IN THE STATE OF MISSOURI
WESTERN DISTRICT COURT OF APPEALS
AT KANSAS CITY, MISSOURI

Case No. WD70001 (16th Cir. Case No. 0816-04217)

SAMUEL K. LIPARI
Appellant

vs.

NOVATION, LLC; NEOFORMA, INC; GHX, LLC; VOLUNTEER HOSPITAL ASSOCIATION; VHA MID-AMERICA, LLC; CURT NONOMAQUE; THOMAS F. SPINDLER; ROBERT H. BEZANSON; GARY DUNCAN; MAYNARD OLIVERIUS; SANDRA VAN TREASE; CHARLES V. ROBB; MICHEAL TERRY; UNIVERSITY HEALTHSYSTEM CONSORTIUM; ROBERT J. BAKER; JERRY A. GRUNDHOFER; RICHARD K. DAVIS; ANDREW CECERE; COX HEALTH CARE SERVICES OF THE OZARKS, INC.; SAINT LUKE'S HEALTH SYSTEM, INC.; STORMONT-VAIL HEALTHCARE, INC.; SHUGHART THOMSON & KILROY, P.C.; HUSCH BLACKWELL SANDERS LLP[1]

LEGAL FILE OF THE TRIAL RECORD
Volume 2 pages 160-353

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[1] Two parties in the trial court action, ROBERT J. ZOLLARS and LATHROP & GAGE L.C. have not been dismissed and are not party to this appeal.

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1 APPENDIX FIVE

2 Plaintiff's Business Relationship With GE, GE CAPITAL and GE TRANSPORTATION

3 The following statement of facts describes the business relationship of the petitioner Samuel K. Lipari with GE, GE CAPITAL and GE TRANSPORTATION which was tortiously interfered with by the Missouri antitrust defendants as the facts were presented in the petitioner's litigation against GE, GE CAPITAL and GE TRANSPORTATION. The word "defendants" herein refers to GE, GE CAPITAL and GE TRANSPORTATION.:

4 General Electric Company, (herein "GE"), Missouri registered agent: C T Corporation System, 314 North Broadway, St. Louis, Mo 63102.

5 General Electric Capital Business Asset Funding Corporation, (herein "GE CAPITAL") Missouri registered agent: The Company Corporation 120 South Central Avenue Clayton, Mo 63105.

6 GE Transportation Systems Global Signaling, L.L.C. (herein "GE TRANSPORTATION") Missouri registered agent C T Corporation System,120 South Central Avenue, Clayton Mo 63105.

7 Samuel K. Lipari's dissolved company Medical Supply Chain, Inc. (Medical Supply) formed a written contract via email with GE and GE Transportation to buy a $10 million dollar building at 1600 N.E. Coronado Drive in Blue Springs, MO for $5 million and simultaneously to sell GE Transportation a release from its ten-year lease for a deeply discounted value.

8 The GE entities knew Medical Supply intended to use the transaction to capitalize its entry into the hospital supply market and that it was the victim of antitrust conspirators using the USA PATRIOT ACT to prevent it from getting capital by conventional means. GE corporate "business leaders" approved the transaction obligating GE Capital's underwriting based on Samuel K. Lipari's business plan and Medical Supply's ability to pay as detailed in Medical Supply's forward looking financials.

9 The e-mail was a written contract meeting the Missouri Statute of Frauds and under Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq.

10 Both the GE entities and Medical Supply partially performed the terms of the contract. GE caused the breach of the contracts when GE Medical and the electronic hospital supply marketplace GHX LLC

created by GE interfered to prevent Medical Supply from getting capitalization through the contract to enter the hospital supply marketplace. GHX, GE and GE Medical are openly part of an unlawful hospital supply cartel with Novation LLC that had previously prevented Medical Supply from capitalizing its entry into the hospital supply market.

11 Medical Supply was entitled to its contract expectations *Albrecht v. The Herald Co*., 452 F.2d 124 at 129 (8th Cir. 1971) including its business plan forward looking financials under *Anuhco, Inc. v. Westinghouse Credit Corp*., 883 S.W.2d 910 (Mo App 1994) and GE Capital has specifically been subjected to business plan expectation damages for breaching finance contracts in Missouri State Court: *Rasse v. GE Capital Small Business Finance Corp*., 2002 MO 808 (MOCA, 2002).

12 The Western District of Missouri U.S. District court decided an electronic contract/electronic signature case under federal and state electronic contract laws and the Missouri statute of frauds as Medical Supply's original pleadings advocated: *International Casings Group, Inc., v. Premium Standard Farms, Inc*., 358 F. Supp. 2d 863; 2005 U.S. Dist. LEXIS 3145, February 9, 2005.

13 Jeffrey R. Immelt, the former president of GE Medical, Inc. knew he had succeeded Jack Welch as CEO of General Electric because GE's hospital supply business units had successfully maintained an anticompetitive market in U.S. hospital supply purchasing permitting GE to pass on higher prices to the hospital consumers and because of this the General Electric Company was under a consent order with the U.S. Department of Justice requiring the corporation to sell a medical imaging unit and refrain from future anticompetitive conduct at the time Medical Supply Chain, Inc. brought its original breach of contract and antitrust complaint against the GE defendants including Jeffrey R. Immelt. Immelt made it an essential priority for the General Electric defendants, their agents and their hospital supply cartel co-conspirators to have the petitioner's complaint dismissed at all costs.

14 Under Jeffrey R. Immelt's direction and control, Immelt's personal and corporate agents made repeated misrepresentations to state and federal judicial branch staff and attempted to influence them unlawfully, largely *ex parte* and unreported to the petitioner in order to have Medical Supply, the petitioner, his cause and his counsel destroyed.

15 The petitioner appealed the district court dismissal of his antitrust claims resulting from Rule 12 (b)

6 pleadings filed by John K. Power, Jonathan I. Gleklen and Ryan Z. Watts deliberately misstating the law so that the petitioner's complaint would be erroneously thrown out for not making General Electric's independent co-conspirator Neoforma, Inc. a defendant. The dismissal was accomplished through the hostile climate in the court created *ex parte* by GE's legal representatives and Mark A. Olthoff, Steven D. Ruse, James P. O'Hara of the law firm Shughart Thomson & Kilroy, all representing Immelt's cartel co-conspirators and the cartel feared Immelt's deception would be discovered.

16 Jeffrey R. Immelt directed his legal team to file a counter appeal in an abuse of process to obtain sanctions against the petitioner that the trial court had denied. Through this overt action and an accompanying unlawful influence over Patrick J. Fisher, Jr., the Clerk of the Tenth Circuit U.S. Court of Appeals and law clerks for the court in a deliberate use of social networking between government officials in a pattern modeled after the Mississippi Sovereignty Commission and that eventually included the U.S. District Attorney for Kansas, Eric F. Melgran and Bradley J. Schlozman working in the U.S. Department of Justice and later installed as the US Attorney for the Western District of Missouri.

17 The resulting appeal decision upholding the erroneous dismissal and correctly reversing the trial court on whether sanctions could have been issued went on to vilify the petitioner and his representation for naming Jeffrey R. Immelt as an antitrust defendant an in doing so the opinion contradicted clearly established Tenth Circuit precedents on identical facts along with the controlling federal case law. The following day the US Supreme Court docketed the appeal of similar and equally unusual sanctions in the antitrust action against the cartel co-conspirators by the petitioner's attorney.

18 The two unusual opinions and the facts in the petitioner's case *Medical Supply Chain, Inc. v. Neoforma, et al*., Case No. 05-0210-CV-W-ODS in which the petitioner was again subjected to the same misconduct and worse, starting with the GE defendants' misrepresentations to Hon. Judge Ortrie D. Smith of the Western District court through John K. Power and the cartel's common defense controlled by Immelt in order to fraudulently transfer the action to Kansas "in the interest of justice" caused the Tenth Circuit on the petitioner's information and belief to conduct a second internal investigation among law clerks in the Denver court following an earlier investigation directed at Magistrate James P. O'Hara led the Tenth Circuit to conclude that the counter appeal had been an abuse of process. This resulted in the unusual trial court

order stating the Tenth Circuit had directed Hon. Judge Carlos Murguia to order Jeffrey R. Immelt by name to personally file for the sanctions Immelt had succeeded in appealing but had not pursued in the year following remand. Immelt declined to appear or resubmit himself to the jurisdiction of the court and directed a letter be sent on his behalf by his personal counsel Jonathan I. Gleklen.

19 The petitioner's state law based contract claims against the GE defendants had been dismissed without prejudice and the petitioner exercised his right to file them where the injury occurred in Jackson County Missouri. Jeffrey R. Immelt attempted to conceal the continuing contractual liability to the petitioner in Securities and Exchange Commission mandated filings from his board of directors to prevent GE's role in the unlawful hospital supply cartel to be exposed.

20 The petitioner had earlier relied on the public filings of Neoforma, Inc., enraging Immelt. Jeffrey R. Immelt had through the aid of U.S. Deputy Attorney General Paul J. McNulty and the McNulty Memo authored in December 2006 to prevent the Northern District of Texas US Attorney's office investigating Novation, LLC's theft of member hospital funds and their money laundering through the petitioner's electronic marketplace competitor from obtaining the corporate papers of Neoforma, Inc. without Main Justice and Karl Rove's approval .

21 When the investment banking and merger syndicate of Merrill Lynch & Company, Inc., Fenwick & West LLP., Innisfree Limited, Lazard, McDermott Will & Emery LLP., Wachtell Lipton Rosen & Katz, Skadden Arps Slate Meagher & Flom LLP., Sidley Austin Brown & Wood LLP., and William Blair & Company formed by Novation LLC for the purpose of solving the cartel's exposure to the petitioner through Neoforma, Inc. discovered the petitioner's claims in November 2005 that had not been disclosed in Securities and Exchange Commission required filings and began to fear the liability of taking Neoforma, Inc. private to obstruct justice in the petitioner's antitrust civil litigation and the government False Claims Act Medicare fraud investigation that were both seeking the records of where the Novation LLC member hospitals' laundered funds went; Jeffrey R. Immelt caused the defendant entity GE Capital to underwrite the loan giving the money to Novation LLC for merging Neoforma, Inc. with GHX, LLC the sole remaining competitor electronic marketplace for hospital supplies.

APPENDIX FIVE 4

GE, GE CAPITAL
and GE TRANSPORTATION
Relationship

22 Jeffrey R. Immelt directed his defense to attempt to unlawfully influence the Independence, Missouri court in deliberately fraudulent filings, a fraudulent removal to federal court and by acting *ex parte* to prevent the petitioner from obtaining counsel using the disbarment of the petitioner's previous counsel, the vilifying rulings and sanctions all knowingly obtained by Immelt through unlawful influence over the court and by using the Mississippi Sovereignty Commission style networking employed by Immelt to destroy the petitioner and his associates. The fear of GE's influence was so great and visibly no constitutional rights or laws could protect even officers of the court that the petitioner could not obtain counsel even when his contract claims survived dismissal.

23 Still Jeffrey R. Immelt feared the discovery of his role in the Novation LLC hospital supply cartel and when the petitioner attempted to receive an order compelling the GE defendants to mediation and to produce discovery, Jeffrey R. Immelt caused his defense counsel John K. Power Mo. Lic. #35312, Leonard L. Wagner MO. Lic. #39783 to repeatedly lie to the court, falsely stating that they had attempted to schedule mediation and falsely stating that the petitioner's discovery requests were not identified as to their relativity to the petitioner's complaint when each numbered production request was indexed to the particular paragraph of the complaint it was related to.

24 While Jeffrey R. Immelt perpetrated this misrepresentation on the court and General Electric was liable for over $60,000.00 dollars in daily interest on contract based claims he could not escape, Jeffrey R. Immelt turned to the Illinois law firm of Seyfarth Shaw LLP to take over direction of the Independence, Missouri defense through extortion of the petitioner. Seyfarth Shaw LLP obtained an order from Hon. Judge Mark Filip, of the Federal District Court in Chicago, Illinois who was nominated to replace Deputy Attorney General McNulty to force the petitioner to testify without counsel on his relationship to the financier Michael Lynch, knowingly causing the petitioner to fear for his safety and evidencing no intention to follow through on the mediation the GE defendants had promised the state court.

25 Realizing the defendants had again openly and notoriously committed fraud on the 16th Circuit, Missouri court, the day after the petitioner's settlement offer to Jeffrey R. Immelt expired, Hon. Judge Michael W. Manners granted the petitioner leave to amend his complaint to include the following racketeering and racketeering conspiracy based claims against the defendants that occurred subsequent to

previous litigation with the requisite specificity to meet the current federal RICO pleading requirements and RICO conspiracy averment requirements in light of *Bell Atlantic v. Twombly*, No. 05-1126, 2007 WL1461066 (May 21, 2007) determination that Sherman Act conspiracy on which RICO is based requires more than notice pleading.

26 The plaintiff through his now dissolved corporation made a contract with the defendants to sell GE Transportation's remaining ten year lease at a deep discount benefiting GE in exchange for GE'S funding of the plaintiff's purchase of the building through GE'S business lending subsidiary, GE Capital.

FORMATION OF A CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANTS TO EXCHANGE GE TRANSPORTATION'S REMAINING LEASE AND FUND THE PURCHASE OF 1600 N.E. CORONADO BUILDING

27 On or about June 1st, 2002, Samuel K. Lipari, in his role as CEO of Medical Supply Chain, Inc. contacted the leasing agent Cohen & Essrey Property Management ("Cohen") regarding a building located at 1600 N.E. Coronado Drive in Blue Springs, MO.

28 Cohen indicated the building was already leased but that the lessee could and would like to sub-lease the building.

29 The building was not occupied so Samuel K. Lipari made a verbal offer to sub-lease a portion of the building.

30 Cohen declined his offer indicating the existing lessee would not accept anything less than sub-leasing the entire building.

31 On or about April 1st, 2003 Samuel K. Lipari contacted the new leasing agent, B.A. Karbank & Company ("Karbank") in the event the new agent had different instructions regarding a sub-lease of the property located at 1600 N.E. Coronado Drive in Blue Springs, MO.

32 The new leasing agent Karbank told Samuel K. Lipari that GE was the lessee seeking to sub-lease the building due to their vacating the building after GE Transportation bought out Harmon Industries.

33 The building was still not occupied so again Samuel K. Lipari made a verbal offer to lease a portion of the building.

34 Karbank declined his offer indicating GE corporate properties would not accept anything less than

leasing the entire building.

35 On or about April 7th, 2003 Samuel K. Lipari contacted GE and spoke with the GE property manager, Mr. George Frickie regarding Medical Supply's interest in sub-leasing the building.

36 George Frickie indicated again that GE would not be interested in sub-leasing a portion of the building but rather would be interested in leasing the entire building.

37 Samuel K. Lipari requested the name of the owners and George Frickie gave him the name and number of Mr. Barry Price with Cherokee Properties L.L.C.

38 Samuel K. Lipari contacted Barry Price, and he was referred to Mr. Scott Asner who also had a substantial interest in the building.

39 While speaking with Mr. Asner he provided Samuel K. Lipari the background and current details on the building lease with GE, terms and a price to purchase the building.

40 The lease was transferable and GE was still obligated for 7-years out of a 10-year lease.

41 Mr. Asner agreed to sell Medical Supply the building for the remaining balance of the GE 7-year lease ($5.4 million) and provided Samuel K. Lipari with a letter of intent to sell the building to Medical Supply.

42 On or about April 15th, 2003 Samuel K. Lipari contacted George Frickie with GE Commercial Properties and indicated that he had an interest in purchasing the building. Samuel K. Lipari asked George Frickie if GE had an interest in buying out the remainder of their lease so that Medical Supply could occupy the building following the purchase.

43 George Frickie offered GE's lease payments for the remainder of 2003 ($350,000) as a buy out offer.

44 On or about May 1st, 2003 Samuel K. Lipari tentatively contacted several local Banks, knowing that US Bank had threatened his company with a malicious USA PATRIOT ACT report to keep Medical Supply from entering the hospital supply market where US bank was affiliated with Neoforma, an existing electronic marketplace for healthcare supplies.

45 Samuel K. Lipari knew Medical Supply could not get a loan because of the threat and extortion of the USA PATRIOT ACT, but knew he needed inputs from bankers familiar with the commercial real estate

market in Blue Springs, MO.

46 Samuel K. Lipari felt Medical Supply could form a holding company to obtain the property without US Bank realizing, and could then enter the hospital supply market.

47 Samuel K. Lipari spoke with Mr. Allen Lefko President of Grain Valley Bank, Mr. Pat Campbell branch manager of Gold's Bank and Mr. Randy Castle Senior Vice-President of Jacomo Bank.

48 Each of the banks indicated a wiliness to provide the mortgage because they felt the property was worth far more than the price offered by Cherokee Properties L.L.C., but the mortgage was too large for the regulatory size of their bank and they each suggested a national bank as an alternative.

49 Due to US Bank's extortion and racketeering, including the pretext and very real threat of a malicious USA PATRIOT ACT "suspicious activity report" (SAR) against Medical Supply since Samuel K. Lipari had tried to enter the hospital supply market in October of 2002, Samuel K. Lipari knew he was unable to solicit a national bank for the real estate loan.

50 On or about May 7th, 2003 Medical Supply contracted a financial consultant (Mrs. Joan Mark) for advice on how to structure a mortgage to buy the building which has a 7- year revenue stream from GE in the amount of $5.4 Million dollars, the identical amount offered to purchase the building and for which Medical Supply had a letter of intent from the owner Cherokee Properties LLC.

51 Mrs. Mark suggested Samuel K. Lipari propose a mortgage arrangement directly to Mr. Frickie with GE Corporate.

52 Mrs. Mark explained how a purchase of the $10 Million dollar property for $5.4 Million dollars was a great deal for any mortgage lender.

53 Mrs. Mark also explained if GE provided a $5.4 Million dollar mortgage on a $10 Million dollar property and eliminated a $5.4 Million dollar lease liability that GE would directly benefit from a $15 Million dollar positive swing to their balance sheet.

Offer

54 On or about May 15th, 2003, Medical Supply's corporate counsel sent a proposed transaction to George Frickie outlining the terms of Medical Supply's proposal :

APPENDIX FIVE

GE, GE CAPITAL
and GE TRANSPORTATION
Relationship

Dear Mr. Fricke:

I am writing on behalf of Medical Supply Chain, Inc. with a proposal to release GE from a seven-year 5.4 million dollar obligation on 1600 N.E. Coronado Dr., Blue Springs MO. We have spoke with the City of Blue Springs economic development officer and the city attorney. Medical Supply Chain, Inc. has also obtained a letter of intent from the building's owner, Cherokee South, L.L.C. (Barry Price/Scott Asner) to purchase the building. We offer to release GE from its lease and 5.4 million dollar obligation, providing GE pays Medical Supply Chain, Inc. at closing for the remainder of the 2003 lease and transfers title to the building's furnishings. This offer is contingent on GE's acceptance by 3pm (EST), Friday, May 23rd; the City of Blue Spring's approval of Medical Supply Chain's purchase and occupation of the building and is contingent upon GE Capital securing a twenty year mortgage on the building and the property with a first year moratorium.

Medical Supply Chain, Inc. believes this arrangement will result in a net gain in revenue for GE and GE's Capital services was our first choice for the commercial mortgage when our area bankers advised us the building and the property at 6.2 million dollars was substantially less than its market value of 7.5 million dollars, but would require a commercial lender. Medical Supply Chain, Inc. has no existing debt and a valuation of thirty two million dollars. See attachment 1.

GE Capital or its underwriter would need to provide Medical Supply Chain, Inc. a twenty-year
Mortgage at 5.4% on the full purchase price of 6.4 million dollars, with a moratorium on the first full year of mortgage payments. The City of Blue Springs would be paid the balance of lease payments for the land ($800,000.00) or in the alternative, the mortgage will include an escrow account to complete the lease and purchase of the land on its original terms. GE
Capital can provide or designate the closing agent and would be required to provide 5.4 million dollars to Cherokee South, L.L.C. and your division's check for the remainder of the lease payable to Medical Supply Chain, Inc. along with a bill of sale for the buildings furniture and equipment. This closing would need to be completed by June 15th, 2003. Please contact us at your receipt of this offer and provide us a contact person for GE Capital or its mortgage agent.

Bret D. Landrith

Oral Acceptance Affirming Meeting of the Minds

55 The afternoon of May 15th, 2003 George Frickie responded, leaving a taped voicemail message and stating he had spoke with the "business leaders" at GE corporate and that they will accept Medical Supply's proposal:

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

APPENDIX FIVE 9

GE, GE CAPITAL
and GE TRANSPORTATION
Relationship

57 May 15th 2003 taped voice mail message recorded by George Frickie.

Verification, A Writing Meeting Statute of Frauds

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

"From: Fricke, George (CORP)
To: Bret Landrith
cc: Newell, Andrew (TRANS) ; Payne, Robert J (TRANS) ;
Davis, Tom L (TRANS) ; Jakaitis, Gary (CORP)
Sent: Thursday, May 15, 2003 6:05 PM
Subject: RE: Lease buyout GE/Harmon building

Bret, I would like to confirm our telephone conversation in that GE will accept your proposal to terminate the existing Lease. Robert Payne GE Counsel will start working on the document. He is out of the office until Monday the 19th. GCF"

Conduct Consistent With Contract

59 On or about May 20th, 2003, Medical Supply was given a walk through of the property to inventory the buildings furniture and fixtures and discuss building maintenance and operational procedures.

60 Mr. Tom Davis, the property manager for GE Transportation in Blue Springs and Mr. John Phillips, the GE Transportation building maintenance engineer provided a three-hour walk through in addition to the building maintenance and operational procedures.

61 Mr. Phillips also provided the construction blueprints of the building and allowed Samuel K. Lipari to make copies.

62 Samuel K. Lipari returned the blueprints after copies were made.

63 Mr. Davis and Mr. Phillips both stated they were being dismissed from employment with GE since they would no longer be needed.

64 On May 22nd, 2003 Samuel K. Lipari spoke to Mr. Doug McKay with GE Capital who had called earlier that week with regard to the mortgage outlined in Medical Supply's proposal.

65 Mr. McKay asked that Samuel K. Lipari send his company information regarding the mortgage.

66 Samuel K. Lipari indicated that he could meet him the following Tuesday because Medical Supply

had a loan package for him that included its financials, the proposal that George Frickie and GE's business leaders accepted, the letter of intent from the owners Cherokee Properties LLC and Medical Supply's Dunn & Bradstreet report showing Medical Supply's good credit rating and strong financial condition.

67 Samuel K. Lipari gave the information to Mr. McKay and Mr. McKay indicated he needed to speak with GE Transportation to see how they wanted to handle the terms of the accepted proposal.

Conduct Suggesting Repudiation

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

69 As the June 15th, 2003 closing date approached, Medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent George Frickie an email stating that a delay in closing would not effect the lease buyout of $350,000.

70 Medical Supply's counsel later again called George Frickie when he received no response and George Frickie became extremely angry and hung up the phone.

71 Medical Supply then proceeded to speak with GE's counsel Mrs. Kate O'Leary to determine if the contract had been repudiated.

72 Supporting statutes and the antitrust basis including damage implications were explained to Kate O'Leary.

73 Medical Supply gave GE a deadline of June 10th, 2003 to clarify whether there had been contract repudiation. Kate O'Leary later faxed a letter on June 10th, requesting that Medical Supply not speak to anyone at GE or its affiliates and that any correspondence relating to this matter be directed to her.

74 Medical Supply then emailed a letter stating that if no earnest money were deposited to indicate the contract was not being repudiated, Medical Supply would file its claims on June 16th, 2003 for antitrust and breach of contract.

75 GE repudiated its contract, sacrificing $15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, L.L.C. and Neoforma in the market for hospital supplies.

APPENDIX FIVE

GE, GE CAPITAL
and GE TRANSPORTATION
Relationship

76 Samuel K. Lipari filed a *lis pendens* in the Jackson County Register of Deeds office based on his state law claims in the US District Court.

77 The defendant Carpet n' More Inc. Stewart Foster placed the building up for sale with actual or imputed knowledge of Medical Supply's claims.

78 The defendants have occupied the building at 1600 NE Coronado preventing plaintiff from receiving the value of his bargain and with actual or imputed knowledge of Medical Supply's claims.

79 In March 2006 GE CAPITAL funded the purchase of Neoforma, an electronic marketplace competitor of Medical Supply Chain, Inc.

80 Neoforma has never been profitable: "Neoforma's balance sheet shows a cumulative loss of nearly $739 million dollars as of Sept. 30, 2004." Healthcare Purchasing News March 2005.

81 "In 2005, in accordance with GAAP, Neoforma's net loss and net loss per share were $35.9 million dollars and $1.81 per share respectively, an improvement from the $61.2 million dollar net loss and $3.17 net loss per share recorded in the prior year." Neoforma, Inc. press release San Jose, CA, USA 02/26/2003.

GENERAL ELECTRIC DEFENDANTS' INTERFERENCE WITH SUBSEQUENT ATTEMPTS TO CAPITALIZE PETITIONER'S ENTRY INTO HOSPITAL SUPPLY MARKET

82 The petitioner attempting to obtain capital inputs a third time to enter the hospital supply market through a Chicago Illinois financier named Michael W. Lynch was stopped again by the GE defendants. Hon. Judge Eugene R. Wedoff, the Chief Bankruptcy Judge of the Northern District of Illinois has revealed to the Federal Bureau of Investigation the defendants' widespread use of offshore funds in the continuation of a "Greylord" racketeering enterprise effecting the outcomes of federal court cases in several states where General Electric's interest in a cartel member's monopoly market share is at stake. The evidence shows GE Capital, a defendant in this case and its financial client Alcoa furthered General Electric's interests by influencing the outcome of any action threatening General Electric's monopolies or actions to retaliate against witnesses who threatened General Electric's monopolies.

83 Michael W. Lynch provided evidence to Western District US Attorney Bradley J. Schlozman discovered in April 2006 that a $39,000,000.00 bribery fund was being used to secure outcomes in court

APPENDIX FIVE

**GE, GE CAPITAL
and GE TRANSPORTATION
Relationship**

cases including the shift of unfunded pension obligations of McCook Metals, Inc. to the Pension Benefit Guaranty Board (PBGC) at the expense of US taxpayers despite the obligation of Alcoa Aluminum financed by General Electric, pursuant to Alcoa's acquisition of Reynolds Metals, under ERISA law.

84 On July 1st, 2007 Hon. Judge Eugene R. Wedoff stepped down as Chief Bankruptcy Judge of the Northern District of Illinois. As a result of federal government investigations of illegal conduct that the petitioner believes was a protection selling racketeering scheme, Bradley J. Schlozman has resigned his current position at main justice, Deputy Attorney General Paul McNulty who authored the memo used by the GE CEO Jeffrey R. Immelt and the General Electric defendants to conceal the financial records of Neoforma and defeat the Sarbanes - Oxley Act of 2002 as described in the petitioner's underlying complaint has also resigned.

GENERAL ELECTRIC DEFENDANTS' INTERFERENCE WITH RECOVERY OF PETITIONER'S CAPITALIZATION FOR ENTRY INTO HOSPITAL SUPPLY MARKET FROM US BANK DEFENDANTS

85 The GE defendants Jeffrey R. Immelt, GE Capital and GE Transportation coordinated their defense of Medical Supply's action with the US Bank defendants US Bancorp and US Bank along with Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff to defeat the petitioner's claims for injunctive and declaratory relief resulting from his first attempt to enter the market for hospital supplies.

86 On January 29, 2004, March 4, 2004, April 2, 2004 US Bancorp's counsel, Nicholas A.J. Vlietstra and Piper Jaffray's counsel Reed coordinated their appeal (10th C.C.A. 03-3342) with the GE defense. The GE defendants included the action against the US BANCORP defendants and Unknown Healthcare Provider as a related appellate case in (10th C.C.A. 04-3075) and used the US BANCORP order as a basis for a cross appeal (10th C.C.A. 04-3102) challenging the failure of the trial court to grant sanctions against Medical Supply. The GE Defendants decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth Circuit Court of Appeals to uphold the trial court's erroneous ruling. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being

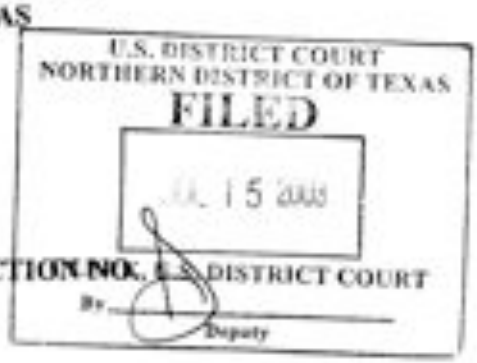
conflicted out and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, originating from US Bancorp and US Bank's agent Shughart Thomson and Kilroy's past and current share holders.

87 The former eighteen year Shughart Thomson & Kilroy, P.C. shareholder acting as magistrate on the GE case denied Medical Supply discovery and the court did not even permit discovery when the dismissal attachments necessitated conversion of the GE motion to one for summary judgment.

