21/01 Memo from Ted Novy to file Controled Group Liability Benefits Liability
09/26/01 E-mail from Peter Miller to Ted Cornell etc.
09/26/01 E-mail from Peter Miller to Ted Cornell etc.
09/27/01 E-mail from Peter Miller to Ted Cornell
09/27/01 Seyfarth, Shaw memo from Pete Miller & Jennifer Kraft to Ted Cornell etc.
01/11/02 Reply memo in support of Trustee’s application to retain Seyfarth, Shaw
07/09/01 Seyfarth, Shaw, Fairweather, & Geraldson work detail
10/01/01 Letter from William Factor to Richard Levy
Time records of William Factor
11/28/01 E-mail from William Factor to Gerald Curran
12/03/01 Caners Business Information
11/28/01 E-mail from Todd Andrlik to William Factor
11/14/01 E-mail from Craig Bloomfield to Todd Andrlik
02/27/02 E-mail from William Factor to Joseph Baldi
02/12/02 E-mail from Robert Fishman to Richard Levy
06/15/98 Fax from Ted Cornell to Thomas Wright
06/04/98 Letter from Ted Cornell to Thomas Wright
06/03/02 E-mail from Peter Woodford to Eric Boyd etc.
05/15/02 Seyfarth, Shaw, Fairweather, & Geraldson work detail
Peter Woodford’s time records

January 2000 invoice of Seyfarth, Shaw, Fairweather, & Geraldson
08/10/01 Draft of McCook Metals LLC
04/16/00 Draft GE CCFIAG review relating to McCook
McCook Metals Inventory 2001
02/26/01 McCook Metals LLC Borrowing Base certificate
11/07/00 E-mail from Michael P. Todorow to Paul M. Freehan
06/01/01 Default notice from General Electric Capitol Corp.
06/14/01 Letter from Michael Lynch to Michael J. McKay
07/09/01 E-mail from Karen A. Austin to Michael J. McKay
07/16/01 Letter from Michael Lynch to Karen A. Austin
08/08/01 Fax from John J. Naughton to Michael Lynch
04/22/02 E-mail from Thomas Donnelly to Jonathan Prescott
10/19/01 Memo from Ted Cornell to file
11/01/01 E-mail from Shawn M. Pettit to Karen A. Austin
01/10/02 E-mail from Michael J. McKay to Thomas Donnelly
12/20/01 E-mail from Richard Levy to Robert Fishman
01/28/02 E-mail from Kevin Murphy to Thomas Donnelly
11/15/01 For Immediate release
12/07/01 Webber Shandwich Worldwide invoice
11/21/01 E-mail from Todd Andrlik to daily southtown.com
01/22/02 Webber Shandwich Worldwide invoice
11/09/01 E-mail from Craig Bloomfield Joseph Baldi
11/26/01 E-mail from William Factor to Gerald Curran
04/09/01 E-mail from Michael P. Todorow to Michael J. McKay
08/14/01 E-mail from Karen A. Austin to David Heller
05/25/01 E-mail from Michael B. Eklund to Michael J. McKay
01/22/01 E-mail from Monica R. Harvey to Michael J. McKay
08/27/99 Letter fom Ted Cornell to Donna Dabney
Peter Woodford time records
Handwritten notes on Turnover MAP files and controlling their claims
Handwritten notes on questions, issues problems, etc
Handwritten notes on PBGC
01/31/02 Application for payment as Joseph Baldi as a Trustee
08/09/02 Leter from Joseph Baldi to Scott Alsterda
08/27/02 Second Application for payment as Joseph Baldi as a Trustee
12/12/02 Third Application for payment as Joseph Baldi as a Trustee
05/23/03 Letter from Diane F. Klotnia to Robert P. Cummins
05/02/03 Letter from Joseph Baldi to Dean C. Harvalis
06/05/03 E-mail from Matthew to Robert P. Cummins
10/17/97 Memo from Memo from Conflicts Dept. to Gus A. Paloian
Supplemental Seyfarth, Shaw clients list
Seyfarth, Shaw clients list
07/07/03 Letter from Kevin M. Murphy to Robert P. Cummins
08/22/03 Letter from Kevin M. Murphy to Robert P. Cummins

07/09/03 Letter from Kevin M. Murphy to Thomas C. Cronin
08/30/04 Letter from Jennifer E. Smiley to Robert P. Cummins etc.
08/30/04 Letter from Jennifer E. Smiley to Robert P. Cummins etc.
01/25/01 E-mail from Ted Cornell to Jim McCall
Certificate of Existence of Longview Aluminum 12/27/00
12/26/00 Draft from Ted Cornell to Michael Lynch
02/26/01 Business Review Longview Aluminum
10/23/01 Letter from Ted Cornell to Gerald Curran
09/24/03 William A. Brandt Jr. PBGC claim summary
Handwritten notes on April Audit
07/17/01 Seyfarth, Shaw client matter form
03/20/00 Seyfarth, Shaw client matter form
08/23/01 Seyfarth, Shaw client matter form
07/17/01 Seyfarth, Shaw client matter form
08/09/01 Seyfarth, Shaw client matter form
Waiver Letter ss conflict
08/29/00 Memo from Peter Miller to John Kolleng
03/16/01 conflict waiver from Gus A. Paloian to Michael Lynch etc.
11/29/99 Validity guaranty
09/02/09 E-mail from Ted Cornell to Dominic Forte
07/26/01 letter from Gus A. Paloian to Michael Lynch
05/15/02 Notice of filing Application of Shaw, Gussis, Fishman, Glantz, & Wolfson for
allowance of March monthly interim compensation and reimbursement of expenses
08/06/01 First Monthely interim application of Seyfarth, Shaw for compensation and
reimbursement of expenses
11/21/01 First Monthely interim application of Seyfarth, Shaw for compensation and
reimbursement of expenses
01/31/02 First Application of allowance and payment of interim compensation for Joseph Baldi
as U.S. Trustee
McCook Entities
11/04/97 letter from Gus A. Paloian to Ted Cornell 01/13/99 client matter maintenance for Gus
A. Paloian
04/24/01 Notice of Application authorizing the employment and retention as Seyfarth, Shaw as special corporate counsel to the debtor nunc pro tunc
05/23/01 Order authorizing the employment and retention as Seyfarth, Shaw as special corporate counsel to the debtor
08/08/01 Letter from Ted Cornell to David Heller
12/03/02 Letter from Michael L. Shakman to Robbert P. Cummins
08/15/01 E-mail from Ted Cornell to Michael Lynch

08/21/01 Supplemental Affidavit of Gus A. Paloian authorizing the employment and retention as Seyfarth, Shaw
09/24/02 Second Supplemental Affidavit of Seyfarth, Shaw
10/04/01 Seyfarth, Shaw client matter form
10/12/01 E-mail from William Factor to Richard Levy
10/19/01 E-mail from Ted Cornell to file
10/19/01 Letter from Richard Levy to Gerald Curran
10/23/01 Letter from Ted Cornell to Gerald Curran
10/24/01 Letter from John Kolleng etc. to Ted Cornell
10/26/01 Letter from Ted Cornell to John Kolleng etc.
11/19/01 Letter from Karen Austin to Shawn Pettit & Tom Donnelly
December 2001 Seyfarth, Shaw, Fairweather, & Geraldson invoice
12/10/01 Application for order authorizing the employment and retention as Seyfarth, Shaw as counsel
01/15/02 Transcripts of Bankruptcy proceedings
01/11/02 Affidavit of Ted Cornell
01/17/02 Order authorizing the employment and retention as Seyfarth, Shaw as counsel
02/12/02 E-mail from Robert Fishman to Richard Levy
01/18/02 E-mail from Ted Cornell to Richard Levy
03/07/02 E-mail from Ted Cornell to Russell Porter Jr.
09/17/02 Preliminary Objection to the Application for order authorizing the employment and retention as Seyfarth, Shaw as counsel to the trustee
Handwritten notes on McCook Property
08/03/01 Conflicts waiver from Gus A. Paloian to Joel L. Klein
08/03/01 Conflicts waiver from Gus A. Paloian to Douglas Taber Esq.
08/06/01 Conflicts waiver from Gus A. Paloian to Michael Lynch
06/04/98 Letter from Ted Cornell to Michael Lynch
06/17/02 Notice of filing Longviews Reply in support of its motion to disqualify the law firms of Seyfarth Shaw and Shaw Gussis Fishman Glants &Wolfson LLC
12/07/01 Termination of representation from Ted Cornell to Michael Lynch
05/03/01 Letter from Paul P.Matingly to the Home Depot Store Support Center
02/26/01 Amended and restated Limited liability Company Agreement of Longview Aluminum LLC
2001 Income tax returns for Longview Aluminum LLC
Plaintiffs Exhibit 251- 1 bookmark 1 George W. Spellmire History
Rŝumž of Mark I. Harrison
09/19/04 Bankruptcy Court Report of George W. Spellmire
Plaintiffs exhinit 253

11/05/04 letter from George W. Spellmire to Michael L. Shakman Court Bulletin and Opinions
10/03/97 Letter from Foran, Nasharr & O'Toole to the Board of Directors.
11/04/97 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Michael Lynch
11/07/97 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Michael Lynch
06/11/98 Fax from Michael Lynch to Seyfarth, Shaw, Fairweather, & Geraldson
11/07/97 Purchasing agreement Reynolds Metals Company
11/21/97 Secretary of State for Illinois, McCook Metals LLC
12/16/97 Operating agreement for McCook Metals LLC
01/09/03 Billing from Seyfarth, Shaw, Fairweather, & Geraldson
03/03/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson
03/06/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson
03/06/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson
03/19/98 Watson Wyatt Letter Proposal to provide valuation services for McCook
Metals LLC
03/20/98 Watson Wyatt Letter
03/31/98 Watson Wyatt Letter
04/20/98 Letter from Foran, Nasharr & O'Toole
04/23/98 fax from Michael Lynch to Ted Cornell
05/27/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson
06/01/98 Fax from Michael Lynch to Seyfarth, Shaw, Fairweather, & Geraldson
06/20/98 Draft from Stephen J. Thompson
06/03/98 Letter from Foran, Nasharr & O'Toole
06/04/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Michael Lynch
06/04/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Michael Lynch
06/04/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Michael Lynch
06/04/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Michael Lynch
06/04/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Thomas Wright
06/08/98 E-mail from Joseph J. Castriano to Eugene Pucek
06/16/98 First Amendment to the Amended and restated operating agreement of McCook
Metals
06/15/98 Fax from Hedlund Hanley & John to Ted Cornell
06/15/98 Fax from Ted Cornell to Thomas Wright
06/17/98 Credit Agreement between McCook Metals and General Electric Capitol

Corporation
06/17/98 Consent and Waiver
06/24/98 Letter from Ted Cornell to Michael Lynch
07/01/98 Letter from Foran, Nasharr & O'Toole to Michigan Avenue Partners, Inc.
07/08/98 Fax from Price, Waterhouse, Coopers, LLP to Michael Lynch
10/19/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Paul Harris
11/10/98 Memorandum from Ed Karlin to Ted Cornell, Gus Paloian, Bob Sell, Jay Gitles,
Fred Kaplan, Jim Schraidt, Paul Driznar.
12/02/98 Memorandum from Peter Miller to Ted Cornell III
12/04/98 Fax from Foran, Nasharr & O'Toole to Michael Lynch
12/04/98 Fax from Ted Cornell to Paul Harris
12/04/98 Fax from Ted Cornell to Paul Harris
12/11/98 Letter from Price, Waterhouse, Coopers, LLP to James C. McCall Jr.
12/11/98 Letter from Price, Waterhouse, Coopers, LLP to James C. McCall Jr.
12/16/98 McCook Metals LLC files with Secretary of State
12/29/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Morgan Guarantee
Trust Co.
12/30/98 Guaranty Michael Lynch and Morgan Guaranty Trust Co.
12/30/98 Security Agreement
12/30/98 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Morgan Guarantee
Trust Co.
12/30/98 Release of Mortgage
Conducting due diligence 1999
01/12/99 Asset Purchase Agreement Norandal USA, Inc., and Scottsborro Aluminum
LLC
01/15/99 Letter from Price, Waterhouse, Coopers, LLP to James C. McCall
01/15/99 Fax from Bernie Smith to Joe Castriano, Eugene Pucek, Graig Yuen
01/10/99 Handwritten notes on meeting
01/20/99 Transmission report from Price, Waterhouse, Coopers, LLP to James C. McCall
02/02/99 Fax from Michael Lynch to Ted Cornell
01/22/99 Draft from Price, Waterhouse, Coopers, LLP to James C. McCall Jr.
01/22/99 Draft from Price, Waterhouse, Coopers, LLP to James C. McCall Jr.
01/27/99 Letter from Foran, Nasharr & O'Toole to Pam Vastine MAP

Services LLC
01/29/99 Letter from Price, Waterhouse, Coopers, LLP to to James C. McCall
02/15/99 Operating Agreement of Scottsborro Properties LLC
02/15/99 Operating Agreement of Scottsborro Properties LLC
02/25/99 McCook Metals Balance sheet
03/10/99 Operating Agreement of Great Lakes Metals LLC
03/15/99 Asset Purchase Agreement Great Lakes Metals LLC and Metro Metals Corp.
03/17/99 Memorandum from Ed Karlin to John Kolleng
03/29/99 Memorandum from John Kolleng to Michael Lynch, etc. April 1999 the M&A advisor
04/05/99 Letter from Hedlund Hanley & John to Michael Lynch
04/13/99 Fax from Jim McCall to John Krupinski
04/28/99 Amended and Restated Credit Agreement McCook Metals LLC, McCook
Equipment LLC, General Electric Capitol Corp.
04/28/99 Amended and Restated Credit Agreement
05/03/99 Fax from Price, Waterhouse, Coopers, LLP to James C. McCall
05/24/99 Fax from Paul S. Drizner to John Kolleng
05/26/99 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Mellon Bank Center
06/01/99 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Michael Lynch
06/01/99 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Michael Lynch
06/18/99 Fax from Hedlund Hanley & John to Joe Castriano
06/29/99 Draft Preliminary Offering Memorandum
07/14/99 Letter from KPMG to James C. McCall
08/01/00 Borrowing base certificate from McCook Metals LLC.
08/09/99 Ed Galvin’s Voice mail
08/10/99 Letter from Price, Waterhouse, Coopers, LLP to Michael Lynch
08/13/99 Ed Galvin’s Voice mail
08/21/99 Fax from Patton Boggs LLP to Kevin O’Keefe, Mike Lynch, John Kolleng, Steve Thompson
04/28/03 Seyfarth, Shaw, Fairweather, & Geraldson billing
08/27/99 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to Donna Dabney Esq.
09/15/99 Fax from Mike McKay to Tom Stephens
October 1999 Billing Statement from Seyfarth, Shaw, Fairweather, & Geraldson
10/20/99 Letter from McCook Metals to Paul Freehan
10/29/99 Fax from Mike McKay to Ted Cornell
10/29/99 Fax from Mike McKay to Ted Cornell
11/05/99 McCook Organizational Chart

11/06/99 Memo from Robert McDole to Matt Ochalski
Ted Cornell's notes on McCook Metals Loan Agreement with GE
11/22/99 Handwritten changes to a Default Guarantee
12/10/99 Default Guarantee
12/10/99 Validity Agreement
12/31/99 Scottsborro Aluminum Group Combined financial statements
2000 Income Tax Returns for Great Lakes Partners LLC
01/02/01 McCook Metals Borrowing base certificate
01/13/00 fax from Robert McDole to Matt Ochalski
02/02/00 fax from Robert McDole to Matt Ochalski
Memorandum of personal involvement of all company's
03/31/00 Letter from Michael Lynch to Jeff Podwika
May 2000 invoice billing Seyfarth, Shaw, Fairweather, & Geraldson
June 2000 McCook Metals Inventory
June 2000 Longview Reduction Plant Sale Memorandum
06/05/00 Bank 1 letter from Charles Self to James C. McCall
06/30/00 Letter from Gus A. Paloian to Douglas Tabler, Esq.
06/30/00 Letter from Gus A. Paloian to Douglas Tabler, Esq.
July 2000 McCook Metals Inventory
07/03/00 Borrowing base certificate from McCook Metals LLC.
07/06/00 LaSalle Bank personal financial statement of Michael Lynch
07/06/00 Letter from Gus A. Paloian to Dean P. Vanek Esq.
07/06/00 Letter from Gus A. Paloian to Dean P. Vanek Esq.
07/13/00 Letter from Michael Lynch to Alain Belda
08/09/00 Fax from John Babarik to Bob Sell
08/10/00 letter from Gus A. Paloian to Dean P. Vanek Esq.
08/10/00 letter from Gus A. Paloian to Dean P. Vanek Esq.
08/18/00 Memorandum from Ted Cornell to Robert J. Sell and Gus A. Paloian
08/18/00 Memorandum from Ted Cornell to Robert J. Sell and Gus A. Paloian
08/29/00 Memorandum from Peter C. Miller to John Kolleng and Ted Cornell
08/31/00 McCook Metals Executive Audit Report
September McCook Metals Inventory
09/05/00 Borrowing base certificate from McCook Metals LLC.
09/21-22/00 Corporate Mergers and Acquisitions
October McCook Metals Inventory
10/02/00 Borrowing base certificate from McCook Metals LLC.
10/18/00 Letter from Ted Cornell to John Kolleng
November McCook Metals Inventory
11/06/00 Borrowing base certificate from McCook Metals LLC.
11/07/00 Declaration of Michael Lynch
December McCook Metals Inventory
12.04/00 Borrowing base certificate from McCook Metals LLC.
12/05/00 letter from Michael Lynch to Stuart Lissner, Luciano

Morelli, Martin Battaglia
12/05/00 letter from Michael Lynch to Stuart Lissner, Luciano Morelli, Martin Battaglia
12/08/00 letter from Robert J. Sell to John Babirak
12/12/00 letter from Michael Lynch to Martin Battaglia, Stuart Lissner
12/14/00 letter from John Kolleng to Stuart Lissner, and Luciano Morelli
12/22/00 Agreement for the purchase and sale of Longview Production Plant
12/31/00 Longview Production Plant's financial statements
Notes & Plans for operating a smelter
January 2001 McCook Metals Inventory
January 2001 Billing invoice Statement from Seyfarth, Shaw, Fairweather, & Geraldson
01/02/01 Letter from Michael Lynch to Ron Bloom
01/12/01 Letter from Michael Lynch to Alan Kestenbaum
01/17/01 Handwritten notes By USWA in Chicago Illinois.
01/17/00 Memo By Robert W. McDole to Matt Ochalski
01/22/01 E-mail from Ted Cornell to Jim McCall
01/23/01 Letter from Stephen J. Thompson to Kestenbaum
01/23/01 Letter from John Kolleng to Dimitri Giotakos
01/29/01 Loan Agreement Longview Aluminum and Ableco Finance LLC
01/29/01 Fax from Michael Lynch to Ted Cornell
Handwritten notes on meetings pertaining to the acquisition on Longview
February 2001 McCook Metals Inventory
02/05/01 Borrowing base certificate from McCook Metals LLC.
02/08/01 Letter From Stephen J. Thompson to Kestenbaum
02/08/01 fax from Michael Lynch to Ted Cornell
02/10/01 E-mail from Lawrence Caster to Dean Vanek
02/15/01 E-mail from Christine Kanchinsky to John Babirak
02/15/01 E-mail from Christine Kanchinsky to John Babirak
02/18/01 Letter of Understanding of USWA and Michigan Avenue Partners LLC
02/19/01 E-mail from Ted Cornell to Stephen J. Thompson
02/21/01 Fax from Mark Miller to John Kolleng
Curtailment Agreement Longview Aluminum
02/23/01 Letter from Michael Lynch to Seyfarth, Shaw, Fairweather, & Geraldson
02/23/01 Letter from John Kolleng to Martin J. Battaglia
02/23/01 Fax from Mark Leddy to Stephen J. Thompson
02/26/01 Amendment Agreement USWA and Michigan Avenue Partners LLC
02/26/01 Intercreditor and Subordination Agreement
02/26/01 First Amendment to Asset Purchase Agreement Reynolds Metals Co.

02/26/01 Amended and restated Limited Liability Agreement of Longview Aluminum
Co. LLC
02/26/01 Letter from Seyfarth, Shaw, Fairweather, & Geraldson to the Aministrative
Agent, Funding Agent, and Initial Lenders.
02/27/01 Term Note
March 2001 McCook Metals Inventory
03/06/01 Letter from Ted Cornell to John Kolleng
03/06/01 Borrowing base certificate from McCook Metals LLC.
03/07/01 Letter from Ted Cornell to John Kolleng
03/16/01 Fax from Gus A. Paloian to Michael Lynch etc.
03/26/01 Fax from Dean P Vanek to Gus A. Paloian
03/19/01 E-mail Jennifer McManus to Firm all attorney's
03/21/01 Memorandum from the Conflicts Dept. Fran Sweet to Jennifer McManus, and
Gus A. Paloian
03/26/01 Borrowing base certificate from McCook Metals LLC.
03/02/01 Bankruptcy Court Case #01-1367 JJF Retention of Seyfarth Shaw as special
Corporate counsel
April 2001 McCook Metals Inventory
04/04/01 Memorandum from Robert McDole to Dominic Forte
04/22/01 The Pulse of the business report
04/26/01 Letter from Stephen Thompson to Karl Lerch
04/30/01 Borrowing base certificate from McCook Metals LLC.
04/30/01 Letter from John Krupinski to James Gurgone
05/01/01 Opinion 01-02
May 2001 McCook Metals Inventory
05/03/01 Letter from James Gurgone to Mike Lynch
05/07/01 Borrowing base certificate from McCook Metals LLC.
05/09/01 Letter from Watson Wyatt & Company to Clyde D. Rundle
05/09/01 Engagement Letter from Watson Wyatt & Company to Clyde D. Rundle
05/09/01 Engagement Letter from Watson Wyatt & Company to Clyde D. Rundle
05/10/01 Letter from Mellon Bank to John Krupinski
05/15/01 Borrowing base certificate from McCook Metals LLC.
05/16/01 Letter from John Kolleng to Martin J. Battaglia
05/21/01 Borrowing base certificate from McCook Metals LLC.
05/22/01 E-mail from Paul Strickland to Michael Lynch
05/29/01 Borrowing base certificate from McCook Metals LLC.
05/30/01 Fax from James Gurgone to Michael Lynch
05/31/01 McCook Metals disbursement account
06/01/01 Default Notice from General Electric Capitol Corp. to McCook Metals LLC
June 2001 McCook Metals Inventory

06/04/01 Memo from Nicole Moirano and John Babirak to Michael Lynch
06/04/01 Borrowing base certificate from McCook Metals LLC.
06/05/01 Fax from Gloria Frank to Ted Cornell
06/11/01 Borrowing base certificate from McCook Metals LLC.
06/14/01 Letter from Michael Lynch to Michael J. McKay Default Notice
06/14/01 Letter from Michael Lynch to Michael J. McKay Default Notice
06/18/01 Borrowing base certificate from McCook Metals LLC.
06/15/01 Raw Materials Inventory
06/15/01 Raw Materials Inventory
06/15/01 Raw Materials Inventory
06/15/01 McCook Metals Inventory
06/18/01 Borrowing base certificate from McCook Metals LLC.
06/18/01 Borrowing base certificate from McCook Metals LLC.
06/21/01 GE Capitol Business Review
06/22/01 Raw Materials Inventory
06/25/01 Borrowing base certificate from McCook Metals LLC
06/22/01 Raw Materials Inventory
06/24/01 The Pulse of the business report
06/25/01 Letter from Karen A. Austin to Michael Lynch
06/25/01 Borrowing base certificate from McCook Metals LLC
06/26/01 E-mail from Michael J. McKay to Karen A. Austin
06/27/01 Letter from Michael Lynch to Karen A. Austin
06/28/01 Credit Consolidation of McCook and Longview
06/30/01 McCook Metals disbursement account
07/02/01 Letter from Michael Lynch to James Gurgone
07/02/01 Borrowing base certificate from McCook Metals LLC
07/03/01 Letter from James Gurgone to Michael Lynch
07/05/01 Letter from David Poremba to Karen A. Austin
07/09/01 E-mail from Karen A. Austin to Michael J. McKay
07/09/01 Daily revolver activity
07/09/01 Borrowing base certificate from McCook Metals LLC
07/12/01 Letter from Michael Lynch to McCook Metals
07/13/01 Letter from Stephen H. Jones to David Poremba
07/16/01 Fax from General Electric Capitol Corp. to Kevin Ford & Steve Jones
07/16/01 Letter from Michael Lynch to Karen A. Austin
07/17/01 Letter from David C. Wagner to Michael Lynch
07/17/01 Letter from Michael Lynch to Karen A. Austin
07/17/01 Letter from Michael Lynch to Karen A. Austin
07/18/01 Default notice letter from David S. Oppenheimer to Michael and John
07/18/01 Letter from Rosemarie Scaramuzzo to Karen A. Austin
07/18/01 Letter from Rosemarie Scaramuzzo to Karen A. Austin
07/19/01 Letter from Karen A. Austin & Tom Donnelly to Jim Ungari

& Shawn Pettit
07/20/01 Letter from John F. Krupinski to Joel Klem
07/24/01 Notes on inventory level
07/24/01 Notes on inventory
07/25/01 Borrowing certificate
07/25/01 Letter from Michael Lynch to Karen A. Austin
07/25/01 Default notice Letter from General Electric Capitol Corp. to McCook Metals LLC
07/26/01 letter from Gus A. Paloian to Michael Lynch
07/27/01 Conflicts waiver from Gus A. Paloian to Joel L. Klein
07/27/01 Letter from David Wagner to Scotsboro Aluminum
07/27/01 Letter from Michael Lynch to Karen A. Austin
07/27/01 Letter from Michael Lynch to Karen A. Austin
07/27/01 Fax from John Kennedy to Michael Lynch
07/27/01 Fax from Michael Lynch to Ted Cornell
07/27/01 Letter from Michael Lynch to Karen A. Austin
07/30/01Written notes in reference conference call
07/30/01 McCook Metals Analysts of inventory
07/31/01 Fax from David G. Crumbaugh to Ted Cornell
07/31/01 Borrowing base certificate from McCook Metals LLC
07/31/01 Fax from Michael Lynch to Karen A. Austin
07/31/01 Borrowing base summary
Form 5 Involuntary Petition Bankruptcy Court
08/02/01 Letter from Forrest B. Lammiman to Gus A. Paloian
08/02/01 Letter from Ted Cornell to David S. Heller
08/03/01 Fax from David S. Heller to Ted Cornell etc.
08/03/01 Fax from Gus A. Paloian to Michael Lynch
08/03/01 Fax from Gus A. Paloian to Douglas Tabler
08/06/00 GE vs. McCook Metals verified complaint
08/06/01 Fax from John F. Kennedy to Michael Lynch
08/06/01 E-mail from Karen A. Austin to Michael J. McKay
08/06/01 Memorandum from the conflicts Dept to Jennifer M. McManus
Form 4 List of Creditors
Quinlan & Crisham Ltd. Billing
08/07/01 Letter from Ted Cornell to Michael Lynch
08/07/01 Fax from William J. Factor to John Kennedy
08/07/01 Letter from Ted Cornell to James C. McCall
08/07/01 Fax from Gus A. Paloian to Michael Lynch
08/07/01 letter from Gus A. Paloian to Michael Lynch
08/08/01 Memorandum from the conflicts Dept to William Factor
07/18/01 Tax Petition for Longview
08/21/01 Karen A. Austin’s written comments on the draft of McCook Metals
08/10/01 Affidavit of Gus A. Paloian
08/13/01 Letter from Boston & Assoc. P.C. to David Heller

08/13/01 Debtors application to rentend Shetfarth Shaw as counsel
08/14/01 E-mail from Anthony Nasharr to Gale Evens
08/14/01 Memorandum from the conflicts Dept to William Factor McCook issues outline
08/16/01 Supplement Affidavit of Gus A. Paloian McCook issues outline
08/16/01 Letter from Michael Lynch to Mark E. Miller
08/16/01 E-mail from Karen A. Austin to Ted Cornell
08/16/01 E-mail from Matthew Ochaiski to Karen A. Austin
08/17/01 Fax from Ted Cornell to McCook Metals
08/17/01 memorandum from Martin J. O'Hara to John F. Kennedy
08/17/01 Fax from Ted Cornell to McCook Metals
08/21/01 Fax from David S. Oppenheimer to Credit file
08/21/01 Affidavit of Gus A. Paloian supporting Shetfarth Shaw as counsel
08/21/01 Application for Shetfarth Shaw as counsel by William Factor
08/22/01 Letter from Ted Cornell to David S. Heller & David N, Missner
08/24/01 Shayfarth Shaw notifies PBGC
08/28/01 Letter from Quinlan & Crisham Ltd. to Michael Lynch
08/29/01 Letter from Quinlan & Crisham Ltd. to David Heller
08/30/01 Fax from Michael Lynch to John F. Kennedy
08/30/01 Letter from Michael Lynch to Gus A. Paloian
08/30/01 Fax from Gus A. Paloian to Michael Lynch
08/31/01 LaSalle Business Credit Memorandum
08/31/01 Fax from Ted Cornell to Michael Lynch etc
08/31/01 Letter from Michael W. Coffield & Assoc. to Michael Lynch
09/02/01 E-mail from Ted Cornell to Michael W. Coffield
09/03/01 E-mail from William Factor to John Kolleng
09/04/01 Letter from Ted Cornell to Michael W. Coffield
09/05/01 Separation Agreement
09/05/01 Fax from Michael W. Coffield & Assoc. to Ted Cornell & Gus A. Paloian
09/05/01 DIP Financing order in ref McCook Metals
09/06/01 Fax from James C. McCall to John Kennedy
09/06/01 Fax from James C. McCall to John Kennedy
09/07/01 Letter from Quinlan & Crisham Ltd. to Ted Cornell etc.
09/07/01 E-mail from Thomas Quirk to Mike
10/17/01 Letter from R. Scott Alsterda to Michael Lynch
09/10/01 E-mail memorandum from William J. Factor to David Missner & Mark Naughton
09/17/01 E-mail from David Wang to Michael Lynch
09/17/01 Michael W. Coffield invoice to Michael Lynch
09/18/01 Letter from John Kennedy to Michael Lynch

Modified Employment Agreement
09/21/01 Modified Draft by Seyfarth, Shaw, controlled group liability benefits exposure
09/27/01 Seyfarth, Shaw Memo from Pete Miller & Jennifer Kraft to Ted Cornell etc.
09/26/01 E-mail from Pete Miller to Ted Cornell
09/26/01 E-mail from Pete Miller to Ted Cornell
09/27/01 Letter from Gus A. Paloian to John Kolleng
09/27/01 Letter from R. Scott Alsterda to Michael Lynch
09/27/01 Draft by Seyfarth, Shaw Ted Novy to Peter C. Miller
09/27/01 E-mail from Pete Miller to Ted Cornell
09/27/01 Seyfarth, Shaw Memo from Pete Miller & Jennifer Kraft to Ted Cornell etc.
Transcripts of Bankruptcy Court on 09/27/01 at 9:30 a.m.
09/28/01 Memo from William J. Factor to John Kolleng
10/01/01 Fax from William J. Factor to Richard A. Levy
10/03/01 E-mail from Ted Cornell to David Heller
10/04/01 E-mail from William J. Factor to Ford Phillips
10/18/01 E-mail from Ted Cornell to Michael Lynch
10/19/01 Letter from Angela Novoa to Michael Lynch & John Kolleng
10/19/01 Letter from Richard A. Levy to Gerald Curran etc.
10/19/01 Seyfarth, Shaw Memo with GE's agenda
10/23/01 Gerald B. Curran's letter to John Kolleng etc.
10/23/01 E-mail from Ted Cornell to Gerald B. Curran
10/24/01 Fax from R. Scott Alsterda to John Kennedy
10/24/01 E-mail from McCook Metals to Ted Cornell
10/25/01 GE Motion to Appoint a Trustee
10/25/01 Letter from Ted Cornell to Michael Lynch
10/25/01 E-mail from Karen A. Austin to Ted Cornell
10/26/01 Motion for Order Determining Authority to seek entry of DIP order
10/26/01 Letter from Ted Cornell to John Kolleng etc.
10/29/01 Fax from Ted Cornell to John Kennedy
10/29/01 Distribution lists from Ted Cornell
10/31/01 Requests for Loan Approval Great Lakes Processing
10/30/01 Debtors Motion for Entry of an Order
11/01/01 Emergency Motion for Appointment of A Trustee
11/01/01 Objection to John Kolleng Appointing a Trustee
11/02/01 Order Appointing Joseph Baldi as Trustee
11/02/01 Seyfarth, Shaw Memo to Joseph Baldi
11/16/01 Letter from Michael Lynch to Mr. Prescott
11/06/01 Fax from Michael Lynch to Joseph Baldi
11/06/01 Fax from R. Scott Alsterda to Michael W. Coffield
11/15/01 Joint Objection of Equity Security Holders to proposed interim financing order
11/19/01 Scottsboro Aluminum Auction ordered by Wedoff
11/20/01 Interim Order

11/19/01 Fax from John Kennedy to Michael Lynch
11/19/01 Fax from John Kennedy to Michael Lynch
11/21/01 Letter from Ceasar Tabet to John Kennedy
11/21/01 E-mail from Todd Andrlik to Daily southtowm.com
11/28/01 Letter from Steven Thompson to Michael Lynch
11/30/01 Watch Asset Report Great Lakes Processing
11/29/01 Letter from Seyfarth, Shaw Peter Miller to Robert McDole etc.
11/29/01 Memo Conflicts Dept to Rebecca Cohen, ect.
12/07/01 Scottsboro Aluminum Order Approving Asset Purchase Agreement Wedoff
12/04/01 Separation Agreement drafted by John Kennedy
12/07/01 Letter from Ted Cornell to Michael Lynch
12/11/01 Affidavit of Gus A. Paloian for retention of Seyfarth, Shaw as counsel
12/17/01 Letter from Ted Cornell to John Kennedy
12/18/01 Deposition of Leslie Glaser
12/20/01 letter from David S. Oppenheimer to John Kolleng
12/27/01 Longview etc., Response to retention of Seyfarth, Shaw as counsel
2001 Longview Aluminum tax returns
01/04/02 Letter from Alan W. Holdsworth, etc., to Dale Granta
01/11/02 Reply Memo to retention of Seyfarth, Shaw as counsel
01/11/02 Affidavit of Ted Cornell
01/14/02 Surreply of Longview Aluminum to retention of Seyfarth, Shaw as counsel
01/15/02 Fax from Michael Lynch to Angela Novoa
01/16/02 Letter from Gerald E. Kubasiak to Michael Lynch
01/17/02 Letter from Angela Novoa to Michael Lynch
01/23/02 Deposition of Thomas Horonzy
01/25/02 Letter from Ceasar Tabet to John Kennedy
01/28/02 Answer and counterclaim of Industrial General LLC and Theodor Bodnar
02/04/02 Form B10 McCook Metals Chpt. 11
02/08/02 Fax from Michael Lynch to John Krupinski
02/11/02 Letter from Michael W. Coffield to Michael Lynch
02/13/02 Supplemental Affidavit of Gus A. Paloian on retention of Seyfarth, Shaw as counsel
02/13/02 Letter from John Kennedy to Michael Lynch
02/15/02 Memo from David S. Oppenheimer to Mike Sharkey & Joe Costanza
02/19/02 Complaint filed by General Electric Capitol Corp.
02/20/02 Letter from John Kennedy to Michael Lynch
02/28/02 Watch Asset Report Great Lakes Processing
03/01/02 Letter from David S. Oppenheimer to John Kolleng
03/14/02 Notice of federal lien on Pension Benefit Guaranty Corp.
03/14/02 Notice of federal lien on Pension Benefit Guaranty Corp.

03/15/02 Letter from Ceasar Tabet to John Kennedy
03/11/04 Claims register of Scottsboro Aluminum
03/16/02 Fax from Michael Lynch to Robbert Cummins
04/17/02 Fax from Robbert Cummins to Gus A. Paloian
04/18/02 E-mail from Peter C. Woodford to Robbert Cummins
04/22/02 Fax from Michael Lynch to Ted Cornell
04/24/02 Letter from John Kennedy to Michael Lynch
04/25/02 E-mail from Peter C. Woodford to Robbert Cummins
05/09/02 Letter from John Kennedy to Peter C. Woodford
05/10/02 E-mail from John Kennedy to Peter C. Woodford
05/15/02 Plaintiffs Emergency Motion for a Protection Order
05/20/02 Letter from Michael L. Shakman to Robbert Cummins
05/31/02 Longview's Disbursement summary
06/19/02 Fax from David S. Oppenheimer to Mark Debniak
06/11/02 Letter from Michael L. Shakman to Robbert Cummins
06/12/02 Fax from Arthur B Muchin to Gaylan Prescott
06/14/02 Fax from Carney Buckley to Jerome Buckley etc.
06/20/02 Transcripts of Proceedings at 10:00 a.m.
06/20/02 Amended Complaint for Declaratory Judgment and damages
06/21/02 Fax from Lou Locke to Jerome Buckley, etc.
06/24/02 Fax from Lou Locke to Jerome Buckley, etc.
07/12/02 Letter from Michael L. Shakman to Robbert Cummins
07/17/02 Letter from Michael L. Shakman to Robbert Cummins
08/21/02 Agreed Order allowing certain reduced claims of the PBGC
08/31/02 Watch Asset Report Great Lakes Processing
09/24/02 Second Affidavit of Ted Cornell on behalf of Seyfarth, Shaw
10/17/02 Deposition of Michael Lynch
10/17/02 Declaration of Michael Lynch
10/18/02 Deposition of Michael Lynch
11/01/02 Fax from Steven J. Thompson to Mr. Krupinski
11/04/02 Letter from John Kennedy to the Magistrate Judge Arlander Keys
Affidavit of Peter C. Woodford
12/10/02 letter from Michael L. Shakman to Robbert Cummins
01/09/03 Seyfarth, Shaw client workload detail & Billing
03/03/98 Letter from Gus A. Paloian to Michael Lynch
03/04/03 Affidavit of Michael Lynch
03/21/03 BPA's Affidavit in opposition to debtors emergency motion
04/02/03 Order authorizing sale of certain real property
05/23/03 Letter from Diane F. Klotnia to Robbert Cummins
05/29/03 Order approving agreement of purchase and sale
06/03/03 Assignment and assumption agreement
06/27/03 Expert opinion of Scott Peltz
07/31/03 Form B10 Longview Aluminum
03/04/03 Claims Register of Longview Aluminum

08/27/03 Debtors report of sale
08/28/03 Claims Register of Longview Aluminum
08/31/03 Watch Asset Report Great Lakes Processing
09/30/03 Letter from Michael Lynch to David S. Oppenheimer
10/23/03 Fax from Scott H. Miller to Michael Lynch
10/30/03 Fax from Diane E. Hundseder to Michael Lynch
10/31/03 Trustees Motion for the authorization for the sale of certain assets
11/12/03 E-mail from Michael Lynch to David S. Oppenheimer
11/17/03 E-mail from Michael Lynch to Larry Landgraff
11/17/03 Letter from David S. Oppenheimer to Michael Lynch
12/18/03 Transcripts of proceedings 11:30a.m.
12/23/03 Letter from Scott H. Miller to Michael Lynch
2004 Great Lakes Processing income statement
01/09/04 Motion for final decree in closing case by Steven B. Towbin
02/04/04 E-mail from Larry Landgraff to Brian Shea
03/15/04 Fax from Michael Lynch to Kevin Flynn
06/29/04 Notice of Motion for the authorization for the sale of certain assets
07/31/04 Plaintiff's expert disclosures
08/06/04 Depositions of Frederick E. Lieber
08/17/04 Great Lakes Processing detailed financial statement
08/16/04 Transcripts of proceedings 9:30 a.m.
08/17/04 Transcripts of proceedings 1:40 p.m.
08/17/04 Transcripts of proceedings 10:00 a.m.
08/17/04 Transcripts of proceedings 10:00 a.m.
07/09/04 Agreed Order on the modification of agreed bargaining agreement
10/7-9/2004 Avoiding affiliation rules with separate entities
11/15/04 Report of Stuart Duhl
11/15/04 Report of Stephen B. Libowsky
11/15/04 Report of Leslie A. Klein
11/22/04 Expert report of Dirks Aulabaugh, MIA, CRE, Huron Consulting group
11/22/04 Expert report of L. Allen Arnett, Huron Consulting group substance of Discussions with Dave Poremba
July of 2001 Courts Bulletins and opinions
07/17/01 Handwritten notes on conversation with Dave Poremba Handwritten notes
Form 7 Longview Aluminum statement of financial affairs
04/29/03 Peter Woodford's time records
Michigan Avenue Partners Senior Magement
02/05/02 McCook Metals Claim register
Post Trial Brief
11/22/04 Letter from Roy R. Brandys to Michael L. Shakman
Inventory on actual borrowing base

M Wexler Post Bankruptcy time McCook
Handwritten notes and Motion for direction to answer certain deposition questions
McCook Equipment LLC written consent of the sole member
10/12/01 Invoice through 09/30/01
Projected Income Statements McCook Metals LLC
12/31/00 and 1999 Consolidated financial statements
Price, Waterhouse, Coopers, LLP copy of 12/31/98 report on audit
Confidential Settlement agreement and full release of all claims
05/06/03 Letter from John F. Kennedy to Robbert Cummins
10/17/01 Letter from from R. Scott Alsterda to Michael Lynch
10/30/01 Letter from Kevin M. Flynn to James C. McCall and Matthew J. Ochalski
11/13/01 John Kolleng invoice for McCook Metals LLC
01/16/02 Letter from Gerald E. Kubasiak to Michael Lynch etc.
Expert Report by David Hochman
Expert Report by Frank Bernatowicz
Frank Bernatowicz Expert Report Exhibit A
Frank Bernatowicz Expert Report Exhibit B
Frank Bernatowicz Expert Report Exhibit C
Frank Bernatowicz Expert Report Exhibit D
Frank Bernatowicz Expert Report Exhibit E
Frank Bernatowicz Expert Report Exhibit F
Frank Bernatowicz Expert Report Exhibit G
Frank Bernatowicz Expert Report Exhibit H
Frank Bernatowicz Expert Report Exhibit I
Frank Bernatowicz Expert Report Exhibit J
Frank Bernatowicz Expert Report Exhibit K
Frank Bernatowicz Expert Report Exhibit L
Frank Bernatowicz Expert Report Exhibit M
Frank Bernatowicz Expert Report Exhibit N
Frank Bernatowicz Expert Report Exhibit O
Frank Bernatowicz Expert Report Exhibit P
Frank Bernatowicz Expert Report Exhibit Q
Frank Bernatowicz Expert Report Exhibit R
Frank Bernatowicz Expert Report Exhibit S
Frank Bernatowicz Expert Report Exhibit T
Frank Bernatowicz Expert Report Exhibit U
Frank Bernatowicz Expert Report Exhibit V
Frank Bernatowicz Expert Report Exhibit W
Expert Report by George Spellmire
Expert Report by Mark I Harrison
5/13 Deposition Thomas Donnelly
9/10/04 Deposition Dean Vanek
10/25/01 Letter to Gus Paloian
9/27/01 letter from R. Scott Alsterda
2/21/06 letter to Richard Golding

2/13/06 letter to David Leibowitz
5/23/02 Fax from Seyfarth & Shaw
1/10/02 Fax from Pechiney
12/20/01 letters from Pechiney to Robert P Wujtowicz
2/8/02 letter to Pechiney
7/26/02 letter from Pechiney to Joseph Baidi
9/6/01 letter to Philippe Darmayan with Pechiney
6/14/01 letter to Michael J McKay (GECC) Re: Default Notice
6/16/01 letter to Karen Austin (GECC)
7/18/01 letter to Karen Austin (GECC)
7/27/01 letter to Karen Austin (GECC)
7/31/01 letter to Karen Austin (GECC)
7/30/01 letter from Karen Austin (GECC) [response to 7/27 letter]
11/19/01 Memo from Robert P Wujtowicz to Prospective Acquirer
11/19/01 letter from Karen Austin (GECC) Re: DIP Financing
3/4/02 letter from J. Baldi to Maurice DeRoover (SABCA) Notice of appearance and request for all copies Case#100cv01011rmu motion to file under seal Case#100cv01011rmu Memo of Points
Case#100cv01011rmu Motion to disqualify Jenkins & Gilchrist
Case#100cv01011rmu Alcoa's response to motion for TRO
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 1
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 2
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 3
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 4
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 5
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 6
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 7
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 8
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 9
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 10
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 11
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 12
Case#100cv01011rmu Alcoa's response to motion for TRO exhibit 13
Case#100cv01011rmu McCooks reply
Case#100cv01011rmu McCooks reply exhibit 1
Case#100cv01011rmu McCooks reply exhibit 2
Case#100cv01011rmu McCooks reply exhibit 3
Case#100cv01011rmu McCooks reply exhibit 3a
Case#100cv01011rmu McCooks reply exhibit 3b
Case#100cv01011rmu McCooks reply exhibit 4
Case#100cv01011rmu McCooks reply exhibit 5
9/18/01 motion for entry of an order establishing procedures for interim compensation and
reimbursement of expenses case #01-27326 /01-27329
Notice of Appearance
9/6/01 Motion to append GECC's routine motion
Motion for admissions of fact and genuineness of documents

directed to plaintiff Longview
Aluminum LLC
Defendants' response to Michael W. Lynch Motion to compel
Seyfarth Shaw to Produce
Documents
Reply brief of the Appellant
3/30/06 Emergency Motion for Dismissal and change of venue
10/5/05 Motion for leave to intervene in the instant cases and
for other relief
12/22/05 Notice of fileing Lynch's reply in support of it's
motion for the court to conduct an evidentiary hearing on the
wiretap matter and for other relief.
9/6/01 Fax from Seyfarth Shaw re: notice of debtors third party
motion for entry of an order (A)
authorizing, but not requiring, payment of certain prepetition
wage obligations; and (B)
authorizing and directing applicable banks and financial
institutions to honor related requests.
8/2/05 Weoff memorandum
1/14/05 Memorandum of decision
3/20/06 Order on Appeal
Case #1:00CV01011 RMU Certificate
12/6/04 Transcript Case # 01 B 27236 / 02 A 01006
12/7/04 Transcript Case # 01 B 27236 / 02 A 01006
12/8/04 Transcript Case # 01 B 27236 / 02 A 01006
12/9/04 Transcript Case # 01 B 27236 / 02 A 01006
12/10/04 Transcript Case # 01 B 27236 / 02 A 01006
12/13/04 Transcript Case # 01 B 27236 / 02 A 01006
11/1/04 Transcript Case # 01 B 27236 / 02 A 01006
1/20/05 1/21/05 Docket # 02 C 399 Transcript
12/13/05 Transcript 02 CH 9478 / 04 L 13656
1/6/06 Transcript 02 CH 9478 / 04 L 13656
2/14/06 Transcript 05B32440
3/2/06 Transcript 05B32440
9/18/01 Case # 01-27236 / 01-27329 Debtors' application for
Order authorizing the employment
and retention of McDonnell Boehnen Hulbert & Berghoff as special
Counsel
12/29/05 Notice of filing 02 CH 09478
3/7/02 email from Ted Cornell to Jr.Porter, Russell W RE:McCook
7/322/02 E-Mail from Mark Miller to Jon D Wright and Kurt W
Runzier
9/13/01 Notice of debtors third party motion for entry of an
order (A) authorizing, but not requiring, payment of certain
prepetition wage obligations; and (B) authorizing and directing
applicable banks and financial institutions to honor related
requests.