APPENDIX FIVE

GE, GE CAPITAL
and GE TRANSPORTATION
Relationship

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



UNITED STATES OF AMERICA and THE STATE OF TEXAS, *ex rel* CYNTHIA I. FITZGERALD, Plaintiffs vs. NOVATION, LLC, VHA, INC., UNIVERSITY HEALTHSYSTEM CONSORTIUM, and HEALTHCARE PURCHASING PARTNERS INTERNATIONAL, LLC, Defendants.	§	CIVIL ACTION NO. FILED IN CAMERA AND UNDER SEAL 3 03CV1589 D

COMPLAINT FOR VIOLATION OF FEDERAL FALSE CLAIMS ACT 31 U.S.C. § 3730 AND TEXAS MEDICAID FRAUD PREVENTION ACT

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I. INTRODUCTION

1. This is an action to recover damages and civil penalties on behalf of the United States of America and the State of Texas arising from false statements and claims made, presented, and caused to be presented by the defendants and/or their agents, employees and co-conspirators in violation of the Federal Civil False Claims Act, 31 U.S.C. §§ 3729 et seq., as amended ("the Federal FCA"), and the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code §§ 36.001 et seq. ("the Texas MFPA").

2. The Federal FCA and Texas MFPA each provide that any person who knowingly submits or causes to be submitted a false or fraudulent claim to the government[1] for payment or approval is liable for a civil penalty of up to $11,000 for each such claim submitted or paid, plus three times the amount of the damages sustained by the government. Liability attaches both when a defendant knowingly seeks payment that is unwarranted from the government and when false records or statements are knowingly created or caused to be used to conceal, avoid or decrease an obligation to pay or transmit money to the government. The Federal FCA and Texas MFPA each allow any person having information regarding a false or fraudulent claim against the government to bring an action for herself (the "relator" or "qui tam plaintiff") and for the government and to share in any recovery. The Complaint is filed under seal for at least 60 days (without service on the defendants during that period) to enable the government: (a) to conduct its own investigation without the defendants' knowledge, and (b) to determine whether to join the action.

3. Defendants in this action are VHA, Inc. ("VHA") and University HealthSystem Consortium ("UHC"), two nation-wide hospital networks consisting of 2,200 community-owned hospitals and 100 teaching hospitals, Novation, LLC ("Novation"), the nation's largest group purchasing organization founded and wholly owned by VHA and UHC to provide purchasing services to their collective 2,300 member health care organizations, and HealthCare Purchasing Partners International, LLC ("HPPI"), another VHA-UHC joint venture and group purchasing

[1] As used herein, the term "government" shall refer to both the federal government and the government of the State of Texas.

organization that markets Novation purchasing agreements to over 5,000 health care organizations (primarily physician groups, clinics, long-term care facilities, and home health agencies) that do not belong to the VHA or UHC hospital networks.

4. At all times relevant to this Complaint, meaning from 1993 to present, the member hospitals of Defendants VHA and UHC ("VHA and UHC Members") and the health care organizations that were customers of Defendant HPPI ("HPPI customers") purchased under the Novation group contracts supplies and services that were used in providing medical care to beneficiaries of state and federally-funded health insurance programs and sought reimbursement for the cost of these supplies and services from the government health insurance programs, including Medicare, Medicaid, and TRICARE/CHAMPUS. Medicare is a federally-funded health insurance program primarily for the elderly. Medicaid is a state and federally-funded health insurance program for low-income patients. In Texas, the Medicaid program – known as the Texas Medicaid Program -- is funded with 60% federal funds and 40% state funds. The Civilian Health And Medical Program of the Uniformed Services, now known as TRICARE ("TRICARE/CHAMPUS"), is a federally-funded health insurance program for individuals with family affiliations to the military services.

5. At all times relevant to this Complaint, defendant Novation (and its predecessor VHA Supply Company), was in the business of securing on behalf of the VHA and UHC Members and HPPI customers group contracts with manufacturers, suppliers, and distributors (collectively "vendors"[2]) for supplies and services. Since the VHA and UHC Members and HPPI customers purchase more than $19.6 billion in supplies and services annually under Novation's group contracts and collectively comprise 22% of the national market of staffed beds, 29% of total admissions, and 30% of total surgeries, Novation wields considerable power in determining which manufacturer will be awarded one of its more than 600 group contracts and which distributors will be authorized to distribute products under these contracts. Throughout the period from at least 1993 to present, defendant Novation, with the assistance of VHA, UHC and HPPI, used this power to secure

[2] As used herein, the term "vendor" shall refer to manufacturers, distributors, and/or suppliers.

kickbacks and other illegal remuneration from the vendors as payment for awarding them coveted Novation contracts.

6. Defendant Novation, with the assistance of VHA, UHC, and HPPI, engaged in these fraudulent practices knowing that such payments would inflate the costs of the contracted supplies that the VHA and UHC Members and HPPI customers purchased and would ultimately cause them to submit to the government health insurance programs – in their invoices and annual cost reports – claims for reimbursement for supplies and services that were higher than they would have been had Novation not solicited and received these illegal payments. Defendant Novation, with the assistance of VHA, UHC, and HPPI, also engaged in these fraudulent practices knowing that, by awarding contracts to those vendors willing to pay Novation the biggest kickback (and not necessarily those able to supply the best product at the lowest price), it routinely excluded smaller manufacturers with safer and more innovative products that would have obviated or reduced the need for treatment of Medicare, Medicaid, and TRICARE/CHAMPUS beneficiaries and, in so doing, caused the government health insurance programs to incur increased health care costs.

7. Under the Federal FCA and Texas MFPA, Qui Tam Plaintiff/Relator Cynthia L. Fitzgerald ("Relator") seeks to recover damages and civil penalties arising from defendants' actions in soliciting and receiving kickbacks and thereby causing the VHA and UHC Members and HPPI customers to present false records, claims, and statements to the United States Government, the state governments (including the State of Texas) and their respective agents in connection with the VHA and UHC Members' and HPPI customers' claims for excessive reimbursement for supplies and services provided to beneficiaries of the Medicare, Medicaid, and TRICARE/CHAMPUS programs.

8. Relator has information and believes that the fraudulent practices described herein were typical of defendant Novation and Novation's predecessor VHA Supply Company at all times material to this action and that VHA, UHC and HPPI aided and abetted Novation and VHA Supply in these activities. Relator has information and believes that defendants have engaged in these fraudulent practices from at least 1993 to present.

II. PARTIES

9. Qui tam plaintiff and relator, Cynthia I. Fitzgerald ("Relator"), is a resident of Plano, Texas and was employed by Novation from July 1998 to February 1999 as a Senior Product Manager for Medical/Surgical products in their Irving, Texas office. Shortly after Ms. Fitzgerald began to complain to senior management at Novation about these fraudulent practices, Novation terminated her employment in retaliation for her questioning their propriety. Ms. Fitzgerald files this action for violations of 31 U.S.C. §§ 3729 et seq. on behalf of herself, the United States Government pursuant to 31 U.S.C. § 3730(b)(1), and the State of Texas pursuant to Texas Human Resources Code §§ 36.101. Ms. Fitzgerald has personal knowledge of the false records, statements and/or claims that defendant Novation – aided and abetted by VHA, UHC, and HPPI – caused the VHA and UHC Members and HPPI customers to submit to the government health insurance programs.

10. Defendant Novation, LLC ("Novation"), the nation's largest group purchasing organization ("GPO"), is a Delaware corporation with its principal place of business at 125 E. John Carpenter Freeway in Irving, Texas. Novation was founded in January 1998 by combining VHA Supply Company and UHC Supply, the former purchasing arms of the 2,300-member VHA and UHC hospital networks. Novation is a for-profit company jointly owned by VHA and UHC whose core business is negotiating and managing contracts for supplies and services on behalf of the 2,300 VHA and UHC Members as well as the over 5,000 HPPI customers who access those contracts. Novation manages more than $19 billion in group purchasing volume. Under Novation's portfolio of over 600 contracts with hundreds of vendors, VHA and UHC Members and HPPI customers can purchase nearly all of their supply and service needs, including such diverse product lines as medical/surgical supplies, pharmaceuticals, diagnostic imaging products, laboratory products, business products, capital equipment and dietary and food products. As its controlling shareholder (with a 77% ownership interest), VHA has populated Novation largely with staff from its former purchasing company, VHA Supply Company. Most, if not all, of the fraudulent practices in which Novation has engaged originated at VHA and VHA Supply Company. Novation's stated mission is to use VHA's and UHC's considerable combined purchasing power "to deliver comprehensive

value and the industry's best pricing to its customers."

11. Defendant VHA Inc. ("VHA"), formerly known as Voluntary Hospitals of America Inc., is a Delaware corporation, with its principal place of business located at 220 E. Las Colinas Boulevard in Irving, Texas. VHA is a nationwide network of community-owned health care systems and their physicians and includes such leading health care organizations as Baylor Health Care System in Dallas, Mayo Foundation in Rochester, Minnesota, and Cedars-Sinai Health System in Los Angeles. VHA has more than 2,200 members in 48 states (excluding Nevada and Utah). A list of VHA's membership is attached as Exhibit 1 and incorporated herein. VHA is a for-profit cooperative that was formed in 1977 to pool the resources and purchasing power of several formerly disparate community-owned hospitals. VHA's member organizations purchase a large percentage of their supplies and services under the more than 600 Novation contracts. From 1985 until January 1998, VHA had its own group purchasing organization, VHA Supply Company ("VHA Supply"), that negotiated supply contracts on its members' behalf. VHA Supply was a wholly-owned subsidiary of VHA. In January 1998, VHA joined its purchasing business with UHC's to form Novation, VHA and UHC's jointly-owned GPO. VHA has a 77% ownership interest in Novation. Many of the fraudulent practices described herein originated from VHA Supply Company, which employed these tactics throughout its existence. Novation – which was created by combining UHC and VHA Supply and is largely staffed by former employees of VHA Supply – continued to perpetrate and expand the fraudulent practices of VHA Supply.

12. Defendant University HealthSystem Consortium ("UHC") is an Illinois corporation with its principal place of business at 2001 Spring Road, Suite 700 in Oak Brook, Illinois. UHC is an alliance of approximately 100 academic health centers nationwide and includes as its members such leading teaching hospitals as NYU Medical Center, Yale-New Haven Hospital, Johns Hopkins Hospital, and Emory University Hospital. A complete list of UHC's members is attached as Exhibit 2 and incorporated herein. Like VHA, UHC was formed to aggregate the resources and purchasing power of teaching hospitals and achieve operational efficiencies and other economies of scale. In January 1998, UHC combined its purchasing business with that of VHA's to form Novation, a VHA

and UHC jointly-owned GPO. UHC has a 23% ownership interest in Novation. Prior to 1998, UHC operated its own GPO – UHC Supply -- and negotiated supply contracts on behalf of its members. Because many of UHC's member hospitals are part of publicly-funded universities, UHC -- and now Novation – uses a public competitive bid process in soliciting bids and awarding contracts. (In contrast, before joining with UHC to form Novation, VHA and VHA Supply Company did not subject its contracts to public competitive bid.) UHC's member hospitals purchase a large percentage of their supplies and services under the more than 600 Novation contracts.

13. Defendant Healthcare Purchasing Partners International ("HPPI") is a Delaware corporation with headquarters located at 220 East Las Colinas Boulevard in Irving, Texas. Like Novation, HPPI is a group purchasing organization that is jointly owned by VHA and UHC. HPPI is engaged in the business of providing access to Novation contracts (and subsequently managing the contracts) for those health care organizations who are not members of VHA and UHC and otherwise served by Novation. Rather than community-owned and teaching hospitals, HPPI's over 5,000 customers consist largely of physician offices, clinics, home health agencies, ambulatory care, and long-term care facilities. A list of HPPI's customers is attached as Exhibit 3 and incorporated herein. HPPI was purchased by VHA in 1994. In January 1998, at the same time that Novation was formed, UHC acquired a partial ownership interest in HPPI from VHA and became a joint owner (with VHA) of HPPI.

III. JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of the Federal FCA action pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 3732(a), which specifically confers jurisdiction on this Court for actions brought pursuant to 31 U.S.C. §§ 3729 and 3730. This Court has jurisdiction over the subject matter of the Texas Medicaid Fraud Prevention Act ("Texas MFPA") action pursuant to 28 U.S.C. § 1367 and 31 U.S.C. § 3732(b) because the Texas MFPA action arises from the same transactions or occurrences as the Federal FCA action.

15. This Court has personal jurisdiction over the defendants pursuant to 31 U.S.C. § 3732(a), which provides that "[a]ny action under section 3730 may be brought in any judicial district in which

the defendant, or in the case of multiple defendants, any one defendant can be found, resides, transacts business or in which any act proscribed by section 3729 occurred." Section 3732(a) also authorizes nationwide service of process. During the relevant period, defendants Novation, VHA, UHC, and HPPI resided and/or transacted business in the Northern District of Texas.

16. Venue is proper in this district pursuant to 31 U.S.C. § 3732(a) because defendants Novation, VHA, UHC, and HPPI each can be found in, resides in, and/or transacts business in the Northern District of Texas and because many of the violations of 31 U.S.C. § 3729 described herein occurred within this judicial district.

IV. BACKGROUND ON GROUP PURCHASING ORGANIZATIONS

17. In the mid-to-late 1980s, mergers among several of the large hospital suppliers increased their market power and helped drive up the costs of medical supplies and services. In response, individual hospitals and health systems sought to increase their bargaining power by joining together to form hospital buying cooperatives, known as group purchasing organizations ("GPOs"). By pooling the purchases of their member hospitals and negotiating group contracts for supplies and services, GPOs could use volume purchasing as leverage to negotiate lower prices with suppliers. Member hospitals would also be able to reduce their purchasing staffs, thereby lowering operating costs, as the GPO assumed their contracting functions.

18. As the primary purchasing agent for its member hospitals, the GPO handles all aspects of group contracting -- from drafting the request for proposal, soliciting and evaluating bids to awarding and subsequently managing the group contracts. Once it has awarded a group contract to a vendor, the GPO notifies hospital members of its terms (Novation issues members a "Launch Packet") and hospital members buy directly from the vendor for the price specified in the group contract. The GPO does not purchase any of the contracted supplies or services for its members nor does it take custody of the supplies.

19. Although they have an ownership interest in the GPOs and are the beneficiaries of the contracting services GPOs provide, neither the member hospitals nor their hospital network pays the GPOs' operating costs. Instead, GPOs are primarily financed by the vendors with whom the GPOs

contract through the use of "administrative fees." Administrative fees are typically calculated as a percentage of each hospital member's purchases from a vendor.

20. To prevent these fees from being treated as a 'kickback' or illegal payment under the Anti-Kickback Act, the GPO-industry convinced Congress to amend the Act in 1986 to include a safe harbor for administrative fees paid to a GPO by a vendor. See 42 U.S.C. § 1320a-7b(b). In defining what constitutes an appropriate administrative fee, the regulations require that the following criteria be satisfied: (1) the GPO must have a written agreement with each of its members under which the fees (and its terms) are disclosed; (2) the agreement must state that the fees are to be 3 percent or less of the purchase price of the supplies to be provided, or for fees above 3 percent, the amount or maximum amount to be paid by each vendor; and (3) the GPO must provide each member with an annual report listing the amount the GPO received from each vendor in administrative fees based on that member's purchases. 42 C.F.R. § 1001.952(j).

21. To enable GPOs to calculate their administrative fee, vendors provide GPOs with monthly reports listing, for each of its members, the amount of supplies and services the member purchased from the vendor the previous month under a particular group contract or set of contracts.

22. After paying its operating expenses, GPOs typically distribute any revenue they earn to their hospital members or hospital networks in the form of annual dividends. Where the administrative fees the GPO receives from vendors exceed its operating costs, a GPO should return the surplus fees to the member hospitals/networks in proportion to the amount of purchases each member made under the group contracts.

V. DEFENDANTS' FRAUDULENT SCHEMES

23. Federal law makes it a felony to "solicit[ ] or receive[ ] any remuneration (including any kickbacks, bribe or rebate) directly or indirectly, overtly or covertly, . . . in return for purchasing, . . . ordering, or *arranging for or recommending* purchasing, . . . or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program [Medicare, Medicaid or TRICARE/CHAMPUS]." 42 U.S.C. § 1302a-7b(b) (emphasis added).

24. As the nation's largest GPO, Novation negotiates contracts on behalf of – and thereby arranges for and recommends the purchasing of supplies and services for -- more than 7,300 health care providers (2,300 VHA and UHC Members and more than 5,000 HPPI customers) who constitute 22% of the national market of staffed beds, 29% of total admissions, and 30% of total surgeries. As Novation informs potential bidders in its Invitations-to-Bid, Novation's customers represent greater than $19.6 billion in actual annual purchasing volume and $32 billion in purchasing potential. As these figures demonstrate, a contract with Novation can mean millions of dollars in sales and increased market share for the successful vendor who is awarded the group contract.

25. Rather than use its considerable collective purchasing power to serve its customers (the VHA and UHC Members and HPPI customers) by awarding group contracts to vendors offering the best product at the lowest price, Novation (and its predecessor VHA Supply) – with the assistance of VHA, UHC and HPPI -- has often acted to increase its profits, and those of its officers and executives, by awarding contracts to vendors who pay Novation the largest kickback, irrespective of the quality or price of their supplies/services.

26. At all times relevant to this Complaint, meaning from at least 1993 to present, Novation (and its predecessor VHA Supply) has solicited and received from the vendors to whom it awards contracts kickbacks and other illegal remuneration as payment for awarding them group contracts. Unlike the administrative fees vendors pay to GPOs, which are condoned by Congress, these kickbacks and other illegal remuneration are in no way tied to the administrative costs Novation incurs in managing the contract. Nor are they calculated based on clearly defined, objective criteria such as the volume of purchases made under the contract by Novation's customers. Instead, they are simply payments Novation requires vendors to pay up-front or throughout the life of the contract for the privilege of being awarded a group contract and thereby gaining access to Novation's 7,300 customers.

27. Since these payments bear no relationship to the performance of the underlying contracts (or the administrative costs incurred in managing those contracts), Novation regularly chooses among the competing vendors based on who is willing to pay the most. Under this guiding business

"principle," Novation has awarded the majority of its over 600 contracts to large vendors, who have been able to pay the biggest kickbacks. (The vendors, in turn, inflate the prices they charge under the contract in order to recoup the costs of paying Novation the kickbacks and other illegal remuneration necessary to win the contract. These increased costs are ultimately borne by the insurers, both government and private, who reimburse the VHA and UHC Members and HPPI customers for the costs of treating their insureds/beneficiaries.) Small vendors, possessing fewer financial resources but safer and more innovative products, have often been unwilling or unable to make such up-front payments and consequently are routinely shut out of Novation contracts.

28. At all times relevant to this Complaint, Novation (and its predecessor VHA Supply) has concealed the existence of these kickbacks and other remuneration from the VHA and UHC Members and HPPI customers, disguising the proceeds in "slush funds," secret accounts and unrelated business ventures. The overwhelming majority of the monies/remuneration received from these kickbacks is retained by Novation, typically as lavish bonuses and "incentive" compensation for its officers and executives[3] or as capital for financing new ventures, such as the e-commerce company Neoforma, Inc. Novation distributes a modicum of its ill-gotten gains to the VHA and UHC Members in annual dividends of its revenue as a way of lulling the Members into believing Novation performs properly on their behalf and persuading them to continue to utilize its services.

29. As a Senior Product Manager at Novation from July 1998 to February 1999, Relator was responsible for negotiating and managing a portfolio of group contracts for medical/surgical supplies and services that was worth $243 million. During her six months in this position, Relator was privy to the inner workings of Novation's contracting process, including the criteria Novation utilized to determine the vendors to whom it would award contracts. From her interactions with her superiors Sherry Woodcock and John Burks, among others, Relator quickly came to understand that her performance would be judged not merely by her ability to deliver to the VHA and UHC Members

[3] In 2002, Novation's President Mark McKenna earned $928,000 ($403,000 in annual base salary; $357,000 under Novation's Retention Long-Term Incentive Program; $145,000 under Novation's Annual Incentive Plan; and $23,000 under Novation's Rewarding Excellence Incentive Plan).

contracts for the best supplies at the lowest prices, but also by the amount of revenue she was able to generate for Novation in the form of up-front payments and other illegal remuneration, of which the Members were not apprised. After raising concerns about these practices with Novation's Human Resources staff, Senior Management and In-House Legal Counsel and having those concerns summarily dismissed, Relator realized that these fraudulent practices were not unique to the Medical/Surgical Division but instead pervaded Novation's business. As described below, these illegal payments/remuneration took a wide variety of forms.

A. Up-Front Payments to "Buy the Contracts"

1. Johnson & Johnson's Attempt to Buy the IV Catheter Contract

30. One of the first medical/surgical contracts to which Relator was assigned in her position as Senior Contract Manager at Novation was Contract No. MS8020B, a three-year contract for "IV Standard and Safety Catheters and NOVAPLUS® IV Start Kits." Under this contract, Novation was seeking a vendor to supply IV Catheters as well as IV Start Kits under Novation's private label brand, NOVAPLUS®, to the VHA and UHC Members and HPPI customers. This was the first contract for IV Catheters and Start Kits put out for public competitive bid since Novation was formed.

31. Shortly after Relator received and opened the bids on the IV Catheter Contract, sales representatives from Johnson & Johnson called Relator to request a meeting with her to discuss Johnson & Johnson's bid. Relator agreed to such a meeting at Novation. During the meeting, it quickly became clear that the Johnson & Johnson sales representatives had no substantive questions regarding the contract but rather had convened the meeting simply to inquire about Johnson & Johnson's prospects of receiving the bid award. Unwilling to provide this information, Relator called an abrupt end to the meeting.

32. Having had their lobbying efforts rebuffed by Relator, the Johnson & Johnson sales staff contacted Relator's supervisor, Sherry Woodcock, and arranged a private meeting with Woodcock to which Relator was not invited. When Relator later learned of the meeting, she became concerned as to why she was being excluded and decided that, as the Senior Product Manager responsible for

awarding this contract, she would attend. Early on in the meeting, while discussing Contract No. MS8020B, "IV Standard and Safety Catheters and NOVAPLUS® IV Start Kits," one of the Johnson & Johnson sales representatives asked Relator "How much will it take to get the contract?" When Relator appeared startled and did not have a ready response, the sales representative added, "Others before you have done it."

33. Offended by the request that she agree to accept a kickback (the price tag of which she was expected to name) in exchange for awarding the contract to Johnson & Johnson, Relator turned to her supervisor, Sherry Woodcock, and said "Oh, no. This is illegal, and I don't look good in orange and I don't look good in stripes." Shortly thereafter, when the meeting had concluded, Relator repeated her concerns to Sherry Woodcock about what had just transpired (i.e., Johnson & Johnson's offer to pay Novation a kickback to obtain the IV Catheter business) and asked Woodcock whether she would like Relator to notify John Burks, the former Head of Novation's Medical/Surgical Division, or whether Woodcock would rather do it. Woodcock assured Relator that she would inform Burks.

34. Over the ensuing seven to ten days, when Relator would ask Woodcock if she had spoken with Burks yet, Woodcock's standard reply was that she had been unable to get to it. Frustrated by Woodcock's apparent unwillingness to address the issue, Relator spoke with Burks herself. According to Burks, while Johnson & Johnson's actions may have been unethical, he did not consider them to be illegal. Burks believed that Relator's suggested action -- disqualifying Johnson & Johnson's bid -- was too harsh a punishment. After Burks refused to take action against Johnson & Johnson, Relator next took the matter to Novation's Human Resources staff, William Laws, Jr. and Shirley Lopez, and in-house counsel, Gerry Rubin, but was similarly rebuffed.

35. At the same time that she was being stonewalled by her superiors on this front, Relator also was beginning to have concerns about the way in which other Novation contracts, including the Can-Liner Contract (discussed below), had been awarded. Shortly after voicing these concerns, Relator began to receive criticism about her job performance, was ostracized by her co-workers, and quickly terminated.

36. With the new found perspective on Novation's contracting process gained from her work on the IV Catheter and Can-Liner Contracts, Relator came to realize what was evident from Johnson & Johnson's question/comment ("How much will it take to get the contract? Others before you have done it."), i.e., that it had been, and continued to be, the practice of Novation (and its predecessor VHA Supply) to award contracts to large vendors like Johnson & Johnson because of the amount they were willing to pay Novation in up-front payments and other illegal remuneration. Under this standard operating procedure, Novation (and its predecessor VHA Supply) would suggest to vendors the amount of money it needed to receive up-front to award them the contract; the vendors, who were typically larger companies like Johnson & Johnson capable of paying such sums, paid Novation these monies to obtain the contract; and Novation ultimately awarded the contracts to these vendors.

37. Relator's refusal to play by these rules in the course of her work negotiating the IV Catheter Contract (and later the Can-Liner Contract) represented an unexpected (albeit short-lived) departure from the norm. Although Relator did not award the IV Catheter Contract to Johnson & Johnson in exchange for a kickback as had been the prior practice of Novation/VHA Supply (as discussed below, Relator awarded the Contract to Becton Dickinson), this was the first and last contract Relator ever negotiated for Novation. Novation fired her before she could interfere with any further contracts.

38. At no time did Novation or its predecessor VHA Supply inform the VHA and UHC Members and HPPI customers that it was their standard practice to solicit and receive kickbacks from vendors, as they had done with Johnson & Johnson on several previous occasions, in exchange for awarding them contracts.

2. Becton Dickinson's $100,000 "Donation" to Novation in Connection with Winning the IV Catheter Contract

39. In addition to Johnson & Johnson, the other primary vendor to submit a bid on the IV Catheter Contract was Becton Dickinson and Company ("Becton Dickinson"). While evaluating the Johnson & Johnson and Becton Dickinson bids under the traditional criteria of price and product quality to determine which vendor to recommend to Novation management, Relator was pressured

by her managers to consider what revenue each bidder would be able to provide Novation.

40. In response to this pressure, Relator implemented a revenue-generating plan that had recently been initiated by other Senior Product Managers at Novation. Under this plan, Relator solicited from bidders bronze, silver, and gold-level "sponsorships" of Novation's latest Information-Technology project, "VHAseCURE.net," an intranet developed by VHA to enable VHA members to communicate with one another over the Internet. Although to the objective observer these sponsorship payments appear wholly unconnected to the underlying contract, both Novation and the bidders understood that such "sponsorships" would buy favorable consideration from Novation in making its bid award. Such "sponsorship" payments were over and above the administrative/marketing fee (expressed as a %-of-total sales made under the contract) that vendors like Becton Dickinson had agreed to pay Novation to cover its costs for administering the contract.

41. In response to Relator's request for VHAseCURE.net donations, Becton Dickinson agreed to pay Novation $100,000. Becton Dickinson's willingness to make such a payment was one of the factors Relator considered in deciding to recommend Becton Dickinson as the proposed recipient of the IV Catheter and Start Kit contract. Shortly after approving Relator's recommendation, Novation awarded Becton Dickinson the contract and Becton Dickinson sent Novation a check for $100,000 . See Exhibit 4 ($100,000 check), which is incorporated herein. Senior management at Novation commended Relator for her work in procuring this and another "sponsorship" payment from vendors. See Exhibit 5 (e-mail from Novation I-T Manager to Relator), which is incorporated herein.

42. As its characterization of the payment on the face of the check – "Marketing Fee/Sole Award" – reveals, Becton Dickinson made this payment to Novation in order to receive the bid award. Id. At no time did Novation ever disclose the existence, amount or purpose of these "sponsorship" payments to the VHA and UHC Members and HPPI customers.

3. *Becton Dickinson's $1 Million Payment In Connection with Winning the Needle Contract*

43. In the course of negotiating Contract No. MS8020B, "IV Standard and Safety Catheters and NOVAPLUS® IV Start Kits," Relator had frequent dealings with Kevin Mooneyham, a sales manager at Becton Dickinson, and had earned his trust and respect. In late 1998, shortly after Relator awarded the IV Catheter Contract to Becton Dickinson, Mooneyham called Relator at work and asked her to meet him for lunch to discuss concerns he was having about activities taking place between Becton Dickinson and Novation regarding another upcoming contract. Over lunch, Mooneyham complained to Relator that Becton Dickinson had agreed to pay Novation large sums of money in order to secure "a huge Novation contract" that was coming up for bid. In short, Mooneyham claimed, Becton Dickinson was "buying the business," i.e., paying Novation an up-front fee to guarantee that it will be awarded the contract.

44. From the goings-on in Novation's Medical/Surgical Division, Relator knew that the contract to which Mooneyham was referring was Novation's upcoming three-year contract for hypodermic needles and syringes, a big ticket item for most hospitals and therefore a highly valuable contract. Relator later learned that Novation had, in fact, awarded the needles and syringes contract to Becton Dickinson and Becton Dickinson had paid Novation $1 million in advance as a "special marketing fee." This $1 million fee was over and above the administrative/marketing fee Becton Dickinson had agreed to pay Novation over the life of the contract based on a percentage (3%) of the total sales made by VHA and UHC Members under the contract.

45. Relator has information and believes that Novation never disclosed to the VHA and UHC Members and HPPI customers the fact that it had received this payment from Becton Dickinson in connection with awarding Becton Dickinson the needle contract.

4. "Fee Enhancements" By Distributors

46. In addition to choosing the manufacturers to whom it will award contracts, Novation also controls the distribution channels for the products purchased under its contracts. For each of its product lines, e.g., medical/surgical supplies, dietary and food services, Novation awards an exclusive right to distribute the products purchased under its contracts to a few select distributors whom Novation calls "Authorized Distributors." For their services in distributing the products, Authorized Distributors are paid "distribution service fees" by the VHA and UHC Members and HPPI customers. The distribution service fees, also known as "the Distribution Mark-Up Fees," are added to the price of the products/services and are calculated based on the total volume of distributed purchases made by the Novation customer.

47. Like its Invitations-to-Bid to manufacturers, Novation's Invitations-to-Bid to distributors are supposed to be a public competitive bid process. However, as is the case with manufacturers, Novation awards the distribution contracts based on which distributors are willing to pay Novation the largest kickback or other illegal remuneration. Relator has information and believes that Novation has failed to inform the VHA and UHC Members and HPPI customers of the existence or amount of these illicit payments.

48. Like the "administrative/marketing" fees it charges manufacturers for the cost of administering the contract (described below), Novation also requires distributors to pay it a monthly fee based on the total purchases of products made by its customers. Although Novation provides distributors with a minimum percentage for what this fee must be, Novation leaves it to the distributor's discretion to propose the amount of the percentage. See Exhibit 6 at 7 & 13 (Invitation-to-Bid Long Term Care Distribution Services), which is incorporated herein. Under such liberal contracting guidelines, Novation regularly solicited and accepted lavish fees from distributors in

exchange for awarding them an authorized-distributor contract.

49. In addition to the monthly fee, Novation also encouraged bidders to propose fee enhancements – ways for distributors "to enhance the fee paid to Novation" -- and additional fees. Id. at 13. These enhancements and additional fees had no relationship to the underlying contract and were just another way for Novation to increase its revenue. Id. Relator has information and believes that Novation routinely awarded distribution contracts to large distributors like Cardinal Health, Inc., Allegiance Corporation, and Owens & Minor, Inc., who were willing and able to pay Novation the largest fee enhancement, "additional fees," or other illegal remuneration.

50. Like manufacturers, distributors also seek to recoup the costs of making these illegal payments to Novation. While manufacturers do so by increasing the price of the products/services themselves, distributors recoup the costs by building them into the distributor mark-up fee that is added to the price of the goods and services, which further inflates the price paid by the Novation customers and ultimately borne by the private insurers and government health insurance programs.

B. "Administrative/Marketing Fees"

51. In its Invitations-to-Bid, Novation requires all prospective bidders to include information on "marketing fees" to be paid to Novation and to calculate these fees as a percentage of sales made under the contract. See Exhibit 7 ("Novation 2001 Invitation to Bid, Enteral Products Bid") at 10, which is incorporated herein. Novation does not prescribe any limits on the size of the marketing fee that it is willing to accept (or that bidders may offer). Id. Contrary to the safe harbor requirements regarding appropriate GPO fees, Novation routinely has solicited and accepted marketing fees that greatly exceed the 3%-of-sales threshold and failed to inform the VHA and UHC Members or HPPI customers of the amount of the marketing fee they have agreed to receive.

52. According to a Novation "Contract Administration Fee Report," as of November 18, 1999, Novation had accepted administrative/marketing fees above 3% on at least 186 or 31% of its 600 contracts. See Exhibit 8 (Contract Administration Fee Report), which is incorporated herein. For many of these contracts, Novation received administrative/marketing fees as high as 30% of total sales made by Novation's customers under the contract. For instance, Novation received 30% administrative/marketing fees on Contract No. RX 132 (NOVAPLUS® Omnipaque, Nonionic Contrast Media, Hypaque) with Nycomed, Inc. and Contract No. RX84160 (NOVAPLUS® Diltiazem) with Ben Venue Laboratories – Bedford Laboratories. Id. at 20 & 28.

1. Major Pharmaceutical Manufacturers Pay Novation Some of the Highest "Administrative/Marketing Fees"

53. Pharmaceuticals are the largest product line in Novation's contract portfolio. Of Novation's 600 contracts, 275 or 46% are contracts with major pharmaceutical manufacturers for the sale of a wide array of pharmaceutical products. Id. at 17-31. Relative to other manufacturers, pharmaceutical manufacturers also paid Novation some of the highest administrative/marketing fees. In addition to the two pharmaceutical manufacturers listed above (Nycomed, Inc. and Bedford Laboratories) as having paid 30% administrative/marketing fees, the following are examples of some of the other pharmaceutical manufacturers from whom Novation received excessive administrative/marketing fees: Dupont Nuclear (Novation Contract No. RX64140) "NOVAPLUS® Dipyridamole," 25% administrative/marketing fee; Bristol-Myers (Novation Contract No. RX019) "Multisource Antibiotics," 18% administrative/marketing fee; Abbott Laboratories (Novation Contract No. RX80010) "Small Volume Injectibles Including Carpuject," 14.5% administrative/marketing fee; and Merck & Company (Novation Contract No. RX81080) "Cozaar, Fosamax, Hyzaar, Mefoxin, Mevacor, Pepcid, Primaxin, Prinivil, Proscar, Recombivax, Timoptic,

Trusopt, Vasotec, Vaccines, Zocor," 20% administrative/marketing fee. Id.

54. Relator has information and believes that Novation has failed to inform the VHA and UHC Members and HPPI customers of the amount of any of these administrative/marketing fees that it has received and continues to receive from pharmaceutical companies.

2. Other Excessive "Administrative/Marketing Fees" Paid by Becton Dickinson and Heritage Bag

55. Before awarding a contract, it was the customary practice of Novation's Senior Contract Managers to prepare an "Executive Summary" setting forth their recommendation on and supporting rationale for which vendor should receive the bid award. The Summary was distributed exclusively to top management at Novation, including the head of the Division in which the Senior Contract Manager worked and Novation's Vice-President, for their approval. At no time was the Executive Summary given to the VHA and UHC Members and HPPI customers.

56. Once the contract was awarded, the Senior Contract Manager distributes a "Launch Packet" to the VHA and UHC Members announcing the recipient of the bid award, describing the supplies being offered and providing other information necessary for making purchases under the contract. At no time is any mention made of either Novation's receipt of or the amount of the "marketing fees" and other remuneration paid/to be paid to Novation by the successful vendors.

57. Attached as Exhibits 9 and 10 to this Complaint, and incorporated herein, are copies of two Executive Summaries Novation prepared that demonstrate Novation's and VHA's receipt of marketing fees well above 3% of total sales on four contracts. In the Executive Summary for Contract No. MS8020B, "IV Catheters and Start Kits," it is noted that Becton Dickinson – the recommended bidder – has offered to provide Novation a marketing fee of 9% of total sales of the NOVAPLUS® products, Novation's private label brand. Exhibit 9 at 4. After receiving approval

for this recommendation from John Burks, Novation's former Head of Medical/Surgical Contracts, and Mark McKenna, Novation's former Vice-President, the contract was awarded to Becton Dickinson under the terms of its bid, which included paying Novation a 9% marketing fee. Novation never informed the VHA and UHC Members or HPPI customers, either orally or in writing, of the amount of this marketing fee.

58. In describing the marketing fee to be paid by Becton Dickinson, the author[4] of the Executive Summary also notes that Becton Dickinson's 9% fee represented an increase of between 1 to 4% above the marketing fee VHA had received under its prior contract for "IV Catheters and Start Kits" of between 5 and 8%. Exhibit 9 at 4. Accordingly, as this document illustrates, before the advent of Novation, VHA had also been receiving marketing fees above the 3% threshold as part of the VHA contract for "IV Catheters and Start Kits" that preceded Novation Contract No. MS80208. Relator has information and believes that neither VHA nor VHA Supply ever informed the VHA Members, either orally or in writing, of the amount of this marketing fee.

59. After its formation in January 1998, Novation experienced a transition period during which it phased out current VHA and UHC contracts and replaced them with new Novation contracts. With Contract No. MS80310, "NOVAPLUS® Can Liners," Novation sought to consolidate VHA and UHC's separate can liner contracts into a new Novation contract. In the Executive Summary for this contract, the author recommends that the Novation contract – available to both VHA and UHC Members (and HPPI customers) – be awarded to Heritage Bag under the same terms as those in VHA Supply's current can-liner contract with Heritage Bag. Exhibit 10 at 1-3. Among the reasons cited for recommending Heritage Bag is that the marketing fee Heritage Bag

[4] Although qui tam plaintiff/relator is listed as the author of this document, every Executive Summary she wrote at Novation, including this one, was thoroughly revised by her manager, Sherry Woodcock, before it was distributed to Novation management.

was offering – 8.19% of total sales -- is 6% higher than that being provided by UHC's supplier, Baxter Tennaco, under UHC's contract. Id. at 2.

60. After receiving approval for this recommendation from John Burks and Mark McKenna, Novation awarded Contract No. MS80310 to Heritage Bag under the same terms as the contract with VHA, which included the payment to Novation of an 8.19% marketing fee. Novation never informed the VHA and UHC Members or HPPI customers, either orally or in writing, of the amount of this marketing fee.

61. The Executive Summary for Contract No. MS80310 also makes clear that, like Novation, VHA Supply had also been receiving a marketing fee from Heritage Bag of 8.19% under its contract with Heritage Bag -- the predecessor to Novation Contract No. MS80310. See Exhibit 10 at 1-3. Relator has information and believes that neither VHA nor VHA Supply ever informed the VHA Members, either orally or in writing, of the amount of this marketing fee.

62. Relator also has information and believes that since 1995 Novation's predecessor VHA Supply routinely solicited and received marketing fees of at least 10% on its committed programs, including the "Opportunity I" and "Opportunity II" Programs. (Under these programs, a VHA Member could receive discounts off of the contract's base price by committing to buy a large fixed percentage of its supplies – typically between 80 and 95% -- under the contract.) Relator has information and believes that neither VHA nor VHA Supply ever informed the VHA Members, either orally or in writing, of the amount of these marketing fees.

3. Novation's Preference for Higher Priced Goods Because They Serve To Increase Its "Administrative/Marketing Fees"

63. By requiring that its administrative/marketing fees be expressed as a percentage of the total sales made under the contract (and routinely suggesting to bidders that the percentage should

exceed 3%), Novation has an interest in awarding contracts to the bidder with the highest priced goods because higher prices yield higher marketing fees. At all times relevant to this Complaint, Novation routinely chose to award contracts to vendors offering the largest marketing fee (either by virtue of the percentage of sales, higher prices or combination of the two) over competing vendors offering goods of comparable quality and lower prices than those of the chosen vendor.

64. For example, during the Summer of 2001, Novation issued an Invitation-to-Bid on a Novation contract to supply endo-mechanical products to its customers. Among the vendors who submitted bids to Novation were Johnson & Johnson and United States Surgical ("U.S. Surgical"). In its bid, U.S. Surgical offered the endo-mechanical products at prices significantly lower than those offered by Johnson & Johnson. After performing market research, Novation found U.S. Surgical's products were of comparable quality to that of Johnson & Johnson's. Despite the potential cost-savings to its customers, however, Novation awarded the contract to Johnson & Johnson.

65. Primary among Novation's reasons for choosing Johnson & Johnson over U.S. Surgical was the fact that U.S. Surgical's significantly lower prices would have greatly diminished the marketing fee that Novation would receive. Relator has information and believes that Novation never informed the VHA and UHC Members or HPPI customers of the specific details of the vendors' bids (including U.S. Surgical's significantly lower prices and comparable quality) or the real reason for its decision to choose Johnson & Johnson over U.S. Surgical – a feared reduction in its marketing fee.

C. Payments for Products Offered Under Novation's Private Label Brand, "NOVAPLUS®"

66. As Senior Product Manager in Novation's Medical/Surgical Division, Relator was also responsible for increasing vendors' participation in Novation's private label brand program,

NOVAPLUS®. NOVAPLUS® was an outgrowth of a similar private label program, VHA PLUS ("Prices Lowered Utilizing Standardization"), started by VHA Supply in the 1980s. Like VHA PLUS, the stated goals of NOVAPLUS® are to help the VHA and UHC Members and HPPI customers achieve cost savings and the benefits of product standardization by having vendors sell their products under Novation's private "NOVAPLUS®" label. In practice, however, NOVAPLUS® is simply another Novation scheme to generate more revenue without the knowledge of, and often at the expense of, the VHA and UHC Members and HPPI customers, whose interests it is supposed to serve.

67. Although made to sound like generics, the NOVAPLUS® products differ from generic products in a number of important ways. With generics, cost savings are achieved because a manufacturer is able to produce an equivalent product more cheaply than the name-brand manufacturer. However, neither Novation nor its predecessor VHA Supply manufactures any products. Instead, Novation (like VHA Supply before it) simply supplies the name. After manufacturing the products, the manufacturers simply affix the NOVAPLUS® label (in lieu of their own label) to their products. As explained in more detail below, rather than save Novation's customers money, the addition of the NOVAPLUS® name does little more than create additional costs, such as "trademark and licensing" fees, that cause the prices of the NOVAPLUS® products to exceed those of the identical products without the NOVAPLUS® label.

68. Rather than providing the VHA and UHC Members and HPPI customers with cost savings, Novation routinely convinced vendors to sell their product under the NOVAPLUS® label at a price significantly higher than what they were offering for the same product under their own label. For their participation in this scheme, Novation routinely offered to share with the vendors a percentage of the profits gained by charging the Members the increased NOVAPLUS® price.

69. For instance, after it had received and opened bids on a recent contract for blood collection tubes, Novation approached Retractable Technologies Inc. ("RTI"), one of the bidders, about the possibility of selling its blood collection tube holder to the VHA and UHC Members and HPPI customers under Novation's private "NOVAPLUS®" label. Although, in its bid, RTI had offered to sell its tube holders for 27 cents per unit, Novation proposed that RTI could sell the same tube holders to Novation's customers for $1 per unit -- a 270% mark-up -- simply by changing the label to Novation's NOVAPLUS® brand. In exchange for RTI's cooperation in this joint venture, Novation agreed to share with RTI a percentage of the profits from the 270% mark-up.

70. Although RTI rejected Novation's offer, Relator has information and believes that Novation consummated many similar deals with other, less scrupulous vendors. Relator has information and believes that Novation never informed the VHA and UHC Members or HPPI customers of the terms of these deals, including the fact that Novation had arranged to have vendors sell the NOVAPLUS® products at prices higher than those charged for the same product without the NOVAPLUS® label and kept the profits.

71. To participate in Novation's private label program and sell products under its NOVAPLUS® brand, manufacturers are required to pay Novation a "trademark and licensing" fee. Despite its name, the "trademark and licensing" fee is not a fixed fee that corresponds to the costs Novation will incur obtaining a trademark and license for a manufacturer's product. Instead, like its "administrative/marketing" fees, Novation requires vendors to offer Novation a percentage of the total purchases of NOVAPLUS® products made by Novation's customers under the NOVAPLUS® contract. The "trademark and licensing" fee is in addition to the "administrative/marketing" fee Novation charges. By giving manufacturers the ability to name the amount of this fee, Novation encouraged manufacturers to bid up the percentage of total sales they were willing to provide as a

trademark and licensing fee and routinely awarded the NOVAPLUS® contract to the highest bidder. Qui tam plaintiff has information and believes that Novation failed to inform the VHA and UHC Members and HPPI customers of either the existence or amount of these fees, let alone the method by which they were calculated.

72. Like the mark-up described in paragraphs 26, 27 and 50 above, the costs of such "trademark and licensing" and "administrative/marketing" fees are built into the prices of the NOVAPLUS® products. Therefore, contrary to their purported cost-savings benefits, the NOVAPLUS® products routinely are more expensive than identical products sold without the NOVAPLUS® label. In her position as Senior Product Manager at Novation, Relator had the opportunity to speak with Novation's Authorized Distributors. Because they carry a wide range of products and could draw direct price comparisons, many of these distributors remarked to Relator how the NOVAPLUS products were more expensive than the same products offered under the manufacturer's label. For instance, one distributor observed that its costs for a case of American Health Products ("AHP") gloves sold under the NOVAPLUS® label were $1 more than those for a case of the same gloves sold under AHP's label.

73. Because these practices are so lucrative, Novation has been aggressive in trying to get manufacturers to agree to sell their products under the NOVAPLUS® brand. In its Invitations-to-Bid on contracts, Novation informs prospective bidders that their willingness to consider "a private label strategy under the NOVAPLUS label" is a plus factor that Novation will consider – along with other "Non-Financial Award Criteria" -- in determining who will receive the bid award. See Exhibit 7 at 12 & Attachment B at 6. However, Novation's internal documents show that a bidder's willingness to sell products under the NOVAPLUS® label is given much more weight in choosing the successful bidder. In a slideshow presentation to its Senior Product Managers describing

Novation's "Supplier Selection Criteria," Novation includes "Private Label" in with Price, Marketing Fees, and Committed programs, as one of the Financial Criteria it will consider. See Exhibit 11 (Novation Slides), which is incorporated herein. As of September 28, 2001, Novation claimed to have 75 agreements with 42 vendors to sell products under the NOVAPLUS® label, representing $1.2 billion in annual sales.

D. Conflicts of Interest/Beneficial Business Relationships

1. Nepotism/Cronyism with Heritage Bag

74. Another one of the first medical/surgical contracts to which Relator was assigned in her position as Senior Contract Manager at Novation was Contract No. MS00210, a three-year contract for "NOVAPLUS® Can Liners." Under this contract, Novation was seeking a vendor to supply trash can liners to the VHA and UHC Members and HPPI customers under Novation's private label brand, NOVAPLUS®. This contract was the first can-liner contract put out for public competitive bid since Novation was formed. (Novation Contract No. MS80310, the predecessor to MS00210, was an interim contract under which Novation extended the terms of VHA Supply's previous can-liner contract to the UHC Members until the above-referenced contract could be awarded by public competitive bid.)

75. Shortly after starting at Novation, Relator met with her supervisor Sherry Woodcock to discuss the contracts she had been assigned. When their discussions turned to Contract No. MS00210, "NOVAPLUS® Can Liners," Woodcock started to laugh and told Relator that this contract had always belonged to and would always belong to Heritage Bag Company ("Heritage Bag") and that the last person who tried to remove it from Heritage Bag almost lost his job. When Relator asked why Heritage Bag deserved such special treatment, Woodcock replied that Heritage Bag was represented by John M. Doyle, the founder and former President of VHA Supply.

76. At first, Relator tried ignoring the comment and went about the business of preparing to put the contract out for bid. Relator conducted some preliminary market research and discovered that at least three vendors had can liners with prices lower than Heritage Bag. During Relator's interviews with these vendors, each expressed surprise at her interest in their can-liners and stated that, since Heritage Bag has had VHA Supply/Novation's can-liner contract for the last 13 years, they had little hope of ever getting it away from Heritage Bag. In the meantime, Sherry Woodcock continued to make comments to Relator that the upcoming can-liner contract should be awarded to Heritage Bag.

77. Increasingly concerned by these comments (particularly in light of her discovery that competitors' can liners were cheaper), Relator went to speak with Brad Mohler, the Novation contracting officer reputed to have almost lost his job for trying to wrest the can-liner contract away from Heritage Bag. Mohler confirmed that the can-liner contract belonged to Heritage Bag because its representative, John M. Doyle, was the founder and former President of VHA Supply and advised Relator not to "rock the boat" (i.e., recommend awarding the contract to another vendor) because "you cannot win."

78. In December 1998, John M. Doyle, his son, and other representatives of Heritage Bag took Relator to dinner at Newport's Seafood in Dallas. At this dinner, John Doyle asked Relator what its competitors were bidding on the upcoming can-liner contract and sought confirmation that, given its history with VHA Supply, Heritage Bag would, in fact, be awarded the contract. When Relator refused to answer, stating that these were improper questions, Doyle's son became visibly angry, at which point John Doyle reassured him Heritage Bag had been around for a long time (as compared to Relator's short tenure at Novation) and that he would "take care of her [Relator]."

79. Convinced by these events that Novation would reject her recommendation to award the Can-Liner Contract to any vendor other than Heritage Bag irrespective of a vendor's more competitive pricing, Relator informed her supervisor Sherry Woodcock – in front of the entire contracting staff of the Medical/Surgical Division (gathered at a holiday dinner) – that she no longer wanted to manage the Can-Liner Contract since she had been informed that she would be fired if she did not award it to Heritage Bag. Woodcock agreed to take over the contract.

80. Shortly after raising these (and other) concerns about Novation's contracting process and rebuffing John Doyle over dinner, Relator experienced a dramatic change in her work environment. Among other things, where before she had received praise and camaraderie, she started receiving criticism about her work performance (including a detailed "performance improvement plan"), was alienated by her co-workers and quickly terminated.

81. Novation ultimately awarded the Can-Liner Contract to Heritage Bag. See Exhibit 12 (Novation Launch Packet for Contract No. MS00210), which is incorporated herein. Relator has information and believes that the basis for awarding Heritage Bag this and every other can-liner contract for the past 16 years was as a pay-off to John Doyle (who received a commission for every liner sold under the contract) for his having agreed in 1986 to resign as President of VHA Supply amidst accusations by three female employees of sexual harassment and sex discrimination. Heritage Bag won its first can-liner contract from VHA Supply shortly after John Doyle began work as its representative and has held the Can-Liner Contract uninterrupted over the succeeding 16 years while Doyle has continued as its representative.

82. Relator has information and believes that neither Novation nor VHA has ever informed the VHA and UHC Members and HPPI customers of the deal that VHA Supply struck with John Doyle, Doyle's current ties to Heritage Bag and previous affiliation with VHA Supply, or the role

these factors have played in guaranteeing Heritage Bag each of the can-liner contracts since 1986, despite the fact that there have been other bidders with less expensive can liners. In its Launch Packet for the most recent contract, which was distributed to its customers, Novation failed to include among the reasons listed under "Award Rationale" for awarding Contract No. MS00210 to Heritage Bag either its commitment to Doyle or the existence of other vendors with prices lower than Heritage Bag. See id.

2. Owning Stock in Vendors to Whom Novation Awarded Contracts

83. At all times relevant to this Complaint, Novation, VHA, and UHC, as well as top executives at these companies with considerable influence over contracting decisions, owned significant stock holdings in and had mutually beneficial business dealings with the vendors to whom Novation awarded contracts. Several of these executives also sat on the vendors' Board of Directors. Rather than award contracts based on objective criteria like quality and price, Novation routinely awarded contracts to vendors in which Novation, its parent companies VHA and UHC, and officers of these companies had a personal financial and/or business interest. Relator has information and believes that Novation, VHA and UHC failed to inform the VHA and UHC Members and HPPI customers of these ownership interests or business dealings and the role such interests/dealings played in awarding contracts to these vendors.

84. At all times relevant to this Complaint, Novation has had significant stock holdings in vendors to whom Novation has awarded contracts, including Johnson & Johnson and Tyco International Ltd. ("Tyco"). As of November 18, 1999, some of the contracts Novation awarded to Johnson & Johnson while it held Johnson & Johnson stock were as follows: Novation Contract Nos. CE116 (Portable Blood Pressure Monitoring Systems), HPM035 (Baby Products), LAB409 (Chemistry Analyzers), MS607 (Sutures, Endo-Mechanicals), MS80142 (Reusable Surgical

Instruments), and RX86100 (Baby Bath, Shampoo, Powder).

85. Kendall Sherwood-Davis & Geck ("Sherwood"), Sherwood Medical, and Kendall Healthcare Products Company ("Kendall") are all subsidiaries of Tyco. As of November 18, 1999, some of the contracts Novation awarded to Sherwood while it held Tyco stock were as follows: Novation Contract Nos. CE195 (Thermometers), HPM053 (Needles & Syringes), and MS644 (Needles & Syringes). As of November 18, 1999, some of the contracts Novation awarded to Sherwood Medical while it held Tyco stock were as follows: Novation Contract Nos. RX146 (Thermazene Cream) and RX81460 (Silver Sulfadiazine & Petrolatum Gauze). As of November 18, 1999, some of the contracts Novation awarded to Kendall while it held Tyco stock were as follows: Novation Contract Nos. MS153 (NOVAPLUS® Endotracheal Tubes, Tracheostomey Care Kits, Open Suction Catheters), MS609 (Vascular Therapy Products), MS642 (Wound Care Products), and MS80010 (Bandages, Dressings, Sponges, Gauze).

86. At all times relevant to this Complaint, VHA and UHC have had significant stock holdings in vendors to whom Novation has awarded contracts, including Neoforma, Inc. ("Neoforma"). On July 26, 2000, VHA, UHC and Novation entered into an outsourcing and operating agreement with Neoforma, under which VHA and UHC collectively received 45% of Neoforma's outstanding common stock and Neoforma agreed to create and manage an on-line marketplace – called Marketplace@Novation™ – through which the VHA and UHC Members and HPPI customers can order products under the Novation contracts. On January 25, 2001, VHA and UHC increased their holdings to 60.9% of Neoforma's total outstanding common stock.

87. Although Neoforma describes itself as an e-commerce company that creates and manages on-line marketplaces for GPOs, Integrated Delivery Networks, and other health care systems, Novation and its customers and vendors have been the primary source of Neoforma's business. In

July 2000, Novation awarded Neoforma a sole source contract, which was never put out for public competitive bid, to establish and provide Novation's customers with the on-line ordering service, Marketplace@Novation™. In 2001 alone, Novation paid Neoforma approximately $21 million in fees for these services. In addition, Novation and Neoforma have an agreement under which Neoforma shares with Novation revenue related to transactions made through Marketplace@Novation.

88. C. Thomas Smith, who until recently was the President of VHA and had the ability to influence Novation's contracting decisions, held stock throughout his tenure at VHA in several vendors with whom Novation had contracts. Smith had significant stock holdings in Genetech and also sat on its Board of Directors from 1986 until 1999. During the time that Smith was both President of VHA, a Genentech stockholder and a member of Genetech's Board of Directors, Genetech was awarded several Novation Contracts, including Contract Nos. RX 163 and RX 81830 under which Genetech supplied the drug activase to the VHA and UHC Members and HPPI customers. As President of VHA, Smith also held at least 3,500 shares in Neoforma and sat on its Board of Directors. Smith also owned stock in Sysco Corporation, to whom Novation had awarded several food services contracts.

89. Curt Nonomaque, who has succeeded Smith as VHA's President and previously served as VHA's Vice-President and Chief Financial Officer, also has owned stock in Neoforma and other vendors to whom Novation has awarded contracts during his tenure at VHA. Nonomaque also sat on Neoforma's Board of Directors. Relator has information and believes that Nonomaque has created a fictitious corporation, called NBI, LLC, through which he purchases stock in vendors to whom Novation has awarded contracts.

90. Mark McKenna, Novation's current President and a former Vice-President, also owned stock in vendors to whom Novation has awarded contracts, including Neoforma, and served on Neoforma's Board of Directors during his tenure at Novation. The following VHA and Novation executive-level employees, with influence over Novation's contracting decisions, also own stock in Neoforma: Daniel Bourque and John Collins, Senior Vice-Presidents at VHA, Donald Caccia, a VHA executive, and Marcea Bland Lloyd, in-house counsel for Novation.

91. Novation requires the vendors to whom it awards contracts to agree to use Marketplace@Novation. In its Invitations-to-Bid, Novation lists as a "basic qualifying factor" to receiving a contract that a vendor be willing to commit to participate in Marketplace@Novation. See Exhibit 7 (Enteral Products Invitation to Bid) at 10 & Attachment C at 10. In so doing, Novation is serving its own financial interests and those of VHA, UHC and their executives since they all have a financial stake in ensuring Neoforma's success.

3. Excessive Conference Fees

92. At all times relevant to this Complaint, Novation (and its predecessor VHA Supply) regularly organized and hosted conferences on topics of interest to the VHA and UHC Members and HPPI customers. In connection with these conferences, Novation routinely would approach large vendors whom it expected to be bidding on upcoming contracts and solicit from them exorbitant fees to attend segments of the conference at which the VHA and UHC Members would be present or sponsor high-profile keynote speakers. These fees typically were well in excess of the costs Novation incurred in putting on the conference. Relator has information and believes that Novation failed to inform the VHA and UHC Members and HPPI customers about the existence or amount of these fees and charges.

4. Travel & Entertainment Costs

93. At all times relevant to this Complaint, Novation (and its predecessor VHA Supply) accepted lavish trips, meals and other entertainment from vendors who regularly bid on Novation contracts and to whom Novation subsequently awarded contracts. These trips, meals and other entertainment had little if any legitimate business purpose. For example, shortly before Novation was expected to issue Invitations-to-Bid for its NOVAPLUS® exam glove contract, American Health Products – a large manufacturer of gloves for medical use -- hosted a Riverboat cruise on Lake Michigan with drinks, dinner and dancing for Relator, Relator's supervisor Sherry Woodcock, and other members of the Novation contracting staff responsible for awarding this contract. Edward Martcka, President of AHP, Rick Feady, an AHP sales representative, and several other members of the AHP sales staff were present. Throughout the evening, little to no business was conducted. Relator has information and believes that Novation failed to inform the VHA and UHC Members and HPPI customers about any of these vendor-sponsored trips, meals and other entertainment, the fact that such events had little to no legitimate business purpose, or the role these events played in awarding contracts.

VI. DAMAGES

A. Inflating Costs of Supplies Reimbursed by Government Health Insurance Programs

94. In order to recoup the often considerable costs of paying Novation the kickbacks and other illegal remuneration described above, vendors build these costs into the prices they charge Novation's customers under the contracts for the supplies and services, thereby inflating the prices. A large percentage of these supplies and services are utilized in the treatment of beneficiaries of the government health insurance programs. The government reimburses health care providers for certain

of the costs of these supplies based on cost-reimbursement calculations the providers include in cost reports filed annually with insurance companies the United States and Texas respectively have retained to act as their program fiscal intermediaries ("F.I.'s"). Under the federal cost-reporting regulations, there are several ways in which the vendors' inflated prices are borne by the government health insurance programs.

95. First, several areas of a hospital, such as rehabilitation and psychiatric units, are reimbursed by the government based on the actual costs incurred therein for treating Medicare/Medicaid/CHAMPUS/TRICARE beneficiaries. When a Novation customer uses an overpriced supply/service (i.e., one that includes the hidden costs of the Novation kickbacks) in one of these hospital areas, the inflated costs will cause a corresponding increase in the amount of the government's reimbursement to that customer.