5/14/04 Letter to John Hourihane from Robert P Cummins
3/14/02 email from Ted Cornell to Russell Porter (Alcoa) Email from Don Seberger (Pechiney) to Philippe Darmayan
2/1/02 Letter from Seyfarth Shaw to Russell Porter (Alcoa)
1/21/02 E-Mail from John Wilson to Ted Cornell
12/20/01 letter from Donald A. Kluthe (Alcoa) to Robert Wujtowicz Schedule A
10/28/05 Motion to Purge
8/6/01 e-mail from Ted Cornell to Philippe Darmayan Re: Meeting on Friday
5/23/02 FAX From Michael Lynch (MAP) to Robert Cummins (Cummins & Cronin) RE: Wolfson/Jenner& Block/McCook
Motion for authorization to turn over documents and other material to the trustee
Petition #:05-32440
9/15/04 FAX from Michael Lynch to Cummins & Cronin RE: Great Lakes vs Seyfarth Shaw. Motion for authorization to turn over documents and other material to the trustee
11/2/05 Motion to compel defendant Seyfarth Shaw to produce documents
Michael Lynch's reply in support of it's motion to compel Seyfarth Shaw to produce documents
and for other relief
2/8/02 Fax From Scott Alsterda to David S Heller
3/1302 Fax from R Scott Alsterda to Holly Barteeki
Defendants Motion in limine
Combined Exhibits to Defendants Motion in limine
4/7/06 Motion to strike rebuttal Opinions of Mark J Harrison
Disk # 7 This Disk contains one .pst file full of various e-mails. This file needs to be imported into Outlook to view the e-mails
10/06/03 Promissory note with fax coversheet
10/06/03 Promissory note without fax coversheet
4/5/06 letter from Shakman & Beem LLP to Robert P. Cummins, Michael W. Lynch, and Daniel
Konicek discussing conflicts of interest.
1/21/06 Article about Bodenstein and Gouveia
4/7/06 Motion to strike Rebuttal opinions of Mark Harrison
4/7/06 Motion to Compel Production of documents from Longview and for leave to take additional discovery of John Kolleng

C. The total damages sought from the US Bancorp Defendants is Four Hundred and Fifty Million Dollars $450,000,000.

D. INSURANCE POLICIES

No insurance coverage or policies relevant to this litigation are in existence.

Respectlly submitted,

_____

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

CERTIFICATE OF SERVICE

I certify I have served a copy of this FRCP 26(a)(1), disclosure to the opposing counsel listed below via U.S. Mail on May 3rd, 2007.

Mark A. Olthoff
Shughart Thomson & Kilroy, PC--Kansas City
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
816-421-3355
Fax: 816-374-0509
Email: molthoff@stklaw.com

_____

SAMUEL K. LIPARI,

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:07-cv-02146-CM-DJW**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

Defendants U.S. Bancorp and U.S. Bank National Association hereby certify that they delivered their Rule 26(a) disclosures via United States mail, postage prepaid, this 4th day of May, 2007 to: Plaintiff, Mr. Samuel K. Lipari, 297 NE Bayview, Lee's Summit, Missouri 64064.

/s/ Mark A. Olthoff
MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK K2 #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via United States mail, postage prepaid, on this 4th day of May, 2007 to:

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

Plaintiff

/s/ Mark A. Olthoff
Attorney for Defendants

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:07-cv-02146-CM-DJW**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO STAY ENTRY OF SCHEDULE, STAY DISCOVERY AND FOR PROTECTIVE ORDER

Defendants U.S. Bancorp and U.S. Bank National Association ("U.S. Bank") respectfully request that the Court enter its Order staying discovery or for protective order, under Fed. R. Civ. P. 26(c), and to stay entry of a scheduling order. Defendants have filed a dispositive motion to dismiss the plaintiff's claims that, if granted, will resolve all of the causes of action and the entirety of the action. Furthermore, additional good cause exists for discovery to be stayed pending a ruling by the Court on the motion to dismiss. As reasons for this motion, defendants state:

1. Plaintiff Samuel Lipari originally filed this lawsuit in the Circuit Court of Jackson County, Missouri. Mr. Lipari purports to bring these claims as the alleged "assignee" of the now-defunct entity known as Medical Supply Chain, Inc.

2. The defendants removed the Missouri state court case to the United States District Court for the Western District of Missouri. That court recently transferred the case to this District.

3. This Court is very familiar with the substantial history of Medical Supply Chain, Inc. and Mr. Lipari in filing lawsuits, a number of which have been resolved by motion in this

Court. *See*, *e.g.*, *Medical Supply Chain, Inc. v. U.S. Bancorp, et al.*, 2003 WL 21479192 (D. Kan., Jun. 16, 2003); *Medical Supply Chain, Inc. v. Neoforma, Inc., et al.*, 419 F. Supp.2d 1316 (D. Kan. 2006); *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100 (D. Kan., Jan. 29, 2004).

4. This lawsuit, purportedly brought by Mr. Lipari on behalf of Medical Supply Chain, Inc., is the third effort by Lipari/Medical Supply Chain to file suit against U.S. Bancorp and U.S. Bank. Defendants believe that the plaintiff's claims are barred for a number of reasons set forth in their motion to dismiss filed on April 25, 2007. Among other things, Lipari is not the proper party to file these claims, Lipari has no standing, the claims are barred by *res judicata*, the complaint must be dismissed under Fed. R. Civ. P. 8 and the allegations fail to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). (Defendants hereby incorporate the arguments set forth in their motion as further basis for good cause to be found that discovery has stayed.)

5. These defendants have already been put to much expense in defending several lawsuits, not only responding to various pleadings filed by Medical Supply Chain, Inc. or Mr. Lipari that have no basis in law or fact, but also having filed motions for sanctions. To date, this Court has awarded defendants in the various cases mentioned above nearly $100,000 in their favor and against Medical Supply Chain, Inc. or its previous counsel (to the knowledge of the undersigned none of which has been paid). Before the defendants or the *pro se* plaintiff are put to further expense of money and time, defendants request that the Court enter a stay of any discovery and scheduling orders in this case pending a ruling upon their motion to dismiss.

6. A stay pending ruling on the motion to dismiss would be efficient and economical under the circumstances. Plaintiff cannot legitimately assert that he would suffer prejudice as a

result of the stay or protective order that the defendants seek. Any argument that delay caused by the entry of an Order pursuant to Rule 26(c) is insufficient to preclude a protective order. *See Niv v. Hilton Hotels Corp.*, 2007 WL 510113 *2 (S.D.N.Y., Feb. 15, 2007).

7. The defendants' motion to dismiss has not been interposed for an improper purpose, nor to harass or cause unnecessary delay. The arguments are well-grounded in law. The interests of judicial economy would clearly be advanced, at this juncture, by staying discovery in this action pending a decision on the dispositive motion. In particular, resolution of the pending dispositive motion would likely dispose of the entire action. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coors*, 357 F. Supp.2d 1277, 1280 (D. Colo. 2004). The parties' resources should not be unnecessarily drained while the dispositive motion is pending. *Spencer Trask Software and Information Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002).

8. Under Fed. R. Civ. P. 26(c), this Court has discretion to limit or stay discovery for good cause shown. Particularly where, as here, there is a pending dispositive motion, the stay is only for a short period of time until the motion is ruled and the opposing party would not be prejudiced, then a protective order is appropriate and good cause exists. *Spencer Trask*, 206 F.R.D. at 368.

9. Based upon the above and foregoing, defendants can establish "good cause" for entry of a stay of discovery and protective order under Fed. R. Civ. P. 26(c). No just reason can exist to compel the parties to engage in expensive discovery particularly given the prior litigation history of Medical Supply Chain, Inc., Mr. Lipari and the dispositive nature of defendants' motion.

WHEREFORE, for all of these reasons and for good cause shown, defendants pray that the Court enter an Order staying discovery and for protective order under Fed. R. Civ. P. 26(c), to stay entry of any scheduling order until a ruling is made on the dispositive motion, and for such other and further relief as the Court deems proper, equitable and just.

/s/ Mark A. Olthoff
MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via United States mail, postage prepaid, on this 7th day of May, 2007 to:

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

Plaintiff

/s/ Mark A. Olthoff
Attorney for Defendants

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:07-cv-02146-CM-DJW**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

ENTRY OF APPEARANCE

The undersigned attorney, Jay E. Heidrick of Shughart Thomson & Kilroy, P.C., enters his appearance on behalf of the defendants in the above-captioned matter.

/s/ Jay E. Heidrick
MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
molthoff@stklaw.com
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
ademarea@stklaw.com
jheidrick@stklaw.com
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via United States mail, postage prepaid, on this 10th day of May, 2007 to:

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

Plaintiff

/s/ Jay E. Heidrick
Attorney for Defendants

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.** 2:07-cv-02146**-CM-DJW**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' MOTION TO DISMISS

Plaintiff's Motion to Strike Defendants' Motion to Dismiss should be denied. Plaintiff's arguments, like this lawsuit, are meritless.

The defendants have not "lost" their Motion to Dismiss. To the contrary, the United States District Court for the Western District of Missouri granted the defendants' request for alternative relief and transferred the matter to this Court. Defendants have only recently filed in this Court their Motion to Dismiss, which the Western District of Missouri did not address prior to transfer. Contrary to plaintiff's assertion, it was not "lost" or denied and does not constitute a "second" (or "fifth") motion to dismiss these claims–it is the *first* dispositive motion in this case.

The plaintiff also makes the untenable argument that U.S. Bancorp and U.S. Bank were compelled to appeal this Court's dismissal of the state law claims in the prior case. Whether defendants may have had the option to appeal the Court's ruling declining to assert supplemental jurisdiction over the state law claims, they clearly were not required to do so. Plaintiff's argument and the authorities he relies upon do not support his position.

Next, the plaintiff asserts that the United States Court of Appeals for the Tenth Circuit has sole federal jurisdiction over these state claims by reason of the appeal in *Medical Supply Chain, Inc.*

v. Novation, Case No. 06-3331 (appealing this Court's Case No. 05-CV-2299-CM and reported at 419 F. Supp.2d 1316 (D. Kan. 2006)) ("*Medical Supply II*"). If that is the case, this matter should be dismissed because there is a prior suit involving the identical causes of action and allegations between these parties. Claim splitting is prohibited, and Lipari's own arguments show he has no justification for filing the same lawsuit in Missouri state court thereby wasting judicial resources and unnecessarily forcing these defendants to incur the cost and time to defend more meritless claims. By plaintiff's own admission, either his Motion to Strike or this lawsuit is frivolous. Plainly, both lack any merit.

As briefed in defendants' Motion to Dismiss, plaintiff's arguments further show he does not have standing to maintain this action. If the Tenth Circuit has jurisdiction over the plaintiff's claims, this proves that any right to bring a cause of action belongs solely to the corporation, Medical Supply Chain, Inc., and not Mr. Lipari. Accordingly, this matter should be dismissed.

In its earlier Order dismissing *Medical Supply II*, this Court ruled that Medical Supply's prior claims should be dismissed for *multiple* reasons, including that the complaint violated Fed. R. Civ. P. 8. The Court also denied Medical Supply an opportunity to amend. While the Court may not have addressed the Rule 12(b)(6) grounds for dismissal of the state claims, it identified an equally justifiable ground for dismissal under Rule 8 which is deemed a dismissal *with prejudice* for purposes of *res judicata*. *See Micklus v. Greer*, 705 F.2d 314, 317 n.3 (8th Cir. 1983) (noting that dismissal under Rule 8 without leave to amend is deemed dismissal on the merits sufficient to trigger *res judicata*); *see also Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997) ("It is well settled that denial of leave to amend constitutes *res judicata* on the merits of the claims which were the subject of the proposed amendment."); *cf. Serrano v. Union Planters Bank, N.A.*, 2007 WL 951612 (W.D. Tex., Mar. 19, 2007) (dismissing claims *inter alia* for failing to meet Rule 8

standards and *res judicata*). Whether the defendants appealed this Court's decision to not exercise supplemental jurisdiction over the state law claims in *Medical Supply II* is irrelevant, as that was only one of several reasons the Court cited in dismissing the matter. The Court also dismissed the entire Complaint in *Medical Supply II* for failure to comply with Rule 8.

Assuming Mr. Lipari is a valid assignee, he can obtain no greater rights than held by Medical Supply. Because *res judicata* would bar Medical Supply from asserting this suit, Mr. Lipari is likewise barred and this matter should be dismissed with prejudice.

WHEREFORE, for the foregoing reasons, defendants respectfully request the Court deny plaintiff's Motion to Strike Defendant's Motion to Dismiss and grant all relief sought by the defendants in their pending Motion to Dismiss.

/s/ Mark A. Olthoff
MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing was filed via electronic case filing this 17th day of May, 2007, with a true and correct copy being delivered via United States mail, postage prepaid, to:

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

Plaintiff

/s/ Mark A. Olthoff
Attorney for Defendants

DJW/bh

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAMUEL K. LIPARI,

Plaintiff,

v. **CIVIL ACTION**

No. 07-2146-CM-DJW

U.S. BANCORP, et al.,

Defendants.

MEMORANDUM AND ORDER

Pending before the Court is Defendants' Motion to Stay Entry of Schedule, Stay Discovery and for Protective Order (doc. 28). Plaintiff has filed no opposition to the motion. For the reasons set forth below, the Court will grant the motion.

As a general rule, discovery and other pretrial proceedings are not stayed in this district based merely on the pendency of dispositive motions. It is well settled, however, that the Court may enter such a stay until a pending motion is decided "where the case is likely to be finally concluded as a result of the ruling thereon; where the facts sought through uncompleted discovery would not affect the resolution of the motion; or where discovery on all issues of the broad complaint would be wasteful and burdensome."[1] The decision whether to stay discovery and other pretrial proceedings rests within the sound discretion of the Court.[2]

Upon careful review of the record in this case, the Court concludes that a stay of discovery and all other pretrial proceedings is warranted. Accordingly, Defendants' motion is granted, and

---

[1]*Wolf v. United State*s, 157 F.R.D. 494, 495 (D. Kan. 1994) (citing *Kutilek v. Gannon*, 132 F.R.D. 296, 297-98 (D. Kan. 1990)).

[2]*Kutilek*, 132 F.R.D. at 297 (citations omitted)..

all pretrial and Rule 26 proceedings, including the planning conference, scheduling conference, Rule 26(a)(1) disclosures, and discovery, are hereby stayed until the Court has ruled on the pending Motion to Dismiss (doc. 22).

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 24th day of May, 2007.

s/ David J. Waxse
David J. Waxse
U.S. Magistrate Judge

cc: All counsel and pro se parties

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Kansas City)

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff,*	)	
v.	)	Case No. 07-CV-02146-CM-DJW
US BANCORP and US BANK NATIONAL ASSOCIATION *Defendants,*	)	

REPLY MEMORANDUM SUPPORTING
STRIKING DEFENDANTS' MOTION TO DISMISS

Comes now the plaintiff Samuel K. Lipari and makes the following reply memorandum supporting his motion to strike the defendants' second or fifth motion to dismiss this case matter because it is prohibited under the rules. Samuel K. Lipari respectfully reserves his right to answer the motion to dismiss should the court not strike the motion.

STATEMENT OF FACTS

1. The defendants' answer "memorandum" spuriously suggests Rule 8 pleading standards were not met by the plaintiff and justified dismissal of the state claims on the merits in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 despite the express dismissal without prejudice by this court which did not evaluate or rule on the plaintiff's state claims.

2. This court is without jurisdiction to expand upon the judgment dismissing the plaintiff's state law claims while the matter is on appeal in *Medical Supply Chain, Inc. v. Novation, et al*, 10th Cir. case no. 06-3331.

3. The court may only enforce its dismissal without prejudice judgment in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299.

4. Enforcement of the dismissal without prejudice judgment is by remanding the matter to the 16th Circuit Missouri State Court.

5. The defendants have not sought relief from this court's order dismissing the plaintiff's claims without prejudice in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299.

6. The defendants did not cross appeal and therefore cannot expect an appeals court outcome altering this court's judgment except for reinstatement of plaintiff's federal claims.

7. The transferring federal court was required by transfer under 28 U.S.C. § 1406(a) to dismiss or transfer this action.

8. The transferring court did not grant the dismissal.

MEMORANDUM IN SUPPORT

Transfer is denial of dismissal. The transferring court was required to dismiss or transfer under 28 U.S.C. § 1406(a):

> "Section 1406(a), under which the Pennsylvania District Court transferred this case, provides:
>
> 'The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.'"

Goldlawr, Inc v. Heiman, 369 U.S. 463 at 465, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962).

Obviously the transferring court was under a duty to preserve the economy of justice and dismiss the action if it was dismissible. An argument could be made that the misconduct that so permeates this case was visible in the clearly erroneous rulings in other cases the defendants were attempting to use inapplicably as the law of the case was on its face bad faith misconduct, not to mention the bold face erroneous argument that a dismissal without prejudice was a res judicata bar that the transferring judge had to deviate from normal procedures. Understandably the defendants have not made this argument.

Transferals are denials of Dismissals

The meaning of the transfer is that the dismissal was considered and denied: See *Ferguson v. Beverly Enterprises, Inc.* at 1-2 (M.D.N.C., 2003) "Therefore, in the interests of justice, defendants' motion should be denied to the extent that it seeks to dismiss this action and granted to the extent that it seeks to transfer the matter..."; *A.J. Taft Coal Company, Inc. v. Barnhart*, Case No. CV 03-P-1390-S (N.D. Ala. 11/14/2003) (N.D. Ala., 2003) "The court TRANSFERS this case to the District of Maryland under 28 U.S.C. § 1404(a). Accordingly, the court DENIES the defendants' motions to dismiss and GRANTS IN PART the defendants' motions to transfer."

This is the normal procedure in the Western District of Missouri: *Kansas City Power & Light v. Kansas Gas and Elec.*, 747 F.Supp. 567 (W.D. Mo., 1990) "Accordingly, it is ORDERED that defendant KG & E's motion to dismiss is denied. It is further ORDERED that defendant KG & E's motion to transfer to the United States District Court for the District of Kansas is denied."

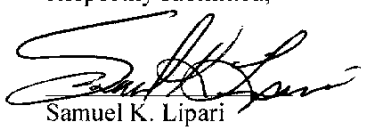
This Court Lacks Jurisdiction to Grant the Dismissal

With the matter being on appeal in the Tenth Circuit over the same issues argued by the defendant, this court cannot entertain the defendants' motion for dismissal. *Brasier v. United States*, 229 F.2d 176 (10th Cir.1955), (per curiam) (trial court lacked jurisdiction to allow amendments to pleadings while appeal was pending), cert. denied, 351 U.S. 925, 76 S.Ct. 783, 100 L.Ed. 1455 (1956); *Martin v. Martin*, 5 Kan.App.2d 670, 623 P.2d 527 (1981) (trial court may not modify judgment while appeal is pending); See *Willoughby v. Sinclair Oil & Gas Co.*, 10 Cir., 188 F.2d 902.

CONCLUSION

Whereas for the above reasons the plaintiff respectfully requires that the motion to strike the defendants' motion to dismiss be granted. In the alternative the plaintiff requests time to respond at law to the dismissal if it is determined by external events that jurisdiction over this matter as returned to this court.

Respectlly submitted,



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

CERTIFICATE OF SERVICE

I certify I have served a copy of this reply memorandum to the opposing counsel listed below via U.S. Mail on May 29th, 2007.

Mark A. Olthoff
Jay E. Heidrick
Shughart Thomson & Kilroy, PC--Kansas City
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
816-421-3355
Fax: 816-374-0509

Email: molthoff@stklaw.com

SAMUEL K. LIPARI,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Kansas City)

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff,*	)	
v.	)	Case No. 07-CV-02146-CM-DJW
US BANCORP and US BANK NATIONAL ASSOCIATION *Defendants,*	)	

OBJECTION TO STAY OF DISCOVERY UNDER RULE 72.1.4

Comes now the plaintiff Samuel K. Lipari and makes the following respectful objection to the magistrate's order staying discovery. The absence of jurisdiction during the pendency of this matter in appeal makes the magistrate's stay clearly erroneous or contrary to law. The absence of jurisdiction makes the order void ab intio. Furthermore, the plaintiff gives notice to the defendants that failure to comply with Rule 26 is actionable.

STATEMENT OF FACTS

1. This matter is a subset of the state claims last brought before this court in *Medical Supply Chain, Inc. v. Novation, et al*, formerly W.D. MO case no. 05-0210, then KS Dist. Court case no.05-2299, now 10th Cir. case no. 06- 3331.

2. The Western Missouri District Court transferring this matter to this court after the defendants removed it from the 16th Circuit Missouri State Court found the matter was identical.

3. *Medical Supply Chain, Inc. v. Novation, et al*, is before the Tenth Circuit Court of Appeals on the plaintiff's notice of appeal.

4. The defendants made no cross appeal.

5. This court is delaying the plaintiff's relief on state contract based claims to which the plaintiff has a clearly established constitutionally guaranteed property right.

6. The plaintiff is injured by the delay.

MEMORANDUM IN SUPPORT OF OBJECTION

As a general rule, an effective notice of appeal divests the district court of jurisdiction over the matter forming the basis for the appeal. See, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 378-79, 105 S.Ct. 1327, 1331, 84 L.Ed.2d 274 (1985); *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 439 (6th Cir.), cert. denied, 474 U.S. 948, 106 S.Ct. 346, 88 L.Ed.2d 293 (1985); *Ced's Inc. v. United States Environmental Protection Agency*, 745 F.2d 1092, 1095 (7th Cir.1984), cert. denied, 471 U.S. 1015, 105 S.Ct. 2017, 85 L.Ed.2d 299 (1985).

This court cannot expand its relief for the defendants to alter its earlier order dismissing the state law claims without prejudice because the defendants did not seek a reconsideration or new trial and did not cross appeal. The trial court during the pendency of this matter in appeal has only the power to enforce its order dismissing this action without prejudice so that it can be brought in Missouri State court (remand) *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585 at 589 (C.A.6 (Ohio), 1987).

The magistrate's order expanding the dismissal without prejudice and suspending or staying the self executing effect of Rule 26 mandating discovery on the state law claims is void. Expansion of a district court's judgment are not permitted while an appeal is pending. See, *e.g., Ced's Inc.*, 745 F.2d at 1095-96 (district court issued new conclusions of law after original judgment was entered and notice of appeal was filed; new judgment was void because district court was without jurisdiction to amend the original order); *Gryar v. Odeco Drilling, Inc.*, 674 F.2d 373, 375 (5th Cir.1982) (per curiam) (amended judgment entered during pendency of appeal was void; amended order conflicted with terms of original order on appeal); *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734-35 (9th Cir.) (amended order issued after filing of notice of appeal was void), cert. denied, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982).

The magistrate is in clear error regarding the likelihood of the plaintiff's success. The defendants are not even eligible for relief from the dismissal without prejudice in the present Tenth Circuit appeal; *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593 (1937). The opinion begins by stating the question before the Supreme Court: "The power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal is here to be admeasured." Id. at 187, 57 S.Ct. at 326 (emphasis added). The Court went on to hold that the appellate court had no such power, stating:

> "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' *United States v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 564, 68 L.Ed. 1087 [1924]. What he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain."

Id. at 190-91, 57 S.Ct. at 327-28. The cross-appeal requirement is one governing the power or jurisdiction of the appellate court: *E.F. Operating Corp. v. American Buildings*, 993 F.2d 1046, 1049 & n. 1 (3d Cir.), cert. denied, 510 U.S. 868, 114 S.Ct. 193, 126 L.Ed.2d 151 (1993); Francis v. Clark Equipment Co., 993 F.2d 545, 552-53 (6th Cir.1993); *New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1206 (3d Cir.1991); *Rollins v. Metropolitan Life Ins. Co.*, 912 F.2d 911, 917 (7th Cir.1990); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415-17 (7th Cir.1989); *Broth. of Maintenance Employees v. St. Johnsbury & Lamoille*, 806 F.2d 14, 15-16 (2d Cir.1986) (at least where no cross-appeal by any party); *Benson v. Armontrout*, 767 F.2d 454,455 (8th Cir.1985); *Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887, 888-89 (10th Cir.1984); *Securities and Exchange Commission v. Youmans*, 729 F.2d 413, 415 (6th Cir.1984) (citing Morley); *Martin v. Hamil*, 608 F.2d 725, 730-31 (7th Cir.1979) (citing Morley); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 725-26 (2d Cir.1978); Gomez v. Wilson, 477 F.2d 411, 414 n. 10 (D.C.Cir.1973); *Whitehead v. American Security and Trust Company*, 285 F.2d 282, 285-86 (D.C.Cir.1960).

The plaintiff also gives notice that the magistrate's void ruling does not immunize the defendants. The magistrate's ruling in the absence of jurisdiction is a nullity.:

> "...judgments rendered by a court lacking jurisdiction are void. *Burnham v.Super. Ct. of Cal.*, 495 U.S. 604, 608, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990); Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir.1986). "Traditionally [this] proposition was embodied in the phrase coram non judice, `before a person not a judge' — meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment." *Burnham*, 495 U.S. at 608, 110 S.Ct. 2105 (emphasis in original)."

U.S. v. Bigford, 365 F.3d 859 at 865 (10th Cir., 2004).

The controlling law of this circuit is that the defendants' actions threatening the plaintiff and seeking to impair the plaintiff's clearly established constitutional rights to speech and property within this litigation are not immune:

> "While there are many persuasive policy arguments in favor of granting immunity to private threats of litigation, these do not override the clear language of the First Amendment...In summary, we hold that when the basis for immunity is the right to petition, purely private threats of

litigation are not protected because there is no petition addressed to the government." *Cardtoons v. Major League Baseball Ass'n*, (en banc) 208 F.3d 885 at 893 (10th Cir., 2000).

The void stay does not shield the defendants from liability for their predicate acts of racketeering fraud under 18 U.S.C. § 1962(c) in the incomplete Rule 26 disclosure omitting names and addresses of defendant employees identified in the complaint and the failure to provide the plaintiff documents identified in the complaint. By doing so the defendants knowingly created a false disclosure defrauding the court and obstructing justice. *Pope v. Federal Express Corp.*, 138 F.R.D. 675 (W.D.Mo. 1990), aff'd in relevant part, 974 F.2d 982 (8th Cir.1992).

The defendants' and their agents' current misconduct in failing to produce discovery is admissible as evidence in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299. See *United States v. Finestone*, 816 F.2d 583, 587 (11th Cir.) (Unindicted prior acts "were admissible to prove a pattern of racketeering activity and overt acts, elements of the ... RICO conspiracy. Furthermore, those events were admissible to prove the membership and participation in the RICO conspiracy...."), cert. denied, 484 U.S. 948, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987), reh'g denied, 485 U.S. 972, 108 S.Ct. 1252, 99 L.Ed.2d 449 (1988); *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir.) (Unindicted acts "would be admissible as circumstantial evidence that [defendant] was a member of a conspiracy."), cert. denied, 479 U.S. 940, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986)

Similarly the defendants' baseless request for a stay after repeatedly being served notice them the defendants' failure to seek relief from the dismissal without prejudice in *Medical Supply Chain, Inc. v. Novation, et al*, KS Dist. Court case no.05-2299 deprived them of later collateral attacks. The defendants pleadings as intentionally false efforts to harm the plaintiff through delay and obstruction are also admissible. See *Carter v. Hewitt*, 617 F.2d 961, 967 (3d Cir.1980) (Prior false complaints were admissible because they "prove the plans [to file false complaints] directly and not inferentially [and therefore], they fall outside the scope of [R]ule 404. The [complaints] are not evidence of other acts used as indirect proof of a plan, but direct evidence of the existence of the plan itself.").

The plaintiff has had enough of the defendants' pleadings asserting positions contrary to clearly established controlling law and of the defendants' answers completely devoid of case law and will bring

racketeering counts against all responsible for the conduct and resulting injury when the plaintiff's cause of action over this new misconduct accrues.

> "as a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite. *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir.1988), cert. denied, 490 U.S. 1007, 109 S.Ct. 1642, 104 L.Ed.2d 158 (1989). Thus, a plaintiff who claims that a debt is uncollectible because of the defendant's conduct can only pursue the RICO treble damages remedy after his contractual rights to payment have been frustrated. *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1166 (2d Cir.), cert. denied, --- U.S. ----, 114 S.Ct. 385, 126 L.Ed.2d 334 (1993)."

First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763 (C.A.2 (N.Y.), 1994).

CONCLUSION

Whereas for the above reasons, the magistrate's order staying discovery should be overruled. Additionally the defendants are on notice that they have failed to meet their duties under Rule 26 and that this court is without jurisdiction to relieve the defendants of any liability for their misconduct in failing to disclose information and produce documents to the plaintiff.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I certify I have served a copy of this objection to magistrate's order to the opposing counsel listed below via U.S. Mail on May 29th, 2007.

Mark A. Olthoff
Jay E. Heidrick
Shughart Thomson & Kilroy, PC--Kansas City
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105
816-421-3355
Fax: 816-374-0509
Email: molthoff@stklaw.com

SAMUEL K. LIPARI

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:07-cv-02146-CM-DJW**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTION
TO STAY OF DISCOVERY UNDER RULE 72.1.4

Plaintiff's "objection" should be overruled. Magistrate Waxse's decision to stay discovery pending defendant's Motion to Dismiss was proper in this matter. Whether to stay discovery is a decision that is firmly vested in the sound discretion of the trial court. *See Kutilek v. Gannon*, 132 F.R.D. 296, 297 (D. Kan. 1990). It is appropriate to stay discovery where a pending dispositive motion will likely conclude the matter, or where discovery on all issues of the broad complaint would be wasteful and burdensome. *See id.* at 298.

The defendants have filed a proper Motion to Dismiss this case. (*See* Docket Entry #23.) If granted, the motion would dispose of all issues in this case with prejudice. As noted in defendant's Motion to Dismiss, this is the third cause of action brought by Mr. Lipari or his company resting on the same set of operative facts. The first case was dismissed by this Court and affirmed by the Tenth Circuit. The second case was dismissed by this Court and is currently pending before the Tenth Circuit. To allow Mr. Lipari to conduct discovery on claims that have already been dismissed twice would force the defendants to waste further resources in addition to those already spent in defending these baseless claims.

Plaintiff's objection–which appears to challenge the Court's jurisdiction to enter the stay–is meritless. There can be no question jurisdiction lies here (if there is a case at all). The lengthy recitations of case law concerning appellate jurisdiction in another suit are misguided and have no bearing on the stay of discovery. Plaintiff's other arguments are likewise baseless.

For these reasons, defendants request that the District Court uphold the Magistrate's ruling to stay discovery; grant defendants' Motion to Dismiss; and enter an injunction against Mr. Lipari from instituting any further actions on behalf of himself or his company based upon these same or similar underlying facts and claims without first showing cause to the Court as to the validity of such cause of action. Defendants also request any other relief to which they are justly entitled.

/s/ Mark A. Olthoff
MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
molthoff@stklaw.com
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
ademarea@stklaw.com
jheidrick@stklaw.com
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via United States mail, postage prepaid, on this 8th day of June, 2007 to:

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

/s/ Mark A. Olthoff
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 07-2146-CM**
	)	
US BANCORP NA and US BANK NA,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff Samuel K. Lipari brings this action against defendants US Bancorp NA and US Bank NA. This matter is before the court on plaintiff's Motion to Strike Defendants' Motion to Dismiss (Doc. 25).

Plaintiff filed the instant action in Jackson County Circuit Court on November 28, 2006 (Jackson County Case No. 0616-CV-32307). On December 13, 2006, defendants removed the action to the United States District Court for the Western District of Missouri, Western Division, on the basis of diversity. Defendants filed a motion to dismiss the case or alternatively to transfer the case to this court. On April 11, 2007, the United States District Court for the Western District of Missouri granted defendants' motion and transferred the case to this court. On April 25, 2007, defendants filed Defendants' Motion to Dismiss Plaintiff's Complaint (Doc. 22). Instead of responding to defendants' motion to dismiss, plaintiff filed a motion to strike the motion to dismiss.

Plaintiff requests that the court to strike defendants' motion to dismiss because (1) similar motions were denied in other cases and (2) the Tenth Circuit Court of Appeals has exclusive jurisdiction over these claims. Plaintiff's arguments are without merit. In plaintiff's motion, he

refers to motions and rulings in previous cases. Motions to dismiss filed in prior lawsuits do not prevent defendants from filing a motion to dismiss in this action. Additionally, judgment has not been entered in this case and no appeal has been filed; jurisdiction remains with this court, not the Tenth Circuit.

Plaintiff appears to argue that this case is the "same case or controversy" as previous actions "variously styled *Medical Supply Chain v. US Bancorp N A, et al, Medical Supply Chain v. Novation, et al* KS Case No. 02-cv-02539-CM, W. Dist. Mo. Case No 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-KHV-GLR . . ." (Pl.'s Mot. to Strike at p.1). If plaintiff's claims are identical to claims that have been adjudicated in a prior action, he should consider whether his claims in this case are appropriate under *res judicata* and collateral estoppel and address the issue in his response to defendants' motion to dismiss. After reviewing the record in this case, the court finds that defendants are not prohibited from filing their motion to dismiss.

IT IS THEREFORE ORDERED that plaintiff's Motion to Strike Defendants' Motion to Dismiss (Doc. 25) is denied. Plaintiff has twenty-three days from the date of this order to file his response to defendants' Motion to Dismiss. Defendants have twenty-three days from the date plaintiff files his response to file their reply.

Dated this 20th day of August 2007, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:07-cv-02146-CM
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

ENTRY OF APPEARANCE

The undersigned attorney, Dennis Hawver, enters his appearance on behalf of the plaintiff in the above-captioned matter.

Respectfully submitted,

/s/ Dennis Hawver

Ira Dennis Hawver 8337
6993 Highway 92
Ozawkie, Kansas 66070
Telephone (785) 876 2233
Fax (785) 876 3038
hawverlaw@earthlink.net
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 11th day of September, 2007 to:

MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
molthoff@stklaw.com

(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
ademarea@stklaw.com
jheidrick@stklaw.com
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

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

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)
	)
Plaintiff,	)
	)
v.	) Case No. 2:07-cv-02146-CM
	)
U.S. BANCORP and	)
U.S. BANK NATIONAL ASSOCIATION,	)
	)
Defendants.	)

REPLY TO MOTION TO DISMISS

Comes now the plaintiff Samuel K. Lipari through his attorney Dennis Hawver and makes the following timely reply to the defendants' motion to dismiss (Doc.# 22).

1. Defendants' contention that Plaintiff Lipari does not have standing or legal capacity to assert a claim on behalf of a dissolved corporation (Medical Supply Chain, Inc.).

The defendants' contention is frivolous in that it contradicts clearly established law, both state and federal rules, statutes, the US Supreme Court and controlling case law for this jurisdiction and the State of Missouri court where the complaint was filed.

Federal courts recognize that corporation dissolution does not end the assignable rights to pursue claims. The dissolution of a firm need not abate suits by or against it, *Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co*., 629 F.2d 1183, 1185-86 (7th Cir. 1980), since "the dissolved corporation might have a successor that could be substituted for it and the suit continue." *BondPro Corp. v. Siemens Power Generation, Inc*., 463 F.3d 702, 705 (7th Cir. 2006).

In *Levy v. Liebling*, 238 F.2d 505 (7th Cir. 1956), cert. denied, 353 U.S. 936, 77 S.Ct. 812, 1 L.Ed.2d 759 (1957) the question was raised as to the ability of former shareholders to bring an action on a judgment, after the corporation was dissolved. The decision allowed the shareholders to maintain a cause of action on the judgment, recognized the rights of former shareholders to succeed, **in their individual capacities**, to rights owned by their corporation prior to its dissolution. The prevailing rule is the general principle that property of a dissolved corporation passes to its stockholders, who can then maintain an action on the property. (*Fletcher, supra*, § 8224, 19 Am.Jur.2d Corporations § 1659).

Samuel Lipari is the assignee of all rights and interests of the dissolved Missouri corporation Medical Supply Chain, Inc. and is identified as such in the complaint.

> "The assignment by Deer Wood to Smith of its rights, title and interest under the purchase contract is within the bounds of "winding up" its business and affairs after the corporation was dissolved. § 351.476.1(5). We find assignment of contract rights of a dissolved corporation to be allowable under Missouri law."

Smith v. Taylor-Morley, Inc., 929 S.W.2d 918 at 924 (Mo. App. E.D., 1996).

Federal statutes governing civil actions permit Samuel Lipari to pursue his claims as an assignee. 28 U.S.C. § 1654 ensures that individuals may appear *pro se*. Section 1654 states: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

This court has to look to Missouri state law to determine Samuel Lipari's capacity as a plaintiff. F.R.Civ P. Rule 17 relies on the corporation law of Missouri to determine the capacity of a party after dissolution. Rule 17(b) provides that issues of capacity are determined by the law of the individual's domicile. *Esposito v. United States*, No. 03-3183 at pg.1 (Fed. 10th Cir. 5/26/2004) (Fed. 10th Cir., 2004).

Missouri courts have determined this issue under Missouri corporation statutes:

> "Section 351.525 mandated every statutory trustee to be named in a suit after dissolution of a corporation. However, § 351.525 was repealed on May 29, 1991. Because of this statute's repeal, with no provision under current Missouri law replacing it, we find that Deer Wood's assignment of its rights, title and interest under the contract is valid."

Smith v. Taylor-Morley, Inc., 929 S.W.2d 918 (Mo. App. E.D., 1996)

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 773, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), the Supreme Court stated in no uncertain terms that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor."

This court is collaterally estopped from judgment that Samuel Lipari cannot represent himself *pro se*. Plaintiff has been determined to have standing to bring claims based on the assigned interest in his dissolved corporation. The Missouri state trial, appellate and supreme courts have already determined this issue as it applies to Samuel Lipari on claims formerly held by Medical Supply Chain, Inc. against the US Bank defendants alleged co-conspirators identified in conduct controlling the US Bank defendants' litigation in a relationship of privity. See ¶¶ 220-224 of plaintiff's complaint. "The doctrine of collateral estoppel prevents a second litigation of the same issues **between the same parties or those in privity with the parties**." *Reed v. McKune*, 298 F.3d 945, 950 (10th Cir. 2002) (emphasis added).

Samuel K. Lipari v. Judge Michael W. Manners of the Circuit Court Of Jackson County, Missouri,

(Petition for Writ of Mandamus) Case 68703, (W. Dist of Missouri State Court of Appeals. 2007) heard and rendered a decision on law declining the issuance of a writ related to the Medical Supply Chain, Inc. assigned claims Lipari was pursuing in state trial court and appellate court *pro se* without dismissing for lack of jurisdiction. Similarly, the Missouri State Supreme Court is hearing *Samuel K. Lipari v. Judge Michael W. Manners of the Circuit Court Of Jackson County, Missouri*, (Petition for Writ of Mandamus) and has not declined jurisdiction on the basis of Lipari's standing:

> "'Regardless of the merits of appellants' claims, without standing, the court cannot entertain the action.'" *Pace Constr. Co. v. Missouri Highway & Transp. Comm'n*, 759 S.W.2d 272, 274 (Mo. App. W.D. 1988) (quoting *Champ v. Poelker*, 755 S.W.2d 383, 386-87 (Mo. App. E.D. 1988))."

Blue Cross and Blue Shield of Missouri v. Nixon, 81 S.W.3d 546 (Mo. Ct. App., 2002).