96. For the majority of the time relevant to this Complaint, the two types/areas of a health care provider that were reimbursed based on the actual costs incurred therein are distinct part units and outpatient ancillary cost centers. As its name suggests, distinct part units are portions of the hospital (or free-standing facilities) that provide services that differ from the hospital's typical inpatient services. The four most typical types of distinct part units are psychiatric units/hospitals, rehabilitation units/hospitals, skilled nursing facilities ("SNFs"), and home health agencies ("HHAs"). Like the hospital itself, distinct part units have their own Medicare provider number under which all Medicare/Medicaid/TRICARE/CHAMPUS billing is processed.

97. The majority of Novation's customers are either free-standing distinct part units or have distinct part units associated with their hospitals. For instance, the 5,000 HPPI customers are largely comprised of alternate care providers such as free-standing rehabilitation hospitals, psychiatric hospitals, SNFs and HHAs. In addition, many of the 2,200 VHA and UHC Members, which consist

largely of community and teaching hospitals, have distinct part units associated with their hospitals. Accordingly, distinct part units account for a large percentage of the $19.6 billion in total purchases that the Novation customers make each year. Since the actual costs of the supplies and services purchased by these units are reimbursed in whole or part by the government health insurance programs, by causing vendors to inflate the prices for such goods/services, defendants have caused the government to overstate its reimbursement to the large population of Novation customers with distinct part units, which has resulted in profound financial harm to the government health insurance programs.

98. The other primary area in which the government reimburses a health care provider based on actual costs incurred therein in treating Medicare/Medicaid/TRICARE/CHAMPUS beneficiaries is outpatient ancillary cost centers. As its name suggests, these are areas of the hospital that provide outpatient services that are ancillary to the hospital's typical inpatient services. Unlike distinct part units, however, services provided in outpatient ancillary cost centers are billed under the hospital's Medicare provider number and do not have their own provider numbers.

99. Examples of outpatient ancillary cost centers are the Operating Room, Recovery Room, Radiology Department, Emergency Room, Electrocardiogram Department, and Laboratory. The 2,200 VHA and UHC Members, which consist largely of community and teaching hospitals, have several such outpatient ancillary cost centers in each of their hospitals. Although largely comprised of alternate care providers, some of the HPPI customers are traditional hospitals with the above-mentioned outpatient ancillary cost centers. Since the actual costs of the supplies/services purchased by these cost centers are reimbursed in whole or part by the government health insurance programs, by causing vendors to inflate the prices for such goods/services, defendants have caused the government to overstate its reimbursement to the many VHA and UHC Members and HPPI

customers who have these cost centers, which has resulted in profound financial harm to the government health insurance programs.

100. Second, the overpriced supplies/services resulting from Novation's fraudulent practices also have served to improperly increase the amount of government reimbursement in areas of the hospital, like general acute care/Adults & Pediatrics, that are reimbursed under the "Prospective Payment System" or "PPS". Under PPS, the Medicare program uses payment schedules based on Diagnosis-Related Groups ("DRGs"), under which hospitals are paid pre-determined amounts for inpatient care in certain areas of the hospital based on the patients' diagnosis. The diagnosis-based DRG payments reflect the average costs an efficiently-run hospital would be expected to incur to treat such a patient. To determine the payment schedule that corresponds to each diagnosis, the government relies on pricing and other data from hospitals within the various geographic regions of the country as well as nationwide. Because Novation's 7,300 customers represent close to a third of the nation's health care providers, the government has necessarily relied on the inflated pricing information from many of Novation's customers in setting its DRG payments. Accordingly, the inflated prices incurred by the VHA and UHC Members and HPPI customers have, in turn, increased the amount of the DRG rate on which the government bases its reimbursement.

101. Third, for the majority of the time relevant to this Complaint, there was a category of products called "moveable capital equipment" that the government reimbursed based on the cost of the product, irrespective of the part of the hospital in which they were used. Examples of moveable capital equipment are ultrasound devices, CAT scanners, x-ray machines, hospital beds, and operating room tables. Capital equipment was one of Novation's primary product lines and Novation regularly negotiated capital-equipment contracts for its customers. As with Novation's other product lines, Relator has information and believes that several capital-equipment vendors paid

Novation kickbacks to obtain the contracts and increased the prices charged in Novation contracts for this equipment in order to recoup the illegal payments. Because such equipment is subject to cost-based reimbursement, the vendors' inflated prices on capital equipment also caused the government to overstate its reimbursement to the VHA and UHC Members and HPPI customers who purchased and later sought government reimbursement for the costs of this equipment.

B. Precluding Manufacturers of Safer, More Innovative Products That Would Have Reduced Health care Costs

102. As a result of its practice of requiring vendors to pay large kickbacks and other illegal remuneration to obtain contracts, Novation routinely awarded contracts to large, well-established vendors, like Johnson & Johnson, who were capable of making such large payments. Smaller vendors, who often have safer, cheaper and more innovative products, were routinely denied contracts because they were unable or unwilling to offer Novation the up-front payments necessary to obtain the business.

103. For example, Novation awarded the most recent contract for needles and syringes to Becton Dickinson, a large, well-established medical product manufacturer. As discussed above, in connection with this contract, Becton Dickinson paid Novation a $1 million "special marketing fee." Novation awarded the contract to Becton Dickinson despite contemporaneous market research showing that ECRI, a respected testing laboratory, had rated as "unacceptable" one of the Becton Dickinson needles to be supplied under the contract. Another bidder, Retractable Technologies, Inc. ("RTI"), who manufactures an innovative safety syringe and needle system with a demonstrated record of preventing needle sticks, was shut out of the contract largely because it was unable and unwilling to pay Novation kickbacks and other illegal remuneration.

104. By regularly shutting out the smaller vendors like RTI and awarding contracts to larger vendors who build the costs of the kickbacks into their prices, Novation caused the VHA and UHC Members and HPPI customers to submit to the government health insurance programs claims for medical supplies that were higher than they would have been had Novation awarded the contracts without such improper financial considerations as kickbacks and other illegal remuneration. In

addition, by favoring larger manufacturers over smaller ones like RTI with safer, more innovative products, Novation caused the VHA and UHC Members and HPPI customers to submit to the government health insurance programs claims for additional treatment related to injuries caused or exacerbated by the use of the larger manufacturers' products, such as needle stick injuries caused by the use of less safe needles. In many instances, these injuries and additional treatment costs would have been preventable had Novation awarded the contracts based on quality and price rather than other improper financial considerations.

VII. EMPLOYMENT DISCRIMINATION FOR ACTS IN FURTHERANCE OF FALSE CLAIMS ACT ACTION

105. Relator began working for Novation on July 27, 1998 as a Senior Product Manager for Medical/Surgical Products with an annual salary of $63,500.04. From the beginning of her six months of employment at Novation until she started complaining to her superiors about the impropriety of the fraudulent practices described above, Relator was regularly commended by her superiors on her job performance.

106. For instance, upon completion of one of her first assignments – putting out to bid and awarding Contract No. MS8020B, "IV Catheters and Start Kits" – Relator received a hand-written note from Novation's then President, James Hersma, complimenting her on her "[g]reat work." See Exhibit 9 at 1. As described above, this was also the contract pursuant to which Relator secured from Becton Dickinson a $100,000 "donation" to VHAseCURE.net. For her work in obtaining this donation as well as a similar donation from another vendor, the Head of Novation's Information Technology Department (who oversaw the VHAseCURE.net program) sent Relator an e-mail congratulating her on her success and thanking her for her efforts. See Exhibit 5. A copy of this e-mail was also sent to John Burks, the former Head of the Medical/Surgical Products Division. Id.

107. By the end of 1998/beginning of 1999, as a result of the experiences described above, Relator had come to realize that the kickbacks and other illegal remuneration were not isolated indiscretions by a few rogue vendors but instead were part of a larger Novation scheme that pervaded its business. Faced with two choices -- play by Novation's rules and be complicit in fraud or refuse and try to effect change from within -- Relator took the latter course. As described above, she

informed her supervisor Sherry Woodcock that she could no longer manage the can-liner contract because of the favoritism being shown to Heritage Bag, and she rebuffed Johnson & Johnson's attempts to pay Novation a kickback to obtain the IV Catheter Contract. Relator also raised her concerns about the impropriety of these practices with Novation senior management, including the Head of the Medical/Surgical Products Division, Human Resources staff, and Novation's in-house counsel. Her concerns were largely ignored.

108. Shortly after she took these corrective measures, Relator began to experience a dramatic change in her employment conditions. Where previously she had been treated as part of the team, Relator now was being alienated by her co-workers. For instance, Relator's administrative assistant, who had previously worked cooperatively with her (while also serving the other members of the Medical/Surgical contracting staff to whom she was jointly assigned), now refused to do any work for her.

109. Relator's supervisor Sherry Woodcock issued Relator a 6-page "Performance Improvement Plan" chronicling a laundry list of serious alleged lapses in her job performance and placing her on a 90-day probationary period. See Exhibit 13, which is incorporated herein. Although the vast majority of these alleged failings had supposedly occurred many months earlier, Relator had never before been informed of these "problems" and no reference to them had been made in her personnel file. Relator was only now hearing about them for the first time, a matter of days after she had first voiced concerns to management about Novation's contracting practices. Because of her supervisor's frequent fabrication and gross mischaracterization of the events described therein, Relator refused to sign the Performance Improvement Plan or agree to the conditions set forth therein. Fifteen days later, on February 5, 1999, Novation fired Relator for alleged problems related to her "performance/judgment."

110. Despite her supposed failings as an employee, Novation nevertheless chose to pay Relator – an at-will employee – a severance package of $7,949.69. Novation conditioned Relator's receipt of these monies on her signing a severance agreement containing a confidentiality provision that prohibited her from revealing any of Novation's confidential information or information about

Novation's "business and opportunities" for three years. Relator signed the agreement and accepted the severance package.

111. As these circumstances clearly demonstrate, the reasons Novation gave for terminating Relator – "performance/judgment" – were a pretext. The real reason Novation fired Relator – as is belied by the close proximity between her complaints and Novation's belated criticism of her job performance – was in retaliation for her investigating and raising concerns about Novation's fraudulent contracting practices.

COUNT I
Substantive Violations of the Federal False Claims Act
[31 U.S.C. §§ 3729(a)(1), (a)(2), (a)(7) and 3732(b)]

112. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 111 of this Complaint.

113. This is a claim for treble damages and forfeitures under the Federal False Claims Act, 31 U.S.C. §§ 3729 et seq., as amended.

114. Through the acts described above, defendants Novation, VHA, UHC, and HPPI knowingly caused VHA and UHC Members and HPPI customers to present to the United States Government, through the Medicare, Medicaid, and TRICARE/CHAMPUS programs, false and fraudulent claims, records, and statements for reimbursement for health care supplies and services provided under Medicare, Medicaid, and TRICARE/CHAMPUS.

115. Through the acts described above and otherwise, defendants Novation, VHA, UHC, and HPPI knowingly caused the VHA and UHC Members and HPPI customers to make or use false records and statements, which also omitted material facts, in order to induce the United States Government and its F.I.'s to approve and pay such false and fraudulent claims.

116. Through the acts described above and otherwise, defendants Novation, VHA, UHC, and HPPI knowingly caused the VHA and UHC Members and HPPI customers to make or use false records and statements to conceal, avoid, and/or decrease the VHA and UHC Members' and HPPI customers' obligation to repay money to the United States Government that the defendants improperly and/or fraudulently received. Defendants Novation, VHA, UHC and HPPI also failed

to disclose to the United States Government and its F.I.'s material facts that would have resulted in substantial repayments by the VHA and UHC Members and HPPI customers to the federal government.

117. The United States, through the Medicare, Medicaid, and TRICARE/CHAMPUS programs and their respective F.I.'s, unaware of the falsity of the records, statements, and claims made or submitted by defendants Novation, VHA, UHC, and HPPI and the VHA and UHC Members and HPPI customers, paid and continue to pay the VHA and UHC members and HPPI customers for claims that would not be paid if the truth were known.

118. The Medicare, Medicaid, and TRICARE/CHAMPUSpeograms and their respective F.I.'s, unaware of the falsity of the records, statements, and claims made or submitted by defendants Novation, VHA, UHC, and HPPI (and the VHA and UHC Members and HPPI customers) -- or of defendants' failure to disclose material facts that would have reduced government obligations -- have not recovered Medicare, Medicaid, and TRICARE/CHAMPUS funds that would have been recovered otherwise.

119. By reason of the defendants' false records, statements, claims, and omissions and defendants' misconduct in causing the VHA and UHC Members and HPPI customers to make and submit false records, statements, claims and omissions, the United Stateshas been damaged in the amount of many millions of dollars in Medicare, Medicaid, and TRICARE/CHAMPUS funds.

COUNT II
Federal False Claims Act Conspiracy
[31 U.S.C. §§ 3729(a)(3) and 3732(b)]

120. Relator realleges and incoeporates by reference the allegations made in Paragraphs 1 through 119 of this Complaint.

121. This is a claim for treble damages and forfeitures under the Federal False Claims Act, 31 U.S.C. §§ 3729 et seq., as amended.

122. Through the acts described above and otherwise, defendants entered into a conspiracy or conspiracies with each other and with others to defraud the United States by getting false and fraudulent claims allowed or paid. Defendants have also conspired with each other and with others

to omit disclosing or to actively conceal facts which, if known, would have reduced government obligations to the VHA and UHC Members and HPPI customers or resulted in repayments from the VHA and UHC Members and HPPI customers to government health insurance programs. Defendants have taken substantial steps in furtherance of those conspiracies, inter alia, by soliciting and accepting kickbacks and other monies from vendors as payment for awarding them Novation contracts knowing that these activities increased the cost of supplies and services ordered by the VHA and UHC Members and HPPI customers under these contracts and caused Novation's customers to submit false bills, cost reports and other records to the government and its F.I.'s for payment or approval that contained these improper costs, and by directing their agentsand personnel not to disclose and/or to conceal their fraudulent practices or those of their co-defendants, as well.

123. The Medicare, Medicaid, and TRICARE/CHAMPUS programs and their respective F.I.'s, unaware of defendants' conspiracies or the falsity of the records, statements and claims caused to be made by defendants Novation, VHA, UHC, and HPPI and made by the VHA and UHC Members and HPPI customers, and as a result thereof, have paid and continue to pay millions of dollars in Medicare, Medicaid, and TRICARE/CHAMPUS interim and final reimbursement that they would not otherwise have paid. Furthermore, because of the false records, statements, claims, and omissions caused to be made by defendants Novation, VHA, UHC and HPPI and made by the VHA and UHC Members and HPPI customers, the United States has not recovered Medicare, Medicaid, and TRICARE/CHAMPUS funds from the VHA and UHC Members and HPPI customers that otherwise would have been recovered.

124. By reason of defendants' conspiracies and the acts taken in furtherance thereof, the United States has been damaged in the amount of many millions of dollars in Medicare, Medicaid, and TRICARE/CHAMPUS funds.

COUNT III
Substantive Violations of the Texas Medicaid Fraud Prevention Act
[Texas Human Resources Code §§ 36.002 (1)(A), (2)(B) & (4)(B)]

125. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 124 of this Complaint.

126. This is a claim for restitution, double damages and penalties under the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code, §§ 36.001 et seq.

127. Through the acts described above, defendants Novation, VHA, UHC, and HPPI knowingly have caused the VHA and UHC Members and HPPI customers to present to the Texas Medicaid program and its F.I.'s false and fraudulent claims, records, and statements for reimbursement for health care supplies and services provided under Medicaid.

128. Through the acts described above and otherwise, defendants Novation, VHA, UHC, and HPPI knowingly made, used, and/or caused the VHA and UHC Members and HPPI customers to make or use false records and statements, which also omitted material facts, in order to induce the Texas Medicaid program and its F.I.'s to appeove and pay such false and fraudulent claims.

129. Through the acts described above and otherwise, defendants Novation, VHA, UHC, and HPPI knowingly made, used, and caused the VHA and UHC Members to make or use false records and statements to conceal, avoid, and/or decrease the VHA and UHC Members' and HPPI customers' obligation to repay money to the Texas Medicaid program and its F.I's that the VHA and UHC Members and HPPI customers improperly and/or fraudulently received. Defendants Novation, VHA, UHC, and HPPI also failed to disclose to the Texas Medicaid program and its F.I.'s material facts that would have resulted in substantial repayments by the VHA and UHC Members and HPPI customers to the Texas government.

130. The Texas Medicaid program and its F.I.'s, unaware of the falsity of the records, statements, and claims made or submitted by defendants and the VHA and UHC Members and HPPI customers, paid and continue to pay the VHA and UHC Members and HPPI customers for claims that would not be paid if the truth were known.

131. The Texas Medicaid program and its F.I.'s, unaware of the falsity of the records, statements, and claims made or submitted by defendants or the VHA and UHC Members and HPPI customers -- or of their failure to disclose material facts which would have reduced government obligations -- have not recovered Medicaid funds that would have been recovered otherwise.

132. By reason of the defendants' false records, statements, claims, and omissions and defendants' misconduct in causing the VHA and UHC Members and HPPI customers to make or submit false records, statements, claims, and omissions, the State of Texas and the Texas Medicaid program have been damaged in the amount of many millions of dollars in Medicaid funds.

COUNT IV
Texas Medicaid Fraud Prevention Act Conspiracy
[Tex. Human Resources Code § 36.002(9)]

133. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 132 of this Complaint.

134. This is a claim for restitution, double damages and penalties under the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code §§ 36.001 et seq.

135. Through the acts described above and otherwise, defendants entered into a conspiracy or conspiracies with each of the other defendants and with others to defraud the Texas Medicaid program by getting false and fraudulent claims allowed or paid. Defendants have also conspired with each other and with others to omit disclosing or to actively conceal facts which, if known, would have reduced the Texas Medicaid program's obligations to the VHA and UHC Members and HPPI customers or resulted in repayments from the VHA and UHC Members and HPPI customers to the Texas Medicaid program. Defendants Novation, VHA, UHC and HPPI have taken substantial steps in furtherance of those conspiracies, inter alia, by soliciting and accepting kickbacks and other monies from vendors as payment for awarding them Novation contracts knowing that these activities increased the cost of supplies and services ordered by the VHA and UHC Members and HPPI customers under these contracts and caused Novation's customers to submit false bills, cost reports and other records to the Texas Medicaid program and its F.I.'s for payment or approval that contained these improper costs, and by directing their agentsand personnel not to disclose and/or to conceal their fraudulent practices or those of their co-defendants, as well.

136. The Texas Medicaid program and its F.I.'s, unaware of defendants' conspiracies or the falsity of the records, statements and claims caused to be made by defendants Novation, VHA, UHC

and HPPI and made by the VHA and UHC Members and HPPI customers, and as a result thereof, have paid and continue to pay millions of dollars in Medicaid interim and final reimbursement that they would not otherwise have paid. Furthermore, because of the false records, statements, claims, and omissions caused to be made by defendants Novation, VHA, UHC and HPPI and made by the VHA and UHC Members and HPPI customers, the Texas Medicaid program has not recovered Medicaid funds from the VHA and UHC Members and HPPI customers that otherwise would have been recovered.

137. By reason of defendants' conspiracies and the acts taken in furtherance thereof, the State of Texas and the Texas Medicaid program have been damaged in the amount of many millions of dollars in Medicaid funds.

COUNT V
Federal False Claims Act -- Employment Discrimination
[31 U.S.C. § 3730(h)]

138. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 137 of this Complaint.

139. This is a claim for damages under the Federal False Claims Act, 31 U.S.C. § 3730(h).

140. Through the acts described above and otherwise, defendant Novation discriminated against Relator in the terms and conditions of her employment at Novation by, among other things, terminating her employment. Novation's stated reasons for terminating Relator regarding deficiencies in her job performance were baseless and simply a pretext for the real reason for her termination -- to retaliate against Relator for her investigation of defendants' fraudulent practices in preparation for filing the above-captioned False Claims Act lawsuit.

141. By reason of defendant Novation's actions, Relator has been damaged in the amount of many thousands of dollars.

COUNT VI
Texas Medicaid Fraud Prevention Act – Employment Discrimination
[Texas Human Resources Code § 36.115]

142. Relator realleges and incorporates by reference the allegations made in Paragraphs 1 through 141 of this Complaint.

143. This is a claim for damages under the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code § 36.115.

144. Through the acts described above and otherwise, defendant Novation discriminated against Relator in the terms and conditions of her employment at Novation by, among other things, terminating her employment. Novation's stated reasons for terminating Relator regarding deficiencies in her job performance were baseless and simply a pretext for the real reason for her termination -- to retaliate against Relator for her investigation of defendants' fraudulent practices in preparation for filing the above-captioned False Claims Act lawsuit.

145. By reason of defendant Novation's actions, Relator has been damaged in the amount of many thousands of dollars.

PRAYER

WHEREFORE, Relator prays for judgment against defendants as follows:

1. That defendants cease and desist from violating 31 U.S.C. §§ 3729 et seq. and Texas Human Resources Code §§ 36.001 et seq.;

2. That the Court enter judgment against defendants in an amount equal to three times the amount of damages the United States has sustained as a result of defendants' actions in violation of the Federal FCA, as well as a civil penalty against each defendant of $11,000 for each violation of 31 U.S.C. § 3729;

3. That the Court enter judgment against defendants in an amount equal to two times the amount of damages Texas has sustained as a result of defendants' actions in violation of the Texas Medicaid Fraud Prevention Act, as well as a civil penalty against each defendant of $10,000 for each violation of Texas Human Resources Code § 36.052(3).

4. That Relator be awarded the maximum amount allowed pursuant to 31 U.S.C. § 3730(d) and Texas Human Resources Code § 36.110;

5. That Relator be awarded all costs and expenses of this action, including attorneys' fees;

6. That the Court enter judgment against defendant Novation as a result of its actions in violation of 31 U.S.C. § 3730(h) and Texas Human Resources Code § 36.115 as well as all relief necessary to make Relator whole, including reinstatement with the same seniority status Relator would have had but for the discrimination, not less than two times the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of Novation's employment discrimination, including litigation costs and reasonable attorney's fees; and

7. That the United States, the State of Texas, and Relator receive all such other relief as the Court deems just and proper.

Jury Demand

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Relator hereby demands trial by jury.

Dated: July 15, 2003

Respectfully submitted:

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ATTORNEYS FOR RELATOR/PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing complaint has been served by certified mail or hand delivery this 11th day of July 2003, as follows:

Mr. John Ashcroft
Attorney General
U. S. Department of Justice
Civil Division
P.O. Box 261, Ben Franklin Station
Washington, DC 20044

Certified Mail No.70022410000415006110
Return Receipt Requested

Ms. Jane J. Boyle
United States Attorney
Northern District of Texas
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699

Hand Delivery

Mr. Greg Abbott
Texas Attorney General
300 W. 15th Street
Austin, Texas 78701

Certified Mail No.70022410000415006127
Return Receipt Requested

John E. Clark

JS 44
(Rev. 3/99)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

FILED
JUL 15 2003
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

I. (a) PLAINTIFFS

United States of America ex rel. (under seal)
AND
State of Texas ex rel. (under seal)

DEFENDANTS

(Under seal)

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

See Attachment

ATTORNEYS (IF KNOWN)

N/A

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- [X] 1 U.S. Government Plaintiff
- [ ] 2 U.S. Government Defendant
- [ ] 3 Federal Question (U.S. Government Not a Party)
- [ ] 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	[ ] 1	[ ] 1	Incorporated or Principal Place of Business in This State	[ ] 4	[ ] 4
Citizen of Another State	[ ] 2	[ ] 2	Incorporated and Principal Place of Business in Another State	[ ] 5	[ ] 5
Citizen or Subject of a Foreign Country	[ ] 3	[ ] 3	Foreign Nation	[ ] 6	[ ] 6

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
[ ] 110 Insurance [ ] 120 Marine [ ] 130 Miller Act [ ] 140 Negotiable Instrument [ ] 150 Recovery of Overpayment & Enforcement of Judgment [ ] 151 Medicare Act [ ] 152 Recovery of Defaulted Student Loans (Excl. Veterans) [ ] 153 Recovery of Overpayment of Veteran's Benefits [ ] 160 Stockholders' Suits [ ] 190 Other Contract [ ] 195 Contract Product Liability	PERSONAL INJURY [ ] 310 Airplane [ ] 315 Airplane Product Liability [ ] 320 Assault, Libel & Slander [ ] 330 Federal Employers' Liability [ ] 340 Marine [ ] 345 Marine Product Liability [ ] 350 Motor Vehicle [ ] 355 Motor Vehicle Product Liability [ ] 360 Other Personal Injury PERSONAL INJURY [ ] 362 Personal Injury — Med. Malpractice [ ] 365 Personal Injury — Product Liability [ ] 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY [ ] 370 Other Fraud [ ] 371 Truth in Lending [ ] 380 Other Personal Property Damage [ ] 385 Property Damage Product Liability	[ ] 610 Agriculture [ ] 620 Other Food & Drug [ ] 625 Drug Related Seizure of Property 21 USC 881 [ ] 630 Liquor Laws [ ] 640 R.R. & Truck [ ] 650 Airline Regs. [ ] 660 Occupational Safety/Health [ ] 690 Other	[ ] 422 Appeal 28 USC 158 [ ] 423 Withdrawal 28 USC 157 PROPERTY RIGHTS [ ] 820 Copyrights [ ] 830 Patent [ ] 840 Trademark	[ ] 400 State Reapportionment [ ] 410 Antitrust [ ] 430 Banks and Banking [ ] 450 Commerce/ICC Rates/etc. [ ] 460 Deportation [ ] 470 Racketeer Influenced and Corrupt Organizations [ ] 810 Selective Service [ ] 850 Securities/Commodities/ Exchange [ ] 875 Customer Challenge 12 USC 3410 [ ] 891 Agricultural Acts [ ] 892 Economic Stabilization Act [ ] 893 Environmental Matters [ ] 894 Energy Allocation Act [ ] 895 Freedom of Information Act [ ] 900 Appeal of Fee Determination Under Equal Access to Justice [ ] 950 Constitutionality of State Statutes [X] 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY
[ ] 210 Land Condemnation [ ] 220 Foreclosure [ ] 230 Rent Lease & Ejectment [ ] 240 Torts to Land [ ] 245 Tort Product Liability [ ] 290 All Other Real Property	[ ] 441 Voting [ ] 442 Employment [ ] 443 Housing/ Accommodations [ ] 444 Welfare [ ] 440 Other Civil Rights	[ ] 510 Motions to Vacate Sentence HABEAS CORPUS: [ ] 530 General [ ] 535 Death Penalty [ ] 540 Mandamus & Other [ ] 550 Civil Rights [ ] 555 Prison Condition	[ ] 710 Fair Labor Standards Act [ ] 720 Labor/Mgmt. Relations [ ] 730 Labor/Mgmt. Reporting & Disclosure Act [ ] 740 Railway Labor Act [ ] 790 Other Labor Litigation [ ] 791 Empl. Ret. Inc. Security Act	[ ] 861 HIA (1395ff) [ ] 862 Black Lung (923) [ ] 863 DIWC/DIWW (405(g)) [ ] 864 SSID Title XVI [ ] 865 RSI (405(g)) FEDERAL TAX SUITS [ ] 870 Taxes (U.S. Plaintiff or Defendant) [ ] 871 IRS — Third Party 26 USC 7609

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- [X] 1 Original Proceeding
- [ ] 2 Removed from State Court
- [ ] 3 Remanded from Appellate Court
- [ ] 4 Reinstated or Reopened
- [ ] 5 Transferred from another district (specify)
- [ ] 6 Multidistrict Litigation
- [ ] 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

The False Claims Act, 31 U.S.C. Sect. 3729, et seq. and the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code Sect. 36.001 et seq.

VII. REQUESTED IN COMPLAINT: [ ] CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ Treble damages/penalties

CHECK YES only if demanded in complaint:
JURY DEMAND: [X] YES [ ] NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 15 July 2003

SIGNATURE OF ATTORNEY OF RECORD: John E. Clark

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

JS 44
(Rev. 3/99)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
United States of America ex rel.
Cynthia I. Fitzgerald
AND State of Texas ex rel.
Cynthia I. Fitzgerald

DEFENDANTS
Novation,LLC, VHA,Inc., University Healthsystem Consortium and Healthcare Purchasing Partners International, LLC

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT County of Dallas
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
See Attachment

ATTORNEYS (IF KNOWN)
N/A

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)
- X 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury PERSONAL INJURY ☐ 362 Personal Injury — Med. Malpractice ☐ 365 Personal Injury — Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability		☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs. ☐ 660 Occupational Safety/Health ☐ 690 Other	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce/ICC Rates/etc. ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 810 Selective Service ☐ 850 Securities/Commodities/ Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes X 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY	
☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Leases & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/ Accommodations ☐ 444 Welfare ☐ 440 Other Civil Rights	☐ 510 Motions to Vacate Sentence HABEAS CORPUS: ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition	☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS: ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS — Third Party 26 USC 7609	

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)
X 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)
The False Claims Act, 31 U.S.C. Sect. 3729, et seq. and the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code Sect. 36.001 et seq.

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND $ Treble damages/penalties
CHECK YES only if demanded in complaint
JURY DEMAND: X YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 15 July 2003
SIGNATURE OF ATTORNEY OF RECORD: John E. Clark

FOR OFFICE USE ONLY
RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

CIVIL COVER SHEET
Attachment

I.(c) Attorneys (Firm Name, Address, and Telephone Number)

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

SAMUEL K LIPARI

Plaintiff(s),

vs.

Case No: 0816-CV04217

Division 2

NOVATION LLC

Defendant(s).

NOTICE OF CASE MANAGEMENT CONFERENCE FOR CIVIL CASE

NOTICE IS HEREBY GIVEN that a case management conference will be held with the Honorable Michael Manners on **27-MAY-2008**, in Division 2 at **08:30 AM**. All applications for continuance of a case management conference should be filed on or before Wednesday of the week prior to the case management setting. Applications for Continuance of a Case Management Conference shall comply with Supreme Court Rule and 16th Cir. R. 34.1. Continuance of a Case Management Conference will only be granted for good cause shown because it is the desire of the Court to meet with counsel and parties in all cases within the first 4 months that a case has been on file. All counsel and parties are directed to check Case.NET on the 16th Judicial Circuit web site at www.16thcircuit.org after filing an application for continuance to determine whether or not it has been granted.

A lead attorney of record must be designated for each party as required by Local Rule 3.5.1. A separate pleading designating the lead attorney of record shall be filed by each party as described in Local Rule 3.5.2. The parties are advised that if they do not file a separate pleading designating lead counsel, even in situations where there is only one attorney representing the party, JIS will not be updated by the civil records department,

and copies of orders will be sent to the address currently shown in JIS. Civil records does not update attorney information from answers or other pleadings. The Designation Of Lead Counsel pleading shall contain the firm name, attorney name, mailing address, phone number, FAX number and E-mail address of the attorney who is lead counsel.

At the Case Management Conference, counsel should be prepared to address at least the following:

a. A trial setting;

b. A schedule for the orderly preparation of the case for trial.

c. Expert Witness Disclosure Cutoff Dates;

d. Pending Motions;

e. Any issues which require input or action by the Court;

f. The status of settlement negotiations; and

g. Whether or not the Court should order mediation or other dispute resolution.

/s/ Michael Manners

MICHAEL MANNERS
Circuit Judge

Certificate of Service

This is to certify that a copy of the foregoing was mailed postage pre-paid or hand delivered to the plaintiff with the delivery of the file-stamped copy of the petition. It is further certified that a copy of the foregoing will be served with the summons on each defendant named in this action.

Attorney for Plaintiff(s):
SAMUEL K LIPARI, 297 NE BAYVIEW, LEES SUMMIT, MO 64064

Defendant(s):
NOVATION LLC
NEOFORMA INC
GHX LLC

ROBERT J ZOLLARS
VOLUNTEER HOSPITAL ASSOCIATION
VHA MID AMERICA LLC
CURT NONOMAQUE
THOMAS F SPINDLER
ROBERT H BEZANSON
GARY DUNCAN
MAYNARD OLIVERIUS
SANDRA VAN TREASE
CHARLES V ROBB
MICHAEL TERRY
UNIVERSITY HEALTHSYSTEM CONSORTIUM
ROBERT J BAKER
JERRY A GRUNDHOFER
RICHARD K DAVIS
ANDREW CECERE
THE PIPER JAFFRAY COMPANIES
ANDREW S DUFF
COX HEALTH CARE SERVICES OF THE OZARKS INC
SAINT LUKES HEALTH SYSTEM INc
STORMONT VAIL HEALTHCARE INC
SHUGART THOMSON AND KILROY PC
HUSCH BLACKWELL SANDERS LLP
LATHROP AND GAGE LC

Dated: 26-FEB-2008

Teresa L. York
Court Administrator

The Law Firm Of

SHUGHART THOMSON & KILROY

A Professional Corporation

Jay E. Heidrick
jheidrick@stklaw.com
Direct Dial (816) 691-3743
Direct Fax (816) 222-0519
Fax (913) 451-3361

May 1, 2008

HAND DELIVER

The Honorable Michael W. Manners
Judge, Division 2
Circuit Court of Jackson County, Missouri
308 W. Kansas Avenue – Suite 214
Independence, MO 64050

Re: Lipari v. Novation, LLC, et al.
Case No. 0816-CV04217

Dear Judge Manners:

I enclose a Chambers copy of Defendants Jerry Grundhofer, Richard Davis and Andrew Cecere's Motion for Extension of Time in Which to Answer or Otherwise Plead.

Please let me know if you have any questions, or if I can be of assistance in any way.

Very truly yours,

JAY E. HEIDRICK

JEH:amo
Enclosure

cc: Mark A. Olthoff, Esq
Samuel K. Lipari (w/encl.)

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	Case No. 0816-CV04217
vs.	)	Division 2
	)	
NOVATION, LLC, et al.	)	
	)	
Defendants.	)	

MOTION FOR AN EXTENSION OF TIME
IN WHICH TO ANSWER OR OTHERWISE PLEAD

Defendants Jerry Grundhofer, Richard Davis and Andrew Cecere, by and through their attorneys Shughart Thomson & Kilroy, P.C., specially enter their appearance solely for the purpose of seeking an extension of time for which to answer. In support, defendants state as follows:

1. This action was filed on about February 25, 2008 by plaintiff Samuel K. Lipari acting *pro se*.

2. Inclusive of its five appendices, plaintiff's Petition spans 214 pages asserting causes of action for violation of Missouri anti-trust statutes; civil conspiracy; tortious interference with business relations; fraud and deceit; and *prima facie* tort.

3. Plaintiff served his Complaint on defendants on April 11 2008, making defendants responsive pleading due May 12, 2008.

4. Given the length of plaintiff's Complaint and the breadth of allegations therein, defendants' request a 30-day extension until and including June 13, 2008 in which to file their Answer or otherwise plead.

5. Defendants have contacted plaintiff, and he does not consent to the requested extension.

6. Nevertheless, plaintiff will suffer no prejudice by the 30-day extension, and the requested extension is not made for reasons of undue delay or to harass the plaintiff.

7. Defendants make this request solely for the purpose of seeking an extension, and do not waive any applicable defenses or objections available to them including but not limited to objections as to lack of personal jurisdiction.

WHEREFORE, for the above stated reasons, defendants respectfully request this Court issue an Order extending their time in which to file an Answer or otherwise plead, until and including June 13, 2008. Defendants further request all other relief to which they are justly entitled.

Respectfully submitted,

MARK A. OLTHOFF MO #38572
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Facsimile: (816) 374-0509

ANDREW M. DeMAREA MO #45217
JAY E. HEIDRICK MO #54699
SHUGHART THOMSON & KILROY, P.C.
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Overland Park, Kansas 66210
Telephone: (913) 451-3355
Facsimile: (913) 451-3361
ATTORNEYS FOR DEFENDANTS
JERRY GRUNDHOFER, RICHARD DAVISAND
ANDREW CECERE

Certificate of Service

I hereby certify that a true copy of the foregoing was mailed via United States Mail, postage-paid, this 30th day of April, 2008, to:

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

ATTORNEYS FOR DEFENDANTS

2278508.01

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

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

Pursuant to Missouri Rules of Civil Procedure 55.27(a)(2) and 55.27(a)(6), Defendants Curt Nonomaque ("Nonomaque") and Robert Baker ("Baker") (collectively "Defendants") submit this Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim.

1. Plaintiff has sued Nonomaque and Baker, among numerous other individual defendants, corporations and other entities, under Missouri antitrust law and Missouri common law theories. Plaintiff seeks several billions of dollars in damage allegedly arising from the obstruction of Plaintiff's efforts to enter the Missouri healthcare supply market.

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

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

Aff.") at ¶ 3 (Attached as Exhibit 2). Neither Baker nor Nonomaque has ever owned real or personal property located in Missouri. Nonomaque Aff. at ¶ 3; Baker Aff. at ¶ 3. Neither Baker nor Nonomaque has solicited a contract with a resident of Missouri. Nonomaque Aff. at ¶ 6; Baker Aff. at ¶ 6. Furthermore, neither individual has ever maintained a mailing address or phone number in Missouri, see Nonomaque Aff. at ¶ 4; Baker Aff. at ¶ 4, and neither has any personal employees or agents in Missouri. Nonomaque Aff. at ¶ 5; Baker Aff. at ¶ 5.

4. There is no basis for the exercise of specific jurisdiction over either Nonomaque or Baker. Indeed, Plaintiff's Complaint does not allege that Nonomaque or Baker performed any tortious act, transacted any business, or engaged in any conduct in Missouri. Thus, the claims at issue in this case do not relate to any contacts of Defendants with the forum. Thus, the Missouri long arm statute, MO. REV. STAT. § 506.500, does not confer upon this Court *in personam* jurisdiction over Nonomaque or Baker.

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

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

7. Subject to their Motion to Dismiss for Lack of Personal Jurisdiction, Defendants join in the Motion to Dismiss for Failure to State a Claim filed by Defendants Novation, LLC, VHA Inc., University Healthsystem Consortium, VHA Mid-America LLC; Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius, Sandra Van Trease; Charles Robb, Michael Terry, Cox Health Care Services of the Ozarks Inc.; Saint Luke's Health System Inc. and

Stormont-Vail Healthcare Inc.

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

Respectfully Submitted,

John K. Power, Bar No. 35312
HUSCH BLACKWELL SANDERS LLP
1200 Main Street
Suite 2300
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Phone: 816.283.4651
Fax: 816.421.0596

ATTORNEYS FOR DEFENDANTS CURT NONOMAQUE AND
ROBERT J. BAKER

OF COUNSEL:

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713.758.3610 – Phone
713.615.5147 – Fax

CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above and foregoing was mailed, by first-class United States mail, this 1st day of May, 2008 to the following:

Sam Lipari
297 NE Bayview
Lee's Summit, MO 64024

ATTORNEYS FOR DEFENDANTS

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	**Case No. 0816-CV-04217**
NOVATION, LLC, et al.,	)	
Defendants.	)	

AFFIDAVIT OF CURT NONOMAQUE

STATE OF TEXAS §
§
COUNTY OF DALLAS §

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

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

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

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

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

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

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

EXHIBIT 1

FURTHER AFFIANT SAYETH NOT.

Robert J. Baker

ROBERT J. BAKER

SWORN TO and SUBSCRIBED before me, the undersigned authority, by Robert J. Baker on April 22, 2008.

Lori M. Richards April 22, 2008
Notary Public in and for the State of Illinois

OFFICIAL SEAL
LORI M RICHARDS
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:04/10/10

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	**Case No. 0816-CV-04217**
NOVATION, LLC, et al.,	)	
Defendants.	)	

AFFIDAVIT OF ROBERT J. BAKER

STATE OF ILLINOIS §
§
COUNTY OF DU PAGE §

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

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

2. Until June 30, 2007, I was the President and CEO of University HealthSystem Consortium, which is headquartered in Oak Brook, Illinois. I retired from that position on June 30, 2007.

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

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

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

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

FURTHER AFFIANT SAYETH NOT.

CURT NONOMAQUE

SWORN TO and SUBSCRIBED before me, the undersigned authority, by Curt Nonomaque on April 29, 2008.

Notary Public in and for the State of Texas

ALICE BEATRICE KELLY
My Commission Expires
November 17, 2010

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	**Case No. 0816-CV-04217**
NOVATION, LLC, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Novation, LLC, VHA Inc., University Healthsystem Consortium, VHA Mid-America LLC, Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius, Sandra Van Trease, Charles Robb, Micheal Terry, Cox Health Care Services of the Ozarks Inc., Saint Luke's Health System Inc., and Stormont-Vail Healthcare Inc. (collectively, "Defendants") respectfully request that the Court dismiss Plaintiff's Petition with prejudice pursuant to Missouri Rule of Civil Procedure 55.27(a)(6).

1. Plaintiff claims that he is the assignee of the claims of Medical Supply Chain, Inc. ("MSC"), a dissolved Missouri corporation of which Plaintiff was the sole shareholder and CEO.

2. Plaintiff alleges that various health care supply related entities, venture capital, real estate and banking firms, law firms, hospitals, and individuals have conspired to commit fraud, bribery, extortion, and even murder in order to inflate prices for medical supplies and to prevent MSC from entering the health care supply market. Plaintiff seeks over $3 billion in damages and asserts claims under the Missouri antitrust statute and various common law theories.

3. This lawsuit is substantially similar to three prior lawsuits in which MSC has asserted claims under the federal antitrust statutes. *See Medical Supply Chain, Inc. v. US Bancorp, NA*, No. 02-2539-CM, 2003 WL 21479192, *6 (D. Kan. June 16, 2003); *Medical Supply Chain, Inc. v. General Elec. Co.*, 03-2324-CM, 2004 WL 956100, *3 (D. Kan. Jan 29, 2004); *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F.Supp.2d 1316, (D. Kan. 2006). In all three of the prior cases, MSC's federal antitrust claims were dismissed with prejudice and MSC and its counsel were sanctioned for asserting frivolous claims.

4. In this case, Plaintiff similarly fails to plead a right to recovery under any of Plaintiff's theories of liability. As set forth in more detail in the Suggestions supporting this motion (which are incorporated herein), Plaintiff's Petition fails to state a claim upon which relief may be granted for multiple independent reasons.

5. Plaintiff's antitrust claims should be dismissed because: (1) they are time barred; (2) Plaintiff lacks standing to assert the claims; (3) Plaintiff is collaterally estopped from asserting the claims; (4) Plaintiff's claims are barred by the *Noerr-Pennington* doctrine; (5) Plaintiff wholly fails to allege concerted action; and, (6) Plaintiff fails to sufficiently allege monopoly power or the elements of an attempt to monopolize.

6. Plaintiff's fraud claim should be dismissed because he fails to plead any of the elements of a fraud claim, including the existence of a misleading statement or omission made by Defendants to Plaintiff.

7. Plaintiff's tortious interference claim should be dismissed because it is time barred and because he fails to plead that Defendants knew about or intentionally interfered with the alleged contracts or business expectancies.

8. Plaintiff's *prima facie* tort claim should be dismissed because his allegations actually contradict the basis for recovery under the theory of *prima facie* tort.

WHEREFORE, for all of these reasons, Defendants request that the Court enter an Order dismissing the Plaintiff's Petition and for all other relief to which they are entitled.

Respectfully Submitted,

John K. Power, Bar No. 35312
HUSCH BLACKWELL SANDERS LLP
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ATTORNEYS FOR DEFENDANTS NOVATION, LLC, VHA INC., UNIVERSITY HEALTHSYSTEM CONSORTIUM, VHA MID-AMERICA LLC, THOMAS SPINDLER, ROBERT BEZANSON, GARY DUNCAN, MAYNARD OLIVERIUS, SANDRA VAN TREASE, CHARLES ROBB, MICHEAL TERRY, COX HEALTH CARE SERVICES OF THE OZARKS INC., SAINT LUKE'S HEALTH SYSTEM INC. AND STORMONT-VAIL HEALTHCARE INC.

OF COUNSEL:

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713.615.5147 – Fax

CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above and foregoing was mailed, by first-class United States mail, this 2nd day of May, 2008 to the following:

Sam Lipari
297 NE Bayview
Lee's Summit, MO 64024

ATTORNEYS FOR DEFENDANTS

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Of Counsel:

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Telephone: (816) 421-4800
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ATTORNEYS FOR NOVATION, LLC, VHA INC., UNIVERSITY HEALTHSYSTEM CONSORTIUM, VHA MID-AMERICA LLC; THOMAS SPINDLER, ROBERT BEZANSON, GARY DUNCAN, MAYNARD OLIVERIUS; SANDRA VAN TREASE; CHARLES ROBB, MICHEAL TERRY, COX HEALTH CARE SERVICES OF THE OZARKS INC.; SAINT LUKE'S HEALTH SYSTEM INC. AND STORMONT-VAIL HEALTHCARE INC.

INTRODUCTION

Although Plaintiff's Petition defies easy summary, the gist of his claims seems to be that various health care supply related entities, venture capital, real estate and banking firms, law firms, hospitals, and individuals have conspired to inflate prices for medical supplies and to prevent Plaintiff's now-dissolved corporation, Medical Supply Chain ("MSC"), from entering the health care supply market. Plaintiff also alleges that the steps Defendants took to prevent him from selling health care supplies involved money laundering, extortion, using fraudulent means to persuade federal courts to dismiss MSC's prior antitrust claims and even murder (including an alleged attempt to lure Plaintiff to his death). Plaintiff even further claims that the conspiracy was aided by former White House Deputy Chief of Staff Karl Rove, the governor of Missouri, and other officials at virtually every level of government and involved such wide-ranging schemes as attempting to dismantle Missouri's health insurance system, establishing a cancer treatment center for money laundering purposes, and causing Kansas Highway Patrol to wrongfully arrest drivers working for Plaintiff's father. Plaintiff seeks over $3 billion in damages and asserts claims under the Missouri antitrust statute and various common law theories.

Although Plaintiff's Petition is quite lengthy, it is frequently incomprehensible, and it fails to plead a right to recovery under any of Plaintiff's theories of liability. Even if Plaintiff's outrageous conspiracy theory is presumed to be true, his Petition fails to state a claim upon which relief may be granted for multiple independent reasons, including:

- Plaintiff's antitrust claims should be dismissed because: (1) they are time barred; (2) Plaintiff lacks standing to assert the claims; (3) Plaintiff is collaterally estopped from asserting the claims; (4) Plaintiff's claims are barred by the *Noerr-Pennington* doctrine;

(5) Plaintiff wholly fails to allege concerted action; and, (6) Plaintiff fails to sufficiently allege monopoly power or the elements of an attempt to monopolize;

- Plaintiff's fraud claim should be dismissed because he fails to plead the existence of a misleading statement or omission made by Defendants to Plaintiff;
- Plaintiff fails to plead that Defendants knew about or intentionally interfered with the contracts or business expectancies with which Plaintiff claims Defendants tortiously interfered;
- Plaintiff's tortious interference claims are time barred;
- Plaintiff's allegations actually contradict the basis for recovery under the theory of *prima facie* tort.

PRIOR ACTIONS

This lawsuit is not the first time Plaintiff has aired his bizarre allegations. Plaintiff has repeatedly tried and failed to prosecute these claims under various federal law theories in federal court in Kansas. MSC sued many of these same defendants in the U.S. District Court for the District of Kansas in 2002 ("*Medical Supply Chain I*"). In that case, which contained many of the same allegations made in this case, the district court dismissed the case and warned MSC's counsel "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *Medical Supply Chain, Inc. v. US Bancorp, NA*, No. 02-2539-CM, 2003 WL 21479192, *6 (D. Kan. June 16, 2003). The Tenth Circuit affirmed the District Court's dismissal and held that MSC's appeal was frivolous. *Medical Supply Chain, Inc. v. US Bancorp, NA*, 112 Fed. Appx. 730 (10th Cir. 2004).

In June of 2003, Plaintiff filed suit in the U.S. District Court for the District of Kansas against General Electric and certain related parties (the "GE Defendants") alleged to be co-

conspirators in this action ("*Medical Supply Chain II*"). That case involved many of the same factual and legal allegations as alleged here. In the district court's order dismissing that suit, the Court noted that the federal antitrust claims failed "at the most fundamental level." *Medical Supply Chain, Inc. v. General Elec. Co.*, 03-2324-CM, 2004 WL 956100, *3 (D. Kan. Jan 29, 2004). The 10th Circuit affirmed the dismissal of that complaint and upheld the district court's award of sanctions against MSC. *Medical Supply Chain, Inc. v. General Elec. Co.*, 144 Fed. Appx. 708 (10th Cir. 2005).

In yet a third case ("*Medical Supply Chain III*"), MSC sued Novation, VHA, UHC and others in the U.S. District Court for the District Of Kansas in March 2005. The court dismissed MSC's federal antitrust, RICO and USA Patriot Act claims, finding that the complaint "fails at the most basic level to allege sufficient facts to support cognizable legal claims." *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F.Supp.2d 1316, 1326 (D. Kan. 2006). MSC and its counsel were again sanctioned for asserting frivolous claims. MSC had also asserted claims under the state law theories Lipari asserts in this case, but the court declined to exercise supplemental jurisdiction over the claims and dismissed them without prejudice. *Id.* Plaintiff appealed the dismissal, but the Tenth Circuit held that the Notice of Appeal was untimely filed. *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 508 F.3d 572 (10th Cir. 2007).[1]

Thus, in the three prior cases filed by Lipari and MSC, the result has been the same: dismissal and sanctions. In this case, which is the *fourth* antitrust case brought on these facts, Lipari's Petition should fare no better. Although Lipari has added more participants and

[1] Plaintiff's litigious history does not end with these cases, however. Plaintiff has two other cases currently pending that arise from facts alleged in this case. After the dismissal of MSC's state law claims in *Medical Supply Chain III*, Lipari filed two separate suits, one against US Bank and certain related parties (the "US Bank Defendants") and one against the GE Defendants, asserting various claims, such as breach of contract, RICO and fraud. *See Lipari v. General Electric Company, et al.*, No. 07-0849-CV-W-FJG, in the U.S. District Court for the Western District of Missouri; *Lipari v. US Bancorp, et al.*, 2:07-CV02146CM, in the U.S. District Court for the District of Kansas.

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irrelevant allegations in this Petition, he has cured none of the legal defects of the claims. On the contrary, these claims suffer from all of the same legal defects and then some. Under the facts alleged in the Petition, no cognizable claim is stated against Novation, LLC, VHA Inc., University Healthsystem Consortium, VHA Mid-America LLC, Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius, Sandra Van Trease, Charles Robb, Micheal Terry, Cox Health Care Services of the Ozarks Inc., Saint Luke's Health System Inc. and Stormont-Vail Healthcare Inc. (hereinafter, collectively, "Defendants"). Thus, the Petition should be dismissed.

ARGUMENT

I. PLAINTIFF'S MISSOURI ANTITRUST CLAIMS FAIL AS A MATTER OF LAW

In Counts I, II, and III, Plaintiff seeks money damages and injunctive relief for violation of Sections 1 and 2 of the Missouri antitrust statute and conspiracy to violate Section 2. *See* MO. REV. STAT. 416.031(1) and (2). Although Lipari's Petition is difficult to decipher, it appears that Lipari's antitrust claims are based on the following allegations:

- Defendants monopolized or attempted to monopolize the Missouri hospital supply market; the Missouri e-commerce hospital supply market; and the upstream healthcare technology company capitalization market, Petition at ¶¶ 58-65;
- Defendants formed a cartel which artificially inflates the prices of hospital supplies, Petition ¶ 2;
- Defendants caused Lipari to lose access to over $300,000 in investment capital Plaintiff allegedly raised in October 2002 to fund his entry into the hospital supply market via US Bank's refusal to provide escrow accounts for MSC, Petition at ¶ 100;

- Defendants have "deprived the petitioner of inputs required to enter the subject relevant Missouri markets" by tortiously interfering with petitioner's property rights to his claims against US Bank and General Electric, Petition at ¶¶ 102.
- Defendants caused MSC to be deprived of corporate counsel and therefore forced MSC to dissolve in January 2006, Petition at ¶¶ 103-105 ;
- Defendants engaged in a "failed scheme" to eliminate federal oversight of Medicare and Medicaid funds in Missouri, Petition at ¶¶ 3-4; and,
- Defendants established a National Cancer Institute Certified Research Center at St. Luke's Plaza hospital in Kansas City, even though Lipari believes it was not worthy of such a designation, Petition at ¶ 5.

As will be explained in more detail below, these claims suffer from multiple fundamental legal flaws and, as a consequence, the antitrust claims should be dismissed in their entirety.

B. Lipari's Antitrust Claims Relating to Medical Supply's Alleged Blocked Entry into the Market are Time Barred

The limitations period for claims under the Missouri Antitrust statute is four years. MO. REV. STAT. § 416.131.2. Lipari alleges that MSC attempted to enter the health care supply market sometime in 2002, but that the alleged antitrust conspiracy blocked his efforts in that regard. Because more than four years have elapsed since that alleged injury, Plaintiff is precluded from bringing claims relating to MSC's alleged attempt to enter the market. Thus, the alleged deprivation of Medical Supply's initial capitalization should be dismissed on this ground alone. Further, to the extent that any other claim asserted in this lawsuit is based on conduct occurring more than four years ago, it is time-barred and must be dismissed. This would include the myriad allegations contained in Appendix Four ("Plaintiff's Business Relationship with US

Bank and US Bancorp") and Appendix Five ("Plaintiff's Business Relationship with GE, GE Capital, and GE Transportation").

Lipari tries to avoid the time bar by invoking Missouri's savings statute, MO. REV. STAT. 516.230, which provides that if claims are timely asserted in one suit and then dismissed without prejudice or ended by a non-suit, the plaintiff has one year from that dismissal or non-suit to refile the claims. *See* Petition at ¶ 20. Lipari alleges that his claims are revived because he has brought this case within a year of the dismissal of his state court claims in *Medical Supply Chain III* - a dismissal which Lipari asserts occurred on March 7, 2007. Lipari misstates the date of the dismissal by one year. The court in *Medical Supply Chain III* actually dismissed Lipari's state court claims on March 7, 2006. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F.Supp 2d 1316 (D. Kan. 2006). As a consequence, this lawsuit was not filed within the one year time period of the savings statute. In any event, the Missouri savings statute does not apply to claims, such as claims under the Missouri antitrust statute, which carry their own statutory limitations period. *See Boggs v. Farmers State Bank*, 846 S.W.2d 233 (Mo. App. S.D. 1993). Thus, the savings statute does not save these time barred claims.

C. Lipari Lacks Standing to Assert the Antitrust Claims

Moreover, Plaintiff lacks standing to recover damages arising from the alleged anticompetitive actions of the alleged hospital supply cartel he alleges exists to overcharge hospitals for medical supplies. Plaintiff does not allege that he or his non-dissolved former company is a hospital, so he is not directly injured by the alleged conspiracy to charge high prices. Indeed, as a competitor of the alleged cartel, Plaintiff would benefit by any agreement to charge high prices, because it could either undercut the price to win business or profit from the cartel's pricing "umbrella." Plaintiff's allegations affirmatively establish this lack of standing, as

he claims that he "found it easy to beat the 'volume discounts' on even very small quantity purchases for widely dispersed customers . . ." Petition at ¶ 385.

The case law is unequivocal that Plaintiff lacks standing to complain of Defendants' alleged price fixing conduct. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990) (holding that a firm has not suffered antitrust injury where competitors have agreed to fix prices); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (same); *Anesthesia Advantage, Inc. v. Metz Group*, 759 F. Supp. 638, 645-46 (D. Colo. 1991) (holding that plaintiffs had "no standing to assert [against its competitors] the price fixing claim independently or as a larger conspiracy, even assuming that the defendants were price fixing.").

Moreover, Lipari's Petition alleges several alleged "schemes" that, on their face, have nothing to do with him or with MSC. For example, Lipari complains at length about the establishment of a National Cancer Institute Certified Research Center at St. Luke's Plaza hospital in Kansas City. There is no allegation that Lipari or MSC was harmed by this. Similarly, Lipari complains about a potential change in health insurance in Missouri. Again, there is nothing which connects this allegation to MSC's alleged inability to compete. Similarly, Plaintiff has not alleged any antitrust injury resulting from Plaintiff's myriad allegations of inflated prices, harm to patients, harm to Medicare and Medicaid, and the alleged efforts to foil any investigation of these alleged facts. Consequently, Plaintiff cannot recover for that alleged conduct.

D. Lipari's Antitrust Claims are Barred by the *Noerr Pennington* Doctrine to the Extent They are Based on Allegations Relating to Defendants' Defense of MSC's Prior Lawsuits

Many of Lipari's allegations concern his belief that he has been wrongfully deprived of a "property interest" in MSC's antitrust claims by Defendants' conduct in defending the prior

lawsuits. For example, Lipari alleges that Defendants "obstruct[ed] the petitioner in his federal litigation to recover the market entry capitalization . . . ." Petition at ¶ 103. *See also id.* at ¶ 501 ("[T]he direct goal of the hospital supply cartel . . . was to make it possible to influence the outcome of the petitioner's litigation in Kansas District Court to take a [sic] business expectancies and property rights from the petitioner without the possibility of a broader civic involvement causing the petitioner's claims to be taken seriously."). In this same vein, Lipari asserts that Defendants have made attempts to "deprive the petitioner of his corporate counsel." Petition at ¶ 103. This claim is apparently based on Lipari's contention that Defendants conspired to have Plaintiff's former counsel, Bret Landrith, disbarred for incompetence and that the prior sanctions awards against MSC prevented other attorneys from agreeing to represent MSC. Lipari alleges that this difficulty in getting replacement counsel led him to dissolve MSC in the hope that he could then continue the litigation *pro se*. *Id.*

First, VHA Mid-America LLC, Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius, Sandra Van Trease, Charles Robb, Micheal Terry, Cox Health Care Services of the Ozarks Inc., Saint Luke's Health System Inc., and Stormont-Vail Healthcare Inc. were not parties to any of the prior lawsuits and there is no allegation that they had any knowledge or involvement in the defense of any of those suits.

Second, Lipari's claim that he has a "property interest" in his federal antitrust claims that was wrongfully taken from him by Defendants is ludicrous. MSC's federal antitrust claims have been ruled to be frivolous in the prior lawsuits. If MSC's claims were not "taken seriously," it was because they were not cognizable claims. It would be a strange result indeed for a plaintiff to be sanctioned for bringing frivolous antitrust claims, and then allowed to proceed in a subsequent case on the theory that the Defendant's conduct in establishing the fundamental legal

defects of the initial claims was itself an antitrust violation. Defending oneself against a frivolous antitrust lawsuit is simply not wrongful.