The Western District of Missouri and the Eight Circuit Court of Appeals have also heard the standing issue that was raised against Samuel Lipari acting *pro se*. Each state and federal court was required to determine their jurisdiction in light of notice of Samuel Lipari's *pro se* status as an assignee or trustee and a record before the courts identifying the challenges:

> "Standing cannot be waived, may be raised at any time by the parties, and may even be addressed *sua sponte* by the trial court or an appellate court. *Id*. "'[I]f a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented.'" *Id*. (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002))."

Cook v. Cook, No. WD 63209 at pg. 1 (MO 9/14/2004) (Mo, 2004)

In *Samuel K. Lipari v. General Electric Company, et al*. 16th Cir. Missouri State Case. No. 0616-CV-07421, the issue of whether Samuel Lipari as an assignee of interest from the dissolved Missouri corporation Medical Supply Chain, Inc. had standing to represent himself *pro se* was raised by John K. Power, the counsel for Neoforma and Novation, alleged to be co-conspirators of the US Bank defendants in the conduct complained of in this action and who also represented the General Electric defendants. The doctrine of collateral estoppel or issue preclusion precludes a court from reconsidering an issue previously decided in a prior action. *Estate of True v. C.I.R*., 390 F.3d 1210, 1232 (10th Cir.2004). Missouri state law finds preclusive effect in identical circumstances and applies it preclusion to jurisdictional issues. See *Woods v. Mehlville Chrysler-Plymouth*, 198 S.W.3d 165 at 168 (Mo. App., 2006).

The court is required to look to Missouri state law to determine the preclusive effect of the proceedings in *Lipari v. General Electric et al* , W. Dist. of Missouri No. 06-0573-CV-W-FJG on this

federal district court action. See *McFarland v. Childers*, 212 F.3d 1178, 1185 (10th Cir.2000) also *Pittsburg County Rural Water Dist. v. McAlester*, 358 F.3d 694 at 708 (10th Cir., 2004).

The US District Court of the Western District of Missouri and the Eighth Circuit Court of Appeals in *Samuel Lipari* v. *General Electric Company, et al.* W.D. MO. Case no. 06-0573-CV-W-FJG and *In Re Samuel K. Lipari*, (Petition for Writ of Mandamus) Case No. 06-3546, (8th Cir. 2006) necessarily determined standing of Samuel Lipari to represent the assigned interests of his dissolved corporation *pro se* in now final judgments that did not expressly litigate the issue but are never the less issue preclusive on standing. See *Gospel Missions of America v. City of Los Angeles,* 2002 C09 585 at ¶33 (USCA9, 2002).

The defendants' argument that judicial estoppel prevents Lipari from now asserting his state law claims in his personal capacity is frivolous. Lipari's status is consistent with the status described in preceding litigation in the court and the Tenth Circuit where Lipari gave notice of the dissolution of Medical Supply Chain, Inc., the assignment of its rights to himself and his need to be substituted as the plaintiff. Lipari's status was changed and Medical Supply dissolved solely as a result of the defendants' continuing unlawful actions to keep Lipari out of the hospital supply market, consistent with the conduct averred by Lipari in his previous litigation and that of Medical Supply Chain, Inc. Lipari's complaint does not violate conventions against inconsistent pleading, therefore it does not meet the judicial estoppel requirement of *Johnson v. Lindon City Corp*., 405 F.3d 1065, 1069 (10th Cir. 2005).

2. Defendants' contention that the complaint fails to comply with Fed. R. Civ. P. Rule 8.

Although a plaintiff need not precisely state each element of his claims, he must plead minimal factual allegations on those material elements that must be proved. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). "Rule 8 does not set out a page limit, but rather requires that `[e]ach averment of a pleading shall be simple, concise, and direct.'" *Oil Express Nat'l, Inc. v. D'Alessandro*, No. 96 C 1528, 1997 WL 613276, at *2 (N.D.Ill. Sept.26, 1997).The plaintiff's claims meet the concise requirements of Rule 8 averments:

> "Rule 8 does not require a "short and plain complaint," but rather a "short and plain statement of the claim." FED. R.CIV.P. 8(a)(2) (emphasis added)... Moreover, it is "each averment of a pleading" that Rule 8(e)(1) states "shall be simple, concise, and direct" — not each pleading itself."

Ciralsky v. C.I.A., 355 F.3d 661 at 670 (D.C. Cir., 2004). The plaintiff's claims are stated with short concise averments of only the elements required to sustain each claim. However, the plaintiff's case is

complex and includes multiple claims based on the conduct of both defendants many agents and employees. Rule 8(a)(2) "must be applied with some logic and common sense. The length of a pleading will depend upon a number of factors, not the least of which is the complexity of the case." *In re Catanella, E.F. Hutton & Co., Inc.*, 583 F.Supp. at 1401. See also *Untracht v. Fikri*, 368 F.Supp.2d 409 (W.D. Pa., 2005). While the trial court's dismissal of *Medical Supply Chain v. Novation, et al* 05-cv-02299-CM, now under review in the Tenth Circuit was based in part on a prolix complaint, that complaint's detail like this complaint's is a direct response to Mr. Olthoff's assertions that Rule 8 pleading is insufficient to state a claim.

Under Fed.R.Civ.P. 8(e) this simplified "notice pleading" "is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Brejcak v. County of Bucks*, 2004 WL 377675, *2 (E.D.Pa.2004); *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). However the plaintiff and his predecessor in interest have never had the opportunity for this liberal discovery.

3. Defendants' contention that the claims in Lipari's complaint are barred by *res judicata*.

The prior dismissals do not preclude the present claims. *Medical Supply Chain v. Novation, et al,* KS Case No. 02-cv-02539-CM has been appealed and is not a final judgment for claim or issue preclusion purposes.

The court's order denying the plaintiff's motion to strike suggested addressing the defendants' *res judicata* arguments in a reply:

> "Plaintiff appears to argue that this case is the "same case or controversy" as previous actions "variously styled *Medical Supply Chain v. US Bancorp N A, et al, Medical Supply Chain v. Novation, et al* KS Case No. 02-cv-02539-CM, W. Dist. Mo. Case No 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-KHV-GLR . . ." (Pl.'s Mot. to Strike at p.1). If plaintiff's claims are identical to claims that have been adjudicated in a prior action, he should consider whether his claims in this case are appropriate under *res judicata* and collateral estoppel and address the issue in his response to defendants' motion to dismiss."

Order 8/20 at page 2.

The record of this court reveals there has never been a final judgment in *Medical Supply I* as required under Fed.R.Civ.P. 58 and the doctrine of Claim Preclusion is inapplicable. The only judgment in the case is a June 9th, 2005 entry limited to the attorney fees of $23,956.00 awarded as a sanction against

Medical Supply's former counsel Bret Landrith. Document 64 on the appearance docket in *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 This judgment does not resolve any of the claims in the plaintiff's complaint.

The first requirement for claim preclusion-- see Restatement (Second) of Judgments § 13 & cmt. g—is that there be a final judgment in the prior case. *Id*. §§ 13, 18-19. 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 *in Medical Supply I*, a determination not opposed or appealed by the defendants, this 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 *Medical Supply I* dismissal was a mere interim order. *Id*.

The plaintiffs' state claims filed in Missouri state court after dismissal without prejudice were the permissible and intended result of the without prejudice distinction. The fact that *Medical Supply Chain v. Novation, et al* includes the US Bank defendants and continues to this day in the Tenth Circuit does not preclude the state court action filed by the plaintiff and now questionably removed and transferred to this court:

> "Identical cases between the same parties can be pending in a federal district court and a state court at the same time. *Carter v. Owens Ill., Inc.*, 261 Ark. 728, 551 S.W.2d 209, 209 (1977). In such instances, the first forum to dispose of the case enters a final judgment binding on the parties. *Id*. at 210."

Mountain Pure, LLC v. Turner Holdings, LLC, 439 F.3d 920 at 924 (8th Cir., 2006). Even if *res judicata* was applicable, it would not apply to the plaintiffs' state law based claims:

> "Even assuming *res judicata* applies, the doctrine does not bar a subsequent action where, in an

earlier action, a court has made an express reservation of right as to future litigation. *Cater*, 846 S.W.2d at 176. An express reservation of rights as to litigation on a certain item preserves the subject for future adjudication. *Miles v. Teague*, 251 Ark. 1059, 476 S.W.2d 245, 247 (1972). Accordingly,[a] determination by the court that its judgment is "without prejudice" (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action.

Coleman's Serv. Ctr., Inc., 935 S.W.2d at 296 (quoting Restatement (Second) of Judgments, § 26(1)(b) (1982))."

Mountain Pure, LLC v. Turner Holdings, LLC, 439 F.3d 920 at 925 (8th Cir., 2006).

This diversity action is governed by Missouri state law, *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) A federal court sitting in diversity jurisdiction applies the substantive law and the choice of law provisions of the forum state, which in this case is Kansas. *Missouri P.R. Co. v. Kansas Gas & Electric Co.*, 862 F.2d 796, 798 n. 1 (10th Cir.1988).

a. Fed. R. Civ. P. Rule 54 Final Judgment Requirements Negate *Res Judicata* Effect of Prior Litigation

Since there has never been a final judgment in earlier litigation between the plaintiff or Medical Supply Chain, Inc. his predecessor in interest and the US Bank defendants, *res judicata* does not apply. "*Res judicata*, or claim preclusion, precludes a party or its privies from relitigating issues that were or could have been raised in an earlier action, provided that the earlier action proceeded to a final judgment on the merits." *King v. Union Oil Co. of Cal.*, 117 F.3d 443, 445 (10th Cir. 1997).

It is clearly established under the controlling law of this jurisdiction that the prior dismissal of the plaintiff's claims without prejudice was not a final judgment.

"The district court's original order dismissing the defendants' counterclaims without prejudice did not satisfy the final judgment rule. Fed. R. Civ. P. 54(b)."

Witherspoon v. Collins, 2002 C10 1113 at ¶ 14 (USCA10, 2002). Under the controlling case law for this jurisdiction, the court is required to perform an analysis that excludes the applicability of *res judicata* against the plaintiff:

"*Reed v. McKune*, 298 F.3d 946 (10th Cir., 2002), sets out the analysis we must follow here:
[18] The doctrine of *res judicata* prohibits litigation of certain claims based on the resolution of an earlier action between the same parties. "Under *res judicata*, a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U. S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)."

Witherspoon v. Collins, 2002 C10 1113 at ¶ 17-18 (USCA10, 2002).

b. Missouri State statute permitted Lipari's refilling of state law claims dismissed without prejudice

In Missouri State Court where Lipari filed his state law based claims that have now been removed and transferred here over Lipari's repeated objections, Lipari clearly was not precluded by this court's earlier decisions: "The dismissal of a petition for failure to state a claim, without prejudice, does not preclude a plaintiff from reasserting the claim on new factual allegations." *Bachman v. Bachman*, 997 S.W.2d 23, 25 (Mo. App. E.D. 1999). In fact, Lipari's clearly established right to proceed in the present action is guaranteed by Missouri statute, Rule 67.01: "This is consistent with Rule 67.01, which permits a party to bring another civil action for the same cause that has been dismissed without prejudice unless the civil action is otherwise barred." *Bentch v. Clifford*, 28 S.W.3d 453 (Mo. App. E.D., 2000).

Missouri state preclusion elements are consistent with this jurisdiction:

> "Generally, the doctrine of collateral estoppel (issue preclusion) precludes a party or those in privity with that party from relitigating issues that were necessarily and unambiguously decided in a previous case and final judgment. *In re Marriage of Evans*, 155 S.W.3d 90, 96[8] (Mo.App.2004). The doctrine applies "when a second suit is between the same parties, or those in privity with them, but the cause of action is different." *Dodson*, 133 S.W.3d at 538[22]. The elements of collateral estoppel are: (1) the issue decided in the prior case mirrors that in the present action; (2) the prior suit resulted in a final judgment on the merits; (3) the party against whom the doctrine is asserted participated as a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine may apply had a full and fair opportunity to litigate the issue. *Evans*, 155 S.W.3d at 96[9].
>
> Commonly, the term "*res judicata*" is called claim preclusion and is described as a judicially created doctrine designed to inhibit a multiplicity of lawsuits. *66, Inc. v. Crestwood Commons Redevelopment*
> *Page 555 Corp*., 998 S.W.2d 32, 42[29] (Mo.banc 1999). The *res judicata* defense precludes not only those issues on which the court in the former suit was required to pronounce judgment, but on all points properly belonging to the subject matter of the litigation and which the parties, exercising reasonable diligence, might have brought into the case at the time. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318[5] (Mo.banc 2002).
>
> The elements of res judicata are: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or status of the person for or against whom the claim is made. *Evans*, 155 S.W.3d at 96[5]. Summarily stated, "the distinction between collateral estoppel and res judicata is that collateral estoppel operates only as to issues previously litigated, but not as to matters not litigated in the prior action even if they might have properly been determined." Vogt v. Emmons, 158 S.W.3d 243, 248 n. 3 (Mo.App.2005)."

Hollida v. Hollida, 190 S.W.3d 550 (Mo. App., 2006).

c. The Controlling Authority for The Kansas District Court Produces the Same Result.

The controlling case law for the Kansas District Court is equivalent . *Res judicata* includes both claim preclusion and issue preclusion. Issue preclusion, or collateral estoppel, prevents re-litigation of an issue by a party against whom the issue has been conclusively determined in a prior action. *Hall v. Doering*, 997 F.Supp. 1445, 1459 (D.Kan.1998); *Am. Home Assurance Co. v. Pac. Indem. Co.*, 672 F.Supp.

495, 498 (D.Kan.1987); *Crutsinger v. Hess*, 408 F.Supp. 548, 551 (D.Kan.1976); *Jackson Trak Group, Inc. v. Mid States Port Auth*., 242 Kan. 683, 690, 751 P.2d 122, 128 (1988); *Phelps v. Hamilton*, 122 F.3d 1309, 1318 (10th Cir. 1997).

Res judicata is an affirmative defense on which defendant has the burden of proof. See Fed.R.Civ.P. 8(c); *Nwosun v. Gen. Mills Rests., Inc*., 124 F.3d 1255, 1256 (10th Cir.1997). For the doctrine to apply, four elements must exist: (1) a judgment on the merits in the earlier action; (2) identity of the parties or privies in the two suits; (3) identity of the cause of action in both suits; and (4) a full and fair opportunity for plaintiff to litigate the claim in the first suit. *Id*. at 1257.

d. Lack of a Full and Fair Opportunity for Plaintiff to Litigate

Neither Medical Supply Chain, Inc. nor its successor in interest Samuel K. Lipari had an opportunity to litigate the state law based claims, which were consistently raised in preceding litigation and repeatedly dismissed by this court without prejudice. No discovery has ever been permitted. This court did not make findings of fact or law in earlier litigation related to the plaintiffs' state law based claims. *Morgan v. City of Rawlins,* 792 F.2d 975, 978-980 (10th Cir. 1986) (applying Wyoming claim preclusion law, finding that where factual issues under Section 1983 were not focus of prior state proceeding, plaintiff did not have full and fair opportunity to litigate federal claim and claim preclusion did not bar action under Section 1983).

e. The Effect of the *Medical Supply I* Dismissal Interim Order.

By dismissing Medical Supply's state claims without prejudice in *Medical Supply I,* a determination not opposed or appealed 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 *Medical Supply I* dismissal was a mere interim order. *Id*.

In the Western District of Missouri where the present action was first filed and where the US Bancorp defendants have now removed the original supplemental state law contract and trade secret claims, it was clearly established law that the plaintiff was not subject to claim preclusion. An interim order that is not accompanied by an express entry of final judgment "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed.R.Civ.P. 54(b); see also, e.g., *United States v. Arkansas*, 791 F.2d 1573, 1576 (8th Cir.1986).

4. Defendants' contention that the Plaintiff's complaint fails to state a claim upon which relief may be granted under Rule 12(b)(6).

A Rule 12(b)(6) motion should not be granted unless "it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *GFF Corp. v. Associated Wholesale Grocers, Inc*., 130 F.3d 1381, 1384 (10th Cir.1997) (further quotations omitted). The Court accepts all wellpleaded factual allegations in the complaint as true and draws all reasonable inferences from those facts in favor of plaintiff. See *Shaw v. Valdez*, 819 F.2d 965, 968 (10th Cir.1987). In reviewing the sufficiency of plaintiff's complaint, the issue is not whether plaintiff will prevail, but whether plaintiff is entitled to offer evidence to support his claims. Although plaintiff need not precisely state each element of his claims, he must plead minimal factual allegations on those material elements that must be proved. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

The plaintiff has met the pleading requirements for his contract based claims:

> "Counter defendants also argue that counter plaintiffs' pleading is insufficient to state a claim because "in stating a claim on contract, the pleader should allege the making of a contract, its terms and the breach thereof, which must not be left to inference." *Thompson v. Phillips Pipe Line Co*., 438 P.2d 146, 200 Kan. 669 (1968). Counter defendants reliance on Kansas case law is misguided. "Under standard Erie doctrine, state pleading requirements, so far as they are concerned with the degree of detail to be alleged, are irrelevant in federal court even as to claims arising under state law." *Andresen v. Diorio*, 349 F.3d 8, 17 (1st Cir.2003); see also *Swierkiewicz v. Sorema N.A*., 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (rule 8's simplified pleading standard applies to all civil actions)."

The Bradbury Co., Inc. v. Teissier-Ducros, 387 F.Supp.2d 1167 at 1172-73 (D. Kan., 2005). See also *Litton v. Maverick Paper Co*., 354 F.Supp.2d 1209 at 1217 (D. Kan., 2005) (Rule 8(a), Fed.R.Civ.P. statement sufficient to give notice of claim.)

Lipari has also pled the elements of a contract claim and they are clearly identified in the headers of the text of his complaint which was written for a Missouri state court where F. R. Civ. P. Rule 8 does not apply. So the defendants' argument a contract could not have been formed between Lipari's predecessor in interest and the US Bank defendants is frivolous:

> "The elements for a breach of contract claim are: (1) the existence of a contract between the parties; (2) consideration; (3) the plaintiffs performance or willingness to perform in compliance with the contract; (4) defendant's breach of the contract; and (5) that plaintiff was damaged by the breach."

Britvic Soft Drinks, Ltd. v. ACSIS Techs., Inc., 265 F.Supp.2d 1179, 1187 (D.Kan.2003). See also *Ice Corp. v. Hamilton Sundstrand Inc*., 444 F.Supp.2d 1165 (D. Kan., 2006).

The plaintiff has met the requirements under Missouri law for pleading his trade secrets in the form of a confidential business plan and representative certification education book were misappropriated:

> "In addition to establishing that the price book is a trade secret, plaintiff must produce sufficient evidence to support a finding that defendants misappropriated it. Plaintiff has proven this by showing that defendants used a trade secret of plaintiff's (the price book), without the consent of plaintiff and that defendants used improper means to acquire the trade secret. Plaintiff has already established that the price book was a trade secret and it did not consent to its use by defendants in competition with plaintiff. There is evidence that the price book was acquired by improper means, as plaintiff presented testimony that the book was never taken from plaintiff's premises except to make sales calls and was immediately returned. Even if Dick had authority to keep the book at home, he was under an obligation to return it after leaving the business, pursuant to his fiduciary duties as an officer of plaintiff to maintain plaintiff's trade secrets and not to use plaintiff's property for his own benefit to the detriment of plaintiff. By not returning the book and further taking it to Walk Easy's office, Dick misappropriated the book. Although the evidence does not show whether the other defendants participated in the removing of the book from plaintiff's premises, they used the price book or allowed it to be used for the benefit of Walk Easy, while knowing or having reason to know that it was a confidential, nonpublic price book belonging to plaintiff. Further, it was acquired when Dick, Wayne and Convy had a fiduciary duty to maintain its secrecy. Defendants' actions amounted to a breach of that duty.
>
> Since plaintiff has established facts sufficient to support a finding that the book was a compilation of data, deriving independent economic value and the subject of reasonable efforts to maintain secrecy, and that the individual defendants, who were officers of plaintiff misappropriated plaintiff's trade secrets by taking the price book and using it for the benefit of defendant Walk Easy, the trial court erroneously applied the law and erred in directing a verdict against plaintiff on the misappropriation count."

Lyn-Flex West Inc. v. Dieckhause et al., 24 S.W.3d 693 (Mo. App. E.D., 1999).

The plaintiff's complaint adequately pleads fraud under F.R. Civ. P. Rule 9. The complaint identifies communications stating the identity of the speaker, time, place, what was misrepresented and how the plaintiff was injured from reliance on the misrepresentations. Additionally, to have met the state pleading requirements where the plaintiff filed the complaint, the plaintiff had to identify the basis of the duty the defendants violated in misrepresentations to the plaintiff. In order to make a submissible case of fraudulent misrepresentation in Missouri state court, a plaintiff must prove nine essential elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximately caused injury. *Heberer v. Shell Oil Co*., 744 S.W.2d 441, 443 (Mo. banc 1988); *Trimble v. Pracna*, 167 S.W.3d 706, 712-13 (Mo. banc 2005) (reversing denial of JNOV on

fraud). This is the reason for the detail in the plaintiff's complaint that the defendants after switching forums now say is too prolix.

Lipari's pleading of Prima Facie Tort and Breach of Fiduciary Duty are also exactly what is required under the controlling case law of the state court where this complaint was filed. Rule 12(b) 6 is inapplicable as a basis for dismissing the plaintiff's claims.

5. Defendants' contention that the parts of the Plaintiff's complaint should be stricken.

The defendants make a conclusory argument that the plaintiffs' complaint describes conduct that should be stricken. The best way to keep conduct from being complained of is not to commit it. The events identified by the plaintiff and complained of by the defendants seem to have occurred after the defendants learned of the gravamen of the antitrust and state law based claims brought by the plaintiff and his predecessor in interest. As such, the information is especially important to Missouri state courts in deciding important public policy issues including whether the present state law based prohibitions against the defendants' conduct should be enforced, why they have not been enforced *vis a vis* the procedural history of the plaintff's experience in other jurisdictions and whether related state antitrust law enforcement or further diligence related to the merger of the defendants' alleged co-conspirators' hospital St. Luke's with the University of Kansas School of Medicine should be performed. As such the text complained of by the defendants has already aided the courts and law enforcement officials of the State of Missouri immensely in obtaining a full understanding of the plaintiff's sate law based claims and his standing to pursue them.

> "The standard for a motion to strike is demanding. As the undersigned previously has observed:
> Rule 12(f) motions are a generally disfavored, drastic remedy. A motion to strike will usually be denied unless the allegations have no possible relation to the controversy and may prejudice one of the parties. If the record reveals any doubt as to whether under any contingency a certain matter may raise an issue, the Court should deny the motion. If plaintiffs plead evidentiary facts that aid in giving a full understanding of the complaint as a whole, they need not be stricken.
> *PAS Communications, Inc. v. U.S. Sprint, Inc*., 112 F.Supp.2d 1106, 1107 (D.Kan.2000).
> ***
> As a result, American Family's motion to strike is inappropriate. It fails to cite any law or logic in support of its motion to strike, which makes it conclusory. Given the demanding standard for a motion to strike, American Family has not met its burden. As this court has held, because Count III "could succeed under certain facts, [Count III] is not insufficient as a matter of law and [is] not subject to a Rule 12(f) motion to strike." *Youell v. Grimes*, 2001 WL 121955, *1-2 (D.Kan.2001)."

Home Quest Mortg. v. American Family Mut. Ins., 393 F.Supp.2d 1096 at 1099-1100 (D. Kan., 2005)

6. Defendants' attempt to sanction the plaintiff without a separate motion and without following the rules.

The defendants' combined motion to dismiss and to sanction the plaintiff is improper. *Zhu v. St.*

Francis Health Center, 413 F.Supp.2d 1232 (D. Kan., 2006).

The Tenth Circuit has stated that filing restrictions are a harsh sanction, and that litigiousness alone is not a sufficient reason to restrict access to the court. Where a party has "engaged in a pattern of litigation activity which is manifestly abusive," however, restrictions are appropriate. *Johnson v. Cowley*, 872 F.2d 342, 344 (10th Cir.1989). The plaintiff has engaged in past litigation against the defendants which due to the fact that discovery has never been permitted and the cases have not reached a final judgment, cannot be ruled abusive.

Placing a prior restraint on the plaintiff for past conduct seeking to vindicate important state and federal public policies by meeting the clearly established pleading standards and the clear language of statutes in a petition created for a state court outside of the jurisdiction of this court innovates a new form of penalty for litigants. The plaintiff could not have known that following the rules of the State of Missouri in filing state law based claims expressly dismissed without prejudice by this court in a ruling that the Federal Rules of Civil Procedure including F.R. Civ. P. 54(b) and F.R. Civ. P. 58 clearly makes a non final judgment would result in penalties. The court should to undertake to restrain the plaintiff's clearly established rights without notice and an opportunity to be heard. Such a ruling would violate the plaintiff's due process rights:

> "A final point worth noting, although not raised in the briefs, is that the due process calculus may also be affected by the "knowledge which the circumstances show [the offending] party may be taken to have of the consequences of his own conduct." *Link*, 370 U.S. at 632, 82 S.Ct. at 1390. Thus, fundamental fairness may require some measure of prior notice to an attorney that the conduct that he or she contemplates undertaking is subject to discipline or sanction by a court. Consequently the absence, for example, of a statute, Federal Rule, ethical canon, local rule or custom, court order, or, perhaps most pertinent to the case at hand, court admonition, proscribing the act for which a sanction is imposed in a given case may raise questions as to the sanction's validity in a particular case."

Eash v. Riggins Trucking Inc., 757 F.2d 557 at 571 (C.A.3 (Pa.), 1985).

The relief the defendants seem to be seeking falls under the Doctrine of Abatement. Surprisingly, this court and the US District Court for the Western District of Missouri rejected the plaintiff's argument that this matter could not proceed in federal court concurrently with *Medical Supply Chain v. Novation, et al* , W. Dist. Mo. Case No 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-CM which at the present time is on review in the Tenth Circuit. The Missouri State Courts are well settled on the Doctrine of Abatement:

> "This doctrine "holds that where a claim involves the same subject matter and parties as a previously filed action so that the same facts and issues are presented, resolution should occur through the prior action and the second suit should be dismissed." *HTH Companies, Inc. v. Mo. Dept. of Labor and Industrial Relations*, 154 S.W.3d 358, 361-62 (Mo.App.2004). Because an interlocutory order of dismissal was entered in Case I, the trial court never lost jurisdiction over that pending case. *Peet v. Randolph*, 103 S.W.3d 872, 876 (Mo.App.2003); *Pritz v. Balverde*, 955 S.W.2d 795, 797 (Mo.App.1997). Rule 55.27(a)(9) authorizes dismissal of a lawsuit on the ground "[t]hat there is another action pending between the same parties for the same cause in this state[.]" The motions to dismiss filed by Jenkins and Central asserted this defense, and it is undisputed that Case I and Case II are identical in all material respects. Consequently, Case II is barred by the doctrine of abatement. *Peet*, 103 S.W.3d at 876."

Golden Valley Disposal v. Jenkins Diesel, 183 S.W.3d 635 at 41-642 (Mo. App., 2006).

The plaintiff acting *pro se* made convincing arguments that the state claims were improperly removed to federal court on diversity grounds when diversity clearly exists in *Medical Supply Chain v. Novation, et al* , W. Dist. Mo. Case No 05-0210-CV-W-ODS and *Medical Supply Chain v. Novation, et al* 05-cv-02299-CM over these claims and the defendants did not seek a reconsideration of this court's dismissal of the state claims without prejudice. This court has rejected abatement of a second concurrent federal incarnation of this case.

CONCLUSION

Whereas for the above stated reasons the plaintiff respectfully requests that the court deny the defendants' motion for dismissal and sanctions.

Respectfully submitted,

/s/ Dennis Hawver

_____

Ira Dennis Hawver 8337
6993 Highway 92
Ozawkie, Kansas 66070
Telephone (785) 876 2233
Fax (785) 876 3038
hawverlaw@earthlink.net
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 11th day of September, 2007 to:

MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105
molthoff@stklaw.com
(816) 421-3355

(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
ademarea@stklaw.com
jheidrick@stklaw.com
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

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

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

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	**State Court No. 0616-CV32307**
US BANCORP, NA	)	
AND US BANK, NA,	)	**JURY TRIAL DEMANDED**
	)	
Defendants.	)	

NOTICE OF REMOVAL OF CIVIL ACTION

To: The Judges of the United States District Court
for the Western District of Missouri
Western Division

Defendants U.S. Bancorp (misnamed as US Bancorp, NA) and U.S. Bank National Association (misnamed as US Bank, NA) (collectively, the "Defendants") submit this Notice of Removal of this action from the Circuit Court of Jackson County, Missouri at Independence, Missouri – where this case is currently pending under the case style of *Lipari v. US Bancorp, NA*, Case No. 0616-CV32307 – to the United States District Court for the Western District of Missouri. In support of this Notice of Removal, Defendants state as follows:

I. INTRODUCTION

1. Defendants desire to exercise their right under the provisions of 28 U.S.C. §§ 1441 *et seq*., to remove this case from the Circuit Court of Jackson County, Missouri, at Independence, Missouri. 28 U.S.C. § 1441(a) provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

2. This civil action has not been tried. Plaintiff filed his Petition for Damages on November 28, 2006. Defendants first received a copy of Plaintiff's Petition on December 8, 2006 via certified mail. Rather than challenge service of process, Defendants voluntarily appear in this action, but hereby reserve all objections, arguments, and defenses to Plaintiff's Petition. A responsive pleading will be filed in accordance with Rule 81 of the Federal Rules of Civil Procedure.

II. NOTICE OF REMOVAL IS TIMELY

3. The time in which Defendants are required by the laws of the State of Missouri, by the Missouri Rules of Civil Procedure, or by the Rules of the Circuit Court of Jackson County, to move, answer or otherwise plead in response to Plaintiff's Petition has not elapsed.

4. In accordance with the requirements of 28 U.S.C. § 1446(b), this Notice of Removal is filed within thirty (30) days after the receipt by any defendant, through service, of a copy of the initial pleading setting forth the claim for relief on which Plaintiff's action is based.

III. DIVERSITY JURISDICTION EXISTS

5. This Court has original jurisdiction over this civil action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states.

6. Plaintiff Samuel K. Lipari is a citizen and resident of the State of Missouri. Defendant U.S. Bancorp is a Delaware corporation with its principal place of business at 800 Nicollet Mall, Minneapolis, Minnesota 55402. Defendant U.S. Bank National Association is a national banking association with its main office located at 800 Nicollet Mall, Minneapolis, Minnesota 55402. Complete diversity of citizenship therefore exists. *See* 28 U.S.C. §§ 1332, 1348; *Wachovia Bank, National Association v. Schmidt*, ___ U.S. ___, 126 S.Ct. 941, 945 (2006).

7. The $75,000 amount-in-controversy requirement found in 28 U.S.C. § 1332 is satisfied because Plaintiff's Petition seeks damages in the amount of four hundred fifty million dollars ($450,000,000.00). *See* Pl.'s Pet. at ¶ 263.

IV. REMOVAL TO THIS DISTRICT IS PROPER

8. Pursuant to 28 U.S.C. §§ 1441 *et seq*., the right exists to remove this case from the Circuit Court of Jackson County, Missouri at Independence, Missouri, to the United States District Court for the Western District of Missouri, which embraces the place where the action is pending.

V. MISCELLANEOUS

9. Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings, and orders served on Defendants – including a copy of the Petition bearing Case No. 0616-CV32307 – is attached to this Notice of Removal as Exhibit A.

10. All Defendants join in this Notice of Removal.

11. Written notice of the filing of this Notice of Removal will be promptly served on counsel for all adverse parties as required by law or, as is the case here, on the alleged "*pro se*" Plaintiff.

12. A true and correct copy of this Notice of Removal will be promptly filed with the Clerk of the Circuit Court of Jackson County, Missouri at Independence, Missouri, as required by law, and served on Plaintiff.

13. Defendants reserve the right to amend or supplement this Notice of Removal, and Defendants reserve all defenses.

14. Defendants request a trial by jury on all issues triable by right to a jury trial.

WHEREFORE, Defendants U.S. Bancorp and U.S. Bank National Association pray that this case be removed from the Circuit Court of Jackson County, Missouri at Independence,

Missouri, where it is now pending, to this Court, that this Court accept jurisdiction of this action, and that this action be placed on the docket of this Court for further proceedings, same as though this case had originally been instituted in this Court.

Dated: December 13, 2006

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certified that the above and foregoing document was filed electronically with the above-captioned court, and a copy was sent by overnight mail on this 13th day of December, 2006 to:

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

/s/ Mark A. Olthoff
Attorney for Defendants

Medical Supply Chain

Empowering Health Systems, Optimizing Supply Chain Results

LITIGATION

Samuel Lipari vs. US Bancorp, NA (Contract Claims)

Lipari vs US Bancorp, NA Complaint
US Bancorp, NA Notice of Removal
Lipari vs US Bancorp NA EAP General Order
Lipari Letter to Clerk on Case Assignment Error
Lipari Reply to US Bancorp NA Removal
Lipari Reply to US Bancorp NA Removal Exb. 1
Lipari Reply to US Bancorp NA Removal
Lipari Reply to US Bancorp NA Removal Exb. 2
Lipari Reply to US Bancorp NA Removal Exb. 3
Lipari Reply to US Bancorp NA Removal Exb. 4
Lipari Reply to US Bancorp NA Removal Exb. 5
US Bank Answer & Affirmative Defenses
Scheduling Order
Lipari Motion For More Definite Answer
Motion For Reconsideration of Scheduling Order
Lipari Reply To Defendants' Remand Answer
Lipari Reply To Defendants' Remand Answer Exb. 1
US Bank Motion For Leave To Exceed Page Limit
US Bank Motion to Dismiss, Strike or Transfer
US Bank Suggestion to Dismiss, Strike or Transfer
US Bank Suggestion to Dismiss, Strike or Transfer Exb. A
US Bank Suggestion to Dismiss, Strike or Transfer Exb. B
US Bank Suggestion to Dismiss, Strike or Transfer Exb. C
US Bank Suggestion to Dismiss, Strike or Transfer Exb. D
US Bank Suggestion to Dismiss, Strike or Transfer Exb. E
Lipari Motion to Stay Proceedings Pending Appeal
Lipari Motion to Stay Proceedings Pending Appeal Exb. 1
Lipari Motion to Stay Proceedings Pending Appeal Exb. 2
Lipari Motion to Stay Proceedings Pending Appeal Exb. 3
US Bancorp Suggestion Opposing Motion to Stay
Rule 26 Planning Conference
Lipari v. US Bancorp Wins Dismissal (Order)
US Bancorp Motion to Dismiss
US Bancorp Memorandum In Support of MTD & Strike
US Bancorp Amended Memorandum In Support of MTD & Strike
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. A-1
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. A-2
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. B
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. C-1
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. C-2
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. C-3
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. C-4
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. D
US Bancorp Amended Memorandum In Support of MTD & Strike Exb. E
Lipari Motion to Strike US Bancorp MTD
Lipari Notice of Initial Disclosure
US Bancorp Motion to Stay Schedule & For Protective Order

Entry of Appearance Jay E. Heidrick
US Bank Opposition to Lipari's Motion to Strike Motion to Dismiss
Order on Lipari Motion to Stay Discovery
Lipari Reply Memorandum Striking US Bank Motion to Dismiss
Lipari Objection To Stay of Discovery Under Rule 72.1.4
US Bank Reply to Lipari Objection to Stay Discovery
Order on Lipari Motion to Strike Motion to Dismiss
Entry of Appearance Dennis Hawver
Lipari Reply to Motion to Dismiss
USB Reply Response to Motion to Dismiss
Order on US Bank Motion to Dismiss (denied)
Lipari Answer to Court Order
Initial Order Regarding Planning & Scheduling
USB Response to Plaintiff's Answer to Order
USB Motion to Dismiss 12(b)(6) & Rule 8
USB Memorandum In Support of MTD
USB Memorandum In Support of MTD Exhibit 1
USB Memorandum In Support of MTD Exhibit 2
USB Memorandum In Support of MTD Exhibit 3
Hawver Motion to Withdraw as Counsel
Order Granting Leave to Withdraw as Counsel
Hawver Notice of Responsibility to Lipari
Lipari Motion for Extension of Time
USB Response to Withdraw of Counsel
USB Response to Motion For Extension of Time
Order Granting Withdraw of Counsel
Report of Parties Planning Conference
Planning Conference Scheduling Order

"No Notice Was Given To Plaintiff On Accelerated 2/1/2008 Response Order Deadline"

1/24/2008 51 ORDER granting in part and denying in part 46 Motion for Extension of Time to File Response/Reply re 43 MOTION to Dismiss Pursuant to Rule 12(b)(6) and Rule 8 of the Federal Rules of Civil Procedure. Response deadline 2/1/2008. Signed by District Judge Carlos Murguia on 1/24/08.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (js) (Entered: 01/24/2008)

Lipari Response to Second Motion to Dismiss
Lipari v US Bank Settlement Brief
Settlement Brief Evidence Exhibits Vol I
Settlement Brief Evidence Exhibits Vol II
Settlement Brief Evidence Exhibits Vol III
Lipari Notice of Service of Discovery
USB Reply Memorandum in Support of Motion to Dismiss
Lipari Motion For Extension on Rule 26 Disclosures
USB Motion For Extension of Time to Supplement Rule 26 (A)
USB Motion For Extension of Time to Supplement Rule 26 (A) Exb. 1
USB Notice of Service of Discovery

3/17/2008 ORDER finding as moot Motion for Extension of Time to File.
Plaintiff's request for an extension of time to serve his supplemental disclosures until 4/15/2008 is unnecessary as Para. 2.h of the Scheduling Order provides that supplemental disclosures are to be served 40 days before the deadline for completion of discovery. The deadline for completion of discovery is 7/1/2008; therefore, the deadline for serving supplemental disclosures is 5/21/2008. Entered by Magistrate Judge James P. O'Hara on 3/17/08. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mh) (Entered: 03/17/2008)

USB Motion for Protective Order
USB Memorandum in Support of Motion for Protective Order
USB Index of Exhibits To Support Motion for Protective Order
USB Index of Exhibits To Support Motion for Protective Order Exhibit A

USB Index of Exhibits To Support Motion for Protective Order Exhibit B
USB Notice of Service of Discovery
Lipari Motion For Leave To Amend
Lipari Notice Of Supplemental Authority
Lipari Memorandum In Opposition To Protective Order
Lipari Memorandum In Opposition To Protective Order Exb. 1
Lipari Memorandum In Opposition To Protective Order Exb. 2
Order to Lipari Motion to Leave to Amend
USB Reply to Motion for Protective Order
USB Motion to Compel Rule 26
USB Motion to Compel Rule 26 Index of Exibits
USB Motion to Compel Rule 26 Index of Exibits Exb. 1
USB Memorandum in Support of Motion to Compel Rule 26
USB Memorandum in Support of Motion to Compel Rule 26 Exb. 1
USB Memorandum in Support of Motion to Compel Rule 26 Exb. 2
USB Memorandum in Support of Motion to Compel Rule 26 Exb. 3
Notice of Service of Deposition and Duces Tecum Request
Notice of Service Lipari Rule 26 Supplemental Disclosures
Lipari Answer to US Bank First Set of Interrogatories
Lipari Motion to Extend Time For Discovery
Lipari Memorandum in Opposition to US Bank Motion to Compel
Lipari Memorandum in Opposition to US Bank Motion to Compel Exb 1 MSC Amended Complaint
Lipari Memorandum in Opposition to US Bank Motion to Compel Exb 2 Motion for Hearing
Lipari Memorandum in Opposition to US Bank Motion to Compel Exb 3 Response to Hearing Motion
Lipari Memorandum in Opposition to US Bank Motion to Compel Exb 4 Appellant Brief
Lipari Memorandum in Opposition to US Bank Motion to Compel Exb 5 MSC v Neoforma
Lipari Memorandum in Opposition to US Bank Motion to Compel Exb 6 MSC Motion to Consolidate
US Bank Notice of Videotaped Deposition
Lipari Second Notice of Supplemental Authority
US Bank Opposition to Lipari Motion to Extend Discovery
US Bank in Support of Motion to Compel
Lipari Motion for Protective Order Against Deposition
US Bank Preliminary List of Witnesses & Exhibits
US Bank Motion For Protective Order for Deposition duces Tecum
US Bank Memorandum in Support of Motion For Protective Order & Duces Tecum
US Bank Amendment to Motion for Protective Order
US Bank Motion to Compel Discovery Responses
US Bank In Support of Motion to Compel Discovery
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Lipari Reply to Supplemental Protective Order Request
Lipari Opposition to Magistrate Order
Lipari US Bank Vacation Notice
US Bank Reply In Support of Protective Order
US Bank Response to Lipari Objection to Magistrate Order
Memorandum and Order For US Bancorp Motion to Compel
Lipari Objection to Magistrate's Order to Compel
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LOTMTC Exhibit 2-4 Settlement Brief Evidence Exhibits Vol I
LOTMTC Exhibit 3-4 Settlement Brief Evidence Exhibits Vol II
LOTMTC Exhibit 4-4 Settlement Brief Evidence Exhibits Vol III
Memorandum & Order to Lipari Objection to Magistrate's Compel Order
Motion to Alter or Amend Judgement For Objection to Order of Magistrate
Motion to Alter or Amend Judgement Exb. 1 Lack of Jurisdiction
Motion to Alter or Amend Judgement Exb. 2 Motion to Stay Proceedings
Motion to Amend Petition to include Declaratory and Injunctive Relief
Motion to Amend Petition to include Declaratory and Injunctive Relief Exb. 1 Lipari v USBank
Motion to Amend Petition to include Declaratory and Injunctive Relief Exb. 2 Amended Lipari v USBank
USBank Response to Plaintiff Objection to Magistrate Order Compelling Discovery
Memorandum and Order on USBank Motion to Compel
USBank Memorandum in Opposition to Motion to Alter or Amend Judgment

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UMIOTMTAOAJ Exb 2
UMIOTMTAOAJ Exb 3
UMIOTMTAOAJ Exb 4
UMIOTMTAOAJ Exb 5
Pretrial Confrence Order
USBank Opposition to Lipari Motion to Alter or Amend Judgement & Stay Proceedings
Lipari Answer to USBank Rule 59 Response
Lipari Response to Show Cause Answer
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Court 8-18-08 Order to Pay Fees
Lipari Affidavit of Prejudice
Court 8_22_08 Order to Show Cause Text Only
US Bank Motion for Order to Show Cause
Lipari Objection to Magistrate Orders of 8_18_08
Lipari Objection to Magistrate Order of 8_20_08
Lipari Objection to Magistrate Order of 8_20_08 Attch 1 Exb A-D
Lipari Objection to Magistrate Order of 8_20_08 Attch 2 Exb 1-3
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SEALED MOTION for Leave to File Under Seal by Defendants US Bancorp N A, US Bank NA
Affidavit of Attorney's Fees
Motion in Support of Affidavit of Attorneys Fees
8-28-08 Order Reffering Motion to Magistrate Waxse
9-02-08 Order Reffering Motion to Magistrate Waxse
9-02-08 Order Granting Motion to Leave to File Under Seal
9-02-08 Order Setting New Dispossitive Motion Deadline
Lipari Answer to Show Cause
Exhibit 1 August 13 2008 Notice of Appeal
Exhibit 2 December 16 2006 Notice of Removal
Exhibit 3 December 18 2006 Plaintiffs Motion to Remand
Exhibit 4 January 4 2007 Plaintiff's Reply to Defendants' Answer
Exhibit 5 August 18 2008 Affidavit of Prejudice
Exhibit 6 August 22 2008 Objection to Magistrate Order of 8_20_08
Exhibit 7 August 18 2008 Plaintiffs Response to Defendants' Show Cause Reply
Exhibit 7-1 August 11 2008 Notice of 8-11-08 Tenth Circuit Order
Exhibit 8 August 21 2008 Defendants Unilateral Pretrial Order
Exhibit 9 August 21 2008 Plaintiffs Combined Pretial Order
Exhibit 10 February 13 2008 Plaintiff Production Request
Exhibit 11 March 26 2008 Lipari Response to Motion for Protective Order
Exhibit 12 January 4 2007 Lipari Reply to Defendants Remand Answer
Exhibit 13 January 4 2007 Lipari Reply To Defendants Remand Answer Exb. 1
Exhibit 14 May 29 2007 Lipari Objection to Stay Discovery Rule 72.1.4
Exhibit 15 December 18 2006 Lipari Letter to Clerk on Case Assignment Error
Exhibit 16 May 24 2007 Order on Lipari Motion to Stay Discovery
Exhibit 17 January 7 2008 Report of Parties Planning Confrence
Exhibit 18 January 31 2008 Lipari Response to Second Motion to Dismiss
Exhibit 19 September 2 2008 Lipari Affidavit
Lipari Affidavit
Exhibit 20 June 7 2005 Initial Disclosure
Exhibit 21 April 20 2007 Disclosure
Exhibit 22 April 20 2007 Lipari Trial Exhibits Volume I
Exhibit 23 April 20 2007 Lipari Trial Exhibits Volume II
Exhibit 24 April 20 2007 Lipari Supplement Trial Exhibits Volume I
Exhibit 25 April 20 2007 Lipari Supplement Trial Exhibits Volume II
Exhibit 26 May 3 2007 Disclosure
Exhibit 27 February 9 2008 Settlement Brief Notice
Exhibit 28 February 9 2008 Lipari v US Bank Settlement Brief

Exhibit 29 February 9 2008 Settlement Brief Evidence Exhibits Vol I
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Exhibit 31 February 9 2008 Settlement Brief Evidence Exhibits Vol III
Exhibit 32 March 10 2008 Jay Discovery Objection
Exhibit 33 March 10 2008 Reply to Defendant Discovery Objection
Exhibit 34 March 26 2008 Answer to First Set of Interrogatories
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Exhibit 37 April 30 2008 Plaintiff Reponse to Defendants April 22 Motion to Compel
Exhibit 38 May 6 2008 Response to Golden Rule Letter Dated April 23
Exhibit 39 May 7 2008 Clarification of CD Rule 26 Disclosures
Exhibit 40 May 17 2008 US Bank Preliminary List of Witnesses & Exhibits
Exhibit 41 May 22 2008 85 Motion to Compel
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Exhibit 43 July 8 2008 Memorandum and Order
Exhibit 44 July 15 2008 Email to Jay Requesting Clarification
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Exhibit 46 August 18 2008 Defendants Response to Show Cause
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Exhibit 49 August 25 2008 Second Notice and Order to Show Cause
Exhibit 50 August 21 2008 Notice USBank Pretrial Order
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Exhibit 52 October 6 2002 Escrow Agreement Before Kabbes Changes
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Exhibit 54 October 7 2002 Lipari Notice of Changes to Escrow Agreement
Exhibit 55 October 8 2002 Kabbes Signature of Accepted Changes
Exhibit 56 October 11 2002 Lipari Request for Escrow Release Language
Exhibit 57 February 13 2008 Plaintiff Production Request
Exhibit 58 February 8 2008 Appendix II. Settlement Brief Vol. I
USBank Combined Response to Objection to Magistrate Order
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Exhibit A

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

SAMUEL K. LIPARI
(Assignee of Dissolved
Medical Supply Chain, Inc.)
Plaintiff

vs.