Third, the Petition contains absolutely no factual allegation that would connect Defendants to Landrith's disbarment or any efforts by Lipari to obtain additional or different counsel. Moreover, this Court can take judicial notice of the docket of *Medical Supply III* and the fact that MSC was represented by attorney Ira Hawver until after the lawsuit was closed and the appeal rejected by the Tenth Circuit. If Lipari chose to dissolve MSC as a litigation tactic, that was his decision—there are no facts alleged that would support a claim that Defendants forced him to do so or even knew about the dissolution until after it was completed.

In any event, the *Noerr-Pennington* doctrine mandates dismissal of Lipari's claims to the extent that they involve allegations relating to Defendants' defense of the prior lawsuits. The *Noerr-Pennington* doctrine immunizes defendants from liability for their "genuine efforts to seek redress through the judicial process, even if the outcome of such litigation is certain to affect or eliminate competition." *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F.Supp. 891, 896 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986). The inapplicability of the *Noerr-Pennington* doctrine is an essential element of plaintiff's case. *Defino v. Civic Center Corp.*, 780 S.W.2d 665, 668 (Mo. App. E.D. 1989). Lipari has failed to overcome that hurdle in this case.

E. Several Legal Deficiencies of Lipari's Antitrust Claims Have Been Established in Prior Proceedings

Collateral estoppel, or issue preclusion, bars the relitigation of an issue by the same parties or those in privity with them. *Kansas City Area Transp. Auth. v. 4550 Main Assocs., Inc.*, 742 S.W.2d 182, 188 (Mo. App. W.D. 1986). In *City of Ste. Genevieve v. Ste. Genevieve Ready Mix, Inc.*, 765 S.W.2d 361 (Mo. App. E.D. 1989), the court identified the following factors to be considered when determining whether collateral estoppel applies:

> (1) Whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment upon the merits; (3) whether the party against whom collateral estoppel is asserted is a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue.

Id. at 364. These conditions are met with regard to several of the relevant issues in this case. First, because Lipari proceeds in this case as the alleged assignee of MSC's claims, he is in privity with MSC. Second, MSC had a fair and full opportunity to litigate the legal adequacy of his prior claims. Third, a dismissal with prejudice is a judgment on the merits of MSC's claims.

Finally, although the prior claims were asserted under federal antitrust law, the elements and relevant issues are identical under Missouri law. Section 416.031(1) of the Missouri Antitrust Act closely parallels Section 1 of the Sherman Antitrust Act and Section 416.031(2) of the Missouri Antitrust Act closely parallels Section 2 of the Sherman Act. *Defino v. Civic Center Corp.*, 718 S.W.2d 505, 510 (Mo. Ct. App. 1986). The Missouri Antitrust Act expressly requires Missouri state antitrust claims to be "construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." MO. REV. STAT. § 416.141; *Fisher, Etc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. banc 1979). Thus, to the extent that Lipari's claims mirror the claims MSC made under the Sherman Act in the prior cases, and those claims were found to be legally deficient, Lipari is collaterally estopped from asserting them in this case. As will be discussed below, collateral estoppel bars Lipari's antitrust claims with respect to his allegations of concerted action (Count I) and relevant markets (Count II).

F. Count I of the Petition Must be Dismissed Because Lipari Has Failed to Adequately Plead Concerted Action

In Count I of Lipari's Petition, he asserts that Defendants violated Section 416.031(1) of the Missouri Antitrust Statute. In order to establish a violation of that statute, Plaintiff must

demonstrate that "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *See Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 5 F.Supp.2d 694, 703 (D. Minn. 1998), *aff'd*, 208 F.3d 655 (8th Cir. 2000). The "contract, combination, or conspiracy" element "requires that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.*

Plaintiff repeatedly states that Defendants acted in concert, but does not allege any facts concerning a common scheme relating to any action against Plaintiff or other unlawful objective. Plaintiff's conclusory statements are insufficient under Missouri law. *See Love v. St. Louis City Bd. of Educ.*, 963 S.W.2d 364, 365 (Mo. App. E.D. 1998) ("Mere conclusions of a pleader not supported by factual allegations cannot be taken as true, and therefore, must be disregarded in determining whether the petition states a claim upon which relief can be granted."). There are no facts relating to any contact or communication between Novation, VHA, UHC, VHA-MidAmerica or the individual defendants on the one hand and the defendants and other parties alleged to have deprived Plaintiff of its financing, real estate and escrow services. The Petition provides no factual basis for a belief that the Defendants on whose behalf this motion is made had any knowledge of the events relating to Plaintiff (or had even heard of MSC prior to these lawsuits). Moreover, the Petition fails to allege facts sufficient to plead an agreement or concerted action relating to group boycott or allocation of customers.

"[A] plaintiff must do more than cite relevant antitrust language to state a claim for relief." *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992). A complaint must "provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has

taken place." *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994). The U.S. Supreme Court recently emphasized that a cognizable claim under Section 1 of the Sherman Act requires "a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). In other words, there must be "plausible grounds to infer an agreement" in order to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.*

The Petition completely fails this test. Plaintiff does not, and could not, allege that the Defendants agreed with anyone to harm Plaintiff. Plaintiff never elaborates on the alleged conspiracy other than to simply assert that such an agreement exists. Because of Plaintiff's failure to allege any of the required particulars, "[d]ismissal of [this] 'bare bones' allegation of antitrust conspiracy without any supporting facts is appropriate." *Estate Constr. Co.*, 14 F.3d at 221.

In *Medical Supply III*, the court held that MSC failed to allege concerted action on similar allegations. The court held that "[a]lthough plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations." *Medical Supply Chain III*, 419 F.Supp.2d at 1327. The court also noted that MSC's prior complaints were found to be deficient in this regard. *Id.* Lipari has done no better in this case and, thus, his claim of concerted action is barred by collateral estoppel.

E. Counts II and III of the Petition Must be Dismissed Because Lipari Has Failed to Adequately Plead a Relevant Market or Market Domination

Lipari's alleged relevant markets, *i.e.* the Missouri hospital supply market, the Missouri e-commerce hospital supply market, and the upstream healthcare technology company capitalization market are legally deficient and cannot provide a basis for a claim under the Missouri Antitrust Act. A plaintiff is required to establish a relevant market to prevail on a

monopolization or attempted monopolization claim. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002). *See generally Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) ("Without a definition of that market there is no way to measure [a defendant's] ability to lessen or destroy competition.").

In fact, Lipari's Section 2 claim is barred by the doctrine of collateral estoppel in this regard. His allegations that the relevant market consists of the hospital supply market, the e-commerce hospital supply market, and the healthcare capitalization market have been repeatedly rejected in the prior cases. *See Medical Supply III*, 419 F.Supp.2d at 1327. The fact that he has limited these insufficiently defined markets to Missouri does not cure the defect.

Even apart from the issue of collateral estoppel, Plaintiff's pleadings with regard to relevant market are plainly insufficient. A proper relevant market consists of all products or services that are reasonably interchangeable. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). In addition, a market definition must be plausible to survive a motion to dismiss. *See IV Communications Network*, 964 F.2d at 1028 (affirming dismissal because the plaintiff "did not allege a relevant product market which [the defendant] was capable of monopolizing, attempting to, or conspiring to monopolize in violation of Section 2 of the Sherman Act."); *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (to survive a motion to dismiss, the plaintiff "must allege a relevant market that includes all [products or services] that are reasonably interchangeable").

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

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

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

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

Second, hospital supplies, defined as such, are not reasonably interchangeable products. *See Community Publishers, Inc. v. Donrey Corp.*, 892 F.Supp. 1146, 1153 (W.D. Ark. 1995), *aff'd, Community Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998) (noting that "products belong in the same market when they are reasonably interchangeable for the same uses and thus exhibit a high cross-elasticity of demand."). Lipari fails to explain how this test is met in a market definition that includes such different items as CT scanners, sutures, and bandages.

In addition, a plaintiff claiming monopolization must allege that the defendant possesses "monopoly power in the relevant market," and a plaintiff claiming attempted monopolization must allege that the defendant has a "dangerous probability of success in monopolizing the relevant market." *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999). Specifically, "[i]n order to sustain a charge of monopolization or attempted monopolization, a plaintiff must allege the necessary market domination of a *particular defendant*." *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (emphasis added) (rejecting attempt to show dangerous probability of success by aggregating shares of two defendants). Plaintiff alleges that Defendants have acquired 80% of the market because he contends that "VHA Mid-America LLC has over 80% of Missouri's

hospital beds" which he claims is the "industry measure of market share for distribution of hospital supplies." Petition at p 93. But this is a fundamentally flawed allegation of market share, because it does not address what percentage of hospital supplies for those beds is purchased through the Novation contracts. Under Lipari's theory, one must assume that VHA members in Missouri purchase 100% of their supplies through Novation contracts and that 80% of the hospital beds constitute the same percentage of purchases of hospital supplies. Neither of these premises is logical and, in any event, Lipari does not even plead that either is true.

For these same reasons, Lipari's Count III, which attempts to set forth a claim for conspiracy to violation Section 2 of the Missouri Antitrust Act must be dismissed.

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

Plaintiff asserts a claim for fraud and deceit against Defendants. The elements of fraudulent misrepresentation are: (1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of the falsity of the statement; (5) the hearer's reliance on its truth, and the right to rely thereon; and (6) proximate injury. *Premium Financing Specialists, Inc. v. Hallin*, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002).

The Court need not go further than the first requirement in order to dismiss this claim against Defendants. Nowhere in the Petition is there an allegation that Defendants made any statement, false or otherwise, to Plaintiff. *See In re Lifecore Biomedical, Inc. Sec. Litig.*, 159 F.R.D. 513, 516 (D. Minn 1993) (noting that "the complaint must allege the time, place, speaker and sometimes even the content of the alleged misrepresentation."). Moreover, Lipari fails to

satisfy the other requirements of pleading a fraud claim, as there are no factual allegations regarding Defendants' intent or knowledge of the alleged falsity of any statement made to Plaintiff, nor are there any factual allegations regarding Lipari's reliance on any statement made by Defendants. Thus, Plaintiff's fraud claim fails at the threshold and Count V should be dismissed.

III. PLAINTIFF'S CLAIM OF TORTIOUS INTERFERENCE IS LEGALLY DEFECTIVE AND TIME BARRED

Plaintiff claims that Defendants tortiously interfered with "trust accounts with U.S. Bank" and some unknown putative sale or lease arrangement with "General Electric Transportation Co." Petition, at p. 103. Tortious interference with a contract or business expectancy requires plaintiff to plead the following elements: (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) an intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; and (5) damages. *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. E.D. 1996).

Even assuming there was a valid contract or business expectancy involved, Plaintiff wholly fails to allege that Defendants knew about it or intentionally interfered with such contract or business expectancy. Indeed, the Petition is devoid of any facts which would ever justify an inference of knowledge or intention. To fill that gap, Plaintiff impermissibly relies on its conclusory allegations that Defendants acted in conspiracy with each other with regard to all the conduct in the Petition in order to try to tie these Defendants to banking and real estate transactions they had nothing to do with between Plaintiff and other parties.

In any event, the limitation for asserting a tortious interference action is five years after the cause's accrual. MO. REV. STAT. 516.120(4). The asserted business expectancies were

allegedly interfered with more than five years before this lawsuit was filed. As noted in Section IB above, Lipari's claims are not revived by the Missouri savings statute, because he failed to sue within a year of the claims' dismissal in *Medical Supply III*. For these reasons, Count IV should be dismissed.

IV. PLAINTIFF'S PETITION CONTRADICTS THE BASIS FOR A RECOVERY FOR *PRIMA FACIE* TORT

Plaintiff wholly fails to adequately plead the elements of a *prima facie* tort. *Lobise v. St. Louis Children's Hospital, Inc.*, 646 S.W.2d 130, 131 (Mo. Ct. App. 1987). 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); *Wilt v. Kansas City Area Transp. Authority*, 629 S.W.2d 669 (Mo. App. W.D. 1982). Failure to plead that the defendant committed an intentional lawful act is fatal to a claim for *prima facie* tort. *Bradley v. Ray*, 904 S.W.2d 302 (Mo. Ct. App. 1995).

The thrust of a *prima facie* tort claim is the intentional undertaking of an otherwise lawful act, which is done with the intent to cause injury to the Plaintiff, and which is without any recognized justification. Here Plaintiff failed to allege action by Defendants which is both intentional and lawful. In fact, Plaintiff specifically alleges the "acts and activities of Defendants are still *unlawful and fraudulent*." Petition at p. 107. (emphasis added).) Consequently, Count VI should be dismissed.

PRAYER

WHEREFORE, for all of these reasons, Defendants request that the Court enter an Order dismissing the Plaintiff's Petition and for all other relief to which they are entitled.

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CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above and foregoing was mailed, by first-class United States mail, this 12 day of May, 2008 to the following:

Sam Lipari
297 NE Bayview
Lee's Summit, MO 64024

ATTORNEYS FOR DEFENDANTS

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

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

Pursuant to Missouri Rules of Civil Procedure 55.27(a)(2) and 55.27(a)(6), Defendants Curt Nonomaque ("Nonomaque") and Robert Baker ("Baker") (collectively "Defendants") submit these Suggestions in Support of their Motion to Dismiss Plaintiff's Petition for Lack of Personal Jurisdiction and for Failure to State a Claim.

INTRODUCTION

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

Bezanson, Gary Duncan, Maynard Oliverius, Sandra Van Trease, Charles Robb, Michael Terry, Cox Health Care Services of the Ozarks Inc., Saint Luke's Health System Inc., and Stormont-Vail Healthcare Inc.

BACKGROUND FACTS

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

ARGUMENT AND AUTHORITIES

I. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS

"When a defendant raises the issue of lack of personal jurisdiction in a motion to dismiss, the burden shifts to the plaintiff to make a prima facie showing that the trial court has personal jurisdiction . . . " *Conway v. Royalite Plastics, Ltd.*, 12 S.W.3d 314, 318 (Mo. banc 2000). As set forth below, Plaintiff cannot meet its burden of proof because neither general nor specific

[1] When considering whether personal jurisdiction exists under Missouri's Long Arm Statute, it is permissible to consider matters outside the pleadings, such as affidavits or declarations from the movant. *Conway v. Royalite Plastics, Ltd.*, 12 S.W.3d 314, 318 (Mo. banc 2000).

jurisdiction exists over Defendants in this case. Accordingly, the claims against Defendants must be dismissed.

Missouri courts employ a two-step test for personal jurisdiction. The first step is to examine whether the defendant is amenable to service of process under the state's long arm statute. *Chromalloy American Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 4 (Mo. banc 1997). The second step is to examine whether the Due Process Clause permits personal jurisdiction. *Id.* Plaintiff cannot meet either prong of this test.

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

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

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

> 3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

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

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

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

1. Defendants Lack Sufficient Minimum Contacts with Missouri

The minimum contacts prong of *International Shoe* which is the very "touchstone" of the constitutional analysis in this area, depends heavily upon the "foreseeability" of a defendant being sued in a forum state. *Burger King*, 471 U.S. at 474; *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In *World-wide*, the United States Supreme Court stated that "the foreseeability that is critical to due process analysis . . . is that the defendant's contacts in connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-wide*, 444 U.S. at 297. Whether it is foreseeable that a defendant can be sued in a particular court can be established only by proof that the defendant has "purposefully directed" its activities toward the forum state. *Asahi Metal Industry Company v. Superior Court*, 480 U.S. 102, 112 (1987); *see also Burger King*, 471 U.S. at 473. In this sense, the due process clause ensures a "degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to whether or not the conduct will or will not render them liable to suit." *World-wide Volkswagen*, 444 U.S. at 297.

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

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

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

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

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

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

An application of these factors to the present case demonstrates that it would be unfair and unjust to require Defendants to litigate in this forum. Nonomaque lives and works in Texas. Baker lives in Illinois and, prior to his retirement, worked in Illinois. On the other hand, Plaintiff's interest in obtaining relief in this forum should be given no weight. As is explained in the Motion to Dismiss for Failure to State a Claim, Plaintiff filed this lawsuit as a fourth "bite at the apple" after his claims for alleged federal antitrust violations were dismissed as frivolous. No state has an interest in encouraging such forum shopping and this multiplicity of suits.

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

Respectfully Submitted:

John K. Power, Bar No. 35312
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CURT NONOMAQUE AND ROBERT J. BAKER

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CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above and foregoing was mailed, by first-class United States mail, this 2nd day of May, 2008 to the following:

Sam Lipari
297 NE Bayview
Lee's Summit, MO 64024

ATTORNEYS FOR DEFENDANTS

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,

Plaintiff,

v.

Case Number 0816-CV04217

NOVATION, LLC, et al.,

Division 2

Defendants.

ORDER

The Court this day takes up Defendants, Jerry Grundhofer, Richard Davis and Andrew Cecere's Motion for Extension of Time, filed April 30, 2008. Now for good cause shown and being fully advised in the premises, the Court GRANTS the Motion.

IT IS SO ORDERED.

MICHAEL W. MANNERS
JUDGE, DIVISION 2

Dated: May 1, 2008

I certify a copy of the above was faxed or mailed this 5th day of April, 2008, to:

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

Jay E. Heidrick, Attorney for Defendants Grundhofer, David and Cecere
Fax # (913) 451-3361

M. Brady, Law Clerk, Division 2

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

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

Pursuant to Missouri Rules of Civil Procedure 55.27(a)(2) and 55.27(a)(6), Defendants Curt Nonomaque ("Nonomaque") and Robert Baker ("Baker") (collectively "Defendants") submit this Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim.

1. Plaintiff has sued Nonomaque and Baker, among numerous other individual defendants, corporations and other entities, under Missouri antitrust law and Missouri common law theories. Plaintiff seeks several billions of dollars in damage allegedly arising from the obstruction of Plaintiff's efforts to enter the Missouri healthcare supply market.

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

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

Aff.") at ¶ 3 (Attached as Exhibit 2). Neither Baker nor Nonomaque has ever owned real or personal property located in Missouri. Nonomaque Aff. at ¶ 3; Baker Aff. at ¶ 3. Neither Baker nor Nonomaque has solicited a contract with a resident of Missouri. Nonomaque Aff. at ¶ 6; Baker Aff. at ¶ 6. Furthermore, neither individual has ever maintained a mailing address or phone number in Missouri, see Nonomaque Aff. at ¶ 4; Baker Aff. at ¶ 4, and neither has any personal employees or agents in Missouri. Nonomaque Aff. at ¶ 5; Baker Aff. at ¶ 5.

4. There is no basis for the exercise of specific jurisdiction over either Nonomaque or Baker. Indeed, Plaintiff's Complaint does not allege that Nonomaque or Baker performed any tortious act, transacted any business, or engaged in any conduct in Missouri. Thus, the claims at issue in this case do not relate to any contacts of Defendants with the forum. Thus, the Missouri long arm statute, MO. REV. STAT. § 506.500, does not confer upon this Court *in personam* jurisdiction over Nonomaque or Baker.

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

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

7. Subject to their Motion to Dismiss for Lack of Personal Jurisdiction, Defendants join in the Motion to Dismiss for Failure to State a Claim filed by Defendants Novation, LLC, VHA Inc., University Healthsystem Consortium, VHA Mid-America LLC; Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius; Sandra Van Trease; Charles Robb, Michael Terry, Cox Health Care Services of the Ozarks Inc.; Saint Luke's Health System Inc. and

Stormont-Vail Healthcare Inc.

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

Respectfully Submitted,

John K. Power, Bar No. 35312
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ATTORNEYS FOR DEFENDANTS CURT NONOMAQUE AND
ROBERT J. BAKER

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CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above and foregoing was mailed, by first-class United States mail, this 1st day of May, 2008 to the following:

Sam Lipari
297 NE Bayview
Lee's Summit, MO 64024

ATTORNEYS FOR DEFENDANTS

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 0816-CV-04217**
	)	
NOVATION, LLC, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF CURT NONOMAQUE

STATE OF TEXAS §
§
COUNTY OF DALLAS §

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

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

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

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

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

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

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

FURTHER AFFIANT SAYETH NOT.

ROBERT J. BAKER

SWORN TO and SUBSCRIBED before me, the undersigned authority, by Robert J. Baker on April 22, 2008.

Lori M. Richards April 22, 2008
Notary Public in and for the State of Illinois

OFFICIAL SEAL
LORI M RICHARDS
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:04/10/10

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

AFFIDAVIT OF ROBERT J. BAKER

STATE OF ILLINOIS §
§
COUNTY OF DU PAGE §

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

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

2. Until June 30, 2007, I was the President and CEO of University HealthSystem Consortium, which is headquartered in Oak Brook, Illinois. I retired from that position on June 30, 2007.

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

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

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

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

FURTHER AFFIANT SAYETH NOT.

CURT NONOMAQUE

SWORN TO and SUBSCRIBED before me, the undersigned authority, by Curt Nonomaque on April 29, 2008.

Notary Public in and for the State of Texas

ALICE BEATRICE KELLY
My Commission Expires
November 17, 2010

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.)		
Plaintiff,	Case No.	0816-CV04217
	Division.	02
vs.		
NOVATION, LLC, et al.,		
Defendants.		

DEFENDANT LATHROP & GAGE L.C.'S
ANSWER TO PLAINTIFF'S PETITION

COMES NOW Defendant, Lathrop & Gage L.C. ("Lathrop & Gage") and for its Answer to Plaintiff's petition states as follows:

1. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1 through 56, and therefore denies the same.

2. As to paragraph 57, Lathrop & Gage admits that it is located at 2345 Grand, Kansas City, MO 64108, but denies paragraph 57 to the extent that the petition alleges that Lathrop & Gage is a proper party subject to this legal action as indicated by the heading of this section.

3. Lathrop & Gage denies the allegations contained in paragraph 58.

4. Lathrop & Gage denies the allegations contained in paragraphs 59 through 68.

5. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 69 through 80, and therefore denies the same.

6. Lathrop & Gage denies the allegations contained in paragraph 81.

7. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 82 and 83, and therefore denies the same.

8. Lathrop & Gage denies the allegations contained in paragraph 84.

9. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 85, and therefore denies the same.

10. Lathrop & Gage denies the allegations contained in paragraph 86.

11. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 87 through 101, and therefore denies the same.

12. Lathrop & Gage denies the allegations contained in paragraph 102.

13. Lathrop & Gage denies the allegations contained in paragraph 103.

14. Lathrop & Gage denies the allegations contained in paragraph 104.

15. Lathrop & Gage denies the allegations contained in paragraph 105.

16. Lathrop & Gage denies the allegations contained in paragraph 106.

17. Lathrop & Gage denies the allegations contained in paragraph 107.

18. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 108 through 193, and therefore denies the same.

19. Lathrop & Gage affirmatively states that Mark F. "Thor" Hearne is a member of Lathrop & Gage and national election counsel to Bush–Cheney 2004, Inc. Lathrop & Gage denies the remaining allegations contained in paragraph 194.

20. Lathrop & Gage affirmatively states that Mr. Hearne is legal counsel to Missourians for Matt Blunt, Inc. Lathrop & Gage denies the remaining allegations contained in paragraph 195.

21. Lathrop & Gage denies the allegations contained in paragraph 196.

22. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 197, and therefore denies the same.

23. Lathrop & Gage admits that its former CEO Tom Stewart requested a leave of absence in April 2007. Lathrop & Gage denies the remaining allegations contained in paragraph 198.

24. Lathrop & Gage admits the allegations contained in paragraph 199.

25. Lathrop & Gage admits that Tom Stewart is no longer a member or employee of Lathrop & Gage L.C. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 200 and therefore denies the same.

26. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 201 through 480, and therefore denies the same.

27. Lathrop & Gage denies the allegations contained in paragraph 481.

28. Lathrop & Gage denies the allegations contained in paragraph 482.

29. Lathrop & Gage denies the allegations contained in paragraph 483.

30. Lathrop & Gage denies the allegations contained in paragraph 484.

31. Lathrop & Gage denies the allegations contained in paragraph 485.

32. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 486, and therefore denies the same.

33. Lathrop & Gage denies the allegations contained in paragraph 487.

34. Lathrop & Gage denies the allegations contained in paragraph 488.

35. Lathrop & Gage denies the allegations contained in paragraph 489.

36. Lathrop & Gage denies the allegations contained in paragraph 490.

37. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 491, and therefore denies the same.

38. Lathrop & Gage denies the allegations contained in paragraph 492.

39. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 493, and therefore denies the same.

40. Lathrop & Gage denies the allegations contained in paragraph 494.

41. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 495, and therefore denies the same.

42. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 496, and therefore denies the same.

43. Lathrop & Gage affirmatively states that Kansas Senator John Vratil is a member of Lathrop & Gage and that he serves as a member of the Kansas Judicial Counsel. Lathrop & Gage denies the remaining allegations contained in paragraph 497.

44. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 498, and therefore denies the same.

45. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 499, and therefore denies the same.

46. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 500, and therefore denies the same.

47. Lathrop & Gage denies the allegations contained in paragraph 501.

48. Lathrop & Gage denies the allegations contained in paragraph 502.

49. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 503 through 547, and therefore denies the same.

50. Lathrop & Gage denies the allegations contained in paragraph 548.

51. Lathrop & Gage denies the allegations contained in paragraph 549.

52. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 550, and therefore denies the same.

53. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 551, and therefore denies the same.

54. Lathrop & Gage denies the allegations contained in paragraph 552.

55. Lathrop & Gage denies the allegations contained in paragraph 553.

56. Lathrop & Gage denies the allegations contained in paragraph 554.

57. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 555 through 558, and therefore denies the same.

58. Lathrop & Gage denies the allegations contained in paragraph 559.

59. Lathrop & Gage denies the allegations contained in paragraph 560.

60. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 561, and therefore denies the same.

61. Lathrop & Gage denies the allegations contained in paragraph 562.

62. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 563, and therefore denies the same.

63. Lathrop & Gage denies the allegations contained in paragraph 564.

64. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 565 through 576, and therefore denies the same.

65. Lathrop & Gage denies the allegations contained in paragraph 577.

66. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 578 through 580, and therefore denies the same.

67. Lathrop & Gage denies the allegations contained in paragraph 581.

68. Lathrop & Gage denies the allegations contained in paragraph 582.

69. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 583, and therefore denies the same.

70. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 584, and therefore denies the same.

COUNTS

Because Plaintiff has not consecutively numbered the paragraphs alleging his causes of action, Lathrop & Gage will answer these allegations by assigning paragraph numbers and referring to the paragraph number within each count. These paragraph

numbers are assigned consecutively to each paragraph in each count, with a new paragraph being assigned after each new paragraph indention, and the paragraph numbers beginning at "1" at the beginning of each separately identified count. Bold headings are omitted from the consecutive paragraph count.

COUNT I
Mo. Rev. Stat. § 416.031.1

71. Lathrop & Gage denies the allegations contained in paragraph 1.

72. As to paragraph 2, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

73. Lathrop & Gage denies the allegations contained in paragraph 3.

74. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4, and therefore denies the same.

75. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5, and therefore denies the same.

76. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 6, and therefore denies the same.

77. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 7, and therefore denies the same.

78. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8, and therefore denies the same.

79. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9, and therefore denies the same.

80. Lathrop & Gage denies the allegations contained in paragraphs 10 and 11.

81. Lathrop & Gage admits only that it is a separately incorporated, legally distinct entity from the other defendants. Lathrop & Gage is without knowledge as to the remaining allegations contained in paragraph 12, and therefore denies the same.

82. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 13 through 27, and therefore denies the same.

83. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 28 through 34, and therefore denies the same.

84. Lathrop & Gage denies the allegations contained in paragraph 35.

85. Lathrop & Gage denies the allegations contained in paragraph 36.

86. Lathrop & Gage denies the allegations contained in paragraph 37.

87. As to paragraph 38, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

88. Lathrop & Gage denies the allegations contained in paragraphs 39 through 40.

89. As to paragraph 41, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

90. Lathrop & Gage denies the allegations contained in paragraph 42.

91. Lathrop & Gage denies the allegations contained in paragraph 43.

92. As to paragraph 44, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

93. Lathrop & Gage denies the allegations contained in paragraph 45.

94. Lathrop & Gage denies the allegations contained in paragraph 46.

COUNT II
Mo. Rev. Stat. § 416.031.2

95. Lathrop & Gage denies the allegations contained in paragraph 1.

96. Lathrop & Gage denies the allegations contained in paragraph 2.

97. Lathrop & Gage admits that Mo. Rev. Stat. § 416.031.2 contains the quote in paragraph 3.

98. Lathrop & Gage denies the allegations contained in paragraph 4.

99. As to paragraph 5, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

100. Lathrop & Gage denies the allegations contained in paragraph 6.

101. Lathrop & Gage denies the allegations contained in paragraph 7.

102. Lathrop & Gage denies the allegations contained in paragraph 8.

103. Lathrop & Gage denies the allegations contained in paragraph 9.

104. Lathrop & Gage denies the allegations contained in paragraph 10.

105. Lathrop & Gage denies the allegations contained in paragraph 11.

106. Lathrop & Gage denies the allegations contained in paragraph 12.

107. Lathrop & Gage denies the allegations contained in paragraph 13.

108. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1 through 145 of the petition referenced in paragraph 14 of plaintiff's petition, and therefore denies the same.