US BANCORP, NA
US BANK, NA
Defendants

0616-CV32307

Case No.

Contract Breach

Jury Requested

DIVISION 02

Plaintiff SAMUEL K. LIPARI is the assignee of the dissolved Missouri Corporation Medical Supply Chain, Inc. SAMUEL K. LIPARI resides at 297 NE Bayview, Lee's Summit, MO 64064. His telephone is 816-365-1306 and email is saml@medicalsupplychain.com

Defendant US BANCORP, NA (US Bancorp) NYSE symbol USB is a bank holding corporation headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.

Defendant US BANK, NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402 and is a Missouri resident residing at 3640 S Noland Rd, Independence, 64055 Its telephone is(816) 521-3310

PETITION

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*.

This is a petition against the defendants for Breach Of Contract, Fraud, Trade Secret Misappropriation Under

R.S.Mo. § 417.450, Breach Of Fiduciary Duty, and Prima Facie Tort.

I. Jurisdiction

1. This court has jurisdiction over questions of Missouri common law in escrow contracts and Missouri statutory law on trade secrets raised in a timely manner by a plaintiff that has never slept on his rights.

2. The injury complained of occurred on December 1, 2002.

3. The defendants are moneyed corporations having banking powers and subject to the statute of limitations of six years in R.S.Mo. § 516.420.

4. The trade secret misappropriation complained of was discovered on November 6, 2002.

5. The defendants if not subject to the statute of limitations of six years in R.S.Mo. § 516.420 are subject to the five year statute of limitations in R.S.Mo. § 417.461.

II. Venue

6. The plaintiff makes a well pleaded complaint claiming state common law and state statutory causes of action over breach of contract to provide escrow services, fraud, trade secret misappropriation under R.S.Mo. § 417.450, breach of fiduciary duty, and prima facie tort taking place in Jackson County. The plaintiff's complaint is against

defendants that regularly do business in Jackson County, Missouri.

7. Venue is proper in this court.

III. Procedural History

8. 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 contract of this claim in a federal action in the US District Court for Kansas in October 2002.

9. 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

10. Medical Supply sought relief based on a complaint for an urgent Temporary Restraining Order filed 10/22/02 and amended 11/02/02 because the defendants were repudiating a contract (misusing the USA PATRIOT Act shown to be a false pretext) on 10/15/02 to provide escrow accounts required for the deposit of $350,000.00 raised from manufacturer rep candidates by Medical Supply. The TRO was denied.

11. The defendants' 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.

12. Medical Supply's cause was controversial because it was an action to seek an injunction against breaking a contract to provide escrow accounts in furtherance of a boycott by US Bancorp and Piper Jaffray's coconspirator identified in the complaint as Novation, a healthcare group purchasing organization ("GPO") competitor of Medical Supply's in the hospital supply market.

13. Also identified in the complaint was Novation's captive e-commerce marketplace Neoforma, Inc. directly competing with Medical Supply on the Internet.

14. 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.

15. 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 the 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. The pre-hearing relief opposed by the

defendants was denied and the interlocutory appeal was dismissed as moot.

16. 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.

17. 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.

18. Medical Supply answered the show cause order asserting the trial court had applied the incorrect legal standard and had misstated the USA PATRIOT Act.

19. 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.

20. Instead of correcting its ruling and ordering that Medical Supply was entitled to injunctive and declaratory relief, the Tenth Circuit panel ordered that Medical Supply's counsel receive its most serious sanction for a frivolous appeal.

21. 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.

22. The court declined to rehear the case *en banc*.

23. 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.

24. The case was transferred to the District of Kansas at Kansas City, Kansas to Kansas District Court Judge Kathryn H. Vratil who made no rulings delaying the opportunity to obtain discovery on the defendants' participation in the wrongful disbarment of Medical Supply's counsel for almost a year.

25. 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.

26. 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.

27. The petitioner's case was then transferred to Kansas District Court Judge Carlos Murguia where he 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 the defendants' law firm Shugart Thomson & Kilroy 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 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.

33. The Kansas District court retained jurisdiction over the federal action to sanction Medical Supply's former counsel and SAMUEL K. LIPARI for among other reasons, witnessing his counsel's disbarment but then because of a timely motion for reconsideration 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 SAMUEL K. LIPARI's federal law based claims over the injuries to his former corporation are currently before the Tenth Circuit Court of Appeals in *Medical Supply Chain, Inc. v. Novation, et al*, (formerly W.D. MO case no. 05-0210, then KS Dist. Court case no.:05-2299, now 10th Cir. case no. 06- 3331.

IV. PARTIES

35. Mr. SAMUEL K. LIPARI was the Chief Executive Officer of the Missouri Corporation Medical Supply Chain, Inc.

36. Medical Supply Chain, Inc. was dissolved by Mr. LIPARI on January 27th, 2006.

37. Mr. LIPARI is the assignee of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. under *Smith v. Taylor-Morley, Inc.*, 929 S.W.2d 918 (Mo. App. E.D., 1996).

38. Defendant US BANCORP, NA (US Bancorp) NYSE symbol USB is a bank holding corporation headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402.

39. Defendant US BANK, NA is a Delaware Corporation organized under the National Bank Act, 12 U.S.C. §§ 21-216d, headquartered at U.S. Bancorp Center 800 Nicollet Mall, Minneapolis, MN 55402 and is a Missouri resident residing at 3640 S Noland Rd, Independence, 64055 Its telephone is (816) 521-3310

V. INTRODUCTION

40. The plaintiff brings the following state law claims against the defendants that arose in the course of the defendants' conduct in keeping Medical Supply Chain, Inc. ("MSCI") from competing in the national market for hospital supplies with a web based electronic marketplace capable of automating purchasing, logistics and fulfillment and

thereby reducing costs up to 40% in the 1.3 trillion dollar market.

41. The defendants had concentrated 70% of their venture capital in hospital suppliers through their subsidiary US BANCORP PIPER JAFFRAY.

42. The defendants through their subsidiary US BANCORP PIPER JAFFRAY formed exclusionary contracts to prevent competing hospital suppliers from having access to the market for hospital supplies.

43. The defendants through their subsidiary US BANCORP PIPER JAFFRAY controlled which companies would receive supplier contracts, access to Novation's member hospitals, venture and initial public offering capital.

44. When the defendants discovered the plaintiff would be able to enter the hospital supply market without US Bancorp Piper Jaffray getting a cut and that the plaintiff would be able to compete and undercut Novation's distribution system, the defendants breached their contract to withhold a critical input from the plaintiff and stole the plaintiff's intellectual property to help Novation protect against competition in the hospital supply market.

VI. STATEMENT OF FACTS

45. 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.

46. 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.

47. Several national banks were evaluated but US BANCORP NA was selected because it also had an investment banking relationship with Piper Jaffray.

48. 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.

49. On or about 4/15/02 SAMUEL LIPARI arranged for Medical Supply's corporate account to be opened at US BANK's SW Topeka branch.

50. 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.

51. 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.

52. 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.

53. SAMUEL LIPARI was approved for a personal checking account and an electronic debit card.

54. SAMUEL LIPARI initially used the personal account to pay expenses of Medical Supply with reimbursement from the corporation.

US BANK and US BANCORP's Knowledge of Medical Supply

55. 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.

56. SAMUEL LIPARI was instructed to send an executive summary of his business plan via email. (Exb 1.)

57. SAMUEL LIPARI sent the summary and financial projections for Medical Supply with a restriction on disclosure notice.

58. Piper Jaffray made no response to the receipt of the executive summary and financial projections from Medical Supply's business plan.

59. SAMUEL LIPARI again telephoned the Minneapolis offices of the Piper Jaffray venture fund managers and his calls were not taken and not returned.

60. 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.

61. 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.

62. The discussions revealed the current condition of venture funding and IPO underwriting was very troubling.

63. At the time of these meetings the first news of WorldCom's debacle was breaking.

64. 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.

65. The venture capital M&A attorney questioned SAMUEL LIPARI about the overtures of large companies seeking to acquire Medical Supply.

66. 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.

67. 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.

68. SAMUEL LIPARI told the VC attorney that Medical Supply would not compromise itself by being aligned with any existing healthcare supplier.

69. Medical Supply has the solution and SAMUEL LIPARI did not want to be tainted with companies that support the high cost healthcare problem.

70. 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.

Medical Supply's Internal Capitalization Plan

71. Medical Supply resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and supply chain management technology.

72. 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.

73. 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.

74. 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.

75. 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.

76. 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.

77. 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.

78. 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.

79. 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.

80. 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.

81. After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification class starting the first week of December/02.

82. During this same time, Medical Supply was preparing the escrow account system that the candidates would utilize.

Defendants' Offer of US BANCORP Escrow Services

83. 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.

84. 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.

85. Becky Hainje connected Medical Supply with Brian Kabbes in St. Louis who was responsible for US BANK commercial trust accounts in Missouri and Kansas.

86. Becky Hainje also connected Medical Supply with Douglas Lewis, responsible for commercial loans in the Noland Road office.

87. 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.

88. Brian Kabbes asked questions about the candidates, the certification program and how many candidates had been selected so far.

Meeting of the Minds With US BANCORP

89. 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.

90. 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.

91. 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.

Performance of Escrow Contract

92. 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.

93. 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.

94. 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.

Oral Confirmation of Escrow Contract

95. 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."

96. 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.

Defendants' Receipt of Value for Escrow Contract

97. On or about 10/9/02 Brian Kabbes called to request an additional change in the escrow contract.

98. 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.

Written Memorialization of Escrow Service Agreement

99. Medical Supply agreed to the additional change and modified the investment instructions exactly as Brian Kabbes instructed.

100. Medical Supply also ask if there were any other changes needed before Medical Supply sent the contracts out to its certification candidates.

101. 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.

102. 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.

103. 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.

104. During this conversation, Brian Kabbes also requested Medical Supply's current corporate good standing documentation from the Missouri Secretary of State's Office.

105. 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.

106. Samuel Lipari told Brian Kabbes he would have Douglas Lewis send the requested information to Brian Kabbes on 10/11/02.

107. Brian Kabbes made no statement that US Bank had yet to approve Medical Supply's escrow accounts and sought no additional information.

Defendants' Misappropriation Of Trade Secrets

108. 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.

109. 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.

110. A letter of introduction also stated the contents were protected and restricted disclosure and possession of the materials.

111. Two more folders contained the good standing documentation Brian Kabbes requested and the associate program contracts that were sent to the candidates.

112. 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.

113. SAMUEL LIPARI further explained that he planned to start a new certification group each quarter.

114. SAMUEL LIPARI was given a loan application and agreed to and did return the application the next day.

Repudiation of Agreement to Provide Escrows

115. 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.

116. 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.

117. 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.

118. Later that morning SAMUEL LIPARI called Becky Hainje and asked if she could see what happened.

119. SAMUEL LIPARI explained that Medical Supply was counting on the escrow accounts and that the line of credit depended on them too.

120. SAMUEL LIPARI said he could not believe the USA PATRIOT Act could be a reason that applied to Medical Supply.

121. Becky Hainje said she would call and see what happened.

122. Becky Hainje called back and left a taped recording on the Medical Supply answering system and listed the reasons Brian Kabbes told her.

123. 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.

US BANCORP Participation in the Repudiation

124. 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.

125. 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.

126. Barb asked for more details concerning the problem.

127. Barb said Mr. Cesere had a morning meeting but she would get the message to him.

128. 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.

129. 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.

130. 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.

131. 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 Paragraph 214. Transcript of Recordings.

132. 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.

133. 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.

134. Ed Higgins said he would check into the matter and call SAMUEL LIPARI back later that day.

135. 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.

136. 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.

137. Lars Anderson expressed some irritation that Medical Supply had contacted the head of the trust unit about the rejection of escrow accounts.

138. Lars Anderson said the bank had never been on board and it was not a done deal.

139. Brian Kabbes denied that there had been an agreement; he said he had twice told SAMUEL LIPARI.

140. 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.

Defendants' Knowledge of Breach

141. 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.

142. 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."

Defendants' Knowledge of Irreparable Harm to Medical Supply

143. 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.

144. 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.

145. Brian Kabbes said that the trust department was a "stand-alone unit" and had its own criteria for accepting customers.

US BANK Refused to Reverse its Decision

146. 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.

147. 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.

148. 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.

149. 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.

150. Medical Supply researched over 300 resumes only to find 30 that appeared to be qualified.

Defendants' Fiduciary responsibility for trade secrets

151. On or about 10/17/02 SAMUEL LIPARI telephoned Douglas Lewis and told him what had happened.

152. Douglas said he had sent Brian Kabbes the good standing documentation but not the business plan and associate program.

153. 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.

154. 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.

155. 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.

156. Douglas Lewis agreed and stated he would keep the business plan materials safe.

157. 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.

158. 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.

159. 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.

160. Medical Supply called the trust department counsel Monday 10/21/02 to ask for service addresses of the other named entities and employees.

161. Kristen Strong said the same address would be good for all and then proceeded to ask what the causes of action were.

162. 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.

163. 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.

164. 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.

165. 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.

166. 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.

167. 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.

168. Medical Supply stated that it had not had any communications with US BANK employees since receiving her reply on Friday 10/18/02.

169. 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.

170. 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.

171. 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.

172. On Thursday 10/24/02 Medical Supply filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees.

173. 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.

174. 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.

175. 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.

176. 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.

177. 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.

178. 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.

The Defendants' Acceptance of Liability for Medical Supply's Business Plan Damages

179. 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.

180. 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.

181. 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.

182. 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.

183. US BANCORP's counsel reiterated his belief Medical Supply needed to find another bank and that no liability existed.

184. 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.

185. US BANCORP's counsel said it would not agree to even just the relief sought in paragraph 66 of the first federal complaint.

186. 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.

187. US BANCORP's counsel refused to do so stating that US Bank did not owe any duty to Medical Supply.

Defendants' Intellectual Property Misappropriation

188. 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.

189. 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.

190. Douglas Lewis gave the documents back to SAMUEL LIPARI.

191. 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.

192. 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.

193. There were also tractor marks from a copy or fax machine on the back of the entire associate program and the business plan pages.

194. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied.

195. There were no marks tractor marks on the back of these documents.

196. Medical Supply became fearful of where these documents were sent and who has reviewed them.

197. 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.

198. SAMUEL LIPARI became fearful this information would fall into the wrong hands further blocking or eliminating entry to market.

Defendants' Breach Injures Medical Supply

199. On or about 11/7/02 SAMUEL LIPARI received a complimentary D&B report dated 10/31/02 on Medical Supply.

200. The report indicated Medical Supply started in 2000 and has a clear credit history and a strong financial condition.

Medical Supply Seeks Federal Declaratory Relief

201. 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.

202. Medical Supply had a second preliminary injunction hearing at 12:00 p.m. on December 12, 2002.

203. 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.

204. On December 17, 2002 Medical Supply filed a notice of interlocutory appeal to The Tenth Circuit Court of Appeals.

205. On June 16, 2003, the Kansas District Court dismissed Medical Supply's action for injunctive and declaratory relief.

206. After losing a motion for new trial, Medical Supply filed a timely notice for appeal on November 21, 2003.

207. On January 7th, 2004, the Tenth Circuit dismissed the interlocutory appeal as moot due to the superceding appeal of the action's dismissal.

The Third Attempt to Cover For Defendants' Breach

208. 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.

209. 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.

210. 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.

211. 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.

212. 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.

213. 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.

214. 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.

215. 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.

216. 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.

217. 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.

218. 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.

219. 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.

US BANCORP and US BANK Work to Frustrate Recovery From GE

220. 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.

221. 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."

222. 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.

223. 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.

224. 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."

225. 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.

VII. CLAIMS

194. Plaintiff alleges the following claims against the defendants US BANK and US BANCORP upon information and belief that discovery will support findings against the defendants.

COUNT I
CAUSE OF ACTION FOR BREACH OF CONTRACT

195. Plaintiff hereby re alleges the preceding averments of facts and incorporates them herein.

196. The Defendants breached their contract with Medical Supply (MSCI) which interests are now assigned to SAMUEL LIPARI to provide MSCI with a full range of business banking services, including corporate trust services and escrow agency to be performed lawfully and professionally with a "five star guarantee" of quality of service.

197. This contract was executed in writing by the Defendants and MSCI when their respective agents opened the Medical Supply Chain Corporate checking account.

198. The Defendants breached their contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates.

199. This contract was made while the plaintiff was influenced by representations over the phone at a distance of 300 miles between the defendant US BANK's St. Louis office and the plaintiff as chief executive officer of MSCI a customer of US BANK's Noland Road Independence office in the regular course of business.

200. No writing or other memorialization of this contract to provide a full range of banking services with a "Five Star Guarantee" was referred to or contemplated at any time

during its negotiation and formation by either the Defendants or MSCI.

201. The Defendant's Vice President Brian Kabbes and Samuel Lipari came into formation of a written contract for escrow account services when both had agreed upon some or all of the terms in exchanges of email including: the composition of the escrow form, the language limiting the liability of US BANK and the escrow agent, the language designating US BANK's compensation for its duties in any legal disputes arising between the parties, the directions for US BANK's investment of long term held funds, the directions for US BANK's investment of short term held funds, the selection of investment vehicles for both funds respectively, the name and address of BRIAN KABBES as escrow agent on the escrow form, the name and address of US BANK as escrow depository on the escrow form, the price term US BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.

202. The Defendants performed diligence to determine whether to accept the contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates.

203. The Defendants required only one item to be rectified

for approval; a current good standing status from the Missouri Secretary of State, which MSCI provided, satisfying their sole open element.

204. The Defendants approved MSCI's escrow form for delivery along with MSCI's associate contract to MSCI's independent representative candidates for their examination and submission for review to their personal legal counsel. After entering into a contract with MSCI, the defendants breached the contract and did not provide the escrow accounts.

205. The Defendants breached the contract to provide escrow accounts to MSCI when the defendants discovered MSCI would reduce hospital supply prices nationwide with an internet based electronic marketplace.

206. MSCI attempted to cover or substitute as described in the statement of facts, seeking the services of Shook, Hardy & Bacon, then the defendants' own law firm to administer escrow accounts unsuccessfully.

207. MSCI then attempted to cover or substitute by obtaining the capitalization for entry to market through a real estate transaction with GE which breached its contract when it also discovered MSCI would reduce hospital supply prices nationwide with an internet based electronic marketplace.

COUNT II
CAUSE OF ACTION FOR FRAUD

208. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

209. The Defendant US BANCORP injured MSCI with a fraudulent misrepresentation material to their transaction of escrow agency and escrow account hosting through US BANK for MSCI and SAMUEL LIPARI.

210. Then Brian Kabbes speaking as a Vice President of US BANK falsely represented to MSCI that US BANK and the commercial trust department would not perform as escrow agent or host MSCI's escrow accounts because of the "know your customer provisions" diligence requirements of the USA PATRIOT Act had come into effect and made it impossible for the bank to perform this service for MSCI.

208. The defendants' officers Lars Anderson and Susan Paine made this fraudulent misrepresentation through the defendant Brian Kabbes by directing him to give this reason to MSCI's chief executive officer, SAMUEL LIPARI.

211. The defendant US BANCORP's officer Andrew Cesere directed the defendants' officers Lars Anderson, Susan Paine And Brian Kabbes not to retract this fraudulent misrepresentation when it had been questioned by MSCI and SAMUEL LIPARI and to maintain the misrepresentation in

their capacity as managing speaking officers for US BANCORP NA, US BANK.

212. The defendants' officers Andrew Cesere, Lars Anderson, Susan Paine and Brian Kabbes caused this fraudulent misrepresentation to be communicated to SAMUEL LIPARI with the intention to induce MSCI to refrain from enforcing US BANK's agreement to provide MSCI escrow agency services and escrow account hosting.

213. On 10-24-02 the defendants officer Brian Kabbes communicated to MSCI and SAMUEL LIPARI that US BANK's corporate trust division (US BANCORP) would not provide the escrow accounts because of the "know your customer" provision of the USA PATRIOT Act prevents them from providing the agreed upon escrow accounts.

214. Becky Hainje US Bancorp (Phone Message left on MSCI answering machine 10-24-02);

> "**Becky Hainje**: Hi Sam this is Becky Hainje with US Bank I a… visited again with Brian Kabbes in the a… corporate trust area and a… ask him what would you need to provide in order to have the a… request for the escrow trust reviewed and he was very honest, he said a… really it does not look good, this is something that the bank would be willing to do and he doesn't want you to invest any more time in it with him, but he did give me a… the listing of the main reasons, the 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 any prior existing relationship with the a… Bank a... that the principals involved with the business were people unknown to the bank as you mentioned they were National and he really had no idea, and but the

main reason is to know your customer "Patriot Act" that was enacted after 911, and which we really could not give all the correct answers a… on the course and the flow of money, so 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 the ground unfortunately this seems to be a day and an age where unique thinking outside of the box isn't a… is being, a…is very difficult to get anything going, and I apologize that I wasn't able to be of more service to you a…hopefully you will be able to get this going perhaps with Doug on financing, and I do wish you all the best, if you have any more concerns, please feel free to give me a call at 913-261-5725."

215. Brian Kabbes called back rather than Ed Higgins:

"**Bret Landrith MSCI**; "Yes Brian, this is Bret Landrith, returning your call.
Brian Kabbes US BANCORP; "Bret hey a…Lars Anderson wants to be on this call too, he is our new business development guy, do you mind if I get him on the line."
Bret Landrith MSCI; " No problem."
Lars Anderson US Bancorp; "Hey Bret, I got Lars Anderson, hey Bret."
Bret Landrith MSCI; "Nice to speak to you"
Lars Anderson US BANCORP; "Susan Pane is here also here in the office a…
Brian Kabbes US BANCORP; "I report to Susan Pane and Lars is our new business development person, now you had called Andy Cesere yesterday."
Bret Landrith MSCI; "Yes I didn't realize when I last spoke to Brian that we had already sent out the escrow agreements that he approved, am of course."
Lars Anderson US Bancorp; "Who approved?"
Bret Landrith MSCI; "Brian Kabbes, he works there in your office, I think he is in front of you, a… of course it is sort of inherent in an escrow customer that somebody is seeking an escrow account because there is not a sufficient establishment of trust yet so between the parties and realizing that we are going to have to change the escrow account contracts with the, our ten best candidates that we've chosen who will produce the most revenue for our business in it's first year in market a… that became a substantial issue for us and I didn't realize that when I last spoke to Mr. Kabbes."

Lars Anderson US Bancorp; "Yeah, we were wondering how obviously calling Andy Cesere a…"
Bret Landrith MSCI; "well a…"
Lars Anderson US Bancorp; "as you were not happy with our decision not to move forward on the transaction to get a hold of management at the bank that runs our overall unit."
Bret Landrith MSCI; "a… Mr. Kabbes was very helpful, he suggested that we go to some local bank, you know some big bank hasn't bought up like you all and taken and run off the staff that knew anything, but a…he a… was also not clear on why we had sought a trust account at US Bank, because he didn't see why we didn't go to our own bank, of course you are our bank and have been since about April, the first corporate account we ever opened was with you all."
Lars Anderson US Bancorp; "Sure",
Brian Kabbes US BANCORP; "I said that when I said that I said your local bank, I didn't know it was with US Bank."
Bret Landrith MSCI; "Who has really accelerated there a level of customer service just recently in the former First Star Bank, you guys took over and occupied, and now they actually connect us with the people that can provide the services they say they have, and that is how come our local bank forwarded us to your Trust Department.
Lars Anderson US Bancorp; "Got yea...Well then no doubt nobody questions about whether you have an account or whether, you know we can't handle this type of transaction generally, the question centers around when did we commit to this transaction specifically and Brian and I have been talking and we don't know at any point where we specifically said we are on board a… we were trying to evaluate the transaction therefore looking at some of the specifics of the document and what our duties were."
Bret Landrith MSCI; "I don't think we need to go into minutia over that right now I think the chronology will come with the demand letter a…but we understood that you knew the purpose and why we kept contacting you in getting the second change approved, by the time you made the negative decision you also had our business plan and that's pretty serious."
Lars Anderson US Bancorp; "We have not divulged your Business Plan to any body, there is no confidentiality issue here."
Bret Landrith MSCI; "well a…"
Lars Anderson US Bancorp; "Where did we ever accept the transaction, we never provided you pricing, we never

provided you a bid and we certainly never signed off on the escrow agreement."
Bret Landrith MSCI; "we had pricing and its oral, and this is Missouri, and this is a business contract in your regular line of business and we relied and depended on your excerption that it was ok and we sent it our to our best people."
Brian Kabbes US BANCORP; "I'll tell you what Bret, you can talk with Sam, you can get him on the phone if you want, because when I went over numbers with Sam, I said by no means is this a done deal, I need to run it past some people, I told him that twice, so I discussed numbers with him, but I said to him twice, I we came to what would work for you."
Bret Landrith MSCI; "Sam is in the room now."
Sam Lipari MSCI; "Hi Brian, well Brian, I also had conversations with Becky Hainje, and Becky had indicated as well that your conversation with her according to the recording that I have of the conversation is that you guys, you or her or combination thereof, had no problem with this and it should be a slam-dunk, to quote her exactly."
Bret Landrith MSCI; "but, but before we go farther down this line, obviously you don't have your new business development guy in there so you can help document why it was good of you not to take on our new business and we are sort of flabbergasted that you got any reason not to take on our business and we are sorry we are with you, but we are with you for at least these ten people."
Brian Kabbes US BANCORP; "Excuse me"
Lars Anderson US Bancorp; "you do want, on what basis do you consider us to be with you guys, I mean in any cap… in this transaction."
Bret Landrith MSCI; "well we have our sole banking relationship with you and we have shared an incredible amount of trust with you and divulged our business practices model and everything to you and are are corporate financials, we knew that a large major competitor of ours is headquartered in St. Louis and we had no concept that there would be a conflict of interest issue, but a… a…..
Lars Anderson US Bancorp; "We don't have a conflict of interest."
Bret Landrith MSCI; "this comes out of left field that you are accusing us of being Arab terrorist or something and not wanting to set up a basic account your bread and butter services of your department, I think you are taking on other customers this year sometime, if you are still going to have a trust office in St. Louis, and we are sort of

surprised you are not taking us on and we can't imagine a reason for it.
Lars Anderson US Bancorp; "Ok, well I think Brian's conveyed..."
Bret Landrith MSCI; 'well those are pretty bad reasons and those end up with a demand letter, and yes there will be extensive chronology and we will explain trust obligations and fiduciary duties and where we think we were in contract and we think we will have an explanation that wins."
Lars Anderson US Bancorp; "well we are not the right people to talk to about that, we are just...
Bret Landrith MSCI; "all right well, like I said earlier, I don't see any point in having a discussion about that, obviously you guys provide a service, you got your new business development guy there on this phone call, either you are talking to us about the services you are going to provide, or what we need to do to be your customer."
Lars Anderson US Bancorp; "so your, what your what are you stating at this point, that you are going to...."
Bret Landrith MSCI; "we got ten people that...."
Lars Anderson US Bancorp; "to force us to provide these services, or what, I don't understand now what you want."
Bret Landrith MSCI; "your, your characterizing that as a threat, there are no threats here, our business future depended on these ten people for the next six months or year revenue, you took them out you didn't even threaten us before you did it, so we will try and save what we can, but probably since you got your team there you ought to think about how to make us a customer at least for these ten so that we can remediate this damage."
Lars Anderson US Bancorp; "well we certainly never contracted with you or these ten people."
Bret Landrith MSCI; "well I think we go to a referee on that, first you get the demand letter, you get to respond to your version and then we go to a forum where they will make a ruling."
Sam Lipari MSCI; "and, and if I might add something here, this patriot act, that was identified as a reason for not extending the escrow services to us might you guys explain how that applies to a company that has been incorporated and in good standing for three years in the state of Missouri, in addition to the fact that we have a trail of where the funds come from, we also have signatures on both financial and criminal discovery of these individuals where anyone can run a background check or financial background on these individuals. I mean I am just really concerned

why this patriot act was brought into this when we don't have anything to do with that.
Lars Anderson US Bancorp; "we were not trying to relate the Patriot Act specifically to your status of business or your integrity it only..."
Sam Lipari MSCI; "well according to Ed Higgins, he didn't see how this, where this even came from."
Bret Landrith MSCI; "what other customers has this been an issue with for you and maybe you shouldn't be dealing with those types of customers?"
Lars Anderson US Bancorp; "The patriot act, when it was put in place, caused us to have a clear set of rules on how we take on business."
Sam Lipari MSCI; "well according to Ed Higgins, he doesn't think that the Patriot Act has anything remotely to do with Medical Supply Chain, and what we are trying to do here."
Bret Landrith MSCI; "but, since you mentioned it the other day, we started looking at who you got investments in, and you got some investments in some healthcare entities that are under the gun, they have either been indicated for anti-trust violations or illegal kick-back schemes and for us now looking at space alien excuse for not having our trust accounts hosted by you, we are starting to think conflict of interest explains it.
Lars Anderson US Bancorp; "yea, you know what...we are not sure...what's your...
Bret Landrith MSCI; "yea, it is pretty serious and it goes beyond contract damages ok."
Lars Anderson US Bancorp; "we are not the right people to talk to if you..."
Bret Landrith MSCI; "I know you may not be the right people to talk about trust, that is why I was trying to get your Vice Chairman, still haven't gotten to him, hopefully we can get this resolved today.
Lars Anderson US Bancorp; "we have already spoken with him and explained the situation, if you want to talk about other things in the Bank and our policies, whatever, I mean."
Bret Landrith MSCI; "no, I think we are going to focus on the Trust Department on US Bank for sometime here, it is probably a three-year process, but we will get to know each other quite well."
Lars Anderson US Bancorp; "do you have any other questions today?"
Bret Landrith MSCI; "No, you called us."
Lars Anderson US Bancorp; "well we were just returning your call to Andy Ceccere".

Bret Landrith MSCI; "well I think he ought to personally talk to us cause we are still not getting a good explanation here."
Lars Anderson US Bancorp; "you are not looking for a good explanation you are looking to force us to do the transaction."
Bret Landrith MSCI; "no, you guys are the ones that don't even threaten you just kill, but we are still wondering how we can fix this."
Sam Lipari MSCI; "yea, we need, the problem here is that we have these a…, we basically have a…, out of 300 resumes we've pined it down to approximately 15 of which 10 we sent out the contract and the escrow and then you guys decide that you don't want to do the escrow over a Patriot Act that we don't have anything do with in the first place, now you claim that we do and be on, I…I still don't understand where you are coming from that standpoint, but that is ok, in the mean time we tried to explain the situation and in fact we spoke with Ed, now who is Ed Higgins,
Brian Kabbes US BANCORP; "He is ahead of personal trust in St. Louis."
Sam Lipari MSCI; "Ok, well when we spoke with Ed, Ed seemed to feel as though this doesn't have anything to do with the Patriot Act, and basically, that is what we are saying, but I will indicate to you this....Becky had already established the fact that Brian you and her had talked last week and you didn't see any problem with it and if you didn't see any problem with it, you also suggested we make a change on #10 of the escrow agreement, so that we could leverage the asset 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 you guys come back and say well you are not going to do it and you guys want to basically climb behind the Patriot Act as a basis for your decision, but Patriot Act doesn't have anything to do with what we are doing.
Brian Kabbes US BANCORP; "first off, that was a minor, that was part of our reason that was a minor reason..."
Sam Lipari MSCI; "well, if, if I quote Becky correctly this morning on her conversation, it was the fact that you don't know who all is involved in the Company, you don't know where these, where the Executives are that are running this company, in other words, you didn't have background information on the company itself to set up the trust, that, why is that any of your business in the first places as it relates to setting up an escrow? That's my question, and again I think we are going to find out that we are

going to constantly come back to this issue where you have a conflict of interest and because of your knowing our business model and how we are arriving at generating revenue and so on and so forth that you basically kill our escrow, so by killing our escrow, especially in this particular situation on these ten that we have sent the information out to, you have essentially cut off at least $300 and possibly $450 thousand dollars."
Bret Landrith MSCI; "but they were our ten best you know, former principal of IBM, and people we hand picked from all over the country at the best change of getting our hundreds of millions of dollars or revenue we count on in the next couple of years."
Sam Lipari MSCI; "so all the conversations that we have documented since last week, have basically indicated that you had no problem in doing the escrow in the first place, in fact, Bryan you and I hammered out a Cost and Price and I would think..."
Brian Kabbes US BANCORP; "you are missing a very important part of that, twice I said to you I need to run this past something, and I stopped you and said it a second time."
Sam Lipari MSCI; "ok well then let me ask you this Brian, why won't you just set the escrow up? Why? We don't have anything to do with the...a…"
Brian Kabbes US BANCORP; "well"
Sam Lipari MSCI; "there is a conflict of interest Brian, and you know there is, and I don't know why you are hiding behind the Patriot Act because the Patriot Act doesn't have anything to do with us, and you know it doesn't, and I am upset about it, I have spent two weeks working with Becky and Doug and You and everybody else, we've got basically $300 to $450 thousand dollars in the pipeline here that has been basically cutoff cause we don't have an escrow for these people 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 of a mute issue, it is just a fact that you don't want to do business with us because you have a conflict of interest with other companies that are doing banking business with you and frankly, you are right, if we ever get our business model off the ground, we are going to put them out of business, in fact, we may not have to the Justice Department has already indicted them, the Federal Trade Commission is after them, and not Medicare and Medicaid is after these GPO's. In addition to that, I have a glass pipe line to the New York Times, so if we really want to bring everybody into this thing and really nail down what is going on we can. All we asked for was a

simple escrow so that we had a place to put our certification program candidates until they receive the weeks worth of training and we were able to identify whether or not they were going to be part of our organization or not. That is all we asked you people to do, instead, you guys have carried this thing farther, in other words, you want to know more information about the company, or you want to know about our background, or you want to know whose involved in this because there is a conflict of interest and that is the only reason you guys wouldn't provide these services. You would provide them for anyone else that walked in off of the street, but you have a conflict. So admit you have a conflict and let's move on. If you don't have a conflict, then set the escrow up."
Lars Anderson US Bancorp; "Sam, this is Lars, Brian and I have talked about this since he bounced the transaction off of me to find out if we should do the deal and I couldn't see good reason to do the deal, but we have never talked about any kind of conflict of interest. I don't even know where you are coming from that standpoint."
Brian Kabbes US BANCORP; "I don't have any idea what he is talking about."
Bret Landrith MSCI; "I understand you are not admitting it yet, but you have not come up with a plausible non-protectoral reason to not set up escrow accounts. We are going to be looking at..."
Brian Kabbes US BANCORP; "we have to know our customers I have to have complete information and to know our customers and to know who we are doing business with."
Bret Landrith MSCI; "I don't think a US Bank knows too much about US Bank, but in terms of, we filled out credit application you got business plan, you got all that information, and once you got all that information then we are surprised you are not accepting the account."
Lars Anderson US Bancorp; "we take on a trust business stand alone, and we have our own acceptance criteria and it's got nothing to do with what someone else got your financials or whatever...."
Bret Landrith MSCI; "like I said, I don't think US Bank is a coherent entity and I am really alarmed at some of the laissez-faire lack of control of practices that you have and I am sure we are going to see a lot of disturbing things, unless you are here are calling us to set up some trust accounts we will probably do our next communications in correspondence."

Lars Anderson US Bancorp; "Ok, well we are trying to explain to you today the reason why we are not taking on the account."
Sam Lipari MSCI; "and what is that reason exactly, because we have gone""

Transcript of tape recorded telephone conference.

216. MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce US BANK's promise with the defendants' officer Brian Kabbes upon learning that US BANK was not going to provide the escrow services. MSCI and and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of US BANK's Commercial Trust department and instead contacted US BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

217. The defendants US BANCORP NA and US BANK caused this fraudulent misrepresentation to be communicated to MSCI with knowledge of its falsity or reckless disregard as to whether it was true or false to the point of not checking and realizing that the increased duties of the "know your customer" for new account holders had not been enacted.

218. Or, in the alternative the defendants caused this fraudulent misrepresentation to be communicated with reckless disregard as to whether it was true or false to

the point of not checking and realizing MSCI and Sam Lipari were established existing customers of US BANK the increased duties of the "know your customer" did not apply to.

219. US BANK and US BANCORP intentionally deceived MSCI and SAMUEL LIPARI over the pretext of the USA PATRIOT Act as a false reason to breach the contract to provide escrow accounts because the defendants knew or should have known that it is well established that a change in federal law does not excuse breach of a banking contract.

220. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage hospital suppliers US BANCORP PIPER JAFFRAY a wholly owned subsidiary of US BANCORP had invested in and underwritten.

221. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage US BANCORP PIPER JAFFRAY and US BANCORP relationships with the hospital Group Purchasing Organization ("GPO") Novation, LLC.

222. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage US BANCORP PIPER JAFFRAY and US BANCORP relationships with the hospital

Group Purchasing Organization ("GPO") Neoforma, Inc. (now acquired by GHX, LLC an electronic healthcare marketplace created by The General Electric Company, "GE")

223. MSCI and SAMUEL LIPARI relied on the Defendants fraudulent misrepresentation to MSCI and SAMUEL LIPARI's detriment.

224. MSCI and SAMUEL LIPARI were harmed by the Defendants' actions, resulting in the immediate loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce.

COUNT III
CAUSE OF ACTION FOR TRADE SECRET MISAPPROPRIATION UNDER SECTION 417.450 RSMO OF THE UNIFORM TRADE SECRETS ACT

225. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

226. Plaintiff hereby re-alleges the averments of facts in the following counts and incorporates them herein.

227. The Defendants have misappropriated MSCI's business plan and associate program containing MSCI's trade secrets.

228. The Defendants have made use of MSCI's trade secrets through unauthorized copying and transmittal.

229. 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.

230. 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 Kabbes.

231. 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.

232. 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.

233. 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.

COUNT IV
CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

234. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

235. US BANCORP through its investment banking subsidiary US BANCORP PIPER JAFFRAY dominated the capitalization of health care technology companies.

236. 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.

237. 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.

238. 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.

239. 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.

240. 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.

241. 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.

242. 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.

243. 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.

244. 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.

245. 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.

246. 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.

COUNT V

CAUSE OF ACTION FOR PRIMA FACIE TORT

247. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

248. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

249. US BANK and US BANCORP's Prima Facie Tort Part 1

1) Intentional lawful acts were committed by US BANK and US BANCORP including:

a refusing to provide escrow account services;

b. circulating derogatory financial information about MSCI.

c. placing warning notes against MSCI's officers on US BANK's computer system

d. disparaging MSCI's legal claims against US BANK and US BANCORP

e. causing a Kansas attorney disciplinary complaint to be filed against MSCI's counsel

f. preventing MSCI from obtaining a loan secured with escrow account funds as they were released to MSCI.

2) US BANK and US BANCORP's committed these lawful acts with intent to injure the MSCI;

3) US BANK and US BANCORP's acts caused injury to MSCI and SAMUEL LIPARI

4) There is an absence of justification and in the alternative insufficient justification for US BANK and US BANCORP's acts.

a. MSCI had good credit.

b. MSCI was a registered Missouri corporation in good standing.

c. MSCI was being kept out of the market for hospital supplies by the concerted action off its competitors and their publicized exclusive agreements over hospital supplies with US BANCORP and US BANCORP PIPER JAFFRAY.

e. The defendants' agent Shughart Thomson & Kilroy did not have good faith cause to make an ethics complaint against MSCI's counsel for appealing the Kansas District Court's clear error.

250. US BANK and US BANCORP's injury from US BANK and US BANCORP's Prima Facie Tort was great and contrary to public policy, causing injury to the state's social and economic interests.

1) the nature and seriousness of the harm to MSCI was great, the company could not afford to hire employees or enter the market after having $350,000.00 to $450,000.00 abruptly taken from it; MSCI could not realize the returns on over ten years of its founder's research and development. MSCI's stake holders were prevented from recovering their inputs.

2) the interests promoted by the US BANK and US BANCORP's conduct are the felonious manipulation of hospital supply prices at the foreseeable risk of permanent injury and death to healthcare consumers across the nation;

251. While the reconsideration of transfer motion was being argued in federal court, the first 65,000 Missouri residents were cut off of Medicaid benefits on July 1, 2005.

252. 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.

253. 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].

254. Patients are the consumers in the market for hospital supplies that is the primary relevant market of Medical Supply's antitrust claims against the defendants US BANK, US BANCORP and their coconspirators.

255. Doctor Moskowitz also stated; "The Missouri Legislature is wrestling with the most critical domestic issue of our time.

256. It is literally a life and death issue for tens of millions of Americans.

257. It seems to me profoundly un-American, on the eve of our nation's birthday, to have people die simply because Medicaid is still paying retail for drugs."

3) the character of the means used by US BANK and US BANCORP were in bad faith and deceptive; and

4) US BANK and US BANCORP's motive was to take advantage of confidential information and power it had acquired over MSCI to keep MSCI from displacing relationships and income US BANCORP had obtained through its subsidiary US BANCORP PIPER JAFFRAY's manipulation of healthcare technology stocks and exclusive dealing with Novation, LLC.

VIII. Prayer for relief

258. Under *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 (Mo App 1994) US Bank and US BANCORP are responsible for the expectation damages of the forward projections that it had accepted at the time it entered into contract with Medical Supply. The plaintiff is able to prove Medical Supply Chain Inc.'s projected profits with reasonable certainty.

259. Lost future profits may be used as a method of calculating damage where no other reliable method of valuing the business is available, see *Albrecht v. The Herald Co.*, 452 F.2d 124 at 129 (8th Cir. 1971).

Expectation Damages

260. The monetary relief sought is the contract expectation damages as determined by the business plan and forward financials in possession of US BANK and US BANCORP at the

time the escrow was accepted and the contract was formed from the US BANK and US BANCORP defendants.

Punitive Damages For Misappropriation of Trade Secrets

261. MSCI's business plan and associate program are trade secrets and will be made available to the court and defendants for in camera inspection.

262. Mr. LIPARI seeks the lost profits that can be determined with reasonable certainty that MSCI would have made for the next four years of operations, had it been allowed to enter the market for hospital supplies from the US BANK and US BANCORP defendants.

263. The total damages from US BANCORP and US BANK Defendants sought by the plaintiff Mr. LIPARI is four hundred and fifty million dollars ($450,000,000).

264. The plaintiff seeks any other relief the court believes is just.

Respectfully Submitted,

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

Attachments: Exhibit 1 Executive summary of Medical Supply Business Plan

REQUEST FOR JURY

The plaintiff respectfully requests a jury decide all questions of fact.

Samuel K. Lipari

Plaintiff has served a copy of this complaint upon the

Office of the Comptroller of the Currency
1301 McKinney Street, Suite 3450
Houston, TX 77010-9050

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 November, 2006

_____
Notary

Commission expires:

EXECUTIVE SUMMARY

Medical Supply Chain, Inc. ("MSCI" or "The Company") incorporated in October of 2000 and is based in Kansas City, MO. The Company is a leading healthcare supply-chain services firm, providing self-directed supply-chain alternatives to the existing maze of inefficient and fragmented supply-chain processes.

The Company's products and services specifically enable health systems (hospitals, IDN's, nursing facilities and physician groups) with supply-chain initiatives that create substantial cost savings for the health system while creating revenue opportunities for its shareholders. The Company focuses on larger volume consumers of medical and non-medical goods. Company objectives are accomplished by directly assisting health systems through dedicated healthcare executives, representatives and material managers.

MSCI combines its in-depth industry knowledge with best in class data management tools to achieve substantial reductions in product and process cost. These management tools capture dynamic data and give immediate decision support to health system executives when procuring products, managing fulfillment and inventory, tracking logistics, and clearing purchases. This is an extremely attractive offering for many health system who do not have large IT infrastructure budgets yet demand management tools that deliver a lower total cost of doing business. The Companies strategies and tools produce more than 20% in total savings.

MARKET OVERVIEW

Healthcare is faced with critical financial and operational challenges due to the staggering reductions in government-based reimbursement, managed care cost caps, a growing nursing shortage, increases in regulations such as the Health Insurance Portability and Accountability Act (HIPAA), and the annual increases in demand for services largely fueled by the growth in the senior population. Needless to say, healthcare executives must seek out new methods for doing business and more efficient tools to manage the activities without sacrificing the quality of patient care.

Given these conditions, there is clearly a significant opportunity for any company that can demonstrate a reduction in the cost of doing business provided that the quality of patient care is not negatively impacted. The future survival of many health systems depends heavily on their ability to shed inefficient activities and embrace new management strategies. MSCI firmly believes its products and services provide a critical path for health systems to follow leading to broad market acceptance and penetration.

All of The Company research indicates that this is true; and the financial projections indicate that The Company's products and services can be more than competitive while providing substantial returns for the shareholders and its customers.

MARKET DEMAND

The Company has isolated a specific need in the healthcare supply-chain market and has positioned itself to make a significant contribution. This market includes all licensed healthcare delivery service companies nation wide. Within the first five years The Company will contribute substantial cost reductions to the healthcare market. Research conducted by several industry leaders has shown cost reductions of 20%-30% through the use of The Company's products and services. These savings can represent more than $40 billion in annualized healthcare market cost reductions.

ATTACH-11

Research has also shown that entry into this market can be achieved through direct representatives and consultant representatives combined with management's editorial access to leading trade publications. This will ensure that The Company's products and services are received and accepted by most of its targeted market. The Company expects 10%-20% market penetration over the first five years of operations representing more than $10 billion in medical and non-medical purchases.

KEY MARKET COMPONENTS

The Company's products and services are offered in two key components. The primary component is educational based, providing knowledge transfer, along with the strategies required to achieve an efficient supply-chain in the healthcare market. This approach is vital to understanding the fundamentals of supply-chain management, the technology that supports it, how it works, why it works, and how to maintain it. The second component provides the functional automation (management tools) for the activities required to execute and accelerate an efficient supply-chain. This two-component approach provides a natural progression into adoption and implementation of The Company's products and services.

The educational component reflects healthcare economics, limitations of traditional supply-chain management methods, defining and reducing process costs and moving the health system from material management to supply-chain management. The second component provides automation of supply-chain activities, which drives data capture, relationship/contract management and real-time collaboration and visibility across the entire supply-chain regardless of product category or class of trade. This component directly supports all supply-chain activities including procurement, fulfillment, inventory management, clearing and settlement. Benefits to the health system include the elimination of inefficient management and tracking activities, more aggressive data to support contract negotiating and reduced inventory requirements through standardization of product and processes. Benefits also extend to manufacturers and distributors through standardizing management and tracking activities, reduced inventory in the pipeline by synchronizing supply with demand and eliminating inaccurate manufacturing and distribution schedules.

MANAGEMENT TEAM

The Company believes that a key element supporting its proposed products and services is the strength and ability of its management team and advisors. For more than a decade the MSCI management team has developed and implemented supply-chain strategies for health systems in addition to providing insight for several top five consulting firms. Each member of the management team has exceptional abilities and years of business experience to draw from in guiding The Company's growth and profitability. The Company management team is mature, experienced and understands corporate, legal, accounting, investment, and securities considerations, due diligence, exit strategies, and the negotiating process following evaluation.

STRATEGIC OPORTUNITY

1. **EXCLUSIVE TECHNOLOGY PLATFORM AND KNOWLEDGE** The Company management team possess unsurpassed strategic and tactical knowledge regarding the healthcare supply-chain market and its players. Management has exclusive technology supporting its application platform (management tools). Management also supports the findings and analysis in a white paper titled "Blueprint for an Efficient Healthcare Supply Chain". This white paper received global recognition and praise from many in the healthcare supply-chain market and covers why and how all the existing players in healthcare can achieve and implement the benefits of an efficient supply-chain in healthcare.

2. **A HUGE MARKET POTENTIAL** exists in the healthcare market and represents over $200 billion in transactional supply-chain activity (medical & non-medical). Industry experts expect this to increase to $360 billion by the year 2009. Many of the existing 6,000 Health systems (hospitals) are spending in excess of 20%-30% in needless and inflationary process costs. Management has identified one health system out of 6,000 currently utilizing similar strategies and initiatives as those developed by the company. This health system has documented over 20% in total supply-chain cost reduction.

3. **NO SIGNIFICANT COMPETITION** exists because many e-commerce companies have developed solutions for manufacturers and distributors (seller/push). None have accounted for the specific needs demanded by the health system service providers (buyer/pull). Many of the manufacturer and supplier initiatives are cumbersome and require substantial resources to implement and maintain. These supplier driven initiatives were built to work in conjunction with previous ROI requirements of what is now considered obsolete technology. Therefore the solutions offered by suppliers are not acceptable to the health system nor do they provide any direct benefit to the health system. It will require a substantial roll-up of complimentary initiatives to compete with the products and services offered by The Company.

4. **PLUG AND PLAY PRODUCTS AND SERVICES** produce low implementation costs that produce accelerated results for the customer and revenue for The Company and its shareholders. With no more than an ISP (Internet service provider) connection and an Internet browser, a health system can now manage its entire supply-chain with real-time collaboration and visibility across the entire enterprise independent from unwanted influence and leverage.

5. **EXTENSIVE MARKET RESEARCH** was conducted by The Company through leading vertical and horizontal market experts which include health system organizations, print media, newsletters, consulting firms, industry analyst, research studies, white papers and books.

6. **CUSTOMER REPRESENTATIONS** are in various negotiating stages with The Company. Potential customers support 2nd year revenue targets.

60 MONTH FORWARD REVENUES

TERM	ANNUAL	CUMULATIVE
Year 1	$2,451,600	$2,451,600
Year 2	$26,916,576	$29,368,176
Year 3	$74,348,940	$103,717,116
Year 4	$140,233,980	$243,951,096
Year 5	$223,278,060	$467,229,156

CURRENT CONDITIONS the Company has completed its R&D phase and is seeking $3 million in operating capital to commence operations. The company is making application to secure equipment lease (technology) and receivables financing. The Company generates profit in the 9th month of operations and has commitments from customers to attain this goal. Company capitalization combined with over two years of market research and development insures the greatest opportunity for the Company and its shareholders. Please contact MSC at 816-220-4128 or email SamL@MedicalSupplyChain.com

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

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*	) Case No. 06-1012-CV-W-FJG) State Court No. 0616-CV32307
vs.	) (Properly Case No. 05-0210-) CV-W-ODS)
US BANCORP, NA US BANK, NA *Defendants*	

REPLY TO DEFENDANTS' ANSWER

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following reply to the defendants US Bancorp NA and US Bank, NA's suggestion opposing remand.

DISPUTED CONTENTIONS

Plaintiff reasserts and clarifies the following contentions that appear to be disputed by the defendants:

1. Case No. 06-1012-CV-W-FJG is a later filed action duplicating the state law claims in Case No. 05-0210- CV-W-ODS (now Kansas District Court case No. 05-2299-CM) arising from the same transactions and comprises the same case or controversy.

2. The defendants' answer to the state complaint and defendants' reply to the plaintiff's motion to remand both openly state the federal jurisdiction over this controversy should be in Kansas District court.

3. The federal jurisdiction over this controversy *is* exclusively in Kansas District Court and Judge Carlos Murguia's dismissal of state law claims without prejudice under 28 USC § 1367 (c) was suspended by the plaintiff's Motion for Reconsideration.

4. The Tenth Circuit in the related action *Medical Supply Chain, Inc. v. US Bancorp NA, et al.* Case No. 02-3443 (See Exb. 1) ruled that the plaintiff's motion for reconsideration "suspended the finality" of the trial court order.

5. The Tenth Circuit order (See Exb. 1) stating the clearly established rule that was served on the defendants and their present counsel Mark A. Olthoff (MO lic. #38572) and Andrew M. DeMarea (MO lic.

#45217) of the law firm Shughart Thomson & Kilroy, P.C. who are responsible for knowing that their assertion that Kansas District Court does not have jurisdiction over the present action is false.

6. *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM (formerly W.D. Mo. Case No. 05-0210- CV-W-ODS) the first filing of the present state claims against US Bank NA and US Bancorp NA is on appeal before the Tenth Circuit, maintaining exclusive federal jurisdiction over the parties in Kansas District Court and the Tenth Circuit Court of Appeals.

7. Mark A. Olthoff (MO lic. #38572) and Andrew M. Demarea (MO lic. #45217) neglected to appeal Judge Carlos Murguia's dismissal of state law claims without prejudice under 28 USC § 1367 (c).

8. A named defendant in *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM is the Missouri headquartered law firm Shughart Thomson & Kilroy, P.C. in privity with the present defendants and which defeated federal diversity jurisdiction in both the complaint's federal and state law antitrust claims, the latter of which would also be in state court if the Tenth Circuit appeal is dismissed.

9. At the time Shughart Thomson & Kilroy, P.C.'s employee Mark A. Olthoff (MO lic. #38572) filed a notice of removal on behalf of the present defendants US Bank NA and US Bancorp NA, federal trial court jurisdiction still existed in *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM by virtue of the plaintiff's Tenth Circuit appeal.

10. By refilling the present state law based claims, the defendants US Bank NA and US Bancorp NA through Shughart Thomson & Kilroy, P.C. and Mark A. Olthoff (MO lic. #38572) violated the order of Hon. Judge Smith transferring the plaintiff's case or controversy (*Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-2299-CM formerly W.D. Mo. Case No. 05-0210- CV-W-ODS) to the District of Kansas and Judge Carlos Murguia's order declining supplemental jurisdiction under 28 USC § 1367 (c).

11. Dismissal of the plaintiff's appeal in the Tenth Circuit would extinguish federal jurisdiction because Mark A. Olthoff (MO lic. #38572) and Andrew M. Demarea (MO lic. #45217) are precluded by the res judicata effect of failing to seek reconsideration or appeal of Judge Carlos Murguia's dismissal under 28 USC § 1367 (c).

12. The plaintiff's success in a Tenth Circuit Appeal would return jurisdiction to Kansas District Court over the plaintiff's state law claims presently before the court, through improper removal from the concurrent jurisdiction of state court.

13. The plaintiff did not make the patently absurd argument that a party's local counsel defeats diversity jurisdiction through privity, the existing concurrent federal jurisdiction over the plaintiff's claims includes named defendants not present in the state case, including the Missouri defendant Shughart Thomson & Kilroy, P.C.

14. The plaintiff in his Motion for Remand never argued this case should be remanded because US Bank as a national association defeats diversity jurisdiction. The US Supreme court determined it does not.

SUGGESTIONS WARRANTING REMAND

The plaintiff observes that the defendants have provided no authority for suspending the effect of 28 USC § 1367 (c) and have failed to assert any special considerations warranting an exception to the well settled comity between two federal courts rule that the first federal court to obtain jurisdiction over a filed federal complaint has priority over its federal litigation.

Comity between Federal Courts

Here cases involving identical issues are pending before two federal district courts, "though no precise rule has evolved, the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In most "cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it." *Smith v. M'Iver*, 22 U.S. (9 Wheat.) 532, 535 (1824). The Eighth Circuit Court of Appeals has recognized the well-established rule is that in cases of concurrent jurisdiction, "the first court in which jurisdiction attaches has priority to consider the case." *Orthmann v. Apple River Campground Inc.*, 765 F.2d 119, 121 (8th Cir.1985).

The prevailing standard is that "in the absence of compelling circumstances," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu,* 675 F.2d 1169, 1174 (11th Cir.1982), the first-filed rule should apply. *Northwest Airlines v. American Airlines*, 989 F.2d 1002, 1005 (8th Cir.1993) (quoting *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-89 (8th Cir.1990)); see *Keymer v. Management Recruiters Int'l, Inc.*, 169 F.3d 501, 503 n. 2 (8th Cir.1999) (stating this rule and citing *Northwest Airlines*); *Midwest Motor Express, Inc. v. Central States Southeast and Southwest Areas Pension Fund*, 70 F.3d 1014, 1014 [(8th Cir.1995); *Boatmen's First* 57 F.3d 638, 641 (8th Cir.1995)' *Nat'l Bank of Kansas City v. Kansas Pub. Employees Retirement Sys.*, 57 F.3d 638, 641 (8th Cir.1995) (same). Thus, the

first-filed rule requires that the concurrent cases be brought by the same parties and embrace the same issues.

Samuel Lipari is the successor in interest to the original plaintiff Medical Supply Chain, Inc. and is a party in the current Tenth Circuit appeal, otherwise US Bank NA and US Bancorp NA are a sub set of defendants from the first filed case. See *Midwest Motor Express*, 70 F.3d at 1017; accord *Keymer*, 169 F.3d at 503 n. 2 ("The first-filed rule gives priority, when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction in order to conserve judicial resources and avoid conflicting rulings."); *Anheuser-Busch, Inc. v. Supreme Int'l Corp.*, 167 F.3d 417, 419 (8th Cir.1999) ("The well-established rule is that in cases of concurrent jurisdiction, `the first court in which jurisdiction attaches has priority to consider the case.'") (quoting *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir.1990)) (internal quotations omitted).

The absence of any authority supporting the defendants' objection to the basis the plaintiff sought remand on does no service to the court. Similarly, the defendants' counsel Mark A. Olthoff (MO lic. #38572) refilled this action with claims that had already been filed in the Western District of Missouri between the same parties without disclosing such to the Clerk of the Court or in the removal notice addressed to the Judges of the Western District of Missouri signed by Mark A. Olthoff (MO lic. #38572). This conduct is described at length in *Disability Advocates and Counseling v. Betancourt*, 379 F.Supp.2d 1343 (S.D. Fla., 2005). Mark A. Olthoff (MO lic. #38572) is clearly attempting to repeatedly deceive the court.

28 USC § 1367

The defendants have conclusorily dismissed the plaintiff's controlling case law that the Kansas District Court retains exclusive federal jurisdiction over all claims arising under the same case or controversy even during periods it does not choose to exercise it because the court can change that decision at any time:

> "While the district court's power to exercise jurisdiction under the "same case or controversy" requirement in 28 U.S.C. § 1367(a) is one ordinarily resolved on the pleadings, the court's decision to exercise that jurisdiction **"is one which remains open throughout the litigation**." *United Mine Workers v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139-40, 16 L.Ed.2d 218 (1966) (discussion of pendent jurisdiction and discretionary power of federal trial court to refuse to hear state law claims, now codified by 28 U.S.C. § 1367). [Emphasis added]

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284 at 1287-88 (C.A.8 (S.D.), 1998).

Consequently the defendants are attempting to deceive this court again when they argue that because the state claims were dismissed without prejudice they can be removed in a second federal action. The claims are still subject to the first court's jurisdiction under United Mine Workers and the reconsideration and appeal suspended the effect of or finality of the first court's order dismissing the state law claims.

Conclusion

The plaintiff respectfully requests that this action be remanded to Missouri state court from where it was removed.

Respectfully submitted,

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

Certificate of Service

I certify that on January 4, 2007 I have served the opposing counsel with a copy of the foregoing notice using the CM/ECF system via the office of the clerk, which will send a notice of electronic filing to the following:

Mark A. Olthoff
MARK A. OLTHOFF MO lic. #38572
ANDREW M. DEMAREA MO lic. #45217
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
120 W. 12th Street, Suite 1700
Kansas City, Missouri 64105
Telephone: (816) 421-3355
Facsimile: (816) 374-0509

ATTORNEY FOR DEFENDANTS
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

Samuel K. Lipari

FILED United States Court of Appeals Tenth Circuit **DEC 10 2003 PATRICK FISHER** Clerk

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. 02-3443 (D.C. No. 02-CV-2539-CM) (D. Kan.)

ORDER AND JUDGMENT*

Before **EBEL**, **PORFILIO**, and **McCONNELL**, Circuit Judges.

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

EXB #1

ordered submitted without oral argument.

This appeal is taken from an order of the district court denying plaintiff's two motions for a preliminary injunction. Our jurisdiction was invoked under 28 U.S.C. § 1292(a)(1), which provides for interlocutory appeals from district court orders granting or denying injunctions.

Following the district court's denial of the injunction, and while this case was pending on appeal, the district court entered a final judgment dismissing plaintiff's action. Plaintiff then filed a combined motion for new trial/amendment of judgment and for retrial on the denial of the preliminary injunction. This timely filed motion effectively suspended the finality of the district court's judgment. The district court has recently denied plaintiff's motion, and plaintiff has filed a new notice of appeal, our No. 033342, seeking review of the district court's dismissal of its action.

"[M]ootness is a matter of jurisdiction, [and] a court may raise the issue sua sponte." *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996). Because the district court has now dismissed the action, this interlocutory appeal is moot. *See Sac & Fox Nation v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir. 1999) (dismissing interlocutory appeal from denial of preliminary injunction where district court subsequently dismissed complaint); *see also Atomic Oil Co. of Okla. v. Bardahl Oil Co.*, 419 F.2d 1097, 1102 n.9 (10th Cir. 1969) (noting order granting or denying preliminary injunction merges into decree granting or denying permanent injunction, and where both orders are appealed, former will be dismissed).

Accordingly, we DISMISS the appeal as moot.

Entered for the Court

Michael W. McConnell

Circuit Judge

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

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 06-1012-CV-W-FJG**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

JOINT REPORT OF PARTIES' PLANNING CONFERENCE AND PROPOSED SCHEDULE

Pursuant to the Court's January 3, 2007 Order, the defendants have taken the lead in preparing the proposed schedule. Plaintiff was sent a copy by regular and certified mail on January 26, 2007. Defendants also sent a reminder letter to plaintiff on February 5, 2007. To date, plaintiff has not responded, other than (1) his January 4 motion to consider the January 3 Order and (2) his January 31 motion to stay the entire case. While defendants do not oppose a stay of discovery and other deadlines pending a ruling on the motion to remand and motion to dismiss, because of the requirement to file this proposed schedule by February 9, 2007, the following proposal is submitted by the defendants:

1. **Plan for Pre-Discovery Disclosures.** The parties are to exchange the information required by Fed. R. Civ. P. 26(a)(1) on or before March 2, 2007.

2. **Plan for Discovery.** The parties jointly propose to the Court the following discovery plan:

   a. All discovery shall be commenced or served in time to be completed by September 7, 2007.

   b. Interrogatories.

      Maximum of 25 interrogatories by plaintiff and 25 by defendants as set forth by the Federal Rules of Civil Procedure.

c. Depositions.

Maximum of 10 depositions by plaintiff and 10 by defendants. The time limits of the Federal Rules of Civil Procedure shall apply.

d. Experts.

Disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, shall be served by plaintiff on or before June 1, 2007, and by defendants on or before July 16, 2007.

3. Deadlines for Amendments and Potentially Dispositive Motions.

a. Any motion for leave to join additional parties or to otherwise amend the pleadings shall be filed on or before March 15, 2007.

b. Discovery motions will be due on or before August 1, 2007.

c. All dispositive motions shall be filed on or before October 8, 2007.

4. Other Items.

a. At the present time, the length of trial cannot be accurately estimated given the breadth of issues pleaded. However, defendants believe the case may take 3-5 days to try.

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

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

PLAINTIFF

/s/ Mark A. Olthoff
MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA MO #45217
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

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

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 06-1012-CV-W-FJG
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

ORDER

Currently pending before the Court is plaintiff's Motion to Remand (Doc. # 6); plaintiff's Motion for a More Definite Statement (Doc. # 10); plaintiff's Motion to Vacate Case Management Order (Doc. # 11); defendants' Motion for Leave to File Excess Pages (Doc. # 15); defendant's Motion to Dismiss or in the Alternative to Transfer (Doc. # 16) and plaintiff's Motion to Stay Further Proceedings Pending Appeal (Doc. # 18).

I. BACKGROUND

On October 22, 2002, Medical Supply Chain, Inc. ("Medical Supply") filed an action in the United States District Court for the District of Kansas alleging both state and federal claims Medical Supply Chain, Inc. V. U.S. Bancorp, N.A. et al., Case 02-2539, ("Medical Supply I"). On June 16, 2003, Judge Murguia dismissed the federal claims with prejudice and dismissed the state claims without prejudice. This decision was affirmed by the Tenth Circuit. The second case brought by plaintiff was Medical Supply Chain Inc. v. General Electric Company et al., Case No. 03-2324 which was filed on June 18, 2003 ("Medical Supply II"). On January 29, 2004, the Court granted

defendants' Motions to Dismiss. The Tenth Circuit affirmed the dismissal of these claims on July 26, 2005. Medical Supply then filed an identical action in the Western District of Missouri on March 9, 2005 captioned Medical Supply Chain, Inc. v. Neoforma, Inc. (05-210-CV-W-ODS) ("Medical Supply III"). In that case, U.S. Bancorp and U.S. Bank National Association were named again as defendants in the Complaint which also alleged violations of state and federal law. On June 15, 2005, Judge Ortrie Smith transferred Medical Supply III to the District of Kansas. On March 7, 2006, Judge Murguia granted defendants' motion to dismiss. Medical Supply appealed this order to the Tenth Circuit where it remains pending. On November 28, 2006, Samuel Lipari filed the instant action in Jackson County Circuit Court against U.S. Bancorp, NA and U.S. Bank NA (Jackson County Case No. 0616-CV-32307). On December 13, 2006, the defendants removed the action to this Court on the basis of diversity. Defendants now move to dismiss plaintiff's case or alternatively to transfer it to the District of Kansas pursuant to 28 U.S.C. § 1404 (a). Plaintiff did not respond to the Motion to Dismiss or Alternatively to the Motion to Transfer.

II. STANDARD

28 U.S.C. § 1404(a) provides, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The Court in Houk v. Kimberly-Clark Corp., 613 F.Supp. 923, 927 (W.D.Mo. 1985), stated that "[i]n any determination of a motion to transfer under § 1404(a), the plaintiff's choice of a proper forum is entitled to great weight, and will not be lightly disturbed." The Court also observed:

It is incumbent upon the party seeking transfer to make a clear showing

> that the balance of interests weighs in favor of the proposed transfer, and unless that balance is strongly in favor of the moving party, the plaintiff's choice of forum should not be disturbed. . . . Where the balance of relevant factors is equal or only slightly in favor of the movant, the motion to transfer should be denied.

Id. at 927 (internal citations omitted).

In Enterprise Rent-A-Car Co. v. U-Haul International, Inc., 327 F.Supp.2d 1032 (E.D.Mo. 2004) the Court stated:

> In determining whether or not to transfer venue, the Court must consider the three general categories of factors stated in §1404(a): (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) whether the transfer would be in the interest of justice.

Id. at 1045 citing Terra Int'l, Inc. v. Mississippi Chem. Corp., 119 F.3d 688, 691 (8th Cir.), cert. denied, 522 U.S. 1029, 118 S.Ct. 629, 139 L.Ed.2d 609 (1997).

III. DISCUSSION

A. Motion to Transfer

Defendants state that this is the third lawsuit stemming from the same operative facts where Medical Supply Chain or Mr. Lipari have named U.S. Bancorp and U.S.Bank as the defendants.[1] Defendants state that federal courts have consistently and uniformly ordered section 1404(a) transfers to other federal district courts when related lawsuits are pending in the transferring court. In Prudential Insurance Co. of America v. Rodano, 493 F.Supp. 954 (E.D.Pa. 1980), the Court stated:

> The most compelling reason for transfer is that it would best serve the interests of justice. The presence of two related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served

[1]Neither U.S. Bancorp nor U.S. Bank Association were named as defendants in Case 03-2323.

> when federal cases arising out of the same circumstances and dealing with the same issues are allowed to proceed separately. The substantial likelihood that this case will be consolidated with the two related cases pending in the United States District Court of Maryland, sitting at Baltimore, weighs heavily in favor of transfer.

Id. at 955.

Defendants do not discuss whether it would be more convenient for the witnesses and parties if this case were transferred to the District of Kansas. However, because the locations of the two courthouses are relatively close, the Court does not find that transferring this case would play a major factor for either the parties or the witnesses. Additionally, the Court finds that the interests of justice would be better served if this case were transferred to the District of Kansas. That district has become extensively familiar with the plaintiff and his various lawsuits over the years. Transfer of this case would conserve judicial resources and avoid the risk of potentially conflicting rulings from different courts.

As mentioned previously, the plaintiff's choice of forum is entitled to great deference. However, the Court finds that the balance of interests in this case weighs strongly in favor of transferring this case due to the extensive previous history that plaintiff has had with his various cases in the District of Kansas. Therefore, because the District of Kansas is a proper alternative forum, this Court hereby **GRANTS** defendants' Motion to Transfer this case to the District Court of Kansas (Doc. # 16).

B. Motion to Remand

Plaintiff moves to remand this case because he states that the Kansas District

Court still has jurisdiction over his state law claims[2]. Plaintiff also states that diversity jurisdiction does not exist. Plaintiff does concede that the Supreme Court has determined that national bank associations are to be treated as residents of the state in which they have their main office, but he argues that this does not save the defendants' removal from being frivolous. He states that diversity jurisdiction still does not exist, despite the movement of the pendant claims to state court. Plaintiff states that claims were filed against the Missouri domiciled defendant Shugart, Thompson & Kilroy as a defendant. Thus, he argues that the presence of this defendant destroys diversity jurisdiction.

Defendants state in opposition that the Motion to Remand should be denied because diversity jurisdiction exists between the parties and the removal was proper. Defendants note that there is no Missouri defendant who was named in plaintiff's state court petition. In his state court petition filed on November 28, 2006, plaintiff named only U.S. Bancorp and U.S. Bank, both of whom are considered Minnesota residents. Additionally, defendants note that the District Court in Kansas did not retain jurisdiction over plaintiff's state law claims, but rather dismissed these claims without prejudice.

The Court agrees with defendants and finds that the removal was proper and diversity jurisdiction exists between the parties. Accordingly, the Court finds no basis for remanding this action and therefore **DENIES** plaintiff's Motion to Remand (Doc. # 6).

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[2] It is unclear how this argument would support remanding this case to the Jackson County court.

III. CONCLUSION

The Court **GRANTS** defendants' Motion for Leave to File Excess Pages (Doc. # 15); **DENIES** as **MOOT** plaintiff's Motion to Reconsider the Court's Case Management Order (Doc. # 11); **DENIES** as **MOOT** plaintiff's Motion to Stay (Doc. # 18); **DENIES** plaintiff's Motion for a More Definite Statement (Doc. # 10); **DENIES** plaintiff's Motion to Remand (Doc. # 6) and **GRANTS** defendants' Motion to Transfer this Case to the District Court of Kansas (Doc. # 16).

Date: 4/4/07
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:07-cv-02146-CM-DJW**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants U.S. Bancorp and U.S. Bank National Association (U.S. Bank) are entitled, as a matter of law, to be dismissed from this case. In support of their motion and as grounds for dismissal, defendants state as follows:

1. Plaintiff Lipari does not have standing or legal capacity to assert a claim on behalf of a dissolved corporation (Medical Supply Chain, Inc.). Even if claims could be stated, which they cannot, the supposed causes of action belong to Medical Supply Chain, Inc. and not Lipari personally. Missouri law precludes a shareholder from asserting claims of the corporation, this Court has previously ruled Lipari cannot be substituted for Medical Supply and principles of judicial estoppel prevent the assertion of these claims by Lipari personally.

2. The Complaint fails to comply with Fed. R. Civ. P. 8. The Complaint is a rambling diatribe of unsubstantiated and hollow conspiracy theories, irrelevant allegations and wild accusations. This lawsuit, just as *Medical Supply II*, is ripe for dismissal under Rule 8.

3. The claims in Lipari's Complaint are barred by *res judicata*. The prior dismissals, in particular under Fed. R. Civ. P. 8 in *Medical Supply II*, 419 F. Supp.2d 1316, 1331-32 (D. Kan. 2006), preclude the present claims.

4. Plaintiff's Complaint fails to state a claim upon which relief may be granted under Rule 12(b)(6). Even observing the allegations in a light most favorable to plaintiff, there are no claims as a matter of law.

5. Lipari's vituperative allegations concerning District Judge Kathryn Vratil, District Judge Carlos Murguia, Magistrate Judge James P. O'Hara, and the law firm of Shughart Thomson & Kilroy, P.C. should be stricken from the Complaint as scandalous, immaterial and frivolous.

6. Defendants have filed a Memorandum in Support of this Motion and incorporate by reference all arguments in the Memorandum as if fully set forth herein.

WHEREFORE, for the above-stated reasons and as more fully discussed in the Memorandum in Support, defendants request the following relief:

1. ***All claims*** in Plaintiff's Complaint be dismissed ***with prejudice***;

2. The Court admonish Samuel Lipari that, should he or Medical Supply bring another action based on the facts and transactions pled in *Medical Supply I, Medical Supply II* or this matter, Lipari and/or Medical Supply may be enjoined and a Show Cause Order issued (*see Serrano*, 2007 WL 951612 *3 (W.D. Tex., Mar. 19, 2007); *see also Johnson v. Stock*, 2005 WL 1349963 *3-4 (10th Cir. 2005) (unpublished));

3. That, should Samuel Lipari or Medical Supply choose to file a subsequent lawsuit based upon the facts pled in *Medical Supply I*, *Medical Supply II* or this case, Medical Supply and/or Lipari first satisfy all orders and judgments previously entered awarding sanctions and attorneys' fees against Medical Supply or Lipari;

4. That the allegations concerning District Judge Kathryn Vratil, District Judge Carlos Murguia, Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy be stricken;

5. For all other relief to which the Defendants are justly entitled.

Respectfully submitted.

/s/ Mark A. Olthoff
MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing was filed via electronic case filing this 25th day of April, 2007, with a true and correct copy being delivered via United States mail, postage prepaid, to:

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

PLAINTIFF

/s/ Mark A. Olthoff
Attorney for Defendants

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:07-cv-02146-CM-DJW**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS AND STRIKE

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STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

The Court is all too familiar with the history of this litigation having presided over several previous lawsuits, each of which was based upon the same set of facts. On or around November 12, 2002, Medical Supply Chain, Inc. ("Medical Supply") first filed this case in the United States District Court for the District of Kansas bringing federal and state law claims against these defendants and others. (*See* Complaint in *Medical Supply I*, attached as **Exhibit A** ("*Medical Supply I*").) On June 16, 2003, this Court dismissed the lawsuit. 2003 WL 21479192 (D. Kan., June 16, 2003). Medical Supply appealed the decision to the Tenth Circuit Court of Appeals where it was affirmed. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished). The Tenth Circuit also found that Medical Supply's counsel had filed a frivolous appeal and remanded the matter to this Court to determine sanctions. (*See* Order, attached as **Exhibit B**.)

While this Court determined the sanctions amount in *Medical Supply I*, *see* 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed another action in the Western District of Missouri, again naming U.S. Bancorp and U.S. Bank National Association (U.S. Bank) as defendants and including the same federal and state law claims as in *Medical Supply I*. (*See* Complaint in *Medical Supply II*, attached as **Exhibit C** ("*Medical Supply II*").) The Missouri court transferred the matter to this Court which granted defendants' motion to dismiss and issued further sanctions against both Medical Supply's former counsel and Medical Supply. 419 F. Supp.2d 1316 (D. Kan. 2006). Medical Supply has appealed the *Medical Supply II* judgment to the Tenth Circuit. *See* Docket of Tenth Circuit (Case No. 06-3331).

Now, Mr. Lipari (instead of the apparently dissolved Medical Supply) sets forth the identical factual allegations for the **third** time under the guise of state law causes of action. Originally filed in Missouri state court and removed to the Western District of Missouri, that court recently transferred the action here. For the reasons that follow, the Court should dismiss this lawsuit with prejudice

following the precedents of *Medical Supply I* and *Medical Supply II* and, further, take such further actions as appropriate to curb the filing of any more lawsuits based upon these alleged facts.

II. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED

The plaintiff's Complaint should be dismissed with prejudice because: (1) plaintiff does not have standing to maintain this action; (2) plaintiff's claims against the defendants are barred by *res judicata*; (3) plaintiff's Complaint fails to comply with Fed. R. Civ. P. 8; or (4) plaintiff's Complaint fails to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6). For any or all of these reasons, this Court must dismiss plaintiff's Complaint with prejudice.

A. Plaintiff Does Not Have Standing To Maintain This Action

Samuel Lipari purports to bring this action alleging he is "the sole assignee of rights for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer. . . ." *See* Complaint at p. 1. The plaintiff does not explain in the Complaint how Medical Supply was dissolved, though he previously advised this Court that he voluntarily dissolved it. (*See* **Exhibit D**.) In any event, Lipari may not maintain this action in his personal capacity.

Under Missouri law, a dissolved Missouri corporation continues business in the name of the corporation in order to wind up its business and affairs. *See* R.S.Mo. §§ 351.476, 351.486.[1] A sole shareholder is prohibited from bringing a cause of action that was held by the dissolved corporation. By way of example, in *Hutchings v. Manchester Life and Cas. Management Corp.*, 896 F. Supp. 946 (E.D. Mo. 1995), the plaintiff (sole shareholder) attempted to assert several causes of action belonging to a dissolved corporation. However, because the Complaint sought relief based on the plaintiff's personal capacity rather than as a trustee acting on behalf of the dissolved corporation, the

[1] Although this matter was transferred from the Western District of Missouri, "The transfer of a case to another district does not alter the applicable law. The transferee court must apply the same law applicable in the transferor court." *Hill's Pet Products, a Div. of Colgate-Palmolive Co. v. A.S.U., Inc.*, 808 F. Supp. 774, 776 n.3 (D. Kan. 1992). Missouri law is therefore applicable for the determination of this motion. Moreover, the capacity to sue or be sued is determined by the law of the state of incorporation or, in the case of an individual, the state of domicile. Fed. R. Civ. P. 17(b). Thus, the Missouri corporation statutes apply.

court dismissed the plaintiff's Complaint in its entirety. *Id.*; *see also Gunter v. Bono*, 914 S.W.2d 437, 440-41 (Mo. App. E.D. 1996); *Mabin Constr. Co. v. Historic Constr., Inc.*, 851 S.W.2d 98, 103 (Mo. App. W.D. 1993).

The same holds true in this matter. The plaintiff is making claims belonging to the dissolved corporation, Medical Supply. Even if he was the sole shareholder, Lipari cannot maintain this action in his personal capacity. *See also Tal v. Hogan*, 453 F.3d 1244, 1254-55 (10th Cir. 2006), *cert. denied* 127 S. Ct. 1334 (2007) (applying Oklahoma law).

This Court has also previously found these claims belonged to the corporation when it denied Lipari's attempt to substitute himself as the plaintiff in *Medical Supply II*. (*See* Order August 7, 2006 attached as **Exhibit E**.) In rejecting the substitution request, the Court recognized that, even though the corporation had been dissolved, the claims nevertheless remained with the corporation.

Finally, Medical Supply's prior representations to this Court and the Tenth Circuit Court of Appeals also compel finding that Lipari has no standing to bring this suit. In each of the previous matters (which stem from the same set of facts and circumstances here), the plaintiff alleged the causes of action belonged to Medical Supply. Judicial estoppel thus prevents Lipari from now asserting these claims in his personal capacity in contradiction to the repeated prior representations to this Court and the Tenth Circuit. *See Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005).

Simply put, this suit is yet another attempt to evade this Court's earlier rulings (just as the *Medical Supply II* Complaint filed in Missouri federal court was an effort to forum shop and avoid the *Medical Supply I* result). Mr. Lipari does not have standing in his personal capacity to bring Medical Supply's claims and this Court should dismiss this action with prejudice.

B. The Federal Rules of Civil Procedure require the plaintiff's Complaint to be pled in a simple, concise and direct manner. Even if Lipari does not lack

standing to sue, the Complaint violates the Federal Rules of Civil Procedure and should be dismissed with prejudice.

Plaintiff's Complaint may also be dismissed for failing to comply with Fed. R. Civ. P. 8. Rule 8(e)(1) states that "Each averment of a pleading shall be simple, concise, and direct." Here, plaintiff's Complaint is 75 pages and consists of 264 paragraphs, many of which are nothing more than plaintiff's ramblings. For example, paragraphs 61 through 67 contain statements that a venture capital firm visited Medical Supply; that Medical Supply believed much of the assets in venture funds were from overvalued equities in telecom technology; that the collapse of WorldCom would depress these venture markets; that Medical Supply's technology is superior to that of several other companies, including Cerner; and that Medical Supply would not compromise itself by being aligned with an existing healthcare supplier. Paragraphs 252-57 contain citations to newspaper articles; testimony before the Missouri Legislature; statistics on the cost of health care; and the number Missouri residents without access to Medicaid. Plaintiff's Complaint is full of baseless conspiracy theories and hollow allegations that have no relation to the supposed causes of action. Rule 8 dismissal is appropriate here just as it was in *Medical Supply II*. *See Huggins v. Hilton*, 180 Fed. Appx. 814 (10th Cir. 2006); *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 439 (8th Cir. 1983).

In *Medical Supply II*, this Court addressed this same issue and dismissed Medical Supply's Complaint for failing to comply with Rule 8. There, this Court stated that the Complaint "falls miles from Rule 8's boundaries. . . . In sum, plaintiff's complaint is so exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331.

The Court also denied Medical Supply's request to amend its Complaint in *Medical Supply II*. Given the long history of plaintiff's pleadings in both *Medical Supply I* and *II*, "amendment would be futile." *Id.* at 1332. This Court also observed that the defendants had sought

sanctions under Rule 11 and had given Medical Supply's attorneys the required 21 days to amend the complaint pursuant to Rule 11(c)(1)(A), yet Medical Supply had failed to do so. The Court also found that Medical Supply had recently changed attorneys and the new attorney had chosen not to amend the complaint and thus adopted it has his own. *Id.* Therefore, Medical Supply's Complaint was dismissed in its entirety.

This Court should also dismiss the current Complaint in its entirety. Like *Medical Supply II*, Lipari's Complaint in this matter does not contain a short, concise statement of facts and "falls miles from Rule 8's boundaries." 419 F. Supp.2d at 1331. Mr. Lipari, through Medical Supply, has had countless opportunities to file pleadings but refuses to comply with Rule 8. Therefore, this Court should refuse any request to amend, and dismiss this Complaint in its entirety, with prejudice, under Rule 8 of the Federal Rules of Civil Procedure.

C. Even if Lipari does not lack standing, Plaintiff's Claims and Causes of Action have twice been dismissed by a Court of competent jurisdiction and are therefore barred by the Doctrine of *Res Judicata.*

Even if Lipari may file suit in his personal capacity, his causes of action are barred by *res judicata*. Medical Supply's earlier lawsuits in *Medical Supply I* and *II* (**Exhibits A and C**)[2] were based upon the same conduct, transaction and set of operative facts alleged here. Because these lawsuits have been dismissed twice by this Court, *see* 2003 WL 21479192; 419 F. Supp.2d 1316, the causes of action against U.S. Bancorp and U.S. Bank in this suit should be dismissed by reason of *res judicata*.

As above, Lipari alleges here that he is the assignee "of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. . . ." Complaint, ¶ 37. Even if

[2] Medical Supply also filed another suit in this Court, *Medical Supply Chain, Inc. v. General Electric Co., et al.*, which was also dismissed. *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100 (D. Kan., Jan. 29, 2004), *aff'd in part*, 144 Fed. Appx. 708 (10th Cir. 2005). Many of the same allegations are included in this Complaint.

so, under Missouri law, "[A]n assignee acquires no greater rights than the assignor had at the time of the assignment." *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-557(Mo. App. S.D. 2004) (quoting, *Carlund Corp. v. Crown Center Redevelopment,* 849 S.W.2d 647, 650 (Mo. App. 1993)); *see also Centennial State Bank v. S.E.K. Constr. Co., Inc.,* 518 S.W.2d 143, 147 (Mo. App. 1974). As a result, Lipari must stand in Medical Supply's shoes and can occupy no better position than Medical Supply would have if it sued these defendants directly. *Id.* Accordingly, "common law principles compel the conclusion that any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari]." *Id.*

The preclusion principle of *res judicata* prevents "the relitigation of a claim on grounds that were raised or **could have been raised** in the prior suit." *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990) (emphasis added), *cert. denied*, 498 U.S. 823 (1990). The doctrine of *res judicata* bars relitigation of a claim if: "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *Id.*; *see also Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997), *cert denied*, 522 U.S. 1090 (1998); *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987).[3] When a "cause of action" or "claim" "arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same claim or cause of action for purposes of *res judicata*." *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997).

This suit is barred by *res judicata* because, among the many reasons for dismissal of *Medical Supply II*, the Court found that Medical Supply's Complaint violated Fed. R. Civ. P. 8 and was "so

[3] Section 24 of the Restatement (Second) of Judgments also provides that : When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar[,] . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Thus, "a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." *Lane v. Peterson*, *supra*, 899 F.2d at 742.

exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331. Amendment was not permitted and the Complaint was dismissed in its entirety. *Id*. at 1332.

While this Court did not reach the Rule 12(b)(6) arguments for dismissal of the state law claims in *Medical Supply II*, 419 F. Supp.2d at 1330, in setting forth an alternative basis for dismissal under Rule 8, and denying any amendment, the Order constituted a final adjudication on the merits of the claims sufficient to trigger *res judicata*. *See Micklus v. Greer*, 705 F.2d 314, 317 n.3 (8th Cir. 1983) (noting that dismissal under Rule 8 without leave to amend is deemed dismissal on the merits sufficient to trigger *res judicata*); *see also Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997) ("It is well settled that denial of leave to amend constitutes *res judicata* on the merits of the claims which were the subject of the proposed amendment."); *Serrano v. Union Planters Bank, N.A.*, 2007 WL 951612 *3 (W.D. Tex., Mar. 19, 2007) (dismissing claims *inter alia* for failing to meet Rule 8 standards and *res judicata* where the same claims were dismissed in a prior lawsuit).

Both U.S. Bancorp and U.S. Bank were defendants in *Medical Supply I* and *II* just as here. *Medical Supply I* and *II* were premised on the same facts and causes of action alleged by the plaintiff in this matter.[4] While Medical Supply is not named as a party to this suit, Mr. Lipari purports to bring this suit based upon his privity with Medical Supply's interest. As stated, Lipari can have no greater right than that possessed by Medical Supply. *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-57 (Mo. App. S.D. 2004). Because Medical Supply's causes of action against both U.S. Bancorp and U.S. Bank would be barred by *res judicata* by reason of the Rule 8 dismissal in

[4] Plaintiff's claim for violation of trade secrets under R.S.Mo. § 417.450 specifically was included in *Medical Supply I* (Exhibit A Count VII). This is a claim which **was or could have been raised** in *Medical Supply II* (and was raised in factual allegations, Exhibit C at ¶¶ 316-332, and the dismissed RICO Count XV, at ¶¶ 587-88) and therefore does not defeat dismissal under the doctrine of *res judicata*. *See Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990).

Medical Supply II, Lipari has no right to maintain this action as an assignee. This matter should be dismissed in its entirety with prejudice.

D. Even if Not Barred by Lipari's lack of standing, Rule 8 or *Res Judicata*, Plaintiff's Claims Should Be Dismissed For Failure to State a Claim under Rule 12(b)(6).

In deciding a motion to dismiss, this Court must accept the well-pled factual allegations in the Complaint as true and grant the plaintiff the benefit of any inferences that are reasonably supported by those factual allegations. However, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). Stated differently, this Court need not "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Plaintiff's allegations here are conclusory, invite unwarranted inferences and the various tort and common law claims asserted are meritless on their face, even when viewed in the light most favorable to plaintiff. Accordingly, dismissal is appropriate in this case.

1. Count I: Damages for Breach of Contract

Plaintiff's breach of contract claim is without merit. The elements of a breach of contract claim are: (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder with respect to a definite subject matter; (3) a valid consideration; (4) part performance by one party and prevention of further performance by the other; and (5) damages measured by the contract and resulting from its breach. *Scher v. Sindel*, 837 S.W.2d 350, 354 (Mo. App. E.D. 1992).

The basis for plaintiff's breach of contract claim is that Lipari and Brian Kabbes of U.S. Bank exchanged email negotiations regarding Medical Supply's desire for escrow services including that Kabbes e-mailed Lipari a contract; that Lipari and Kabbes agreed to lower the normal fees for escrow agent services; U.S. Bank compensation; the investment of long and short term held

funds; the name of the escrow agent; and payment schedule (Complaint at ¶ 201). Plaintiff further alleges that defendants performed diligence to determine whether to contract with Medical Supply (*id.* at ¶ 202); and that Kabbes also requested corporate good standing documentation from Medical Supply which was provided (*id.* at ¶ 203).[5]

It is hornbook law that the existence of a valid and enforceable contract is dependent upon agreement of the parties, or meeting of the minds, upon the terms of that contract. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. App. S.D. 2002). As the *Hammons* court stated:

> "*Negotiations or preliminary steps towards a contract do not constitute a contract*. The existence of a contract necessitates a 'meeting of the minds' which the court determines by looking at the intention of the parties as expressed in their words or acts. Whether a contract is made and, if so, what the terms of that contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties."

Id. (*quoting Gateway Exteriors, Inc. v. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. E.D. 1994) (emphasis supplied). At best, Medical Supply and U.S. Bank were *negotiating* a potential written contract which never came to fruition. Obviously, had there been a meeting of the minds between the parties, a written contract memorializing all of these terms would have been executed. Plaintiff's supposition that an oral contract was formed based on the negotiation of the terms of a potential written agreement is insufficient to support its claim. *Hammons*, 63 S.W.3d at 325.

No reasonable person reviewing the facts as set forth in plaintiff's Complaint could conclude that a contract was formed between Medical Supply and U.S. Bank. Plaintiff cannot legitimately allege that any U.S. Bank representative, including Kabbes, stated or even implied that the escrow accounts had been approved by U.S. Bank. It is clear that the changes allegedly suggested by Kabbes and agreed to by Medical Supply were indicative of parties negotiating a potential contract.

---

[5] Defendants note that plaintiff nowhere pleads the existence of a purported contract with U.S. Bancorp. It is also clear that the supposed contract is alleged to have been between U.S. Bank and Medical Supply, not Lipari.

Therefore, plaintiff's cause of action for breach of contract fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6).

2. Count II: Damages for Fraud and Deceit

Count II of the Complaint purports to claim damages for fraud and deceit. Plaintiff alleges that Brian Kabbes falsely represented that U.S. Bank would not perform escrow services to Medical Supply because of the "know your customer" provisions of the Patriot Act. (Complaint ¶ 210.) As support for this claim, plaintiff includes approximately ten single spaced pages of what he claims was a call between representatives of Medical Supply and the defendants. (Complaint ¶¶ 214, 215.) Plaintiff then alleges the following in paragraph 216:

> MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce U.S. BANK'S promise with the defendants' officer Brian Kabbes upon learning that U.S. BANK was not going to provide the escrow services. MSCI and and (*sic*) SAMUEL LIPARI justifiably relied upon the fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of U.S. BANK's Commercial Trust department and instead contacted U.S. BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

Plaintiff further alleges that the defendants made the fraudulent misrepresentation with knowledge of its falsity or with reckless disregard as to "whether it was true or false to the point of not checking and realizing that the increased duties of the 'know your customer' for new account holders had not been enacted." (Complaint ¶ 217.)

The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and (6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App.

W.D. 2002). There must be more than mere suspicion, surmise and speculation. *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo. Ct. App. 1997).

Plaintiff's fraud claim delineated in Count II is legally insufficient. Assuming all facts as true, even if the defendants stated the "know your customers" provision of the Patriot Act was the reason for not providing escrow accounts, there is no allegation that this statement was made with the intent for Medical Supply to act upon it. Thus, regardless if the statement is false and justifiably relied upon by Medical Supply (which defendants strongly deny), no reasonable person could interpret that the statement was made by the defendants with the intent for Medical Supply to act or refrain from acting in a particular manner.

Further, plaintiff's claim that it relied upon this statement is nonsensical. Plaintiff asserts that because Medical Supply relied on the statement, Mr. Lipari did not call the St. Louis branch of U.S. Bank, but instead called U.S. Bancorp, which angered Lars Anderson and Susan Paine. This nonsensical allegation does not show the plaintiff justifiably relied on the statement or that any action it took in reliance on the statement was detrimental to the plaintiff. For these reasons, plaintiff's fraud claim in Count II should be dismissed with prejudice pursuant to Rule 12(b)(6).

3. Count III: Misappropriation of Trade Secrets under R.S.Mo. § 417.450.

Under Missouri law, the misappropriation of trade secrets occurs when one acquires a trade secret through improper means such as theft or bribery; or when one discloses a trade secret without consent or knew or had reason to know that the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy. *See H&R Block Eastern Tax Services, Inc. v. Enchura*, 122 F. Supp.2d 1067, 1074 (W.D. Mo. 2000).

The following is a summary of the allegations plaintiff makes to support his misappropriation claim:

- On or about October 10, 2002 plaintiff gave a copy of the Medical Supply business plan and associate program booklets to U.S. Bank employee Douglas Lewis to apply for the escrow accounts Medical Supply was seeking. (Complaint ¶ 108);

- The business plan and associate booklets "had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained therein." (Complaint ¶ 109);

- The letter of introduction also addressed the confidential nature of the documents (Complaint ¶ 110);

- After delivery, Mr. Lipari was given a loan application and agreed to return the next day (Complaint ¶ 114);

- On or about November 6, 2002, Mr. Lipari sought to retrieve the documents given to Mr. Lewis on October 10, 2002 (Complaint ¶ 189);

- Upon retrieving the booklets, he noticed that the binders had been separated and copies or faxes had been made of the associate program and business plans as shown by "tractor marks" from a copy or fax machine (Complaint ¶¶ 192, 193);

- That the defendants instructed Mr. Lewis to disassemble the documents and make copies in violation of the notice of limitations and disclosure (Complaint ¶ 229);

- U.S. Bank exceeded its authorized use and copied and/or transmitted the documents to three U.S. Bancorp employees (Complaint ¶ 230);

- That U.S. Bancorp, its officers, and its subsidiary "U.S. BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI's trade secrets and made use thereof (Complaint ¶ 232).

Plaintiff's cause of action for misappropriation of trade secrets fails to state a claim. While plaintiff alleges that U.S. Bancorp obtained "unconsented knowledge of MSCI's trade secrets and made use thereof," it was Medical Supply and Mr. Lipari who selected U.S. Bank for the purposes of providing escrow services. *See* Complaint ¶¶ 45, 47. Further, the plaintiff admits in his Complaint that, before seeking escrow services from the defendants, plaintiff voluntarily contacted Piper Jaffray and submitted his idea and business plan for consideration of Medical Supply as a venture capital candidate. *See* Complaint, ¶¶ 55-60.

These facts show that plaintiff's claim for misappropriation of trade secrets cannot stand. It was the plaintiff who sought out U.S. Bank; the plaintiff who submitted the alleged trade secrets to U.S. Bank; and the alleged trade secrets had already been divulged (by the plaintiff) to Piper Jaffray (U.S. Bancorp's subsidiary at the time). Moreover, the plaintiff fails to allege how any of the defendants misused the materials or how he was damaged by the misuse. For these reasons, this Court must dismiss Count III of plaintiff's Complaint with prejudice pursuant to Rule 12(b)(6).

4. Count IV: Damages for Breach of Fiduciary Duty

Plaintiff generally alleges that defendants owed it a "fiduciary duty" but fails to provide any factual basis for this particular allegation. A claim for breach of fiduciary duty has four elements: (1) the existence of a fiduciary relationship between the parties, (2) a breach of that fiduciary duty, (3) causation, and (4) harm. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. Ct. App. 2000). A fiduciary is a person having a duty to "act primarily for the benefit of another in matters connected with his undertaking." *See* Restatement (Second) Agency 13 cmt. a (1957); Restatement (Second) of Trusts § 2 (1958). While Missouri has not adopted a precise common-law definition, a "fiduciary relationship" may exist when "a special confidence [is] reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence." *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 751 (Mo. Ct. App. 1990). Plaintiff cannot, however, unilaterally foist a fiduciary duty upon a defendant in the absence of some agreement or conduct by the defendants to accept such a responsibility. *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996). Nor does a business relationship give rise to a fiduciary relationship. *Kratky v. Musil*, 969 S.W.2d 371, 377 (Mo. Ct. App. 1998).

No fiduciary relationship between plaintiff and defendants ever existed. Accordingly, Count IV should be dismissed.

5. Count V: Damages for *Prima Facie* Tort

Count V of the plaintiff's complaint should be dismissed for failure to plead the required elements of a *prima facie* tort. *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1983). The Missouri Supreme Court has held that *prima facie* tort is not "a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort. . . ." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993). The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant's act. *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is lawful. Plaintiff does not make his claim for *prima facie* tort in the alternative and at no point in the Complaint does plaintiff allege that any of the defendants' actions were lawful or truthful. Further, plaintiff alleges no facts to support the element that there was an intent to cause injury. Rather, plaintiff simply alleges that "U.S. BANK and U.S. BANCORP's (*sic*) committed these lawful acts with intent to injure MSCI." (Complaint ¶ 249(2).) While the requirements of Rule 12(b)(6) state that all allegations in the complaint must be accepted as true, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). For these reasons, Count V should be dismissed with prejudice pursuant to Rule 12(b)(6).

III. PLAINTIFF'S CLAIMS REFERENCING DISTRICT JUDGE KATHRYN VRATIL; DISTRICT JUDGE CARLOS MURGUIA; MAGISTRATE JUDGE JAMES P.

O'HARA; AND THE LAW FIRM OF SHUGHART THOMSON & KILROY SHOULD BE STRICKEN

Throughout the Complaint, Lipari makes numerous scandalous comments and allegations directed at Judge Kathryn Vratil, Judge Carlos Murguia, Magistrate James P. O'Hara and the defendants' law firm of Shughart Thomson & Kilroy. These allegations concern the disbarment of Medical Supply's former attorney and are immaterial, impertinent and scandalous within the meaning of Rule 12(f). Plaintiff makes these allegations solely in an attempt to embarrass and vilify these Judges and the law firm engaged to represent these defendants. These supposed "facts" are irrelevant and immaterial to the claims. Fed. R. Civ. P. 12(f) provides "[u]pon motion made by a party before responding to a pleading . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court is afforded broad discretion in ruling on a motion to strike. *See Nationwide Ins. Co. v. Cent. Mo. Elec. Co-op.*, 278 F.3d 742, 748 (8th Cir. 2001) ("[A] district court enjoys liberal discretion under Rule 12(f).").

This Court should exercise its discretion and specifically strike paragraphs 24-28, 224, 225, and 249(e) of plaintiff's Complaint as these allegations are immaterial to the claims, add nothing to the Complaint and were included solely for a malevolent purpose. Each of these allegations is immaterial, impertinent and scandalous under Rule 12(f) and should therefore be stricken by this Court. *Young v. Dunlap*, 223 F.R.D. 520, 521-22 (E.D. Mo. 2004); *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp.2d 1255, 1258 (W.D. Mo. 2001).[6]

[6] Defendants note that similar vitriol appeared in the *Medical Supply II* Complaint which has been dismissed. In any event, even a cursory review of the Complaint shows that the law firm and Magistrate O'Hara had no involvement with anything touching upon plaintiff's supposed claims until the law firm was engaged to provide representation of certain defendants in the *Medical Supply I* case. Magistrate O'Hara's first involvement with Medical Supply apparently was with a subsequent suit that it filed. *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM.

IV. CONCLUSION

Defendants request that the Court enter its Order granting the following relief:

(1) ***All claims*** in Plaintiff's Complaint be dismissed ***with prejudice***;

(2) The Court admonish Mr. Lipari that, should he or Medical Supply bring another action based on the facts and transactions pled in *Medical Supply I, Medical Supply II* and this matter, Mr. Lipari or Medical Supply may be enjoined and a Show Cause Order will be issued (*see Serrano*, 2007 WL 951612 *3 (W.D. Tex., Mar. 19, 2007); *see also Johnson v. Stock*, 2005 WL 1349963 *3-4 (10th Cir. 2005) (unpublished));

(3) That, should Lipari or Medical Supply choose to file a subsequent lawsuit based upon the facts pled in *Medical Supply I*, *Medical Supply II* or this case, Medical Supply and/or Lipari first satisfy all orders and judgments previously entered awarding sanctions and attorneys' fees against Lipari or Medical Supply;

(4) That the allegations concerning District Judge Kathryn Vratil, District Judge Carlos Murguia, Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy be stricken;

(5) For all other relief to which the Defendants are justly entitled.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP, U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 25th day of April, 2007, to:

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

/s/ Mark A. Olthoff
Attorney for Defendants

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 2:07-cv-02146-CM-DJW**
	)	
U.S. BANCORP and	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
Defendants.	)	

AMENDED MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS AND STRIKE[1]

[1] This content of this Amended Memorandum is the same as the original filed on April 25, 2007. This Amendment only reflects that the exhibits are being filed with the brief, which were inadvertently filed separately on that date.

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I. INTRODUCTION

The Court is all too familiar with the history of this litigation having presided over several previous lawsuits, each of which was based upon the same set of facts. On or around November 12, 2002, Medical Supply Chain, Inc. ("Medical Supply") first filed this case in the United States District Court for the District of Kansas bringing federal and state law claims against these defendants and others. (*See* Complaint in *Medical Supply I*, attached as **Exhibit A** ("*Medical Supply I*").) On June 16, 2003, this Court dismissed the lawsuit. 2003 WL 21479192 (D. Kan., June 16, 2003). Medical Supply appealed the decision to the Tenth Circuit Court of Appeals where it was affirmed. 112 Fed. Appx. 730 (10th Cir. 2004) (unpublished). The Tenth Circuit also found that Medical Supply's counsel had filed a frivolous appeal and remanded the matter to this Court to determine sanctions. (*See* Order, attached as **Exhibit B**.)

While this Court determined the sanctions amount in *Medical Supply I*, *see* 2005 WL 2122675 (D. Kan., May 13, 2005), Medical Supply filed another action in the Western District of Missouri, again naming U.S. Bancorp and U.S. Bank National Association (U.S. Bank) as defendants and including the same federal and state law claims as in *Medical Supply I*. (*See* Complaint in *Medical Supply II*, attached as **Exhibit C** ("*Medical Supply II*").) The Missouri court transferred the matter to this Court which granted defendants' motion to dismiss and issued further sanctions against both Medical Supply's former counsel and Medical Supply. 419 F. Supp.2d 1316 (D. Kan. 2006). Medical Supply has appealed the *Medical Supply II* judgment to the Tenth Circuit. *See* Docket of Tenth Circuit (Case No. 06-3331).

Now, Mr. Lipari (instead of the apparently dissolved Medical Supply) sets forth the identical factual allegations for the **third** time under the guise of state law causes of action. Originally filed in Missouri state court and removed to the Western District of Missouri, that court recently transferred the action here. For the reasons that follow, the Court should dismiss this lawsuit with prejudice

following the precedents of *Medical Supply I* and *Medical Supply II* and, further, take such further actions as appropriate to curb the filing of any more lawsuits based upon these alleged facts.

II. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED

The plaintiff's Complaint should be dismissed with prejudice because: (1) plaintiff does not have standing to maintain this action; (2) plaintiff's claims against the defendants are barred by *res judicata*; (3) plaintiff's Complaint fails to comply with Fed. R. Civ. P. 8; or (4) plaintiff's Complaint fails to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6). For any or all of these reasons, this Court must dismiss plaintiff's Complaint with prejudice.

A. Plaintiff Does Not Have Standing To Maintain This Action

Samuel Lipari purports to bring this action alleging he is "the sole assignee of rights for the dissolved Missouri Corporation Medical Supply Chain, Inc. where he was the founder and Chief Executive Officer. . . ." *See* Complaint at p. 1. The plaintiff does not explain in the Complaint how Medical Supply was dissolved, though he previously advised this Court that he voluntarily dissolved it. (*See* **Exhibit D**.) In any event, Lipari may not maintain this action in his personal capacity.

Under Missouri law, a dissolved Missouri corporation continues business in the name of the corporation in order to wind up its business and affairs. *See* R.S.Mo. §§ 351.476, 351.486.[2] A sole shareholder is prohibited from bringing a cause of action that was held by the dissolved corporation. By way of example, in *Hutchings v. Manchester Life and Cas. Management Corp.*, 896 F. Supp. 946 (E.D. Mo. 1995), the plaintiff (sole shareholder) attempted to assert several causes of action belonging to a dissolved corporation. However, because the Complaint sought relief based on the plaintiff's personal capacity rather than as a trustee acting on behalf of the dissolved corporation, the

[2] Although this matter was transferred from the Western District of Missouri, "The transfer of a case to another district does not alter the applicable law. The transferee court must apply the same law applicable in the transferor court." *Hill's Pet Products, a Div. of Colgate-Palmolive Co. v. A.S.U., Inc.*, 808 F. Supp. 774, 776 n.3 (D. Kan. 1992). Missouri law is therefore applicable for the determination of this motion. Moreover, the capacity to sue or be sued is determined by the law of the state of incorporation or, in the case of an individual, the state of domicile. Fed. R. Civ. P. 17(b). Thus, the Missouri corporation statutes apply.

court dismissed the plaintiff's Complaint in its entirety. *Id.*; *see also Gunter v. Bono*, 914 S.W.2d 437, 440-41 (Mo. App. E.D. 1996); *Mabin Constr. Co. v. Historic Constr., Inc.*, 851 S.W.2d 98, 103 (Mo. App. W.D. 1993).

The same holds true in this matter. The plaintiff is making claims belonging to the dissolved corporation, Medical Supply. Even if he was the sole shareholder, Lipari cannot maintain this action in his personal capacity. *See also Tal v. Hogan*, 453 F.3d 1244, 1254-55 (10th Cir. 2006), *cert. denied* 127 S. Ct. 1334 (2007) (applying Oklahoma law).

This Court has also previously found these claims belonged to the corporation when it denied Lipari's attempt to substitute himself as the plaintiff in *Medical Supply II*. (*See* Order August 7, 2006 attached as **Exhibit E**.) In rejecting the substitution request, the Court recognized that, even though the corporation had been dissolved, the claims nevertheless remained with the corporation.

Finally, Medical Supply's prior representations to this Court and the Tenth Circuit Court of Appeals also compel finding that Lipari has no standing to bring this suit. In each of the previous matters (which stem from the same set of facts and circumstances here), the plaintiff alleged the causes of action belonged to Medical Supply. Judicial estoppel thus prevents Lipari from now asserting these claims in his personal capacity in contradiction to the repeated prior representations to this Court and the Tenth Circuit. *See Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005).

Simply put, this suit is yet another attempt to evade this Court's earlier rulings (just as the *Medical Supply II* Complaint filed in Missouri federal court was an effort to forum shop and avoid the *Medical Supply I* result). Mr. Lipari does not have standing in his personal capacity to bring Medical Supply's claims and this Court should dismiss this action with prejudice.

B. The Federal Rules of Civil Procedure require the plaintiff's Complaint to be pled in a simple, concise and direct manner. Even if Lipari does not lack

standing to sue, the Complaint violates the Federal Rules of Civil Procedure and should be dismissed with prejudice.

Plaintiff's Complaint may also be dismissed for failing to comply with Fed. R. Civ. P. 8. Rule 8(e)(1) states that "Each averment of a pleading shall be simple, concise, and direct." Here, plaintiff's Complaint is 75 pages and consists of 264 paragraphs, many of which are nothing more than plaintiff's ramblings. For example, paragraphs 61 through 67 contain statements that a venture capital firm visited Medical Supply; that Medical Supply believed much of the assets in venture funds were from overvalued equities in telecom technology; that the collapse of WorldCom would depress these venture markets; that Medical Supply's technology is superior to that of several other companies, including Cerner; and that Medical Supply would not compromise itself by being aligned with an existing healthcare supplier. Paragraphs 252-57 contain citations to newspaper articles; testimony before the Missouri Legislature; statistics on the cost of health care; and the number Missouri residents without access to Medicaid. Plaintiff's Complaint is full of baseless conspiracy theories and hollow allegations that have no relation to the supposed causes of action. Rule 8 dismissal is appropriate here just as it was in *Medical Supply II*. *See Huggins v. Hilton*, 180 Fed. Appx. 814 (10th Cir. 2006); *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 439 (8th Cir. 1983).

In *Medical Supply II*, this Court addressed this same issue and dismissed Medical Supply's Complaint for failing to comply with Rule 8. There, this Court stated that the Complaint "falls miles from Rule 8's boundaries. . . . In sum, plaintiff's complaint is so exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331.

The Court also denied Medical Supply's request to amend its Complaint in *Medical Supply II*. Given the long history of plaintiff's pleadings in both *Medical Supply I* and *II*, "amendment would be futile." *Id.* at 1332. This Court also observed that the defendants had sought

sanctions under Rule 11 and had given Medical Supply's attorneys the required 21 days to amend the complaint pursuant to Rule 11(c)(1)(A), yet Medical Supply had failed to do so. The Court also found that Medical Supply had recently changed attorneys and the new attorney had chosen not to amend the complaint and thus adopted it has his own. *Id.* Therefore, Medical Supply's Complaint was dismissed in its entirety.

This Court should also dismiss the current Complaint in its entirety. Like *Medical Supply II*, Lipari's Complaint in this matter does not contain a short, concise statement of facts and "falls miles from Rule 8's boundaries." 419 F. Supp.2d at 1331. Mr. Lipari, through Medical Supply, has had countless opportunities to file pleadings but refuses to comply with Rule 8. Therefore, this Court should refuse any request to amend, and dismiss this Complaint in its entirety, with prejudice, under Rule 8 of the Federal Rules of Civil Procedure.

C. Even if Lipari does not lack standing, Plaintiff's Claims and Causes of Action have twice been dismissed by a Court of competent jurisdiction and are therefore barred by the Doctrine of *Res Judicata.*

Even if Lipari may file suit in his personal capacity, his causes of action are barred by *res judicata*. Medical Supply's earlier lawsuits in *Medical Supply I* and *II* (**Exhibits A and C**)[3] were based upon the same conduct, transaction and set of operative facts alleged here. Because these lawsuits have been dismissed twice by this Court, *see* 2003 WL 21479192; 419 F. Supp.2d 1316, the causes of action against U.S. Bancorp and U.S. Bank in this suit should be dismissed by reason of *res judicata*.

As above, Lipari alleges here that he is the assignee "of all interests and rights held previously by the Missouri Corporation Medical Supply Chain, Inc. . . ." Complaint, ¶ 37. Even if

[3] Medical Supply also filed another suit in this Court, *Medical Supply Chain, Inc. v. General Electric Co., et al.*, which was also dismissed. *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100 (D. Kan., Jan. 29, 2004), *aff'd in part*, 144 Fed. Appx. 708 (10th Cir. 2005). Many of the same allegations are included in this Complaint.

so, under Missouri law, "[A]n assignee acquires no greater rights than the assignor had at the time of the assignment." *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-557(Mo. App. S.D. 2004) (quoting, *Carlund Corp. v. Crown Center Redevelopment,* 849 S.W.2d 647, 650 (Mo. App. 1993)); *see also Centennial State Bank v. S.E.K. Constr. Co., Inc.,* 518 S.W.2d 143, 147 (Mo. App. 1974). As a result, Lipari must stand in Medical Supply's shoes and can occupy no better position than Medical Supply would have if it sued these defendants directly. *Id.* Accordingly, "common law principles compel the conclusion that any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari]." *Id.*

The preclusion principle of *res judicata* prevents "the relitigation of a claim on grounds that were raised or **could have been raised** in the prior suit." *Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990) (emphasis added), *cert. denied*, 498 U.S. 823 (1990). The doctrine of *res judicata* bars relitigation of a claim if: "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *Id.*; *see also Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997), *cert denied*, 522 U.S. 1090 (1998); *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987).[4] When a "cause of action" or "claim" "arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same claim or cause of action for purposes of *res judicata*." *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997).

This suit is barred by *res judicata* because, among the many reasons for dismissal of *Medical Supply II*, the Court found that Medical Supply's Complaint violated Fed. R. Civ. P. 8 and was "so

[4] Section 24 of the Restatement (Second) of Judgments also provides that : When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar[,] . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Thus, "a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." *Lane v. Peterson*, *supra*, 899 F.2d at 742.

exceptionally verbose and cryptic that dismissal is appropriate." 419 F. Supp.2d at 1331. Amendment was not permitted and the Complaint was dismissed in its entirety. *Id*. at 1332.

While this Court did not reach the Rule 12(b)(6) arguments for dismissal of the state law claims in *Medical Supply II*, 419 F. Supp.2d at 1330, in setting forth an alternative basis for dismissal under Rule 8, and denying any amendment, the Order constituted a final adjudication on the merits of the claims sufficient to trigger *res judicata*. *See Micklus v. Greer*, 705 F.2d 314, 317 n.3 (8th Cir. 1983) (noting that dismissal under Rule 8 without leave to amend is deemed dismissal on the merits sufficient to trigger *res judicata*); *see also Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997) ("It is well settled that denial of leave to amend constitutes *res judicata* on the merits of the claims which were the subject of the proposed amendment."); *Serrano v. Union Planters Bank, N.A.*, 2007 WL 951612 *3 (W.D. Tex., Mar. 19, 2007) (dismissing claims *inter alia* for failing to meet Rule 8 standards and *res judicata* where the same claims were dismissed in a prior lawsuit).

Both U.S. Bancorp and U.S. Bank were defendants in *Medical Supply I* and *II* just as here. *Medical Supply I* and *II* were premised on the same facts and causes of action alleged by the plaintiff in this matter.[5] While Medical Supply is not named as a party to this suit, Mr. Lipari purports to bring this suit based upon his privity with Medical Supply's interest. As stated, Lipari can have no greater right than that possessed by Medical Supply. *Citibank (South Dakota), N.A. v. Mincks*, 135 S.W.3d 545, 556-57 (Mo. App. S.D. 2004). Because Medical Supply's causes of action against both U.S. Bancorp and U.S. Bank would be barred by *res judicata* by reason of the Rule 8 dismissal in

[5] Plaintiff's claim for violation of trade secrets under R.S.Mo. § 417.450 specifically was included in *Medical Supply I* (Exhibit A Count VII). This is a claim which **was or could have been raised** in *Medical Supply II* (and was raised in factual allegations, Exhibit C at ¶¶ 316-332, and the dismissed RICO Count XV, at ¶¶ 587-88) and therefore does not defeat dismissal under the doctrine of *res judicata*. *See Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir 1990).

Medical Supply II, Lipari has no right to maintain this action as an assignee. This matter should be dismissed in its entirety with prejudice.

D. Even if Not Barred by Lipari's lack of standing, Rule 8 or *Res Judicata*, Plaintiff's Claims Should Be Dismissed For Failure to State a Claim under Rule 12(b)(6).

In deciding a motion to dismiss, this Court must accept the well-pled factual allegations in the Complaint as true and grant the plaintiff the benefit of any inferences that are reasonably supported by those factual allegations. However, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). Stated differently, this Court need not "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Plaintiff's allegations here are conclusory, invite unwarranted inferences and the various tort and common law claims asserted are meritless on their face, even when viewed in the light most favorable to plaintiff. Accordingly, dismissal is appropriate in this case.

1. Count I: Damages for Breach of Contract

Plaintiff's breach of contract claim is without merit. The elements of a breach of contract claim are: (1) an agreement between parties capable of contracting; (2) mutual obligations arising thereunder with respect to a definite subject matter; (3) a valid consideration; (4) part performance by one party and prevention of further performance by the other; and (5) damages measured by the contract and resulting from its breach. *Scher v. Sindel*, 837 S.W.2d 350, 354 (Mo. App. E.D. 1992).

The basis for plaintiff's breach of contract claim is that Lipari and Brian Kabbes of U.S. Bank exchanged email negotiations regarding Medical Supply's desire for escrow services including that Kabbes e-mailed Lipari a contract; that Lipari and Kabbes agreed to lower the normal fees for escrow agent services; U.S. Bank compensation; the investment of long and short term held

funds; the name of the escrow agent; and payment schedule (Complaint at ¶ 201). Plaintiff further alleges that defendants performed diligence to determine whether to contract with Medical Supply (*id.* at ¶ 202); and that Kabbes also requested corporate good standing documentation from Medical Supply which was provided (*id.* at ¶ 203).[6]

It is hornbook law that the existence of a valid and enforceable contract is dependent upon agreement of the parties, or meeting of the minds, upon the terms of that contract. *Smith v. Hammons*, 63 S.W.3d 320, 325 (Mo. App. S.D. 2002). As the *Hammons* court stated:

> "*Negotiations or preliminary steps towards a contract do not constitute a contract*. The existence of a contract necessitates a 'meeting of the minds' which the court determines by looking at the intention of the parties as expressed in their words or acts. Whether a contract is made and, if so, what the terms of that contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties."

Id. (*quoting Gateway Exteriors, Inc. v. Suntide Homes, Inc.*, 882 S.W.2d 275, 279 (Mo. App. E.D. 1994) (emphasis supplied). At best, Medical Supply and U.S. Bank were *negotiating* a potential written contract which never came to fruition. Obviously, had there been a meeting of the minds between the parties, a written contract memorializing all of these terms would have been executed. Plaintiff's supposition that an oral contract was formed based on the negotiation of the terms of a potential written agreement is insufficient to support its claim. *Hammons*, 63 S.W.3d at 325.

No reasonable person reviewing the facts as set forth in plaintiff's Complaint could conclude that a contract was formed between Medical Supply and U.S. Bank. Plaintiff cannot legitimately allege that any U.S. Bank representative, including Kabbes, stated or even implied that the escrow accounts had been approved by U.S. Bank. It is clear that the changes allegedly suggested by Kabbes and agreed to by Medical Supply were indicative of parties negotiating a potential contract.

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[6] Defendants note that plaintiff nowhere pleads the existence of a purported contract with U.S. Bancorp. It is also clear that the supposed contract is alleged to have been between U.S. Bank and Medical Supply, not Lipari.

Therefore, plaintiff's cause of action for breach of contract fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6).

2. Count II: Damages for Fraud and Deceit

Count II of the Complaint purports to claim damages for fraud and deceit. Plaintiff alleges that Brian Kabbes falsely represented that U.S. Bank would not perform escrow services to Medical Supply because of the "know your customer" provisions of the Patriot Act. (Complaint ¶ 210.) As support for this claim, plaintiff includes approximately ten single spaced pages of what he claims was a call between representatives of Medical Supply and the defendants. (Complaint ¶¶ 214, 215.) Plaintiff then alleges the following in paragraph 216:

> MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce U.S. BANK'S promise with the defendants' officer Brian Kabbes upon learning that U.S. BANK was not going to provide the escrow services. MSCI and and (*sic*) SAMUEL LIPARI justifiably relied upon the fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of U.S. BANK's Commercial Trust department and instead contacted U.S. BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

Plaintiff further alleges that the defendants made the fraudulent misrepresentation with knowledge of its falsity or with reckless disregard as to "whether it was true or false to the point of not checking and realizing that the increased duties of the 'know your customer' for new account holders had not been enacted." (Complaint ¶ 217.)

The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and (6) proximate injury. *Premium Financing Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo. App.

W.D. 2002). There must be more than mere suspicion, surmise and speculation. *Blanke v. Hendrickson*, 944 S.W.2d 943, 944 (Mo. Ct. App. 1997).

Plaintiff's fraud claim delineated in Count II is legally insufficient. Assuming all facts as true, even if the defendants stated the "know your customers" provision of the Patriot Act was the reason for not providing escrow accounts, there is no allegation that this statement was made with the intent for Medical Supply to act upon it. Thus, regardless if the statement is false and justifiably relied upon by Medical Supply (which defendants strongly deny), no reasonable person could interpret that the statement was made by the defendants with the intent for Medical Supply to act or refrain from acting in a particular manner.

Further, plaintiff's claim that it relied upon this statement is nonsensical. Plaintiff asserts that because Medical Supply relied on the statement, Mr. Lipari did not call the St. Louis branch of U.S. Bank, but instead called U.S. Bancorp, which angered Lars Anderson and Susan Paine. This nonsensical allegation does not show the plaintiff justifiably relied on the statement or that any action it took in reliance on the statement was detrimental to the plaintiff. For these reasons, plaintiff's fraud claim in Count II should be dismissed with prejudice pursuant to Rule 12(b)(6).

3. Count III: Misappropriation of Trade Secrets under R.S.Mo. § 417.450.

Under Missouri law, the misappropriation of trade secrets occurs when one acquires a trade secret through improper means such as theft or bribery; or when one discloses a trade secret without consent or knew or had reason to know that the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy. *See H&R Block Eastern Tax Services, Inc. v. Enchura*, 122 F. Supp.2d 1067, 1074 (W.D. Mo. 2000).

The following is a summary of the allegations plaintiff makes to support his misappropriation claim:

- On or about October 10, 2002 plaintiff gave a copy of the Medical Supply business plan and associate program booklets to U.S. Bank employee Douglas Lewis to apply for the escrow accounts Medical Supply was seeking. (Complaint ¶ 108);

- The business plan and associate booklets "had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained therein." (Complaint ¶ 109);

- The letter of introduction also addressed the confidential nature of the documents (Complaint ¶ 110);

- After delivery, Mr. Lipari was given a loan application and agreed to return the next day (Complaint ¶ 114);

- On or about November 6, 2002, Mr. Lipari sought to retrieve the documents given to Mr. Lewis on October 10, 2002 (Complaint ¶ 189);

- Upon retrieving the booklets, he noticed that the binders had been separated and copies or faxes had been made of the associate program and business plans as shown by "tractor marks" from a copy or fax machine (Complaint ¶¶ 192, 193);

- That the defendants instructed Mr. Lewis to disassemble the documents and make copies in violation of the notice of limitations and disclosure (Complaint ¶ 229);

- U.S. Bank exceeded its authorized use and copied and/or transmitted the documents to three U.S. Bancorp employees (Complaint ¶ 230);

- That U.S. Bancorp, its officers, and its subsidiary "U.S. BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI's trade secrets and made use thereof (Complaint ¶ 232).

Plaintiff's cause of action for misappropriation of trade secrets fails to state a claim. While plaintiff alleges that U.S. Bancorp obtained "unconsented knowledge of MSCI's trade secrets and made use thereof," it was Medical Supply and Mr. Lipari who selected U.S. Bank for the purposes of providing escrow services. *See* Complaint ¶¶ 45, 47. Further, the plaintiff admits in his Complaint that, before seeking escrow services from the defendants, plaintiff voluntarily contacted Piper Jaffray and submitted his idea and business plan for consideration of Medical Supply as a venture capital candidate. *See* Complaint, ¶¶ 55-60.

These facts show that plaintiff's claim for misappropriation of trade secrets cannot stand. It was the plaintiff who sought out U.S. Bank; the plaintiff who submitted the alleged trade secrets to U.S. Bank; and the alleged trade secrets had already been divulged (by the plaintiff) to Piper Jaffray (U.S. Bancorp's subsidiary at the time). Moreover, the plaintiff fails to allege how any of the defendants misused the materials or how he was damaged by the misuse. For these reasons, this Court must dismiss Count III of plaintiff's Complaint with prejudice pursuant to Rule 12(b)(6).

4. Count IV: Damages for Breach of Fiduciary Duty

Plaintiff generally alleges that defendants owed it a "fiduciary duty" but fails to provide any factual basis for this particular allegation. A claim for breach of fiduciary duty has four elements: (1) the existence of a fiduciary relationship between the parties, (2) a breach of that fiduciary duty, (3) causation, and (4) harm. *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 411 (Mo. Ct. App. 2000). A fiduciary is a person having a duty to "act primarily for the benefit of another in matters connected with his undertaking." *See* Restatement (Second) Agency 13 cmt. a (1957); Restatement (Second) of Trusts § 2 (1958). While Missouri has not adopted a precise common-law definition, a "fiduciary relationship" may exist when "a special confidence [is] reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence." *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 751 (Mo. Ct. App. 1990). Plaintiff cannot, however, unilaterally foist a fiduciary duty upon a defendant in the absence of some agreement or conduct by the defendants to accept such a responsibility. *Arnold v. Erkmann*, 934 S.W.2d 621, 630 (Mo. Ct. App. 1996). Nor does a business relationship give rise to a fiduciary relationship. *Kratky v. Musil*, 969 S.W.2d 371, 377 (Mo. Ct. App. 1998).

No fiduciary relationship between plaintiff and defendants ever existed. Accordingly, Count IV should be dismissed.

5. Count V: Damages for *Prima Facie* Tort

Count V of the plaintiff's complaint should be dismissed for failure to plead the required elements of a *prima facie* tort. *Lohse v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1983). The Missouri Supreme Court has held that *prima facie* tort is not "a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort. . . ." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993). The specific elements of a *prima facie* tort claim are: (1) an intentional lawful act by the defendant; (2) an intent to cause injury to the plaintiff; (3) injury to the plaintiff; and (4) an absence of any justification or an insufficient justification for the defendant's act. *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the plaintiff, and which is without any recognized justification. Here plaintiff failed to allege action by the defendants which is lawful. Plaintiff does not make his claim for *prima facie* tort in the alternative and at no point in the Complaint does plaintiff allege that any of the defendants' actions were lawful or truthful. Further, plaintiff alleges no facts to support the element that there was an intent to cause injury. Rather, plaintiff simply alleges that "U.S. BANK and U.S. BANCORP's (*sic*) committed these lawful acts with intent to injure MSCI." (Complaint ¶ 249(2).) While the requirements of Rule 12(b)(6) state that all allegations in the complaint must be accepted as true, the "court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002). For these reasons, Count V should be dismissed with prejudice pursuant to Rule 12(b)(6).

III. PLAINTIFF'S CLAIMS REFERENCING DISTRICT JUDGE KATHRYN VRATIL; DISTRICT JUDGE CARLOS MURGUIA; MAGISTRATE JUDGE JAMES P.

O'HARA; AND THE LAW FIRM OF SHUGHART THOMSON & KILROY SHOULD BE STRICKEN

Throughout the Complaint, Lipari makes numerous scandalous comments and allegations directed at Judge Kathryn Vratil, Judge Carlos Murguia, Magistrate James P. O'Hara and the defendants' law firm of Shughart Thomson & Kilroy. These allegations concern the disbarment of Medical Supply's former attorney and are immaterial, impertinent and scandalous within the meaning of Rule 12(f). Plaintiff makes these allegations solely in an attempt to embarrass and vilify these Judges and the law firm engaged to represent these defendants. These supposed "facts" are irrelevant and immaterial to the claims. Fed. R. Civ. P. 12(f) provides "[u]pon motion made by a party before responding to a pleading . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court is afforded broad discretion in ruling on a motion to strike. *See Nationwide Ins. Co. v. Cent. Mo. Elec. Co-op.*, 278 F.3d 742, 748 (8th Cir. 2001) ("[A] district court enjoys liberal discretion under Rule 12(f).").

This Court should exercise its discretion and specifically strike paragraphs 24-28, 224, 225, and 249(e) of plaintiff's Complaint as these allegations are immaterial to the claims, add nothing to the Complaint and were included solely for a malevolent purpose. Each of these allegations is immaterial, impertinent and scandalous under Rule 12(f) and should therefore be stricken by this Court. *Young v. Dunlap*, 223 F.R.D. 520, 521-22 (E.D. Mo. 2004); *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp.2d 1255, 1258 (W.D. Mo. 2001).[7]

[7] Defendants note that similar vitriol appeared in the *Medical Supply II* Complaint which has been dismissed. In any event, even a cursory review of the Complaint shows that the law firm and Magistrate O'Hara had no involvement with anything touching upon plaintiff's supposed claims until the law firm was engaged to provide representation of certain defendants in the *Medical Supply I* case. Magistrate O'Hara's first involvement with Medical Supply apparently was with a subsequent suit that it filed. *Medical Supply Chain, Inc. v. General Electric Co., et al.*, Case No. 03-2324-CM.

IV. CONCLUSION

Defendants request that the Court enter its Order granting the following relief:

(1) ***All claims*** in Plaintiff's Complaint be dismissed ***with prejudice***;

(2) The Court admonish Mr. Lipari that, should he or Medical Supply bring another action based on the facts and transactions pled in *Medical Supply I, Medical Supply II* and this matter, Mr. Lipari or Medical Supply may be enjoined and a Show Cause Order will be issued (*see Serrano*, 2007 WL 951612 *3 (W.D. Tex., Mar. 19, 2007); *see also Johnson v. Stock*, 2005 WL 1349963 *3-4 (10th Cir. 2005) (unpublished));

(3) That, should Lipari or Medical Supply choose to file a subsequent lawsuit based upon the facts pled in *Medical Supply I*, *Medical Supply II* or this case, Medical Supply and/or Lipari first satisfy all orders and judgments previously entered awarding sanctions and attorneys' fees against Lipari or Medical Supply;

(4) That the allegations concerning District Judge Kathryn Vratil, District Judge Carlos Murguia, Magistrate Judge James P. O'Hara and the law firm of Shughart Thomson & Kilroy be stricken;

(5) For all other relief to which the Defendants are justly entitled.

Respectfully submitted,

/s/ Mark A. Olthoff
MARK A. OLTHOFF KS Fed. #70339
SHUGHART THOMSON & KILROY, P.C.
1700 Twelve Wyandotte Plaza
120 W 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)

ANDREW M. DeMAREA KS #16141
JAY E. HEIDRICK KS #20770
SHUGHART THOMSON & KILROY, P.C.
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
(913) 451-3355
(913) 451-3361 (FAX)

ATTORNEYS FOR DEFENDANTS
U.S. BANCORP, U.S. BANK NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was filed electronically with the above-captioned court, with notice of case activity to be generated and sent electronically by the Clerk of said court (with a copy to be mailed to any individuals who do not receive electronic notice from the Clerk) this 25th day of April, 2007, to:

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

/s/ Mark A. Olthoff
Attorney for Defendants

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

CASE NO.: 02-2539-CM

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff ,

vs.

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

Defendants.

PLAINTIFF'S AMENDED COMPLAINT

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

EXHIBIT A

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

NATURE OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

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

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

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

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

PARTIES

PLAINTIFF:

MEDICAL SUPPLY CHAIN INC.

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

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

DEFENDANTS:

US BANCORP NA

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

US BANK NA

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

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

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

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

US BANCORP PIPER JAFFRAY, INC.

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

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

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

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

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

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

28. The defendant US BANCORP PIPER JAFFRAY invested in, underwrote and promoted companies providing internet or web based software to help healthcare systems mange their purchasing, including Embion, Inc. (which US BANCORP PIPER JAFFRAY raised 10 million dollars for)[ix] or Centromine, to improve their service delivery. Several did not make it to the IPO stage and US BANCORP PIPER JAFFRAY has difficulty maintaining the good will of its venture

fund investors.[x] Some companies made it to the public offering stage like Eclipsys Corp to have their shares promoted and marketed for 125 million dollars by US BANCORP PIPER JAFFRAY only to fall drastically in value like upon revelation of sharply lower financial expectations then investors had been lead to believe. Now US BANCORP PIPER JAFFRAY is embroiled in numerous investor law suits for irregularities in its promotion of IPO capitalization equity shares.

29. In both healthcare supplier and healthcare electronic commerce firms, the defendant US BANCORP PIPER JAFFRAY concentrates its investments in early stage firms that partner with existing dominant healthcare suppliers and distributors. US BANCORP PIPER JAFFRAY publicizes these relationships as it solicits and promotes investment in the venture funds US BANCORP PIPER JAFFRAY uses for their capitalization. US BANCORP PIPER JAFFRAY publicized a high profile merger Eclipsys Corp with the GPO controlled Neoforma to dominate the healthcare supply electronic marketplace[xi]. Later, the merger would terminate and Eclipsys Corp and Neoforma would announce a mutual alliance to dominate online healthcare supplies utilizing their existing dominant GPO partner; Novation.[xii]The existing dominant healthcare suppliers and distributors co-opt the business model development of the healthcare electronic commerce firms into channels to push a limited sub set of products whose suppliers are allied with the established partnering firms, creating only additional dimensions to the anticompetitive market. The technology for web based supply chain management merely becomes Internet storefront faces for existing monopolistic suppliers motivated to increase costs as they do in their traditional

GPO distribution channels. Whatever potential exists in the still nascent technologies of MSCI's potential competitors like MedCenterDirect.com[xiii] (initially given 30 million dollars in early stage capital) to provide widespread cost savings and obtain high rates of adoption is subordinated by the defendant US BANCORP PIPER JAFFRAY's use of anticompetitive business practices including sole source or exclusive dealing contracts, and vertical exchange of stock ownership with established dominant suppliers, distributors and their corporate officers to inflate the value of its equity funds and offerings.

UNKNOWN HEALTHCARE ENTITY

30. Defendant UNKNOWN HEALTHCARE ENTITY is believed to be a supplier or purchasing organization who has communicated with US Bancorp NA, its employees or its subsidiaries about MSCI for the purpose of obstructing or delaying MSCI's entry into commerce. Defendant UNKNOWN HEALTHCARE ENTITY and its corporate executives and directors are assisted by US BANCORP NA in obtaining ownership shares in companies Defendant UNKNOWN HEALTHCARE ENTITY allows to enter the healthcare supply chain marketplace.

INDIVIDUAL US BANCORP EMPLOYEES

31. Defendant JERRY A. GRUNDHOFER, the President and Chief Executive Officer of US BANCORP NA and at all times relevant to this action was the controlling officer of US BANCORP NA. Defendant JERRY A. GRUNDHOFER was in communication with MSCI regarding the action of US Bank trust department in St. Louis rejecting MSCI escrow accounts and MSCI's efforts to reverse or remidiate the decision. Defendant JERRY A. GRUNDHOFER directly supervised Defendant ANDREW CESERE. Defendant JERRY A.

GRUNDHOFER acquired Piper Jaffray and renamed the subsidiary US BANCORP PIPER JAFFRAY and oversaw the units anticompetitive business practices, including setting revenue goals and providing finincing and guarantees for US BANCORP PIPER JAFFRAY healthcare supplier and distribution integration and combination. Defendant JERRY A. GRUNDHOFER refused to review the decision to deny services and critical facilities to MSCI or to participate in a fact finding effort to clear up the problem without litigation.

32. Defendant ANDREW CESERE is identified as Vice Chairman of US Bancorp trust division by the US Bank website and at all times relevant to this action was a senior controlling officer of US BANCORP in communication with the US Bank trust department in St. Louis regarding the acceptance of MSCI escrow accounts and MSCI's efforts to reverse or remidiate the decision. Defendant ANDREW CESERE would not take calls or return them form Plaintiff MSCI. Defendant ANDREW CESERE directed LARS ANDERSON, SUSAN PAINE and BRIAN KABBES not to reverse their decision on MSCI and not to perform the required dilligence on MSCI to meet the standard of expectation of providing a professional service or their duties under the USA PATRIOT Act.

33. Defendant SUSAN PAINE is the supervisor for US BANK's St. Louis, MO corporate trust offfice. SUSAN PAINE was identified by Defendant Brian Kabbes as being present during a conference call where Plaintiff MSCI sought to reverse or remediate the damages from Defendants and in which Defendants expressed their disturbance that MSCI had contacted the corporate headquarters of US BANCORP NA about the problem with setting up escrow accounts.

34. Defendant LARS ANDERSON was identified to MSCI as the new customer acquistion manger for US BANK's St. Louis, MO corporate trust offfice by Defendant BRIAN KABBES. Defendant LARS ANDERSON stated he made the decision not to provide escrow account services to MSCI.

35. Defendant BRIAN KABBES identified himself as Vice President of Corporate Trusts for US BANK. Plaintiff MSCI was referred to Brian Kabbes for escrow account services by its neighborhood US BANK branch in Independence, MO and later when MSCI was again referred to Defendant BRIAN KABBES when MSCI sought to establish a Kansas escrow account after having difficulty with the St. Louis corporate Trust Department. Defendant BRIAN KABBES provided a review of Plaintiff MSCI's proposed escrow account agreement and suggested changes to meet US BANK's acceptance. Defendant BRIAN KABBES reviewed an approved the escrow account agreement with his name on it as escrow agent for US BANK , along with the changes to make it correct for transmittal to MSCI's ten known selected candidates with their certification contract. After the escrow agreements were sent to the candidates Defendant BRIAN KABBES contacted Sameul Lipari of MSCI to inform him US BANK would not host the escrow accounts because of the USA PATRIOT Act. Defendant BRIAN KABBES maintains the he and Samuel Lipari had not reached an oral contract for service and that reservation for additional approvals were part of earlier conversations.

STATEMENT OF FACTS

36. On or about 3/12/2002, and following 3 years of R&D Sam Lipari, President and CEO of Medical Supply Chain, Inc. (MSCI) began a process of selecting a corporate bank for the rollout of its healthcare supply chain empowerment program that produces significant benefits to healthcare and its patients. He sought input from associates and advisors concerning selection of

an appropriate national bank that would be capable of a full range of corporate banking services, including nation wide checking, escrow services, short and long term credit facilities, receivables financing and international clearing of transactions between thousands of health systems and their suppliers. Several national banks were evaluated but US BANCORP NA was selected because it also had an investment arm called US BANCORP PIPER JAFFRAY that had targeted healthcare customers and participated as underwriter and funds manager for pre IPO healthcare manufacturers and service providers and US BANCORP NA acted as underwriter for corporate bonds of healthcare companies.

37. On or about 4/15/02 Sam Lipari arranged for MSCI's corporate account to be opened at US BANK's SW Topeka branch. The account was opened in the name of Medical Supply Chain, Inc., using MSCI's federal tax I.D. number with a cashier's check in the name of MSCI's agent and drawn on Miner's State Bank of Frontenac Kansas for $7,500.00.

38. On or about 4/25/02 Sam Lipari opened a personal account in his name at US BANK's neighborhood branch at 3640 S. Noland Road, Independence, MO. Before opening the checking account, the US BANK employee reviewed Sam Lipari's account application and submitted Sam Lipari's personal data to Chex Systems, Inc. for a background check, evaluation and verification of eight years of his previous banking history at other banking institutions. Sam Lipari was approved for a personal checking account and an electronic debit card. Sam

Lipari initially used the personal account to pay expenses of MSCI with reimbursement from the corporation.

39. On 6/5/02 Sam Lipari contacted US BANCORP PIPER JAFFRAY'S Minneapolis headquarters to speak to Heath Lukatch, managing director of the US BANCORP PIPER JAFFRAY healthcare venture fund about MSCI being considered as a venture capital candidate. He was instructed to send an executive summary of his business plan via email. Sam Lipari sent the summary and financial projections for MSCI with a restriction on disclosure notice. US BANCORP PIPER JAFFRAY made no response to the receipt of the executive summary and financial projections from MSCI's business plan. Sam Lipari again telephoned the Minneapolis offices of the US BANCORP PIPER JAFFRAY venture fund managers and his calls were not taken and not retumed. Sam Lipari also attempted to speak to a US BANCORP PIPER JAFFRAY venture fund manger in their San Francisco office but again, his calls were not taken or returned.

40. On 7/9/02 Sam Lipari and MSCI were visited by a Merger and Acquisitions attorney for another San Francisco venture capital firm and after extensive discussions with her at MSCI's Blue Springs, MO headquarters on the need to quickly enter the healthcare supply chain market and take advantage of the opportunity created by the healthcare industry's sudden willingness to reject the existing Group Purchasing Organizations, and after the New York Times had began uncovering corruption revelations in the market. However the discussions revealed the current condition of venture funding and IPO underwriting was very

troubling. At the time of these meetings the first news of WorldCom's debacle was breaking. MSCI's management felt with the exception of US BANCORP PIPER JAFFRAY, which concentrated its investments in healthcare, that much of the assets venture funds reported were in fact overvalued equities in telecom technology companies and that the collapse of WorldCom would further depress the venture capital markets.

41. The venture capital M&A attorney questioned Sam Lipari about the overtures of large companies seeking to acquire MSCI. Sam Lipari recounted the contacts made with Supply Solution, a Michigan based company focused on expanding integration in the healthcare industry, GoCoop/Avendra a Florida based company providing e-procurement/group purchasing in the hospitality industry and also wanted to integrate in the healthcare industry, both of which were seeking go to market partners in healthcare, and Cerner, a Kansas City healthcare company with enterprise resource planning software that is based on an older operating system, called EDI that is inferior to MSCI's web based services and poorly suited for electronic commerce. Cerner had bought out Mitch Cooper & Associates, a healthcare supply chain consulting company and seemed to be trying to acquire the capability to create an electronic healthcare marketplace. Sam Lipari told the VC attorney that MSCI would not compromise itself by being aligned with any existing healthcare supplier. MSCI has the solution and he did not want to be tainted with companies that support the high cost healthcare problem. He also recounted how start up healthcare electronic marketplace firms with technology similar to MSCI like Impact Health and

Medibuy had been bought up by GPOs for tens of millions of dollars, but that once they were no longer independent, their market potential was eliminated and the technology was used by GPO firms to deceive health systems into thinking their GPO partner was attempting to increase its economic efficiency when in fact they continued to restrict trade in support of monopolizing markets.

42. MSCI resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and supply chain management technology. MSCI settled on a plan that would utilize the value of its healthcare supply chain intellectual property and offer a comprehensive year long education and healthcare supply chain certification program to independent representatives.

43. This plan would put representatives in the field nationwide that possess the knowledge and skills to relate to all levels of management in healthcare systems and assist in the adoption of MSCI's supply chain empowerment program. The independent representatives would pay for their certification and fund their own marketing and sales operations, consistent with distribution systems that rely on independent manufacturer's representatives. Since MSCI's web services were new to the market, Sam Lipari decided that it would be critical for the certification fee to be held in escrow until the candidates had a chance to meet MSCI's certification team and have a chance to see if they would succeed in mastering healthcare supply chain empowerment knowledge. After a week long intensive seminar, the candidates would have the opportunity to decide whether or not to commit to the certification program and MSCI would have the opportunity to reject any candidates it felt would not succeed in the program.

44. MSCI developed a curriculum and contracted with the industry's foremost logistics and supply chain experts to provide instruction during the weeklong seminar and assist and advice candidates throughout the certification process. MSCI made arrangements to include information and presenters from companies with expertise in financial analysis of healthcare purchasing, including strategic sourcing and human resource evaluations so that the representatives would be able to represent products and technology services outside of MSCI's capabilities that would complement MSCI's supply chain empowerment program in allowing a health system/hospital to break free of its GPO supplier.

45. Beginning 8/1/02 MSCI advertised nationwide to recruit experienced account executives and sales professionals and processed hundreds of applicants with detailed evaluation of resumes, job history and financial disclosure applications. For the first of what were to be quarterly classes, MSCI selected 15 candidates that had the potential to succeed as independent representatives for its services. After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification class starting the first week of December/02. During this same time, MSCI was preparing the escrow account system that the candidates would utilize.

46. On or about 10/1/02 MSCI contacted Chris Walden of the Noland Road, Independence MO branch of US BANK for direction on escrow accounts and commercial banking services. MSCI was referred to Becky Hainje a US BANCORP "Private Banker" and on or about 10/3/02 Becky Hainje contacted

Sam Lipari and told him she would arrange to put him in contact with the persons in different departments of US BANK that could provide MSCI the services MSCI requested and needed. She connected MSCI with Brian Kabbes in St. Louis who was responsible for US BANK commercial trust accounts in Missouri and Kansas. She also connected MSCI with Douglas Lewis, responsible for commercial loans in the Noland Road office.

47. Sam Lipari described MSCI's need for escrow accounts to Brian Kabbes and emailed him an escrow contract that MSCI counsel had prepared for its candidates. Brian Kabbes asked questions about the candidates, the certification program and how many candidates had been selected so far. Sam Lipari negotiated with Brian Kabbes to reduce the escrow fee per account since all escrow accounts would be identical, and US BANK had refused to have the funds in a single account. Brian Kabbes agreed to lower the fee for US BANK's escrow agent services from the normal of $1,500 to $600 per account and no hidden or additional transaction or dispersement fees.

48. After reviewing the escrow contract, on or about 10/5/02 Brian Kabbes communicated to Sam Lipari that the language of paragraph 10 "Security Interests" should be changed so that a security interest for US BANK could be created in the $5,000 portion of the escrow that became MSCI's property the moment a candidate submitted their certification funds into escrow. MSCI altered its escrow contract to conform to Brian Kabbes' s suggestion and on or about 10/7/02 emailed the changes to Brian Kabbes. Brian Kabbes and US Bank were

identified as the escrow agent in the escrow agreement and Brian Kabbes' address was included in the body of the agreement.

49. On or about 10/8/02 Sam Lipari spoke again to Becky Hainje about MSCI's need for a business line of credit based on the MSCI portion of the escrow assets. Becky Hainje said she had talked to Brian Kabbes and he had told her there would be no problems with the escrow accounts, that they were a "slam dunk." She suggested Sam Lipari call Doug Lewis and make an appointment to apply for the line of credit, which was based on the escrow account assets.

50. On or about 10/9/02 Brian Kabbes called to request an additional change in the escrow contract. He supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US BANK TRUST DEPARTMENT. MSCI agreed to the additional change and modified the investment instructions exactly as Brian Kabbes instructed. MSCI also ask if there were any other changes needed before MSCI sent the contracts out to its certification candidates. Brian Kabbes said there would be no other changes and asked why MSCI was sending the candidates the escrow contract. MSCI explained that the contracts were going out with the certification program agreement so candidates would have a chance to review the information before their November 1st deadline, which required their funds to be in the US BANK escrow accounts. Brian Kabbes acknowledged the explanation and agreed to look over the release document MSCI developed that candidates would execute following the weeklong evaluation seminar to be held the first week of December.

51. During this conversation, Brian Kabbes also requested MSCI's current corporate good standing documentation from the Missouri Secretary of State's Office. MSCI agreed to send him the reinstatement and tax clearance documents on Friday 10/11/02 and that Sam Lipari was meeting with Doug Lewis on the afternoon of Thursday 10/10/02 to set up the credit facility using the escrow accounts as security. Sam Lipari told Brian Kabbes he would have Doug Lewis send the requested information to Brian Kabbes on 10/11/02. Brian Kabbes made no statement that US BANK had yet to approve MSCI 's escrow accounts and sought no additional information.

52. On or about Thursday 10/10/02, Sam Lipari delivered the MSCI business plan and associate program to Douglas Lewis, at the US BANK, Noland road office to apply for the agreed upon commercial line of credit based on the portion of the escrow accounts MSCI would retain. The business plan and associate program booklets each had cover pages giving notice of restricted use and that MSCI protected the confidential business trade secret and intellectual property contained in them. A letter of introduction also stated the contents were protected and restricted disclosure and possession of the materials. Two more folders contained the good standing documentation Brian Kabbes requested and the associate program contracts that were sent to the candidates. Doug Lewis asked how many candidates MSCI had and Sam Lipari reached into his brief case and held up the ten folders of applicants who had committed to sending in their funds by November 1st and five others who were in the final stages. Sam Lipari further explained that he planned to start a new certification group each quarter. Sam

Lipari was given a loan application and agreed to and did return the application the next day.

53. On or about Tuesday 10/15/02 Brian Kabbes called Sam Lipari and informed him that US BANK had turned down the escrow accounts because of the USA Patriot Act. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for MSCI. Sam Lipari was shocked and stunned and handed away the phone, where Brian Kabbes repeated again The Patriot Act as the reason the accounts were denied.

54. Later that morning Sam Lipari called Becky Hainje and asked if she could see what happened. Sam Lipari explained that MSCI was counting on the escrow accounts and that the line of credit depended on them too. He said he could not believe the USA Patriot Act could be a reason that applied to MSCI. She said she would call and see what happened. Becky Hainje called back and left a taped recording on the MSCI answering system and listed the reasons Brian Kabbes told her. She said the reasons were the lack of a "relationship with the Bank... that the principals involved with the business were people unknown to the bank, but the main reason is to know your customer "Patriot Act" that was enacted after 9/11, and which we could not really give all the correct answers on the source and flow of money.

55. On or about 10/15/02 MSCI found ANDREW CESERE was the head of US BANCORP trust department on the US BANK web site and at 4 p.m. called his secretary Barb in Minneapolis. He was unavailable so MSCI asked her to

leave instructions for him to call Sam Lipari about MSCI's corporate escrow account rejection at 9 a.m. the following morning. Barb asked for more details concerning the problem. She said Mr. Cesere had a morning meeting but she would get the message to him. At 4:30 p.m. she called back and asked for additional information and the names of the people MSCI had dealt with so that Mr. Cesere could inquire about the problem.

56. At 9 a.m. the following morning on or about 10/16/02 Ed Higgens called, leaving a tape-recorded message on MSCI's answering system identifying him as the executive vice president of Midwest trusts for US BANK.

Sam Lipari, believing that the USA Patriot Act had probably been used to reject the escrow accounts because of his family sir name which is also the name of a small group of Islands in the Mediterranean Sea and which ends in "ari" like many Moslem sir names of people of Arabic descent, activated a tape recorder with a built in microphone and called Mr. Higgens back on the speaker phone. Each subsequent call to US Bank in which Sam Lipari participated was also recorded by him to document what he suspected was discrimination based on his national origin or ethnic descent.

57. Ed Higgins listened to Sam Lipari after stating he was an attorney and how long he had been working in trust banking, agreed with him that he saw no reason why the USA Patriot Act would apply to MSCI. Sam Lipari explained that MSCI needed additional US BANK services including credit facilities, receivables financing and clearing and settlement services for approximately 90 million worth

of transactions in the first year of operations. He said he would check into the matter and call Sam Lipari back later that day.

58. Instead Brian Kabbes called back with Lars Anderson who he identified as head of corporate trust new business development person and Susan Paine who he said he reported to, both on the line with him. MSCI explained that at the time of his previous call, it was not realized that the escrow account contracts that US BANK had approved had already been sent out to the candidates in reliance on US BANKS agreement to host the escrow accounts.

59. Lars Anderson expressed some irritation that MSCI had contacted the head of the trust unit about the rejection of escrow accounts. Lars Anderson said the bank had never been on board and it was not a done deal. Brian Kabbes denied that there had been an agreement; he said he had twice told Sam Lipari. Lars Anderson said that there had never been a signed off agreement to provide the service and that there had never been any bid for it. MSCI contradicted that and said the price for the service had been quoted by Brian Kabbes and after negotiating, a specific amount had been agreed upon. Sam Lipari also told them Brian Kabbes provided and requested changes to the escrow and that Brian Kabbes had told Becky Hainje it was a "slam dunk."

60. During the call MSCI attempted several times to work out any misunderstandings and set up at least the 10 accounts MSCI had relied on US BANK for and that US BANK had known about and that MSCI was now in danger of being irreparably harmed. MSCI stated that the Patriot Act did not apply and that MSCI was in actuality an established US BANK customer and that MSCI had

been in a trust relationship with US BANK and the bank even had its business plan and information about its proprietary business model. Brian Kabbes said that the trust department was a stand-alone unit and had its own criteria for accepting customers. US BANK refused to reverse its decision.

61. MSCI pointed out that it had not received a true reason for denial of the accounts and that the reason given was a pretext at best. Viewing US BANK's actions, MSCI stated they could only be explained by a conflict of interest due to US BANCORP's existing healthcare investments and involvement.

MSCI felt extremely disturbed by the apparent out come of this situation, there was not enough time to establish a new banking relationship with another nationally recognized Bank and MSCI would loose substantial momentum. MSCI had spent several months building up to roll out it's supply chain empowerment program and felt to change a trust relationship in the middle will be devastating to it's entry to market. MSCI researched over 300 resumes only to find 30 that appeared to be qualified.

62. On or about 10/17/02 Sam Lipari telephoned Douglas Lewis and told him what had happened. Doug said he had sent Brian Kabbes the good standing documentation but not the business plan and associate program. Sam Lipari instructed him not to send the business plan and associate program materials to the corporate trust office of US BANK in St. Louis. He told Douglas Lewis that MSCI would be litigating over the escrow decision and planned to renew its application for a line of credit once it had the situation straightened out. Sam Lipari suggested he might find another bank but Douglas Lewis said that would

make the line of credit difficult. Sam Lipari further instructed Douglas Lewis to hold on to the materials and keep anyone else from having access to them. Douglas Lewis agreed and stated he would keep the business plan materials safe.

63. On or about 10/18/02 MSCI drafted a letter and sent it to Jerry A. Grundhofer, the President and Chief Executive Officer of US BANCORP NA with a copy being sent to Andrew Cesere, explaining the staggering damages US BANCORP would be liable for in imminent litigation due to the refusal to provide escrow accounts to MSCI. MSCI suggested an alternative of fact finding depositions to take place in St. Louis, MO before the end of the day Tuesday 10/22/02, believing US BANK to be misinformed about the USA Patriot Act and any reason for denying the escrow accounts.

64. US BANCORP Trust Department corporate counsel replied Friday 10/18/02 via fax and priority delivery with a letter denying US BANCORP NA was in contract with MSCI and that if any law suit is filed to address service for the trust department to her at her office.

65. MSCI called the trust department counsel Monday10/21/02 to ask for service addresses of the other named entities and employees. She said the same address would be good for all and then proceeded to ask what the causes of action were. MSCI explained that it was chiefly an antitrust action based on the Sherman, Clayton and Hobbs Act and that causes of action under the USA Patriot Act were also a basis for the suit. She was surprised MSCI was told the USA Patriot Act had been given as the reason for the denial of escrow account

service but reiterated that there was no contract in her view and she saw no basis for the other causes of action. MSCI stated that it would fax the complaint to her at the time the action was filed at the end of business Thursday 10/24/02, but they were still waiting for Mr. Gunderson to select the alternative of mutual fact finding to promote a resolution of the matter without litigation. She stated that the depositions would not lead to any meaningful explanation, that we had her letter explaining US BANK's reason for denying the escrow accounts and that the bank reserved the right to choose whom it served. MSCI reminded her that US BANCORP had extensive investments in healthcare and that choosing not to provide a service to a competitor is actionable under antitrust law.

66. She warned MSCI not to contact anyone at US BANK and said if MSCI filed an action against US BANCORP NA, she would send a letter to the judge in advance of her answer to our complaint saying we had *ex parte* communications. MSCI stated that it had not had any communications with US BANK employees since receiving her reply on Friday 10/18/02. However, MSCI was an account holder at US BANK and would continue to have communications with US BANK regarding its other bank business. MSCI reminded her that US BANCORP had extensive investments in healthcare distributors and that choosing not to provide a service to a competitor is actionable under antitrust law.

67. MSCI contacted an attorney, familiar with the healthcare supply chain research and development done by Sam Lipari at the law firm of Shook Hardy and Bacon and asked if his firm could act as escrow agent for accounts to be set

up in US BANK. He said the bank is better prepared to provide escrow services and declined to act as escrow agent.

68. On Thursday 10/24/02 MSCI filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees. MSCI counsel contacted US BANK counsel Kristin Strong to clarify the clerk of the court's questioning of service and to attempt to schedule a hearing. Ms. Strong said she would call the following morning Friday 10/25/02 to answer the question about service. She did not call and took the day off. MSCI counsel called her on Monday morning 10/28/02 at which time she said the case had been transferred to outside counsel and gave the phone number to MSCI.

69. On or about 10/28/02 MSCI contacted US BANCORP's retained counsel and explained that there were questions about service and that MSCI was seeking to schedule a hearing that week for its requested relief to stop the harm it was suffering and to avoid a terminal outcome for the company. US BANCORP's counsel said he had to travel and was unsure of his schedule but by the next day he might know of a time he could make a hearing. Without hearing from the opposing counsel, MSCI became concerned and sent an email on or about 10/29/02 suggesting portions of the injunctive relief it seemed likely the two parties could agree on and explaining the harm it was suffering and what delaying the relief beyond critical dates would inflict on MSCI, its associates and customers.

70. The email explained the losses as follows: the damages of failing to receive the $350,000 to $450,000 it depended on November 1st and the resulting

effects of that delay on its projected financials including lost profit of $51,795,005.00, lost increase in average valuation of $155,385,015.00, Candidate lost revenue of $15,499,788.00. The email explained that these injuries would be far greater if a December 1st deadline is missed. However, if the company does not recover from US BANK's denial of the escrow accounts the total third year losses of the company would be as follows: lost profits $51,795,005.00, loss of increased company avg. valuation of $155,385,015.00, Candidate lost revenue of $15,499,788.00 and Customer losses of $697,486,200.00.

71. On or about Wednesday 10/30/02, US BANCORP's counsel sent a letter to the court dismissive of MSCI's complaint and stating that it would oppose all requested relief.

72. On or about Thursday 10/31/02, MSCI called US BANCORP's counsel explaining the necessity of the relief sought and specifically the relief requested under paragraph 66 seeking to stop US BANK from reporting negative information about MSCI under the USA PATRIOT Act. US BANCORP's counsel reiterated his belief MSCI needed to find another bank and that no liability existed. MSCI's counsel explained that Sam Lipari will not risk a hundred million dollar company that requires high level banking services to future damage from a secret USA Patriot Act report that has misinformation in it and would create a black mark preventing them from ever being able to do any business. US BANCORP's counsel said it would not agree to even just the relief sought in paragraph 66. MSCI asked US BANCORP's counsel if his firm would act as an

escrow agent for accounts to be deposited in US BANK, since Shook Hardy and Bacon had declined to do so. US BANCORP's counsel refused to do so stating that US BANK did not owe any duty to MSCI.

73. Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by Sam Lipari in 1995 was appropriated by HSCA and MEDECON through exploitation of a confidential business relationship and then taken later by many other GPOs; on or about 11/6/02 Sam Lipari visited US Bank, Noland road branch to retrieve the documents left by him following the meeting with Doug Lewis on 10/10/02. Doug Lewis gave the documents back to Sam Lipari. Sam Lipari specifically ask if the documents were copied or faxed and Doug Lewis said he put all of the information in his analysis and Sam Lipari left the bank. Upon returning to MSCI's office Sam Lipari Inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents. There are tractor marks from a copy or fax machine on the back of all the pages. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied. There were no marks on the back of these documents.

74. MSCI is now fearful of where these documents were sent or who has reviewed them. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms and financials including 5 year details, 5 year

condensed and break even analysis. Sam Lipari is fearful this information will fall into the wrong hands further blocking or eliminating entry to market.

75. On or about 11/7/02 Sam Lipari received a complimentary D&B report dated 10/31/02 on MSCI. The report indicated MSCI started in 2000 and has a clear credit history and a strong financial condition.

CAUSES OF ACTION

COUNT I: VIOLATIONS OF THE SHERMAN ANTITRUST ACT

76. Plaintiff re-alleges paragraphs 1-75 above.

77. Defendants have violated Section 1of the Sherman Anti Trust Act prohibition against combination or conspiracy, in restraint of commerce.

78. Defendants are a vertically integrated commercial banking, private banking, trust and investment banking concern with investment and underwriting trade concentrated in the healthcare supplier market. In this specific market of companies supplying new products, services and technology, new entrants are dependant on the approval and endorsement of the Defendants to healthcare supply distributors dominated by Healthcare Group Purchasing Organizations or GPO's due to the Defendants' monopoly power.

79. Defendants are believed to be the largest holder of healthcare supplier equity issues through their direct investments and the investments of funds they manage. Defendants are believed to be the largest promoters of healthcare supplier stock issues and provide the largest amount of industry analysis for investor evaluation of healthcare supplier stock issues. On information and belief, US BANCORP NA, US BANK, PRIVATE CLIENT GROUP, CORPORATE

TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC and US BANCORP PIPER are alter egos of each other in that they now and at all relevant times (a) held themselves out to the public as a single, integrated, full-service, professional business enterprise; (b) completely dominated and controlled each other's assets, operations, policies, procedures, strategies, and tactics; (c) failed to observe corporate formalities; (d) and used and commingled the assets, facilities, employees, and business opportunities of each other, as if those assets, facilities, employees, and business opportunities were their own -- all to such an extent that any adherence to the fiction of the separate existence of any of these defendants distinct from the others would be inequitable, would permit egregious wrongdoers to abuse a corporate, limited liability corporation, and/or similar privilege of limited liability, if any, and would promote injustice by allowing these defendants to evade liability or veil assets that should be attachable.

80. Defendants' predatory practices in the capitalization of healthcare suppliers have been found to be in violation of regulatory statutes. In June of 2002, US BANCORP PIPER JAFFRAY was censured and fined $250,000.00 by the National Association of Securities Dealers for threatening to deny Antigenetics, Inc. a critical service of analyst coverage if it did not select US BANCORP PIPER JAFFRAY as a lead underwriter for a second issuing of stock.[xiv]

81. US BANCORP has participated in underwriting syndicates for 131 IPO's worth nearly 10 billion dollars since January 1999. [xv]US BANCORP is named as

a defendant in shareholder law suits investigating US BANCORP's role in a scheme to allocate equity shares of Commerce One to particular customers on the condition that these customers would then buy additional equity shares in the securities markets at agreed upon times to create a false increase in the prices of Commerce One shares.[xvi] Commerce One is an electronic marketplace technology company providing supply chain management services in the business to business market and specifically through Medibuy in a "strategic relationship" to provide these services to healthcare facilities. Medibuy is a partner of the largest GPO which is also the main subject of federal healthcare supply marketplace inquiry, Premier, Inc. Medibuy is also the exclusive e-commerce supplier for HCA.

82. The Defendants maintain control over the day-to-day operations of healthcare supplier companies they invest in or provide services for. [xvii] This control extends to interlocking directors when Defendants place corporate officers of US BANCORP NA on the boards of the healthcare supplier corporations that the Defendants have participated with in creating anti competitive sole source supplier contracts with healthcare GPO's that are "agreements whose nature and necessary effect are so plainly anticompetitive . . . no elaborate study of the industry is needed to establish their illegality-they are 'illegal per se.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct.1355, 1365, 55 L. Ed. 2d 637 (1978).

83. The Defendants use the creation of anticompetitive sole source contracts between their client healthcare suppliers and healthcare GPO's the Defendants

have developed to promote and inflate the value of equity shares they are marketing.

The Defendants operate a conspiracy among their subsidiaries and parent companies and through their employees as "Persons" engaged in combination with healthcare GPO's including UNKOWN HEALTHCARE SUPPLIER for the purpose of restraining commerce. On information and belief, Defendants, in agreement, concert, and conspiracy with each other, directly or indirectly initiated, directed, participated in, aided and abetted, furthered, otherwise caused, and/or concealed the anticompetitive denial of services and critical facilities, or related events, for the purpose of preserving their directorships and/or other positions with US BANCORP NA, keeping their contracts with US BANCORP NA, their income, compensation, and fringe benefits, supporting the value of their US BANCORP NA securities, and/or concealing their participation in and liability for anticompetitive activities.

84. The Defendants prevented MSCI from establishing escrow accounts it was intending to use as a unique banking service with special escrow account agreements reviewed and approved by the Defendants to finance MSCI's entry into to commerce in competition to reduce prices and increase manufacturers of healthcare devices and other healthcare suppliers access to markets in competition with sole source healthcare suppliers and healthcare GPO's.

85. The escrow account contracts are novel and could not be duplicated at another bank in the short time between the Defendants surprise announcement that they were not going to host the accounts, breaching their contract or duty to

MSCI based falsely on the USA Patriot Act, and the deadlines MSCI was in reliance on for receipt of funds. The escrow accounts developed between MSCI and US BANK, along with the line of credit tying arrangement based on the contract guaranteed portion were "unique and unusual financing terms which are unavailable from competing financial institutions." If other financial institutions have the required presence of bank branches and familiarity with MSCI candidates in several states, along with commercial trust departments capable of acting as escrow agent for accounts that provide fractional secured interests for a bank commercial loan line of credit, they were not present with the capability of putting the arrangement together in Blue Springs or Independence MO. Sam Lipari turned to US BANK for the escrow accounts after evaluating and visiting other banks within driving range of his Blue Springs office. US BANK's branch office on Noland Rd. in Independence, MO was able to perform this custom financial service and proceeded to do so with a regional US BANK commercial trust office in St. Louis pooling resources for a multi state district. Once US BANK decided to withdraw the service, there was no financial institution MSCI could turn to that was capable of meeting its requirements in the few days remaining in which to get out the escrow contracts to the candidates for their examination in advance of the November 1st deadline. If US BANK had made its reversal earlier; there still was no competing national financial institution capable of providing such a complex custom service without having a pre-established banking relationship. US BANCORP NA was a financial institution lending upon a unique, novel or custom escrow financial instrument in the commercial money market

with sufficient economic power to give rise to a claim under the Sherman Act as contemplated in *United States Steel Corporation v. Fortner Enterprises, Inc.*, 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977).

86. Defendants through their financial institutions act as a supplier of financial services to companies in the healthcare industry. Defendants own and control other supplier companies including medical device manufacturers, biotechnology producers, healthcare distributors and health system end users. Defendants have conspired with, aided and abetted and participated in the financing of efforts to limit or prevent competition in healthcare supply. Defendants have prevented MSCI from entering the healthcare supply market by refusing to act as a supplier of escrow accounts at any price to MSCI. Such conduct constitutes a contract, combination or conspiracy in restraint of trade in *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

87. The Defendants have acted in furtherance of the combine's conspiracy to deny MSCI access to services and essential facilities through a refusal to deal, denial of services, boycott or withholding of critical facilities which is conducted "to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both," *DeFilippo v. Ford Motor Co.*, 516 F.2d 1313, 1318 (3d Cir.) (citations omitted), cert. denied, 423U.S. 912, 96 S. Ct. 216, 46 L. Ed. 2d 141 (1975), and is a per se violations of § 1.

88. Defendants through their financial institutions have discriminated against MSCI in provision of services and facilities in the form of the five escrow accounts MSCI had mailed out contracts for and the five escrow accounts for

candidates committing to payment of funds by November 1st which MSCI was in the process of sending contracts to and the future escrow accounts for its ongoing future quarterly medical supply chain strategist certification programs.

89. The public is being severely injured by the Defendants actions in restraint of trade through their combination or conspiracy, in restraint of commerce

90. MSCI has been severely injured and is in danger of further injury resulting from the Defendants actions in restraint of trade through their combination or conspiracy, in restraint of commerce. MSCI is now unable to meet its obligations, and risks damage to its corporate credit rating. MSCI is unable to procure an escrow agent to substitute for US BANK. MSCI is unable to meet its commitments to independent representatives that MSCI depended on to enter commerce. MSCI is unable to produce revenue without independent consultants who have begun its very expensive certification program. MSCI's good will with its associates and customers has been harmed by not meeting its scheduled entry to market.

91. Defendants have violated Section 2 of the Sherman Anti Trust Act prohibition against combining or conspiring with any other person or persons, to monopolize or attempt to monopolize any part of the trade or commerce.

92. Defendants have acquired, maintained and extended their monopoly power through improper means, including attempting to extort healthcare technology companies into using US BANCORP as the underwriter of capitalization against securities regulations and in denying MSCI the escrow accounts it required to capitalize its entry into commerce through extortion under

the color of official right-The USA Patriot Act, fraudulently invoked to tortuously Interfere with MSCI's contracts and prospective contracts.

93. Defendants utilize their monopoly power to foreclose competition and gain a competitive advantage for their client and associate companies, in which they have invested millions of dollars and on whose behalf and acting as a combination, they have attempted to destroy MSCI, a potential competitor in violation of 15 U.S.C.S. § 2.

94. The Defendants' vertical integration is part of a calculated scheme to gain control over the 1.3 trillion dollar healthcare supplier and distribution segment of the healthcare industry and to restrain or suppress competition, rather than an expansion to meet the legitimate business needs of US BANCORP's customers, exhibiting the requisite specific intent needed to show a violation of 15 U.S.C.S. § 2.

95. The Defendants as monopolists, or would be monopolists of the healthcare supplier/distribution marketplace engage in predatory tactics and dirty tricks including the above mentioned extortion of business customers seeking capitalization, "laddering" schemes to fraudulently inflate equity values of competitors they own interests in. Additionally, healthcare suppliers the Defendants invest in and promote engage in anticompetitive predatory sole source contract agreements with healthcare GPOs.

96. The Defendants through conspiracy and combination with healthcare suppliers and distributors have established monopoly power and have the power to control prices of healthcare supplies which they exercise in maintaining higher

prices through GPO distribution channels that are higher than those negotiated directly by hospitals, sometimes 25% higher according to the Government Accounting Office[xviii] and by excluding competition in violation of 15 U.S.C.S. § 2.

97. Anticompetitive effects have resulted from the Defendant's actions. New technologies have been prevented from entering the healthcare market to protect competitors with the capitalization provided by the actions of the Defendants to make kickback payments to GPOs in exchange for sole source contracts. This has resulted in the unavailability of superior products and services that would have been able to save lives and alleviate suffering in hospital patients

98. The public is being severely injured by the Defendants actions in restraint of trade through their combining or conspiring with any other person or persons, to monopolize or attempt to monopolize any part of the trade or commerce

99. MSCI has been severely injured and is in danger of further injury resulting from the Defendants actions in restraint of trade through their combining or conspiring with any other person or persons, to monopolize or attempt to monopolize any part of the trade or commerce.

COUNT II: VIOLATIONS OF CLAYTON ANTITRUST ACT

100. Plaintiff re-alleges paragraphs 1 through 99 above.

101. Defendants have denied MSCI escrow account services, a critical facility in violation of the Robinson-Patman Act against discrimination in price, services, or facilities; 15 U.S.C. § 13 of the Clayton Antitrust Act.

102. Defendants provide financial services and facilities to existing healthcare supply market participants on the basis of those participants maintaining

exclusive dealing arrangements. The Defendants exclusive dealing criteria is directly applied where Defendants make contracts and provide investment and financing to healthcare supplier companies the Defendants proclaim and publicize as entering into and maintaining sole source or single source contracts with distributors and end user health systems. The Defendants publicize this information to solicit subscription of stocks they underwrite and to obtain additional investors. As a direct and proximate result of the Defendants' pervasive conspiracy to restrain trade in healthcare supplies, against the interests of shareholders, potential investors, and the integrity of the securities market, as set forth fully above, Plaintiffs have suffered injury and damages in the capitalization of their entry into market.

103. The Defendants exclusive dealing criteria is indirectly applied where Defendants make contracts and provide investment and financing to healthcare supplier companies on the basis of collusion derived profits. The Defendants have prevented MSCI from entering the healthcare supplier/distribution market by refusing to act as a supplier of financial services and facilities in the form of escrow accounts in violation of the Robinson-Patman Act.

104. The Defendants have denied MSCI equal access to these financial services on the basis of tying financial services to healthcare supplier and distribution customers participating in market limitation and denial of access.

105. Defendants through their financial institutions have discriminated against MSCI in provision of services and facilities in the form of the five escrow accounts MSCI had mailed out contracts for and the five escrow accounts for

candidates committing to payment of funds by November 1st which MSCI was in the process of sending contracts to and the future escrow accounts for its ongoing future quarterly medical supply chain strategist certification program.

106. Defendants provide financial services and facilities to existing healthcare supplier market participants. Defendants own, control or have a participatory interest in healthcare supplier market participants that they provide financial services and facilities to. Defendants have prevented MSCI from entering the healthcare supply market by refusing to act as a supplier of financial services and facilities in the form of escrow accounts. Such conduct constitutes a *per se* violation of 15 U.S.C. § 13.

107. The public is being severely injured by the Defendants actions in restraint of trade.

108. MSCI has been severely injured and is in danger of further injury resulting from the Defendants actions in restraint of trade.

109. MSCI is a corporation entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the Defendants, against threatened loss or damage by a violation of the antitrust laws, including sections 13 of this title. MSCI is likely to prevail on one or all of its claims against the Defendants. The danger of irreparable loss or damage to MSCI is immediate. There is a substantial threat that MSCI will suffer irreparable injury in the absence of preliminary relief; the likely injury to MSCI is greater than that likely to be suffered by the Defendants; and entry of the preliminary injunction would not disserve the public interest. *Lucero v. Operation Rescue of Birmingham*, 954

F.2d 624, 627 (11th Cir. 1992), *reh'g denied*, 961 F.2d 224 (1992). Where, as here, the plaintiff advances anti-trust claims, preliminary relief is specifically authorized by 15 U.S.C. § 26.

COUNT III: VIOLATIONS OF THE HOBBS ACT AGAINST RACKETEERING

110. Plaintiff re-alleges paragraphs 1 through 109 above.

111. Defendants violated The Hobbs Act prohibition against racketeering by preventing MSCI's entry into commerce under color of official right in violation of 18 U.S.C. 1951(b)(2).

112. Defendants committed an unusual act for banks by denial of service and facilities for plaintiff MSCI's escrow accounts in bad faith or nonperformance of their duty as financial institutions and employees. Defendants "under color of official right" through invocation of the USA PATRIOT Act deny and threaten MSCI's access to service at any national bank that MSCI, its customers or associates require to conduct their business, effecting the unjust enrichment of the Defendants and their related healthcare suppliers and distributors combine, preventing MSCI's services from entering into commerce in violation of The Hobbs Act, 18 U.S.C. 1951(b)(2).

113. Defendants are extensively invested in selected healthcare suppliers. The profits of these healthcare companies are dependent on a current market where competition in pricing is severely curtailed. Defendants' US BANCORP NA profit has not increased proportionately to its acquisition of banks and traditional commercial banking business. Defendants are consequentially dependant on revenue from their private banking, trust and investment banking divisions which

are disproportionately concentrated in healthcare suppliers engaging in anticompetitive business practices.

114. Defendants' US BANCORP NA , despite the patriotic appellation "US BANK" in red white and blue signage that it places on its newly acquired Kansas and Missouri banks, is unlike a traditional American bank in that Defendants US BANCORP NA functions like an Asian bank interlinked in an industry group combine, acting against the combine's industry competitors and aiding the combine's allies. In Japan a similar industry group would be called a "Keiretsu"[xix] or in Korea a "Chaebol." The Defendants' vertically integrated monopoly acting in consort with their healthcare suppliers and distributors combine in efforts to prevent MSCI from entering into commerce through the misuse of the USA Patriot Act are extorting property from MSCI, its associates and customers.

115. The Defendants did not do the investigation of MSCI they claimed was required under the USA PATRIOT Act and sought to harm MSCI out of an undisclosed profit incentive. In using the USA PATRIOT Act the Defendants are using force or in the alternative acting under color of law in taking property from MSCI its associates and customers.

116. This bad faith performance of its regulator imposed and customer expected duty was made self evident by the Defendants' St. Louis Trust Department telling MSCI that it "did not understand why MSCI went to them and not MSCI's local bank" without even realizing MSCI was already an established US BANCORP NA client customer with a corporate checking account and a

pending corporate credit application, or that MSCI's chief executive was an established checking account holder.

117. Plaintiff MSCI has accepted voluntarily that it will be delayed, suffer lost profits, injury to its associates and loose some or all of the ten best candidates for bringing its electronic marketplace and supply chain management software services to commerce. The Defendants have the power to label MSCI as a money laundering suspect or to do their normal duty of diligence and discover MSCI, its candidates and associates are upstanding citizens with documented funds. MSCI may reluctantly have no choice but to wait until the Defendants' healthcare suppliers and distributors develop a strategy to counter MSCI's neutral electronic marketplace and cost reducing supply chain management software before the Defendants allow MSCI the escrow accounts it needs to enter the healthcare supply marketplace.

118. MSCI's chief executive prudently fears that bad faith reporting under the USA PATRIOT Act by the Defendants to enrich their vertically integrated combine will prevent MSCI from going to other financial institutions and opening escrow accounts or obtaining other banking services, including the clearing and settlement of over 90 million dollars in annual healthcare supply transactions, foreign exchange conversion and purchasing finance, all of which are far more sensitive and subject to greater anti-money laundering scrutiny under know your customer laws and the USA Patriot Act.

119. The Defendants have opposed MSCI's requested injunctive relief which would have temporarily ordered US BANCORP NA and its employees to stop

secretly reporting negative information against MSCI under the USA Patriot Act until adequate training and the required compliance officers were in place. The Defendants have not denied exercising the USA Patriot Act against MSCI.

120. The Defendants' unprofessional conduct and lack of truthful disclosure about USA PATRIOT Act based conduct continues to threaten the Plaintiff MSCI, its associates and customers through actions that may trigger similar surprise denials of critical banking services at other financial institutions.

121. The Public has been harmed by the Defendants extortion of MSCI that has obstructed or delayed MSCI's entry into commerce and the resulting cost savings and increased availability of beneficial healthcare technologies. Over 2000 hospitals nation-wide are endangered by the current anticompetitive market for healthcare supplies and are harmed by the Defendants continued prevention of MSCI from entering commerce. Public access to healthcare will be harmfully cut back if more hospitals are closed because they are unable to realize the 20% cost reduction provided through MSCI's system.

COUNT IV : FAILURE TO PROPERLY TRAIN EMPLOYEES ON USA PATRIOT ACT OR PROVIDE A COMPLIANCE OFFICER

122. Plaintiff re-alleges paragraphs 1 through 121 above.

123. Defendants US BANCORP NA, US BANK; PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., failed to provide training or adequate training to its employees or to designate a USA PATRIOT Act compliance officer in each of its financial institutions as required under Section 352 of USA Patriot Act. Without training, employees of US BANCORP denied MSCI, a known domestic

corporation in good standing with its Secretary of State and State Department of Revenue an escrow account service even though it was not an activity that was regulated under Section 312 effective July 23, 2002.

124. Without having adequately trained employees and a USA PATRIOT Act mandated compliance officer in each of their financial institutions, the Defendants continue to endanger the plaintiff MSCI, its associates and customers with wrongful denial of services and facilities of US BANCORP NA where MSCI has its accounts or at other national and state banks where MSCI and its associates may be harmed through denied services based on erroneous reporting by the Defendants.

COUNT V: MISUSE OF AUTHORITY AND EXCESSIVE USE OF FORCE AS ENFORCEMENT OFFICERS UNDER THE USA PATRIOT ACT

125. Plaintiff re-alleges paragraphs 1 through 124 above.

126. The Defendants BRIAN KABBES, LARS ANDERSON and SUSAN PAINE, under knowing direction of Defendants ANDREW CESERE and JERRY A. GRUNDHOFER, repeatedly used the USA Patriot Act to deny services of US BANK, PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC. and US BANCORP NA to MSCI, causing the loss of MSCI property. The Defendants, despite their regulated status as financial institutions and corporate officers of financial institutions responsible for providing a professional service; denied MSCI, a known domestic corporation in good standing with its Secretary of State and State Department of Revenue an escrow account service on the basis of increased reporting requirements for new accounts under the USA PATRIOT Act

even though The US Treasury Department had previously announced it was delaying the date account opening requirements become issued and effective and US BANCORP was under no reporting requirements for MSCI's escrow accounts.

127. The Defendants continue to endanger the plaintiff MSCI and its associates with wrongful denial of services and facilities of US Bancorp NA where MSCI has its accounts or at other national and state banks where MSCI may be denied services based on erroneous or bad faith reporting by the Defendants.

128. The Defendants continue to endanger the plaintiff MSCI its associates and customers with wrongful denial of services and facilities of national and state banks where MSCI may be denied services based on the Defendants unprofessional and bad faith denial of escrow accounts based on the US PATRIOT Act. The Defendants action prevents MSCI from escaping the denial of escrow accounts history and banking references in all new financial arrangements.

129. On October 22, 2002 MSCI approached an attorney of Shook, Hardy and Bacon for the purpose of acting as escrow agent in substitute accounts to be set up at a national bank. After asking why MSCI's existing bank did not provide the accounts, the attorney declined to act as escrow agent.

COUNT VI: VIOLATION OF CRIMINAL LAWS TO INFLUENCE PUBLIC POLICY UNDER SECTION 802 OF THE USA PATRIOT ACT

130. Plaintiff re-alleges paragraphs 1 through 129 above.

131. Defendants are preventing MSCI from entry into commerce to alleviate market collusion in healthcare supplies that has lead to injury and loss of life and

continues to threaten US citizens. This healthcare supply emergency has been the subject of US agency action and investigation. Members and committees of the US Congress have begun inquiry into the failure of the healthcare supply market place for the purposes of creating public policy regulating market participants. Defendants are preventing MSCI's entry into commerce in violation of Section 802 of the USA PATRIOT Act which creates a federal crime of "domestic terrorism" that broadly extends to "acts dangerous to human life that are a violation of the criminal laws" if they "appear to be intended...to influence the policy of a government by intimidation or coercion," and if they "occur primarily within the territorial jurisdiction of the United States."

132. The Defendants continue to endanger the plaintiff MSCI, its associates and customers with illegal conduct that prevents them from or threatens to prevent them providing a market solution to this governmental healthcare policy issue.

Supplemental State Law Based Causes Of Action

COUNT VII: MISAPPROPRIATION OF TRADE SECRETS

133. Plaintiff re-alleges paragraphs 1-132 above.

134. The Defendants have misappropriated MSCI's business plan and associate program containing MSCI's trade secrets. The Defendants have made use of MSCI's trade secrets through unauthorized copying and transmittal.

135. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make copies and or fax their contents in violation of Sam Lipari's oral instructions to Douglas Lewis and the notice of

limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents. US BANK's exceeded its authorized use and copieded and or transmitted the above documents to the defendants PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., UNKNOWN HEALTHCARE SUPPLIER, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES.

136. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make a derivative analysis document containing MSCI's trade secret and or fax their contents in violation of Sam Lipari's oral instructions to Douglas Lewis and the notice of limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents. US BANK's exceeded its authorized use and cop ied and or transmitted the above documents to the defendants PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., UNKNOWN HEALTHCARE SUPPLIER, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES.

137. The defendants US BANCORP NA; US BANCORP PIPER JAFFRAY; PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC.; LARS ANDERSON; SUSAN PAINE and BRIAN KABBES acquired unconsented knowledge of MSCI's trade secrets and made use thereof.

138. The Defendants are attempting to settle litigation through payment of several million dollars for theft of customer information in an unrelated class action lawsuit giving rise to MSCI's heightened fears of being materially inured if its trade secrets are not recovered and their dissemination is not disclosed.

COUNT VIII: TORTUOUS INTERFERENCE WITH PROSPECTIVE CONTRACTS

139. Plaintiff re-alleges paragraphs 1-138 above.

140. The Defendants have committed Tortuous Interference With Prospective MSCI Contracts for independent representatives, business associates and health system customers.

141. The Defendants willfully and intentionally acted to prevent 15 prospective contractual relationships between MSCI and independent representatives.

142. The Defendants willfully and intentionally acted to prevent or interfere with the prospective contractual relationships between MSCI and business associates named in MSCI's business plan and associate agreement.

143. The Defendants willfully and intentionally acted to prevent or interfere with the prospective contractual relationships between MSCI and health system customers including hospitals.

144. The Defendants willfully and intentionally acted to prevent or interfere with the prospective contractual relationships between MSCI and the technology partners discussed in MSCI's business plan and associate agreement.

145. MSCI had a reasonable probability of entering into contracts with 15 independent representatives for the December 1st course, nine business associates, three technology partners and numerous hospital groups.

146. The Defendants decision to withdraw from acting as MSCI's escrow agent on October 15, and refusing to repair or reverse their decision was the proximate cause of MSCI's damages and loss.

147. The Defendants decision to withdraw from acting as MSCI's escrow agent on October 15, and refusing to repair or reverse their decision caused the actual loss of 350,000 to 450,000 dollars MSCI would have on deposit on November 1st, of which $50,000 to $75,000 would be available for securing credit and which the entire sum would be the property of MSCI by December 15th. MSCI depended on these funds to meet its contractual obligations.

COUNT IX: TORTUOUS INTERFERENCE WITH CONTRACTS

148. Plaintiff re-alleges paragraphs 1-147 above.

149. The Defendants have committed Tortuous Interference With MSCI Contracts for independent representatives, business associates and health system customers.

150. The Defendants willfully and intentionally acted to disrupt or interfere with 10 contractual relationships between MSCI and potential independent representatives.

151. The Defendants willfully and intentionally acted to disrupt or interfere with the contractual relationships between MSCI and business associates named in MSCI's business plan and associate agreement.

152. The Defendants willfully and intentionally acted to disrupt or interfere with the contractual relationships between MSCI and a human resource technology partner.

153. The Defendants willfully and intentionally acted to disrupt or interfere with the contractual relationships between MSCI and its landlord and utilities.

154. The Defendants decision to withdraw from acting as MSCI's escrow agent on October 15, and refusing to repair or reverse their decision was the proximate cause of MSCI's damages and loss.

155. The Defendants decision to withdraw from acting as MSCI's escrow agent on October 15, and refusing to repair or reverse their decision caused the actual loss of 350,000 to 450,000 dollars MSCI would have on deposit on November 1st, of which $50,000 to $75,000 would be available for securing credit and which the entire sum would be the property of MSCI by December 15th. MSCI depended on these funds to meet its contractual obligations.

COUNT X: BREACH OF CONTRACT

156. Plaintiff re-alleges paragraphs 1-155 above.

157. The Defendants breached their contract with MSCI to provide MSCI with a full range of business banking services, including corporate trust services and escrow agency to be performed lawfully and professionally with a "five star guarantee" of quality of service. This contract was executed in writing by the Defendants and MSCI when their respective agents opened the Medical Supply Chain Corporate checking account in Topeka, Kansas.

158. The Defendants breached their contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates. This contract was made over the phone at a distance of 300 miles between the defendant US BANK's St. Louis office and

MSCI a customer of US BANK's Noland Road Independence office in the regular course of business. No writing or other memorialization of this contract was referred to or contemplated at any time during its negotiation and formation by either the Defendants or MSCI.

159. The Defendant BRIAN KABBES and Sam Lipari came into formation of contract when both had agreed upon some or all of the terms including: the composition of the escrow form, the language limiting the liability of US BANK and the escrow agent, the language designating US BANK's compensation for its duties in any legal disputes arising between the parties, the directions for US BANK's investment of long term held funds, the directions for US BANK's investment of short term held funds, the selection of investment vehicles for both funds respectively, the name and address of BRIAN KABBES as escrow agent on the escrow form, the name and address of US BANK as escrow depository on the escrow form, the price term US BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.

160. The Defendants performed diligence to determine whether to accept the contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates. The Defendants required only one item to be rectified for approval; a current good standing status from the Missouri Secretary of State, which MSCI provided, satisfying their sole open element.

161. The Defendants approved MSCI's escrow form for delivery along with MSCI's associate contract to MSCI's independent representative candidates for their examination and submission for review to their personal legal counsel.

COUNT XI: PROMISSORY ESTOPPEL

162. Plaintiff re-alleges paragraphs 1-161 above.

163. The Defendants repudiated the existence of a binding oral contract to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its independent representative candidates. The Defendants refused to perform the services that their actions and communications reasonably lead MSCI to rely on when the Defendants were estopped from doing so by their promises.

164. The Defendants approved MSCI's escrow form for delivery along with MSCI's associate contract to MSCI's independent representative candidates and did other actions and made statements that caused MSCI with the full knowledge of the Defendants to rely on the Defendants' performance of the escrow agency and to host the accounts at US BANK.

165. MSCI relied on the Defendants conduct and statements to MSCI's detriment when Defendants refused to perform and host the escrow accounts and perform as escrow agents for MSCI. MSCI was harmed by the Defendants actions, resulting in the loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide

network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce.

COUNT XII: FRAUDULENT MISREPRESENTATION

166. Plaintiff re-alleges paragraphs 1-165 above.

167. The Defendants injured MSCI with a fraudulent misrepresentation material to their transaction of escrow agency and escrow account hosting with MSCI.

168. The Defendant BRIAN KABBES speaking as a Vice President of US BANK falsely represented to MSCI that US BANK and the commercial trust department would not perform as escrow agent or host MSCI's escrow accounts because of the "know your customer" diligence requirements of the USA Patriot Act had come into effect and made it impossible for the bank to perform this service for MSCI.

169. The defendants LARS ANDERSON and SUSAN PAINE made this fraudulent misrepresentation through the defendant BRIAN KABBES by directing him to give this reason to MSCI's chief executive, Sam Lipari.

170. The defendant ANDREW CESERE directed the defendants LARS ANDERSON, SUSAN PAINE and BRIAN KABBES not to retract this fraudulent misrepresentation when it had been questioned by MSCI and to maintain the misrepresentation in their capacity as managing speaking officers for US BANCORP NA, US BANK and LLC

171. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES caused this fraudulent misrepresentation to be communicated to Sam Lipari with the intention to induce MSCI to refrain from

enforcing US BANK's agreement to provide MSCI escrow agency services and escrow account hosting.

172. MSCI justifiably relied upon this fraudulent misrepresentation to not enforce US BANK's promise with the defendant BRIAN KABBES upon learning that US BANK was not going to provide the escrow services. MSCI justifiably relied upon this fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of US BANK's Commercial Trust department and instead contacted US BANCORP NA's ANDREW CESERE, to try and resolve the problem, unintentionally angering LARS ANDERSON and SUSAN PAINE.

173. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE BRIAN KABBES and PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., UNKOWN HEALTHCARE SUPPLIER, US BANCORP NA and US BANK caused this fraudulent misrepresentation to be communicated to MSCI with knowledge of its falsity or reckless disregard as to whether it was true or false to the point of not checking and realizing that the increased duties of the "know your customer" for new account holders had not been enacted. Or, the defendants caused this fraudulent misrepresentation to be communicated with reckless disregard as to whether it was true or false to the point of not checking and realizing MSCI and Sam Lipari were established existing customers of US BANK the increased duties of the "know your customer" did not apply to.

174. MSCI relied on the Defendants fraudulent misrepresentation to MSCI's detriment. MSCI was harmed by the Defendants actions, resulting in the loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce.

COUNT XIII: VIOLATION OF GOOD FAITH AND FAIR DEALING

175. Plaintiff re-alleges paragraphs 1-174 above.

176. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES were trust officers in a fiduciary relationship with MSCI that was established at the point BRIAN KABBES began working with Sam Lipari to draft MSCI's escrow form. As trust officers in a confidential relationship they had the duty of providing a professional service for MSCI in good faith performance of that duty including keeping abreast of the current status of federal account reporting regulations the duty of disclosure of obstacles to US BANK's ability to perform for MSCI the services it was seeking. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE, BRIAN KABBES, US BANCORP NA and PRIVATE CLIENT GROUP, CORPORATE TRUST, INSTITUTIONAL TRUST AND CUSTODY, AND MUTUAL FUND SERVICES, LLC., breached their duty of good faith performance when they failed to alert MSCI to the possibility US BANK would not perform the services MSCI was seeking.

177. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES breached their duty of good faith performance when they failed to apply the current status of the USA Patriot Act to MSCI's requirements.

178. The defendants ANDREW CESERE, LARS ANDERSON, SUSAN PAINE and BRIAN KABBES breach their duty of good faith and fair dealing when they misuse the USA Patriot Act to injure MSCI.

179. MSCI was harmed by the Defendants breach of their duty of good faith and fair dealing, resulting in the loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce, and including the ability to obtain sensitive banking services required by the business model and future growth of MSCI.

PRESENT AND FUTURE INJURY

180. The actions taken by the Defendants have resulted in dramatic losses to MSCI its stakeholder, associates, suppliers and customers. As of 11/1/02 under traditional Robinson-Patman Act (Clayton Antitrust Act sec. 13) damages calculations, the Defendants have caused substantial short and long-term losses that are not recoverable due to MSCI's injury and delay in obtaining banking services. According to the formula utilized under a Robinson-Patman Act proceeding, the first 3 months losses are $15,000,000. In the alternative, MSCI

business plan losses are $300,000 to $450,000 in addition to the last three months of MSCI's 3-year financials, which combined, are $24,547,576.

181. As a direct result of MSCI's injury, its associates also are damaged due to the actions of the Defendants. Losses include an average of 40-60 hours per week participation in MSCI's evaluation and hiring practices; in addition to due diligence and market evaluation activities. Sustained losses of revenue for associate/representatives outlined in the last three months of MSCI's 3-year financials are $4,819,515.

182. As a direct result of MSCI's injury, its consultants and suppliers have been harmed by MSCI's inability to fulfill success agreements and service contracts due to the actions of the Defendants. MSCI consultants and suppliers have performed several hundred hours in services that are contractually due and MSCI is unable to perform as a result of the actions of the Defendants. These consultants and suppliers depend on MSCI to meet its obligations and the actions of the Defendants are preventing MSCI from doing so.

183. The direct result of MSCI injury and inability to perform its services to customers are the lost savings and additional revenue MSCI generates for its customers through its services. Losses to MSCI customers are directly due to the actions of the Defendants and are 20% of the total supplies spend health systems currently pay out annually. Sustained losses of revenue for MSCI health system customers outlined in the last three months of MSCI's 3-year financials are $13,759,800.

184. The above claims reflect the immediate losses suffered by MSCI its stakeholders, associates, suppliers and customers as of 11/1/02 excluding legal representation. To date MSCI and its counsel have performed over 378 hours in legal work on the antitrust based preliminary injunction remedy.

185. Failure to resolve this matter increases MSCI damages over time. Stakeholders, associates, suppliers and customers will also suffer far more in damages. MSCI will directly suffer $2,901,600 in revenue the 1st year, $27,366,576 in revenue the 2nd year and $74,798,940 in the 3rd year, as a combined total of $105,067,116.

186. Failure to resolve this matter increases the damages MSCI will suffer for injury to associate/representatives including in the 1st year $490,320, in the 2nd year $5,293,315, and in the 3rd year $14,779,788 as a total combined $20,563,423.

187. Failure to resolve this matter increases the damages MSCI will suffer over time, through harm to its suppliers which will suffer losses in the 1st year of $540,000, the 2nd year of $540,000 and in the 3rd year $540,000 as a total combined $1,620,000.

188. Failure to resolve this matter increases the damages MSCI's customers will suffer over time, including losses in the 1st year of $1,705,400, the 2nd year of $244,032,960 and the 3rd year of $697,486,200 as a total combined $943,224,560.

189. MSCI's customers are healthcare systems consisting of hospital groups. The actions of the Defendants to preserve an anticompetitive marketplace in

healthcare supplies keeps in jeapordy over 2000 of the nation's 6,500 hospitals. The resulting closings of some or most of these hospitals due to unsustainable supply costs will significantly harm public access to healthcare, increasing loss of life and unnecessary injury.

PRAYER FOR DECLARATORY RELIEF

190. Paragraphs 1 through 189 are incorporated herein by this reference as if fully pled herein.

191. As a direct result of the conduct of said defendants as set forth in Counts I, II, III and IV, V, VI, VII,VIII,IX,X,XI,XII, and XIII and herein, plaintiff has sustained actual damages in excess of $75,000.00. Such actual damages also include, but are not limited to, damages for injury to business associates, including suppliers,partners, independent representative candidates, prospective customers, other lost benefits, reasonable attorney's fees, expert fees, and costs.

192. Plaintiff's Sherman I & II and Clayton antitrust claims against the Defendants include claims against the noncorporate "Persons" in their individual and official capacities: JERRY A. GRUNDHOFER, ANDREW CESERE, BRIAN KABBES, LARS ANDERSON, and SUSAN PAINE for constructive knowledge of intentional denial of services and critical facilities to injur the Plaintiff and delay or obstruct its entry into commerce.

193. Because elements of malice, wantonness and oppression mingle in the conduct of the defendant County and its agents, plaintiff is entitled to recover damages against the County for violation of plaintiff's rights as claimed herein

and guaranteed under Title VII, the Civil Rights Act of 1991, the Kansas Act Against Discrimination, 42 U.S.C. § 1981,1981 (a) and 1981 (a)(b)(4).

PRAYER FOR URGENT INJUNCTIVE RELIEF

194. **WHEREFORE**, the Plaintiff respectfully prays for the following urgent injunctive prospective relief in exceptional circumstances including:

195. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants who are the subject of causes of action based in criminal law and to which the above Defendant persons and entities have varying degrees of culpability or liability ; obtain separate and independent counsel for any future civil claims seeking monetary damages for the purpose of avoiding conflicts of interest among commonly represented parties prohibited under Kansas law and which may jeopardize recovery under future resulting judgments.

196. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants cease reporting information related to MSCI under the USA PATRIOT Act or Anti Money Laundering laws until the Plaintiffs can exhaust administrative relief from the Defendants misconduct available through the US Office of the Comptroller of Currency.

197. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants disclose the names of bank or trust officers that performed any diligence duty regarding MSCI and the names of any AML or USA PATRIOT Act compliance officers consulted regarding MSCI's escrow accounts.

198. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide their employees adequate training regarding their duties and responsibilities enforcing the USA PATRIOT Act.

199. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide their employees adequate training regarding their duties and responsibilities avoiding antitrust prohibited conduct in their non traditional banking activity including investment banking , trusts and escrow services.

200. The Plaintiff seeks injunctive relief in the form of a court order mandating the corporate governance organ of above named Defendants review and audit their relationships with healthcare companies engaging in restrictive trade practices, including the assistance Defendants have provided in purchasing or selling healthcare supplier equity to healthcare companies or corporate officers engaging in restrictive trade practices.

201. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants including US BANCORP PIPER JAFFRAY be barred from publicizing a sole source, multi year or exclusive contract to provide healthcare supplies related to any company the Defendants own part of or control an interest in or to which the Defendants currently market investment opportunities, including venture fund and equity shares or anticipate marketing in the future.

202. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide escrow accounts for MSCI and its independent representative candidates and future banking services for reasonable fees, equal to the fees charged other corporate customers for similar services for the duration of the preliminary relief order.

203. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide escrow accounts and escrow agency for MSCI and its independent representative candidates and future banking services

for reasonable fees, equal to the fees charged other corporate customers for similar services for the duration of the preliminary relief order.

204. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants provide a letter stating the delay and resumption of banking services to MSCI's associates, customers, credit references and independent representative candidates.

205. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants correct any negative reporting made to government or industry agencies regarding MSCI.

206. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants reimburse the Plaintiff for all legal fees and costs related to obtaining injunctive relief under the Clayton Act.

207. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants pay interest on the Plaintiff's damages from the date a complaint for injunctive relief was first filed until any award is paid by the Defendants.

208. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants are restrained from copying, circulating, disclosing or transmitting MSCI's business information including trade secrets derived from MSCI's business plan or associate program amongst employees of US BANCORP NA and its subsidiaries or outside persons and entities.

209. The Plaintiff seeks injunctive relief in the form of a court order mandating the above named Defendants participate in expedited discovery including depositions and document production related to the dissemination of MSCI's confidential business information and trade secrets.

210. The Plaintiff seeks injunctive relief in the form of a court order allowing the Plaintiff to assist a United States Marshal in searching the premises of the Defendants for evidence of their violations of Misappropriation of Trade Secrets.

REQUEST FOR ORAL HEARING

WHEREAS the above stated facts are true based on information and belief of the Plaintiff MSCI, attested to by its chief executive officer Samuel Lipari and in a previously filed affidavit of facts, the Plaintiff respectfully requests the above stated injunctive relief is granted. In the event that the Defendants oppose the granting of the above relief or challenge the truthfulness of the above stated facts, the Plaintiff requests the opportunity to supply the court evidence, expert testimony and memorandums in support of the contested facts and the appropriateness of the relief requested. Additionally, the Plaintiff requests an oral hearing on the evidence and memorandum filed in support of or opposing the above requested relief.

PRAYER

WHEREFORE, plaintiff prays for judgment against all defendants for actual damages in excess of $75,000.00; injunctive relief as indicated; costs, including all appropriate attorney's fees, expert fees and expenses allowed; and for such other and further relief as the Court may deem appropriate in law and equity.

Respectfully submitted,

Bret D. Landrith
Attorney for Plaintiff

DESIGNATION OF PLACE OF TRIAL

Comes now plaintiff and designates Kansas City, Kansas as the place of trial.

Bret D. Landrith

VERIFICATION

STATE OF KANSAS)
)
COUNTY OF WYANDOTTE)

I, Samuel Lipari, President of Medical Supply Chain, Inc., being of lawful age and being first duly sworn upon my oath, state that I am the Chief Executive Officer of the corporate plaintiff herein and that I have read the above and foregoing Second Amended Complaint and find the statements therein made to be ~~true~~ and correct to the best of my information, knowledge and belief.

November 12 2002
Samuel K. Lipari
CEO
Medical Supply Chain, Inc.

JURY DEMAND

Plaintiffs renew their demand for a trial by jury on all issues so triable.

Respectfully submitted this 12th of November, 2002.

Bret D. Landrith
Attorney for Plaintiff

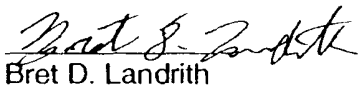
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I caused a true and correct copy of the foregoing to be deposited in the U.S. mail, postage prepaid, on this 12th day of November, 2002 addressed to:

Patrick J. McLaughlin
Mark A. Olthoff
Attorneys for Defendants
Suite 1500
50 South Sixth Street
Minneapolis, MN 55402-1498

Fax 612-340-2643

Certified by,



Bret D. Landrith
Kansas Supreme Court # 20380
Attorney for Plaintiff MSCI
P.O. Box 17-2137
Kansas City, KS 66117-0137
1.816-220-4128
1.620.231-7636
Fax 1-734-549-6495

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[i] Omnicell, Inc. company press release dated August 07, 2001

[ii] July 27 /PRNewswire/ -- Aspect Medical Systems, Inc.

[iii] *HCA Acquires Hospital Chain* (Bloomberg) Oct. 16, 02

[iv] Omnicell, Inc. company press release dated June 17, 2002

[v] NEWTON, Mass., and ST. LOUIS, Mo., Sept. 14 /PRNewswire/ -- AmeriNet, Inc.,

[vi] The Exclusion of Competition for Hospital Sales Through GPOs, Prof. Elhauge June 25, 2002

[vii] *3 Medical Supply Companies Receive U.S. Agency Subpoenas*; Walsh, Mary; NY Times, Aug. 15, 2002

[viii] *2 Powerful Groups Hold Sway Over Buying at Many Hospitals*; Bogdanich, Walt; NY Times, Aug, 2002

[ix] *Internet Supply Management Firms Merge* Healthdatamanagement.com December 17, 1999

[x] US BANCORP NA web site homepage news article regarding falling values of venture funds including those of US BANCORP NA, dated Oct. 15,2002

[xi] Neoforma.com, Inc Press Release; March 30, 2000

> Neoforma.com, Inc. (NASDAQ: NEOF), Eclipsys Corporation (NASDAQ: ECLP) and HEALTH*vision*, Inc., today announced the signing of definitive agreements to merge and create a new company serving the e-healthcare business-to-business (B2B) marketplace. In conjunction with the agreements, Neoforma.com announced that it has signed an exclusive 10-year strategic agreement to provide e-commerce services for the 6,500 healthcare organizations participating in the purchasing programs of Novation, LLC, the world's largest buyer of medical supplies and the supply company of national healthcare alliances VHA Inc. and University HealthSystems Consortium (UHC).

[xii] Neoforma.com, Inc Press Release; May 25, 2000

> Neoforma.com, Inc. (NASDAQ: NEOF) today announced that it has reaffirmed its exclusive 10-year agreement to provide e-commerce procurement services for Novation. Neoforma.com also announced modifications to the structure and terms of its stock and warrant transactions with VHA Inc. and University HealthSystem Consortium (UHC), the national healthcare alliances that own Novation.
> In a related announcement, Neoforma.com, Eclipsys Corporation (NASDAQ: ECLP) and HEALTH*vision*, Inc. today jointly announced that they have agreed by mutual consent to terminate, effective immediately, their proposed mergers announced March 30, 2000. Instead, Neoforma.com, Eclipsys and HEALTH*vision* have entered into a strategic commercial relationship that will include a co-marketing and distribution arrangement between Neoforma.com and HEALTH*vision*. The arrangement includes the use of Eclipsys' eWebIT™ enterprise application integration (EAI) technology and professional services to enhance the integration of legacy applications with Neoforma.com's e-commerce platform.

[xiii] *MedCenterDirect.com Files for IPO* MedCenterDirect.com Press Release March 28, 2000

[xiv] *State Steps up Probe of Research at Piper Jaffray;* Meisner, Jeff; Puget Sound Business Journal Oct 21, 2002

[xv] IPOmonitor.com database

[xvi] *Commerce One Hit With A Securities Lawsuit*, Temple, James, San Francisco Business Times, June 22, 2001

[xvii] US BANCORP PIPER JAFFRAY Venture Fund web site April 2001

[xviii] *Hospitals Sometimes Loose Money by Using a Supply Buying Group*; Walsh, Meier; NY Times, April30, 2002

[xix] Federal Antitrust Law: Cases and Materials; Gifford, Raskind2nd Ed, 2002

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 03-3342

ORDER
Filed December 30, 2004

Before **McCONNELL**, **HOLLOWAY**, and **PORFILIO**, Circuit Judges.

On November 8, 2004, we entered an order and judgment affirming the district court's dismissal of plaintiff's complaint alleging, among other things, violations of the Sherman Act, 15 U.S.C. §§ 1-37a, and of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). In the order and judgment, we

directed plaintiff and plaintiff's counsel, Bret D. Landrith, Esq., to show cause why they, jointly or severally, should not be sanctioned pursuant to Fed. R. App. P. 38 for pursuing a frivolous appeal. Plaintiff and Mr. Landrith were given an opportunity to file objections to the proposed sanctions, and they have done so. Based upon our review, we conclude that Mr. Landrith's objections on his own behalf are inadequate to avoid sanctions. We further conclude, however, that given the nature of the claims presented, plaintiff is not as culpable as its counsel and, therefore, plaintiff should not bear the burden of sanctions.

Mr. Landrith objects to sanctions on the ground that the appellate arguments he advanced on plaintiff's behalf had merit. In particular, he maintains that he was correct when he argued that the district court erroneously applied a heightened pleading standard to the Sherman Act claims and that he was correct when he argued that the district court erroneously failed to recognize a private right of action in the USA PATRIOT Act for the claims asserted in the amended complaint.

The district court found that the allegations underlying the Sherman Act claims were inadequate on several grounds, any one of which would have justified dismissal. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade. 15 U.S.C. § 1. In his response to the show cause order, Mr. Landrith focuses on only one of the district court's grounds for

dismissal of the § 1 claim: that the amended complaint did not adequately allege the participation of two or more independent actors in the alleged contract, combination, or conspiracy. Mr. Landrith contends that the district court applied a heightened pleading standard by ignoring the fact that defendant "Unknown Healthcare Supplier" qualified as an actor economically independent from the other defendants, all of whom were related to US Bancorp.

Our review shows that the district court did not apply a heightened pleading standard to the amended complaint. Rather, Mr. Landrith's reliance on the naming of an "Unknown Healthcare Supplier" as a defendant ignores the fact that the allegations concerning this unknown defendant were completely speculative. The very existence of such a defendant, whom the amended complaint described as an entity "believed to be a supplier or purchasing organization who has communicated with US Bancorp NA, its employees or its subsidiaries about [plaintiff] for the purpose of obstructing or delaying [plaintiff's] entry into commerce," Amended Complaint, para. 30, had no factual support in the amended complaint. Allegations of an agreement between one or more of the defendants and the chimerical defendant Unknown Healthcare Supplier certainly were not sufficient to establish a § 1 violation. Mr. Landrith makes no comment on the other failings the district court found in the allegations of the § 1 claim, any one of which also would have justified the claim's dismissal.

The district court also found numerous flaws in the allegations relating to a violation of § 2 of the Sherman Act, which prohibits monopolization of trade. 15 U.S.C. § 2. There are two elements of a monopoly offense under § 2, the first of which is "possession of monopoly power in the relevant market." *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966). The district court found that plaintiff failed to allege facts necessary to establish the first element, including the exercise of monopoly power, the identity of a relevant product market, and the identity of the relevant geographic market.

In his response to the show cause order, Mr. Landrith raises only one brief argument in support of the § 2 allegations, and again that argument is misplaced. Citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), as "[t]he leading case imposing § 2 liability for refusal to deal with competitors," Mr. Landrith argues that US Bancorp's refusal to provide escrow services to plaintiff evidenced illegal anticompetitive behavior. Answer to Show Cause on Sanctions, at 3 (quotation omitted). *Aspen Skiing Co.* is quite inapposite, however, not the least because plaintiff and US Bancorp are not competitors.

The Court in *Aspen Skiing Co.* was concerned with whether the refusal of an established monopolist to cooperate with a smaller competitor in a marketing arrangement could be found to violate § 2. In answering that question, the Court noted that "the right of a monopolist to deal with whom he pleases" is qualified,

and that the exercise of that right "as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act." 472 U.S. at 602, 603 (quotation omitted). One of the many problems with the amended complaint here was that it did not adequately allege facts that could establish US Bancorp as a monopolist in a relevant market in the first instance.

Plaintiff tried to shore up these weaknesses on appeal by arguing that a liberal reading of the complaint revealed that the relevant geographic market was national and that there were two relevant product markets: healthcare supplies and capitalization of healthcare technology companies. US Bancorp does not even compete in the healthcare supplies market, however, much less is it capable of monopolizing that market. Similarly, whatever the alleged market of "capitalization of healthcare technology companies" may be, it is clear that it is one in which plaintiff neither does nor intends to compete.

Plaintiff's arguments on appeal did little to address the many grounds for dismissal of the Sherman Act claims articulated by the district court, and Mr. Landrith's response to the show cause order does even less. The appeal of the Sherman Act claims was frivolous, and Mr. Landrith has provided no justification for its pursuit.

Plaintiff's appeal also challenged the district court's dismissal of three claims alleged under the USA PATRIOT Act. It did so despite the fact that the

allegation of those claims prompted the district court to remind Mr. Landrith of his obligations under Fed. R. Civ. P. 11(b)(2), and to advise him to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." Memorandum & Order of June 16, 2003, at 11.

The first of the USA PATRIOT Act claims sought to impose liability for defendants' failure to adequately train their employees on the provisions of the Act or to designate a compliance officer as provided for in section 352 of the Act (modifying 31 U.S.C. § 5318(h)(1)). The second claim alleged that by denying plaintiff escrow services, defendants misused their authority and used excessive force as enforcement officers under the Act. The third claim alleged that by denying plaintiff escrow services, defendants engaged in "domestic terrorism" as that term is defined in 18 U.S.C. § 2331, as modified by section 802 of the Act. The district court determined that plaintiff had no standing to assert the first of these claims, that there was no private right of action in the Act for any of these claims, and that the allegations of the third claim were "completely divorced from rational thought," Memorandum & Order of June 16, 2003, at 14-15.

Ignoring all but one of the grounds articulated by the district court, plaintiff argued on appeal that the district court erred in dismissing the USA PATRIOT Act claims because the Act does in fact provide a private right of action for those claims. In his response to the show cause order, Mr. Landrith repeats the

arguments advanced on appeal. He boldly declares that he declines to accept this panel's "revisionist pronouncement about the lack of a private right of action in the USA PATRIOT Act," and he argues that the Act contains at least two private rights of action. Answer to Show Cause on Sanctions, at 4.

The two sections of the Act to which Mr. Landrith points are section 223 (codified at 18 U.S.C. § 2712), which relates to civil actions against the United States, its officers or employees, and section 355 (amending 12 U.S.C. § 1828(w)), which limits the immunity available to a financial institution and its employees when voluntarily disclosing suspicious activity in an employment reference if the disclosure is made with malicious intent. Even if these two sections did create private rights of action under the Act for some types of conduct, a matter we need not decide here, neither creates a private right of action for the conduct alleged in the amended complaint, and counsel's reliance on them is frivolous.

Once again, the arguments advanced on appeal in support of the USA PATRIOT Act claims not only failed to address all the grounds for dismissal articulated by the district court, but they were themselves frivolous. Mr. Landrith's response to the show cause order only magnifies these deficits.

Rule 38 provides that if we determine that an appeal is frivolous, we may "award just damages and single or double costs to the appellee." Sanctions under

Rule 38 serve two purposes: not only do they "punish the offender as a deterrence to future misconduct; but, with equal importance, they . . . compensate a party who has had to finance the defense of a groundless action." *Braley v. Campbell*, 832 F.2d 1504, 1516 (10th Cir. 1987) (Moore, J., dissenting).

An appeal may be frivolous as filed or as argued. *See Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1578-79 (Fed. Cir. 1991). This appeal was both. Keeping in mind that as between a party and its attorney, the impact of a sanction should be felt by the one(s) at fault, we conclude that only Mr. Landrith, and not plaintiff, should bear the burden of sanctions here. "[A]n attorney must realize, even if a party does not, that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk-reaction to every unfavorable ruling." *Braley*, 832 F.2d at 1513 (en banc) (quotation omitted). Mr. Landrith's response to the show cause order demonstrates that he did not make the considered judgment required before taking an appeal here, nor has he considered what the district court, or this court, has said before advancing his arguments.

As a sanction under Rule 38, we assess attorney fees and double costs against Mr. Landrith. Procedures for the taxation of costs shall be in accordance with Fed. R. App. P. 39(d) and (e). The case shall be REMANDED to the district court to determine the amount of attorney fees to be awarded as a sanction.

Entered for the Court
PATRICK FISHER, Clerk

By: Steve Larson
Deputy Clerk