109. As to paragraph 15, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

110. Lathrop & Gage denies the allegations contained in paragraph 16.

111. Lathrop & Gage denies the allegations contained in paragraph 17.

112. Lathrop & Gage denies the allegations contained in paragraph 18.

113. Lathrop & Gage denies the allegations contained in paragraph 19.

114. Lathrop & Gage denies the allegations contained in paragraph 20.

115. Lathrop & Gage denies the allegations contained in paragraph 21.

116. Lathrop & Gage denies the allegations contained in paragraph 22.

117. Lathrop & Gage denies the allegations contained in paragraph 23.

118. Lathrop & Gage denies the allegations contained in paragraph 24.

119. As to paragraph 25, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

120. Lathrop & Gage denies the allegations contained in paragraph 26.

121. As to paragraph 27, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

122. Lathrop & Gage denies the allegations contained in paragraph 28.

123. Lathrop & Gage denies the allegations contained in paragraph 29.

124. Lathrop & Gage denies the allegations contained in paragraph 30.

125. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 31, and therefore denies the same.

126. Lathrop & Gage denies the allegations contained in paragraph 32.

127. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 33, and therefore denies the same.

128. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 34, and therefore denies the same.

129. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 35, and therefore denies the same.

130. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 36, and therefore denies the same.

131. Lathrop & Gage denies the allegations contained in paragraph 37.

132. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 38, and therefore denies the same.

133. Lathrop & Gage denies the allegations contained in paragraph 39.

134. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 40, and therefore denies the same.

135. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 41, and therefore denies the same.

136. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 42, and therefore denies the same.

137. Lathrop & Gage denies the allegations contained in paragraph 43.

138. Lathrop & Gage denies the allegations contained in paragraph 44.

COUNT III
Conspiracy to Violate § 416.031.2

139. As to paragraph 1, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

140. As to paragraph 2, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

141. As to paragraph 3, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

COUNT IV
Tortious Interference with Business Relations

142. Lathrop & Gage denies the allegations contained in paragraph 1.

143. As to paragraph 2, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

144. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 3, and therefore denies the same.

145. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4, and therefore denies the same.

146. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5, and therefore denies the same.

147. As to paragraph 6, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

148. Lathrop & Gage denies the allegations contained in paragraph 7.

149. As to paragraph 8, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

150. Lathrop & Gage denies the allegations contained in paragraph 9.

151. As to paragraph 10, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

152. Lathrop & Gage denies the allegations contained in paragraph 11.

153. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12, and therefore denies the same.

154. As to paragraph 13, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

155. Lathrop & Gage denies the allegations contained in paragraph 14.

156. Lathrop & Gage denies the allegations contained in paragraph 15.

157. Lathrop & Gage denies the allegations contained in paragraph 16.

COUNT V
Fraud and Deceit

158. Lathrop & Gage denies the allegations contained in paragraph 1.

159. As to paragraph 2, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

160. Lathrop & Gage denies the allegations contained in paragraph 3.

161. As to paragraph 4, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

162. Lathrop & Gage is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5, and therefore denies the same.

163. Lathrop & Gage denies the allegations contained in paragraph 6.

164. As to paragraph 7, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

165. Lathrop & Gage denies the allegations contained in paragraph 8.

166. As to paragraph 9, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

167. Lathrop & Gage denies the allegations contained in paragraph 10.

168. As to paragraph 11, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

169. Lathrop & Gage denies the allegations contained in paragraph 12.

170. Lathrop & Gage denies the allegations contained in paragraph 13.

171. As to paragraph 14, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

172. Lathrop & Gage denies the allegations contained in paragraph 15.

173. As to paragraph 16, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

174. Lathrop & Gage denies the allegations contained in paragraph 17.

175. As to paragraph 18, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

176. As to paragraph 19, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

177. Lathrop & Gage denies the allegations contained in paragraph 20.

COUNT VI
Prima Facie Tort

178. As to paragraph 1, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

179. Lathrop & Gage denies the allegations contained in paragraph 2.

180. Lathrop & Gage denies the allegations contained in paragraph 3.

181. Lathrop & Gage denies the allegations contained in paragraph 4.

182. As to paragraph 5, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

183. Lathrop & Gage denies the allegations contained in paragraph 6.

184. As to paragraph 7, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

185. Lathrop & Gage denies the allegations contained in paragraph 8.

186. Lathrop & Gage denies the allegations contained in paragraph 9.

187. As to paragraph 10, Lathrop & Gage incorporates its responses to prior allegations made by plaintiff.

188. Lathrop & Gage denies the allegations contained in paragraph 11.

AFFIRMATIVE DEFENSES

1. Plaintiff's petition fails to state a cause of action against Lathrop & Gage upon which relief may be granted, and should therefore be dismissed.

2. Plaintiff's causes of action are barred by the applicable statute of limitations.

3. Plaintiff lacks standing to being all claims in the petition.

4. To the extent that plaintiff is acting on behalf of any interest other than his own personal interest, the petition constitutes the unauthorized practice of law.

5. Plaintiff's claims are barred by the doctrines of *res judicata*, collateral estoppel and laches.

6. Lathrop & Gage invokes its rights under Mo. Rev. Stat. § 537.528.

7. To the extent that any settlement is reached with an alleged tortfeasor, Plaintiff's claim should be reduced by the stipulated amount of the agreement or in the amount of consideration paid, whichever is greater, as provided by Mo. Rev. Stat. § 537.060.

8. Should Lathrop & Gage enter into a settlement agreement with Plaintiff, such settlement agreement releases Lathrop & Gage from contribution and non-contractual indemnity to the other alleged tortfeasors, as provided by Mo. Rev. Stat. § 537.060.

9. Lathrop & Gage denies each and every allegation contained in Plaintiff's petition not specifically addressed herein.

10. Lathrop & Gage reserves the right to raise additional affirmative defenses as determined during the course of discovery.

11. Lathrop & Gage incorporates by reference any and all defenses raised by other defendants in this action.

12. Plaintiff's claim for punitive damages is barred under the doctrine of void for vagueness under the United States Constitution and the Constitution of the State of Missouri because it does not inform Lathrop & Gage of the conduct of which it is charged, it does not provide for meaningful appellate review and because it allows the jury to act as a roving commission and to punish defendants for extra-territorial conduct empowered to act without any direction or limitation upon their discretion. It is void for vagueness because there is no standard by which Lathrop & Gage can assess its conduct to avoid imposition of punitive damages. It is void for vagueness because Plaintiff is not required to plead the conduct upon which the damages are assessed.

13. Plaintiff's claim for punitive damages is barred because the statutory scheme for awarding punitive damages is void for vagueness under the United States Constitution and the Constitution of the State of Missouri because it does not inform Lathrop & Gage of the conduct of which is charged, it does not provide for meaningful appellate review and because it allows the jury to act as a roving commission and to punish defendants for extra-territorial conduct empowered to act without any direction or limitation upon their discretion. It is void for vagueness because there is no standard by which Lathrop & Gage can assess its conduct to avoid imposition of punitive damages. It

is void for vagueness because plaintiffs are not required to plead the conduct upon which the damages are assessed. It is void for vagueness because the jurors are not given adequate instructions to guide their decision. It is void for vagueness because the requirement that the amount of punitive damages not set forth separately eliminates any possibility of meaningful post-award review by an appellate court.

14. Plaintiff's claim for punitive damages is barred because the procedural scheme for awarding punitive damages is void for vagueness under the United States Constitution and the Constitution of the State of Missouri because it does not inform Lathrop & Gage of the conduct of which it is charged, it does not provide for meaningful appellate review and because it allows the jury to act as a roving commission and to punish defendants for extra-territorial conduct empowered to act without any direction or limitation upon their discretion. It is void for vagueness because there is no standard by which defendant can assess its conduct to avoid imposition of punitive damages. It is void for vagueness because Plaintiff is not required to plead the conduct upon which the damages are assessed. It is void for vagueness because the jurors are not given adequate instructions to guide their decision.

15. Plaintiff's claim for punitive damages is barred because the statutory scheme for awarding punitive damages violates the United States Constitution including but not limited to the Fifth and Fourteenth Amendments because it fails to provide due process because it does not inform Lathrop & Gage of the conduct of which it is charged, it does not provide for meaningful appellate review and because it allows the jury to act as a roving commission and to punish defendants for extra-territorial conduct empowered to act without any direction or limitation upon their discretion. It is void for vagueness

because there is no standard by which defendant can assess its conduct to avoid imposition of punitive damages. It is void for vagueness because Plaintiff is not required to plead the conduct upon which the damages are assessed. It is void for vagueness because the jurors are not given adequate instructions to guide their decision.

16. Plaintiff's claim for punitive damages is barred because the statutory scheme for awarding punitive damages violates the Constitution of the State of Missouri including but not limited to Article 1, Section 10, because it fails to peovide due process because it does not inform Lathrop & Gage of the conduct of which is charged, it does not provide for meaningful appellate review and because it allows the jury to act as a roving commission and to punish defendants for extra-territorial conduct empowered to act without any direction or limitation upon their discretion. It is void for vagueness because there is no standard by which defendant can assess its conduct to avoid imposition of punitive damages. It is void for vagueness because Plaintiff is not required to plead the conduct upon which the damages are assessed.

17. Plaintiff's claim for punitive damages is barred because the procedural scheme for awarding punitive damages violates the Constitution of the United States including but not limited to the Fifth and Fourteenth Amendments because it fails to provide due process because it does not inform Lathrop & Gage of the conduct of which is charged, it does not provide for meaningful appellate review and because it allows the jury to act as a roving commission and to punish defendants for extra-territorial conduct empowered to act without any direction or limitation upon their discretion. It is void for vagueness because there is no standard by which defendant can assess its conduct to avoid imposition of punitive damages. It is void for vagueness because Plaintiff is not

required to plead the conduct upon which the damages are assessed. It is void for vagueness because the jurors are not given adequate instructions to guide their decision.

18. Plaintiff's claim for punitive damages is barred because the procedural scheme for awarding punitive damages violates the Constitution of the State of Missouri including but not limited to Article 1, Section 10 because it does not inform Lathrop & Gage of the conduct of which is charged, it does not provide for meaningful appellate review and because it allows the jury to act as a roving commission and to punish defendants for extra-territorial conduct empowered to act without any direction or limitation upon their discretion. It is void for vagueness because there is no standard by which defendant can assess its conduct to avoid imposition of punitive damages. It is void for vagueness because Plaintiff is not required to plead the conduct upon which the damages are assessed. It is void for vagueness because the jurors are not given adequate instructions to guide their decision.

19. Plaintiff's claim for punitive damages is barred under the Constitution of the United States including, but not limited to, the Fifth and Fourteenth Amendments and the Constitution of the State of Missouri including but not limited to Article 1, Section 10 for the reason that the statutory and procedural scheme for awarding such damages allow arbitrary and capricious actions by the jury and permit the jury to act completely within their discretion without limit or control or standards and the scheme for review of such action is inadequate, all of which deny defendants due process rights because it does not inform the defendant of the conduct of which is charged, it does not provide for meaningful appellate review and because it allows the jury to act as a roving commission and to punish defendants for extra-territorial conduct empowered to act without any

direction or limitation upon their discretion. It is void for vagueness because there is no standard by which defendant can assess its conduct to avoid imposition of punitive damages. It is void for vagueness because Plaintiff is not required to plead the conduct upon which the damages are assessed. It is void for vagueness because the jurors are not given adequate instructions to guide their decision.

Respectfully submitted,

Dated: May 9, 2008

LATHROP & GAGE L.C.

By: 

William G. Beck (26849)
Peter F. Daniel (33798)
J. Alison Auxter (59079)
2345 Grand Boulevard, Suite 2800
Kansas City, Missouri 64108-2684
Telephone: (816) 292-2000
Telecopier: (816) 292-2001

ATTORNEY FOR DEFENDANT
LATHROP & GAGE L.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, by First Class United States mail, postage prepaid, on the following parties of record this 9th day of May 2008:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
Plaintiff, *pro se*

Novation LLC, Defendant
125 E. John Carpenter Freeway
Suite 1400
Irving, TX 75062

Neoforma, Inc., Defendant
3061 Zanker Road
San Jose, CA 95134

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

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

Volunteer Hospital Association, Defendant
220 E. Las Colinas Blvd.
Irving, TX 75039

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

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

Thomas F. Spindler, Defendant
Area Senior VO VHA Mid America
8500 West 110th Street, Ste. 118
Overland Park, KS 66210

Robert H. Bezanson, Defendant
President/CEO Coxhealth
1423 North Jefferson
Springfield, MO 65802

Gary Duncan, Defendant
President CEO Freeman Health
1102 W. 32nd Street
Joplin, MO 64804

Maynard Oliverius, Defendant
President and Chief Executive Officer
Stormont-Vail HealthCare
1500 SW 10th Avenue
Topeka, KS 66604

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

Charles V. Robb, Defendant
Saint Luke's Health System
10920 Elm Avenue
Kansas City, MO 64134

Michael Terry, Defendant
President/ Chief Officer Salina Regional Health Center
400 South Santa Fe
Salina, KS 67401

University Healthsystem Consortium, Defendant
2001 Spring Road, Suite 700
Oak Brook, IL 60523-1890

Robert J. Baker, Defendant
President/CEO of UHC
2001 Spring Road Suite 700
Oak Brook, IL 60523

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

Richard K. Davis, Defendant
President/CEO of UN Bancorp
800 Nicollet Mall
Minneapolis, MN 55402

Andrew Cecere, Defendant
Chief Financial Officer
800 Nicollet Mall
Minneapolis, MN 55402

The Piper Jaffray Companies, Defendant
1 Hallbrook Place, Suite 310
11150 Overbrook Road
Kansas City, KS 66211

Andrew S. Duff, Defendant
1 Hallbrook Place, Suite 310
11150 Overbrook Road
Kansas City, KS 66211

Cox Health Care Services of the Ozarks Inc., Defendant
c/o Robert H. Bezanson
1423 N. Jefferson Avenue
Springfield, MO 65802

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

Stormont-Vail Healthcare Inc., Defendant
c/o Michael Lummis RA
1500 Southwest Tenth Avenue
Topeka, KS 66604

Shugart Thomson and Kilroy PC, Defendant
c/o STK Registered Agent Inc.
120 W. 12th Street, Ste. 1800
Kansas City, MO 64105

Husch Blackwell Sanders LLP, Defendant
c/o CT Corporation System
120 S. Central Avenue
Clayton, MO 63105

An Attorney for Defendant Lathrop & Gage L.C.

IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
Plaintiff	)	
	)	**Case No. 0816-cv-04217**
vs.	)	
	)	
Novation,LLC *et al.* ,	)	
Defendants	)	

MOTION FOR EXTENSION OF TIME IN WHICH TO ANSWER
DEFENDANTS' MOTIONS FOR DISMISSALS

Comes now, the plaintiff Samuel K. Lipari appearing pro se and respectfully requests that the court extend the time to reply to the defendants' motions to dismiss until all defendants have appeared and answered or filed motions to dismiss. The plaintiff will then be able to consolidate his response addressing duplicative issues in a single pleading. The plaintiff believes this will greatly aid the parties and the court in conserving resources and time.

STATEMENT OF FACTS

1. The defendants Novation LLC, VHA, Inc. University Healthsystem Consortium, VHA Mid-America LLC, Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius. Sandra Van Trease, Charles Robb, Michael Terry, Cox Healthcare Services of the Ozarks Inc., Saint Luke's Healthcare System, Inc. and Stormont-Vail Healthcare Inc. have filed a consolidated motion to dismiss under Rule 55.27(a)(6).

2. The defendants Curt Nonomaque and Robert Baker have filed a motion to dismiss for lack of personal jurisdiction and failure to state a claim.

3. The defendants Richard Davis, Jerry Grundhofer, Andrew Cecere, and Shughart Thomson & Kilroy, P.C. have sought an extension to June 13 which the plaintiff has opposed.

4. The defendants Andrew S. Duff and The Piper Jaffray Companies are cartel members with a history of filing motions to dismiss instead of answering and the plaintiff believes intend to do so here but have not yet answered or appeared.

5. The defendants Lathrop & Gage, L.C. has also not answered and is believed will seek dismissal.

6. The plaintiff has sought a timely rehearing of the dismissal of the federal action based on an intervening decision by the US Supreme Court overruling the Tenth Circuit US Court of Appeals on the

pleading standard used by the Kansas District Court trial judge that resulted in this case being filed in state court.

7. On May 6, the F.B. I. raided the US Justice Department Office of Special Counsel, detaining 17 US Justice Department officials involved in interfering in the plaintiff's litigation in *Medical Supply Chain, Inc. v Novation LLC et al* KS District Curt case no. Case No. 05-2299 and raided the home of Scott J. Bloch a former Kansas Attorney Discipline official and now the US Special Counsel for the conduct described in the plaintiff's press releases and the RICO action *Lipari v. General Electric et al*., W. Dist. Of MO, Case No. 07-CV-00849-FJG.

8. Should the US District Court for Kansas decide to conform to controlling federal law, this case for pendant state claims would be properly dismissed without prejudice, yielding to the earlier concurrent jurisdiction established in federal court, now styled *Medical Supply Chain, Inc. v Novation LLC et al* KS District Curt case no. Case No. 05-2299 and *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW.

9. The plaintiff has no objection to defendants withdrawing their motions or otherwise changing their answers in light of recent events before June 15, 2008.

10. The plaintiff proposes to answer all motions for dismissal by filing a consolidated response on or before July 21, 2008.

11. The plaintiff has not been able to obtain consent from the defendants to this motion for extension.

SUGGESTION IN SUPPORT

This antitrust action is very complex and the defendants have already sought dismissals of claims not made by the plaintiff and asserted statutes of limitation inapplicable to the new defendants, the previous defendants' subsequent conduct or the earlier charged conduct covered by the Missouri savings statute for refilling claims dismissed without prejudice. Individual defendants have sought dismissal for lack of personal jurisdiction that is void of recognition of individual capacity to conspire to commit antitrust violations and injury against residents of Missouri within the borders of this state recognized under Missouri and federal controlling precedent. This issue was raised in the RICO context by the same defendants in *Medical Supply Chain, Inc. v Novation LLC et al* where the controlling precedent differentiated between state law long arm jurisdiction under RICO conspiracy and antitrust conspiracy and

was resolved through consent of the defendants to jurisdiction. The plaintiff is willing to afford the defendants the opportunity to withdraw their motions and affidavits or change their motions and affidavits for dismissal.

The court and the parties will find the many issues raised by the different groups of defendants difficult to resolve unless the plaintiff is able to consolidate his responses to all, addressing each issue and identifying the parties joining the issue or separately raising independent arguments.

This action is the same case or controversy currently before the Kansas District Court as *Medical Supply Chain, Inc. v Novation LLC et al* KS District Curt case no. Case No. 05-2299 under Article III of the U.S. Constitution and 28 U.S.C. § 1367 and contains claims over which the US District Court judge has at the present time expressly declined to exercise jurisdiction over through an order of dismissal without prejudice that the defendants did not object to or appeal.

That status should change under controlling law and the Kansas District Court should end its secession from the United States by June 15, 2008. However there is no guarantee after six years that the court will and the federal agencies responsible for protecting against the violations described in this complaint will likely not be purged from the defendants' influence this year because of the lengthy process of FBI Director Robert S. Mueller must employ to process the email and documentary evidence obtained in the raid and to obtain the testimony of cooperating witnesses in the racketeering enterprise detailed in *Lipari v. General Electric et al.*, W. Dist. Of MO, Case No. 07-CV-00849-FJG formerly the State of Missouri 16th Circuit Case No. 0616-cv07421.

The defendant Cox Health did not even take steps to affirmatively withdraw from the hospital supply cartel and to deal directly with hospital suppliers until April 14, 2008. US Attorney John Wood for the District of Western Missouri and Jeffrey P. Ray, Assistant United States Attorney on April 25, 2008 were still committing unlawful acts to interfere in the plaintiff's private civil litigation and obstructing justice in the criminal prosecution of Cox Health officials for Medicare fraud when the raid took place on May 6th.

CONCLUSION

Whereas for the above stated reasons and for the conservation of the court's resources, the plaintiff respectfully requests the court extend the time to respond to all dismissals until 4:30 pm, July 21, 2008.

Respectively submitted,

S/Samuel K. Lipari
_____
Samuel K. Lipari
Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 8th day of May, 2008, by first class mail postage prepaid to:

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

Jay E. Heidrick, Shughart Thomson & Kilroy, P.C. 32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway Overland Park, Kansas 66210

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

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	Case No. 0816-CV04217
vs.	)	Division 2
	)	
NOVATION, LLC, et al.	)	
	)	
Defendants.	)	

SHUGHART, THOMSON & KILROY'S MOTION FOR
EXTENSION OF TIME IN WHICH TO ANSWER OR OTHERWISE PLEAD

Defendant Shughart Thomson & Kilroy, P.C., specially enters its appearance solely for the purpose of seeking an extension of time for which to answer. In support, defendant states as follows:

1. This action was filed on about February 25, 2008 by plaintiff Samuel K. Lipari acting *pro se*.

2. Inclusive of its five appendices, plaintiff's Petition spans 214 pages asserting causes of action for violation of Missouri anti-trust statutes; civil conspiracy; tortious interference with business relations; fraud and deceit; and *prima facie* tort.

3. Plaintiff served his Complaint on defendant on April 15, 2008, making defendant's responsive pleading due May 15, 2008.

4. Given the length of plaintiff's Complaint and the breadth of allegations therein, defendant's request a 30-day extension until and including June 13, 2008 in which to file its Answer or otherwise plead.

5. Defendant has contacted plaintiff, and he does not consent to the requested extension.

6. Nevertheless, plaintiff will suffer no prejudice by the 30-day extension, and the requested extension is not made for reasons of undue delay or to harass the plaintiff.

7. Defendant makes this request solely for the purpose of seeking an extension, and does not waive any applicable defenses or objections available to it.

WHEREFORE, for the above stated reasons, defendant respectfully requests this Court issue an Order extending its time in which to file an Answer or otherwise plead, until and including June 13, 2008. Defendant further requests all other relief to which it is justly entitled.

Respectfully submitted,

WILLIAM E. QUIRK MO #24740
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 DEFENDANT
SHUGHART THOMSON & KILROY, P.C.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed via United States Mail, postage-paid, this 13th day of May, 2008, to:

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

ATTORNEYS FOR DEFENDANT

IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
Plaintiff	)	
	)	**Case No. 0816-cv-04217**
vs.	)	
	)	
Novation,LLC *et al*. ,	)	
Defendants	)	

MOTION TO REQUIRE DEFENDANT LATHROP & GAGE, L.C. TO MAKE A MORE DEFINITE ANSWER UNDER RULE 55.27(d)

Comes now, the plaintiff Samuel K. Lipari appearing *pro se* and respectfully requests that the court require defendant Lathrop & Gage, L.C. to make a more definite answer under Rule 55.27(d).

STATEMENT OF FACTS

1. In their initial but late first responsive pleading, the defendant Lathrop & Gage, L.C. repeatedly denies each material fact related to the chargeable conduct averred by the plaintiff that Lathrop & Gage, L.C. and Lathrop & Gage, L.C.'s clients participated in.

2. The defendant Lathrop & Gage, L.C.'s answer does not distinguish between facts known to Lathrop & Gage, L.C.'s attorneys in service to Governor Blunt and the firm's other clients and therefore are imputed to be the knowledge of Lathrop & Gage, L.C. and are denied as unknown in the answer and facts not known to Lathrop & Gage, L.C. and its employees and agents.

3. Lathrop & Gage, L.C.'s responses lack the requisite detail to adjudicate the claims of the plaintiff without invasive discovery that would otherwise be spared Lathrop & Gage, L.C., its attorneys and clients.

SUGGESTION IN SUPPORT

Rule 55.27(d) motion for more definite statement provides a tool to efficiently resolve claims and to lessen the burden of discovery on the parties and the court:

> "The Missouri rules of civil procedure require fact pleading. Rule 55.08 provides: "A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." The goal of fact pleading is the quick, efficient, and fair resolution of disputes. Fact pleading identifies, narrows and defines the issues so that the trial court and the parties know what issues are to be tried, what discovery is necessary, and what evidence may be admitted at trial. *Luethans v. Washington University*, 894 S.W.2d 169, 171-172 (Mo. banc 1995); *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d

371, 377 (Mo. banc 1993); *Walker v. Kansas City Star Co*., 406 S.W.2d 44, 54 (Mo.1966) (quoting *Johnson v. Flex-O-Lite Mfg. Corp*., 314 S.W.2d 75, 79 (Mo.1958)).

The proper remedy when a party fails to sufficiently plead the facts is a motion for more definite statement pursuant to Rule 55.27(d). Rule 55.27(d) provides:

" A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial when a responsive pleading is not required. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just."

State ex rel. Harvey v. Wells, 955 S.W.2d 546 at pg.546 (Mo., 1997).

The lack of details in the defendant's answer strongly suggests that Lathrop & Gage, L.C., does not understand the gravamen of its answer or the repercussions. There is no reason more Missouri law firms must fall to this controversy like Fortune 100 companies:

"15. *See generally* LAW GOVERNING LAWYERS § 120(1)(b) ("A lawyer may not knowingly make a false statement of fact to the tribunal."); *id.* cmt. c ("*A lawyer's knowledge.* . . . A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document . . . . A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false."). The Reporter's Note to cmt. c recognizes that some courts have applied a "conscious ignorance" test for knowledge, citing *Wyle v. R.J. Reynolds Indus., Inc.,* 709 F.2d 585, 590 (9th Cir. 1983) (in view of other facts known to the law firm, it could not accept at face value client's denial of known fact)."

In re Food Management Group, LLC, Case No. 04-22880 at fn 15 (ASH) (Bankr. S.D.N.Y. 1/23/2008) (Bankr. S.D.N.Y., 2008)

The court has a nondiscretionary duty to order Lathrop & Gage, L.C. to amend its answer and provide more definite responses.

Rule 55.27(d) clearly requires entry of an order that the offending pleading be amended within a period of time. While the trial court is allowed discretion regarding the amount of time within which the pleading must be amended, and the appropriate sanction in the event the pleading is not amended, the trial court is not allowed the discretion to ignore the fact pleading requirement of Rule 55.08."

State ex rel. Harvey v. Wells, 955 S.W.2d 546 at pg.546 (Mo., 1997)

Respectively submitted,

S/Samuel K. Lipari

Samuel K. Lipari

Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 13th day of May, 2008, by first class mail postage prepaid to:

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

Jay E. Heidrick, Shughart Thomson & Kilroy, P.C. 32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway Overland Park, Kansas 66210

William G. Beck, Peter F. Daniel, J. Alison Auxter, Lathrop & Gage LC, 2345 Grand Boulevard, Suite 2800, Kansas City, MO 64108

S/Samuel K. Lipari
_____
Samuel K. Lipari

IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
Plaintiff	)	
	)	**Case No. 0816-cv-04217**
vs.	)	
	)	
Novation,LLC *et al*. ,	)	
Defendants	)	

MOTION TO STRIKE DEFENDANT LATHROP & GAGE, L.C.'s SECOND THROUGH NINETEENTH AFFIRMATIVE DEFENSES UNDER RULE 55.08

Comes now, the plaintiff Samuel K. Lipari appearing pro se and respectfully requests that the court strike the defendant Lathrop & Gage, L.C.'s second through nineteenth affirmative defenses under Missouri Supreme Court Rule 55.08 for failing to

STATEMENT OF FACTS

1. In their initial but late first responsive pleading, the defendant Lathrop & Gage, L.C. raises nineteen affirmative defenses.

2. The defendant Lathrop & Gage, L.C.'s first affirmative defense "failure to state a claim" is permissible under controlling case law even though it is devoid of supporting facts and fails as a mater of law.

3. The defendant Lathrop & Gage, L.C.'s remaining defenses are devoid of a single supporting fact and are conclusory.

SUGGESTION IN SUPPORT

Rule 55.07 requires that "[a] party shall state in short and plain terms his defenses to each claim." Rule 55.08 requires that a party "plead ... 'matter constituting an avoidance or affirmative defense.' " *Gee v. Gee*, 605 S.W.2d 815, 817 (Mo.App.1980). Finally, Rule 55.11 requires that "[a]ll averments of claim or defense ... shall be limited as far as practicable to a statement of a single set of circumstances." Such rules contemplate that in pleading affirmative defenses, their factual basis must be set out in the same manner as is required for pleading claims. *ITT Commercial Finance v. Mid-Am Marine,* 854 S.W.2d 371, 384 (Mo. banc 1993). The purpose of such rules is to give notice to the opposing parties in order to be prepared on the issues. *Schimmel Fur Co. v. American Indemnity Co*., 440 S.W.2d 932, 939 (Mo.1969).

"Rule 55.08 requires that all affirmative defenses be pled in responsive pleadings or be abandoned. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002). Failure to plead affirmative defenses will result in their waiver. *Holdener v. Fieser*, 971 S.W.2d 946, 950 (Mo. App. E.D. 1998); *Leo's Enters., Inc*., 805 S.W.2d at 740."

City of Peculiar v. Effertz Bros. Inc., No. WD 67554 at pg. 1 (Mo. App. 1/22/2008) (Mo. App., 2008).

Rule 55.08 (2004) provides in pertinent part:

"A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation."

The purpose of Rule 55.08 is to require a defendant raising an affirmative defense to plead the defense so as to give the plaintiff notice of it. *Bailey v. Cameron Mutual Ins. Co*., 122 S.W.3d 599, 604 (Mo.App. E.D.2003).

Lathrop & Gage, L.C.'s affirmative defenses are deficient at law:

"An affirmative defense is asserted by the pleading of additional facts not necessary to support a plaintiff's case which serve to avoid the defendants' legal responsibility even though plaintiffs' [sic] allegations are sustained by the evidence." *Reinecke v. Kleinheider*, 804 S.W.2d 838, 841 (Mo.App.1991). [Emphasis added.] Bare legal conclusions, ..., fail to inform the plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08. *Schimmel Fur Co. v. American Indemnity Co*., 440 S.W.2d 932, 939 (Mo.1969) (rule requires notice of facts relied on so that opposing parties may be prepared on those issues).

ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 383 (Mo. banc 1993). Mr. and Mrs. Brekke failed to plead any facts in support of their "affirmative defenses." The affirmative defenses were deficient as a matter of law. They amount only to legal conclusions without any factual basis. A motion for judgment on the pleadings does not admit the truth of facts not well pleaded by an opponent nor conclusions of law contained in an opponent's pleading. *Holt v. Story,* 642 S.W.2d 394, 396 (Mo.App.1982); *Helmkamp v. American Family Mut. Ins. Co*., 407 S.W.2d 559, 565-66 (Mo.App.1966). Mr. and Mrs. Brekke's "affirmative defenses" raised no issue of material fact."

Stephens v. Brekke, 977 S.W.2d 87 at pg. 93-94 (Mo. App. S.D., 1998).

Missouri courts have consistently held that deficient affirmative defenses such as those raised by Lathrop & Gage, L.C. in defenses 2 through 19 are without effect and a nullity:

"Appellants also pled the affirmative defenses of accord and satisfaction, estoppel, waiver, failure to state a claim upon which relief can be granted, and lack of subject matter jurisdiction in their respective answers to respondent's petition. These defenses were listed as conclusory statements and appellants pled no specific facts to serve as the basis for each defense. Rule 55.08 requires that a pleading setting forth an affirmative defense shall contain a plain statement of the facts showing that the pleader is entitled to the defense. The factual basis for an affirmative defense must be set out in the same manner as is required for the pleading of claims under the Missouri Rules of Civil Procedure. *Ashland Oil, Inc. v. Warmann,* 869 S.W.2d 910, 912 (Mo.App.1994). Because appellants have not sufficiently pled the alleged affirmative defenses, they fail as a matter of law. See Id."

Curnutt v. Scott Melvin Transport, Inc., 903 S.W.2d 184 (Mo. App.W.D., 1995)

> "Here, Thornton alleged no facts showing that the adverse interest exception did not apply in this matter. Nor did it allege facts that established that Western Container was otherwise aware of the misrepresentations until after Horton's defalcation was discovered. Thus, even if Horton knowingly made knowing misrepresentations to Thornton, Thornton's motion fails because it neglects to present undisputed facts showing that those misrepresentations are legally attributable to Western Container or that Western Container had actual knowledge of the misrepresentations at the time they were made. Having failed to allege sufficient facts to establish that it is entitled to the affirmative defense as a matter of law, Thorton cannot prevail on its motion for summary judgment upon that basis."

Lumbermens Mut. Cas. Co. v. Thornton, 92 S.W.3d 259 at pg. 270 (Mo. App., 2002).

Missouri has long held as a clearly established rule deficient affirmative defenses coupled with an answer that uniformly refutes every material fact is a mere general denial making recognition of alleged affirmative defenses reversible:

> "For the error, then, which permeates all these instructions, and which was present throughout the whole trial, in admitting what are held to be affirmative defenses under a general denial, and in instructing the jury on affirmative defenses, none of which have been pleaded, we are compelled to reverse this case."

People's Bank v. Stewart, 117 S.W. 99 at pg. 103, 136 Mo. App. 24 (Mo. App., 1909).

Lathrop & Gage L.C.'s asserted affirmative defenses 2-11 are fact based or dependent if they could exist, however Lathrop & Gage L.C. has identified no facts or application.

The plaintiff is entirely without information to have notice of Lathrop & Gage, L.C.'s affirmative defenses 7 and 8 regarding settlement. The issue appearing to be raised is indemnification but there is no suggestion as to which defendants are indemnifying Lathrop & Gage L.C. through what if any settlement. Why should any corporate tortfeasor ever settle after Lathrop & Gage L.C. has replaced your state republican form of government with Kansas style corporate syndicalism.

Lathrop & Gage L.C. is mistaken over settlement as a defense. Indemnification is a direct claim against another party, not an affirmative defense. See e.g., *KC. Landsmen, L.L.C. v. Lowe-Guido*, 35 S.W.3d 917, 921 (Mo.App.2001); *Buchanan v. Rentenbach Constructors, Inc.*, 922 S.W.2d 467, 470 (Mo.App.1996); *Cass Bank & Trust Co. v. Mestman*, 888 S.W.2d 400, 403 (Mo.App.1994); *Honey v. Barnes Hosp.*, 708 S.W.2d 686, 696 (Mo.App.1986).

Lathrop & Gage L.C. does however have a substantial core competency in constitutional law. It is poetic justice that the plaintiff acting *pro se* will attempt to defend Missouri's Supreme Court rules and state statutes against this serious and credible challenge to the constitutionality described in Lathrop &

Gage L.C.'s affirmative defenses 12 through 19. The plaintiff has been repeatedly deprived of counsel by the continuing actions of the defendants including Lathrop & Gage Lucy's senior partner Kansas State Senator Vratil in what clearly are crimes and yet the Missouri Board of Bar Governors continues to participate in this unlawfulness as recently as March 2008 in the informal decision to deprive the plaintiff's associate Huffman of an opportunity to sit for the Missouri Bar.

The plaintiff , like the citizens of Missouri and its courts, has been ill served by the policy of the Missouri Board of Bar Governors to support Kansas' racial discrimination, denial of due process, rampant extrinsic fraud for the purposes of rigging the outcomes of Kansas cases and defeating the supremacy of federal law for private profit. A policy incredulously upheld by the Missouri Board of Bar Governors in the name of reciprocal admissions and no doubt to avoid disbarment or other reprisals in Kansas that await any Missouri attorney helping the plaintiff.

Regardless, the plaintiff will hold off Lathrop & Gage L.C.'s meritorious for the time being with the argument that the failure to plead facts related to standing and to injury deprives Lathrop & Gage L.C. from ending Missouri's punitive damage scheme for the time being. However, later these challenges will be ripe and Lathrop & Gage L.C. will be free to raise them to challenge the judgment the plaintiff seeks to deter the monopolization of Missouri's hospital supply market that has so injured the state's citizens. Hopefully, the Missouri Board of Bar Governors may develop some sense of duty and recognize the gravamen of their loyalty to Kansas before the plaintiff has to single handedly hold off Lathrop & Gage L.C. next challenge.

Under the controlling case law applicable to the Missouri Rules, Lathrop & Gage, L.C. has failed to plead affirmative defenses 2 through 19 and they are now lost:

"After specifically listing certain affirmative defenses, Rule 55.08 provides that a party must plead "any other matter constituting an avoidance or affirmative defense." "If a defendant intends to raise a defense based on facts not included in the allegations necessary to support the plaintiff's case, they must be pled under Rule 55.08." *Shaw v. Burlington Northern, Inc.*, 617 S.W.2d 455, 457 (Mo.App.1981). A defense, which contends that even if the petition is true, a plaintiff cannot receive the relief sought because there are additional facts which place defendant in a position to avoid legal responsibility, must be set forth in a defendant's answer. Id. Such is the defense at issue here and Plaintiff was obliged to plead it affirmatively. Rule 55.08. This she has failed to do.

"Generally, failure to plead an affirmative defense results in waiver of that defense." *Detling v. Edelbrock*, 671 S.W.2d 265, 271 (Mo. banc 1984); *Lucas v. Enkvetchakul*, 812 S.W.2d 256, 263 (Mo.App.1991). Clearly, Plaintiff recognized the need to plead additional facts which would have allowed her to avoid legal liability as to Karlyn because she pled the matter affirmatively in her answer to Larry's pleading. Based on long standing rules of pleading, Plaintiff waived her "inequitable conduct" defense as to Karlyn unless (1) Karlyn either implied or expressly consented to trying the case on that defense, or (2) the

trial court permitted the pleadings to be amended to include the defense. Rule 55.33(b). 5 See *Lucas*, 812 S.W.2d at 263.

Consent to the trial of nonpleaded affirmative defenses should not be inferred unless it clearly appears that the party against whom the defense is asserted tacitly agreed to join issues on such defenses. *Lucas*, 812 S.W.2d at 263. Moreover, "[w]hen evidence is relevant to an issue already in the case, and there is no indication at trial that the party who introduced the evidence was seeking to raise a new issue, the pleadings will not be amended by implication or consent." *Gee*, 605 S.W.2d at 817."

Tindall v. Holder, 892 S.W.2d 314 at 328 (Mo. App. S.D., 1994).

CONCLUSION

For the above stated reasons this court should strike the affirmative defenses deficiently asserted by the defendant Lathrop & Gage L.C. except for Lathrop & Gage L.C.'s first affirmative defense which is permitted to be asserted even though it is deficient in supporting facts and fails at law.

Respectively submitted,

S/Samuel K. Lipari
_____
Samuel K. Lipari
Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 13th day of May, 2008, by first class mail postage prepaid to:

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Pro se

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI, (Assignee of Dissolved Medical Supply Chain, Inc.)	)	
Plaintiff,	)	
v.	)	Case No.: 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF MOTION OF HUSCH BLACKWELL SANDERS LLP TO DISMISS PETITION FOR FAILURE TO STATE A CLAIM

Introduction

Plaintiff filed this *pro se* action against twenty-seven defendants, including HBS, seeking $3.2 billion in damages for alleged acts which plaintiff claims constitute antitrust violations, tortious interference with business relationships, fraud, and *prima facie* tort. Plaintiff contends that the numerous and widely-varied defendants joined together and formed a "hospital supply cartel" to prevent him from entering the Missouri hospital supply market. Although plaintiff's petition is, to say the least, voluminous, it does not set out even the minimal facts necessary to state any valid legal claim upon which relief can be granted as to HBS. All counts and claims asserted against HBS must, therefore, be dismissed pursuant to Missouri Supreme Court Rule 55.27(a)(6).

I. Pleading Standard

Missouri courts require a *pro se* plaintiff to meet the minimum pleading standards set forth in the rules of procedure established by the Missouri Supreme Court, just like any other

litigant. *Scher v. Sindel*, 837 S.W.2d 350, 351 (Mo. Ct. App. 1992). The Court is thus required to review plaintiffs' pleadings, like all others, "to determine whether they invoke principles of substantive law." *Weems v. Montgomery*, 126 S.W.3d 479, 484 (Mo. Ct. App. 2004). "The pleadings are given their broadest intendment, all facts alleged are treated as true, and all allegations are construed favorably to plaintiff." *Scher*, 837 S.W.2d at 351. "However, the conclusions of the pleader are not admitted." *Id.* If the pleaded facts do not establish the presence of all elements of a valid claim, the petition must be dismissed. *See Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997).

II. Plaintiff's Antitrust Claims Must Be Dismissed Because He Failed To Plead Them "With Enough Fact To Raise A Reasonable Expectation That Discovery Will Reveal Evidence Of Illegal Agreement"

A. Antitrust Claims Must be Supported By Plausible Pleaded Facts.

Missouri courts construe Missouri's antitrust statutes in "harmony with . . . judicial interpretations of comparable federal antitrust statutes." MO. REV. STAT. § 416.141 (2001); *Metts v. Clark Oil & Refining Corp.*, 618 S.W.2d 698, 703 (Mo. Ct. App. 1981). Missouri's antitrust statute and the Sherman Act are analogous. (*See, e.g., Zipper v. Health Midwest*, 978 S.W.2d 398, 418 (Mo. Ct. App. 1998). As such, the Court should follow federal decisions when interpreting Missouri's antitrust statute. *Id.*

The United States Supreme Court requires an antitrust plaintiff to support a claim with "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007) (interpreting the Sherman Act). This "plausibility" requirement prevents a plaintiff with "a largely groundless claim from taking up the time of a number of other people . . . ." *Id.* at 1966 ("The cost of modern . . . antitrust litigation and the increasing caseload of the . . . courts counsel against sending the

parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint" (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Thus, plaintiff's antitrust claims must be dismissed unless the Court believes that the petition contains "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."

Plaintiff appears to try to describe three apparently separate antitrust claims against HBS. First, he alleges in Count I that HBS "contracted, combined, or conspired" with the twenty-six co-defendants to restrain the hospital supply trade in violation of MO. REV. STAT. § 416.031.1. (Pet. pp. 93-98.) In Count II, he alleges that HBS and the co-defendants have a monopoly or have attempted to monopolize the relevant markets in violation of MO. REV. STAT. § 416.031.2. (Pet. pp. 98-103.) Then, in Count III, he alleges that HBS and the co-defendants have attempted to monopolize the hospital supply market in violation of MO. REV. STAT. § 416.031(2). (Pet. p.103). A review of the petition, however, shows that none of these claims rises to the "plausibility" level as to HBS.

B. Count I: The Facts Pleaded In The Petition Raise No Expectation That Discovery Will Reveal Evidence That HBS Contracted, Combined Or Conspired With The Co-Defendants To Restrain The Trade Of Hospital Supplies.

Plaintiff alleges that HBS violated MO. REV. STAT. § 416.031.1 by contracting, combining, and conspiring with the other defendants to restrain the hospital supply trade. (Pet. 93.) The only conduct that plaintiff claims links HBS to the "hospital supply cartel" is recited in paragraphs 201-215 and paragraph 229 of the petition. Only three actions by HBS are alleged: first, HBS, through a predecessor firm, provided legal representation to other alleged co-conspirators, and, according to the petition, an HBS lawyer failed to show up for court hearings or participate in mediation. (Pet. ¶¶ 201-03.) Second, HBS "installed" a one-time employee as

Director of the Missouri Department of Health and Senior Services. (Pet. ¶ 229.) Finally, HBS lied to its malpractice carrier about its liability to the client it poorly represented in one of plaintiff's earlier suits. (Pet. ¶¶ 214-15.) These facts, while impugning the quality of HBS's legal services, have nothing whatsoever to do with cartels or hospital supplies. These pleaded facts cannot be said to give rise to any expectation that discovery will reveal that HBS contracted, combined, or conspired with the co-defendants to restrain the hospital supply trade.

In fact, none of the pleaded facts connect HBS to any scheme involving hospital supplies. At most, plaintiff links HBS to one of the supposed co-conspirators by pointing out that HBS, in its performance as a law firm, provided legal representation to that company in another lawsuit filed by plaintiff. Plaintiff says HBS provided inadequate representation, but this does not give rise to a claim by plaintiff, let alone an anti-trust claim.

The fact that a one-time associate at HBS was selected to head the state of Missouri's Department of Health and Senior Services in no way links HBS to the hospital supply business. Though plaintiff claims that HBS "installed" the former employee in this position, he gives no explanation as to how this could be or how a private law firm could have any role in the selection of gubernatorial appointments.[1]

Likewise, a reader of the petition is left befuddled as to how the alleged provision of inadequate legal services to a client had any effect on hospital supplies or plaintiff's ability to enter the market for such goods. The reality is that nowhere in Count I or any part of the petition does plaintiff show any connection whatsoever between HBS and the market for hospital supplies, let alone show that there is a reasonable expectation that discovery would reveal any

[1] HBS respectfully requests that the Court take judicial notice that such appointments are made by the governor of Missouri, not private law firms.

evidence whatsoever of an attempt by HBS to illegally monopolize that market. Count I must thus be dismissed because it pleads no claim against HBS for which relief may be granted.

C. Count II: Plaintiff Raises No Expectation That Discovery Will Reveal Evidence That HBS Monopolized Or Attempted To Monopolize The Hospital Supply Industry.

Plaintiff alleges in Count II that HBS violated MO. REV. STAT. § 416.031.2 when it monopolized or attempted to monopolize the hospital supply trade. (Pet. p. 98.) The method used by HBS to establish this control over hospital supplies is never explained. The only conduct that allegedly links HBS to such a monopoly or the "hospital supply cartel" is that described above in paragraphs 201-215 and paragraph 219 of the petition which has nothing to do with cartels or hospital supplies. The pleaded facts show only that HBS represented a client in a lawsuit, albeit poorly, and that a state official once worked at an HBS predecessor firm. None of these facts in any way connects HBS to a medical supplier, to a market, or anything harmful to plaintiff's business interests. Most certainly, these facts cannot be said to raise the Court's expectation that discovery will reveal that HBS monopolized or attempted to monopolize the hospital supply trade. Thus, Count II must be dismissed for failing to state a claim against HBS for which relief may be granted.

D. Count III: Plaintiff Raises No Expectation That Discovery Will Reveal Evidence That HBS Conspired With The Co-Defendants To Violate Missouri's Antitrust Act.

Count III alleges that HBS violated MO. REV. STAT. § 416.031.2 when it conspired with the co-defendants to restrain the hospital supply trade in violation of MO. REV. STAT. §§ 416.011 to 416.161. (Pet. 93.) Again, the only conduct that allegedly links HBS to the "hospital supply cartel" is the provision of legal services and the prior employment of a state official. As noted above, these facts don't even connect HBS to the hospital supply market, let alone raise an expectation that discovery will reveal that HBS conspired with anyone to restrain the hospital

supply trade in violation of Missouri's antitrust act. Count III must also be dismissed for failing to state a claim.

III. Plaintiff's Fraud Claim Must Be Dismissed Because He Failed To Plead "Each Element Of Fraud With Particularity"

A. A Plaintiff Must Plead Each Element of Fraud With Particularity.

"The rules governing the pleading of fraud are more precise than those which generally govern pleading a claim for relief." *Arnold v. Erkmann*, 934 S.W.2d 621, 626 (Mo. App. 1996). Fraud claims must be pleaded with particularity. Mo. Sup. Ct. Rule 55.15; *Arnold*, 934 S.W.2d at 626. "If any essential element of fraud is not properly pleaded, the petition is fatally defective and subject to dismissal." *Bohac v. Walsh*, 223 S.W.3d 858, 863 (Mo. Ct. App. 2007).

The elements of fraud which must be pleaded with particularity are: "1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity, or his 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) his 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. 1988).

B. Plaintiff Failed To Plead the Essential Elements of Fraud.

Plaintiff alleges that the "Defendants" committed fraud. (Pet. 105-106.) HBS can only assume that plaintiff intended to assert Count V against it. Plaintiff claims that the facts recited in the first ninety-two pages of his petition support a claim of fraud against the "defendants." (Pet. pp. 105-106.) But nothing in those pages describes anything like fraud by HBS.

There is no allegation of any statement or omission by HBS which even suggests fraud. Although the first ninety-two pages of the petition mention four alleged statements by HBS, the

petition does not state how any of these statements were false or constituted fraud. An HBS lawyer is said to have told counsel for plaintiff (it is unclear whether the alleged statement occurred before or after the lawyer was disbarred) that his house and all his property would be taken from him if he did not stop seeking redress for plaintiff. (Pet. ¶ 505). An HBS lawyer is claimed to have told unnamed judicial branch officials, in ex parte conversations, and officials of the city of Blue Springs that the General Electric Company is "rich and powerful with the ability to control court outcomes and that the petitioner, because he did not have money, was not entitled to have his contract rights enforced." (Pet. ¶ 506). HBS is alleged to have somehow communicated to attorney David Sperry that any agreement by him to represent petitioner "would likely result in ethics complaints and in the case being transferred to a distant venue where it would be impossible for him to economically prosecute the case and his property rights in the contingent fee representation of the petition would be forfeited." (Pet. ¶ 510). Finally, plaintiff claims HBS contacted attorney Jim Wirken and placed him in fear of representing plaintiff, falsely stating that petitioner had been repeatedly sanctioned for baseless claims, and that the "GE defendants were so powerful that no law firm could stand up to them." (Pet. ¶ 514).

With the sole exception of the alleged statement regarding plaintiff having been sanctioned for baseless claims, none of these statements is alleged to be false. (Pet. ¶¶ 505, 510, 513-14, and 577-78.) More specifically, plaintiff did not plead: 1) that HBS knew that these representations were false; 2) that the representations were material; 3) that HBS intended the representations to be acted on by the person in the manner reasonably contemplated; 5) the hearer's ignorance of the falsity of the representation; 6) that anyone relied on the representation being true; 7) that the hearer had a right to rely thereon; or, 8) that any statement caused a loss. Plaintiff thus failed to particularly plead the elements of fraud. Count V must therefore be

dismissed because it fails to state a claim against HBS for which relief can be granted. *Hanrahan v. Nashua Corp.*, 752 S.W.2d 878, 882 (Mo. Ct. App. 1988) (dismissing fraud claim for failing to plead with particularity); *Green v. Green*, 606 S.W.2d 395, 398 (Mo. Ct. App. 1980) (dismissing fraud claim for failing to plead with particularity).

IV. Plaintiff's Claims For Tortious Interference Must Be Dismissed Because He "Failed To Allege Facts Essential To Recovery"

Plaintiff next asserts six claims of tortious interference against HBS. He does not, however, allege any of the facts essential to a cognizable tortious interference claim. "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). The court presumes that all averments in the petition are true and determines "if the facts alleged meet the elements of a recognized cause of action . . . ." *Anderson v. Village of Jacksonville*, 103 S.W.3d 190, 193 (Mo. Ct. App. 2003). A court will grant a motion to dismiss for failure to state a claim when "the petition fails to allege facts essential to a recovery." *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997).

The essential elements of a claim for tortious interference are as follows: "(1) a valid business expectancy; (2) defendant's knowledge of the relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages." *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 316 (Mo. banc 1993).

A. Interference With Business Relationship With Bret D. Landrith.

Plaintiff alleges that HBS tortiously interfered with some undefined business expectancy involving Bret D. Landrith, plaintiff's disbarred former legal counsel. (Pet. ¶¶ 505-06.) Specifically, plaintiff contends that an HBS partner informed Landrith that HBS would "have his house taken from him and all his property if [Landrith] did not stop seeking redress for [plaintiff]

. . . ." (Pet. ¶ 505.) Even if the Court assumes that these facts are true, plaintiff failed to plead the essential elements of tortious interference.

As previously explained, a claim for tortious interference requires plaintiff to recite a breach caused or induced by HBS. But plaintiff Lipari fails to allege any such breach. Although plaintiff recites that HBS "caused prejudice against [plaintiff] and his counsel to extort from them their property rights and the right to vindicate [plaintiff's] contract claims . . . ," this allegation fails to state in what way Landrith breached his business expectancy with plaintiff or how, given his lack of a law license, Landrith could have been expected to seek redress for plaintiff.

Plaintiff cannot allege that anything done by HBS prevented Brett Landrith from serving as plaintiff's counsel. To the contrary, Landrith cannot represent plaintiff because he is not a licensed attorney. (Pet. ¶¶ 498-500). *See also In the Matter of Bret Landrith*, 280 Kan. 619, 124 P.3d 467 (Kan. 2005). This tortious interference claim wholly fails to state any valid claim against HBS, and it must be dismissed.

B. Interference With Business Relationship With David Sperry.

Plaintiff alleges that HBS, through its "*pro hac vice* agent" Jonathan Gleeken, persuaded attorney David Sperry not to represent plaintiff in this action. (Pet. ¶ 510.) Plaintiff also says that HBS's "power . . . over [this] [C]ourt" caused Sperry to decline plaintiff's case. (Pet. ¶ 510.) Even if the Court assumed HBS had such power over it and that the other allegations are true, the necessary elements of tortious interference are still lacking.

First, plaintiff offers no basis for the claim that Jonathan Gleeken (apparently an attorney with Arnold & Porter of Washington, D.C.) was an agent of HBS, let alone explain what a "*pro hac vice* agent" is.. Moreover, as noted above, a claim for tortious interference requires the

demonstration of a valid business expectancy. Although plaintiff states that he consulted with Sperry about this case, he has failed to give the Court any reason to believe he had a valid business expectancy that Sperry would agree to take this case. (Pet. ¶¶ 507-10.) Attorneys frequently screen prospective clients, but that is far from a commitment to provide representation. Without some allegation that David Sperry actually intended to represent him, plaintiff cannot show this essential plausible element of a tortious interference claim.

Furthermore, a claim for tortious interference requires HBS to have known about plaintiff's business expectancy with Sperry. Although plaintiff alleges that Sperry declined to pursue his case because of HBS's "power . . . over [this] [C]ourt," he failed to allege that HBS had any knowledge about any business expectancy with Sperry, including how HBS could have known that plaintiff was even talking to Sperry. (Pet. ¶¶ 507-10.) Without an assertion that HBS knew about this alleged expectancy, an essential element of a tortious interference claim is lacking. Thus, the Court must dismiss this tortious interference claim because no valid claim is pleaded.

C. Interference with Business Relationship With James C. Wirken And The Wirken Group.

Plaintiff similarly alleges that HBS persuaded James C. Wirken and The Wirken Group not to represent plaintiff in this action. (Pet. ¶ 514.) Plaintiff says HBS "placed the Wirkens in fear of associating with [plaintiff], falsely stating that [plaintiff] had been repeatedly sanctioned for baseless claims." (Pet. ¶ 514.) Even these facts were true, which they are not, plaintiff still failed to plead the facts essential to a valid claim of tortious interference.

As with the other lawyers, plaintiff must show that he had some valid business expectancy, as opposed to a mere hope, that James Wirken would represent him. Although plaintiff states that he consulted with Wirken about this case, he failed to give any reason to

believe either that HBS knew about it or that Wirken actually ever intended to provide representation. (Pet. ¶¶ 511-19.) Indeed, though plaintiff says Wirken agreed to look into plaintiff's case if plaintiff would pay a retainer (Pet. ¶ 516), he does not say the retainer was paid or that he offered to pay any of the attorneys for their services. Plaintiff then admits that Wirken "charitably offered some constructive criticisms . . . but strongly urged [him] to continue on *pro se*". (Pet. ¶ 515.) Without some allegation that Wirken actually intended to represent him, plaintiff failed to allege an essential element of a tortious interference claim. Thus, this Court must dismiss the tortious interference claim because plaintiff failed to state a claim against HBS for which relief can be granted.

D. Tortious Interference With Business Relation By Defendants Jerry Grundhoffer, Richard K. Davis, Husch Blackwell Sanders LLP, Shughart Thomson & Kilroy PC.

Plaintiff appears to link HBS to an allegation that U. S. Bank and U. S. Bancorp persuaded attorney Norman E. Siegel not to represent plaintiff in this action. (Pet. ¶ 520-21.) Plaintiff says that an HBS attorney met with attorneys from Shughart Thompson & Kilroy PC "for the purpose of coordinating General Electric's defense of contract and antitrust claims brought by [plaintiff] . . ." and thereafter "repeatedly failed to produce" some undefined, but privileged documents. (Pet. ¶ 521.) Even if this Court assumes that these facts are true, they have nothing to do with a tortious interference claim.

If the petition intended to allege that HBS interfered with any valid expectancy to representation by Norman E. Siegel that plaintiff had, it fails to state a valid claim. Plaintiff did not allege how HBS's alleged refusal to disclose privileged documents tortiously interfered with his alleged business expectancy with Siegel. He did not plead that HBS knew about his alleged business expectancy with Siegel. He did not plead how Siegel breached their alleged business

expectancy. Finally, he failed to plead why HBS lacked justification for refusing to produce potentially privileged documents. As such, he utterly failed to establish the essential elements of tortious interference. Thus, this Court must dismiss this tortious interference claim because plaintiff failed to state a claim against HBS for which relief can be granted.

E. Tortious Interference With Business Relationship Between Petitioner And Senator Claire McCaskill Through Attempted Extortion Over Judy Jewsome For Helping Petitioner's Witness David Price By Defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, And Shughart, Thompson Kilroy PC.

Plaintiff alleges that HBS prevented him from speaking to Congressional aides in the offices of Congresswoman Claire McCaskill and Congressman Emmanuel Cleaver, II. (Pet. ¶¶ 541-61.) Specifically, he alleges that these Congressional staffs refused to speak with him because HBS prevented Judy Jewsome, an aide to Congresswoman Nancy Boyda, from disclosing who kidnapped the son of David Price. (Pet. ¶¶ 541-61.) Even if the Court were assume that these facts make sense, plaintiff did not establish any claim of tortious interference by HBS.

Plaintiff does not allege any business expectancy he had with Judy Jewsome, who is mentioned only in connection with the alleged judicial ring of baby kidnappers described in *In re Bret D. Landrith*, 280 Kan. 619, 124 P.3d 467 (Kan. 2005). Plaintiff failed to allege that HBS knew about his alleged business relationship with any of the other Congressional aides. Furthermore, he failed to allege how any of these Congressional aides breached their business expectancy with plaintiff. As such, plaintiff failed to establish the necessary elements of tortious interference. Given those failures, this aspect of the interference claim must also be dismissed because plaintiff failed to state a claim against HBS for which relief can be granted.

F. Tortious Interference With Business Relationship Between Petitioner And Donna Huffman, The Petitioner's Trusted Advisor, Real Estate

Finance Expert And Potential Replacement Counsel By Defendants Lathrop & Gage L.C., Husch Blackwell Sanders LLP, and Shughart, Thompson & Kilroy PC.

Plaintiff alleges that HBS prevented Donna Huffman from representing him at this trial. (Pet. 91). Specifically, he contends that HBS caused the Kansas Bar Examiners to deny Hoffman's Kansas Bar application. (Pet. ¶¶ 575-77, 582.) Even if this Court assumes that these facts are true, plaintiff failed to establish a claim for tortious interference.

Plaintiff failed to plead the facts essential to this tortious interference claim. First, plaintiff failed to establish that HBS knew about his alleged business expectancy with Hoffman. Second, he failed to establish that Hoffman breached this alleged business expectancy. Lastly, he failed to establish that, even assuming that HBS informed the Kansas Bar Examiners about Hoffman's alleged conduct, which it did not, that it lacked justification for doing so. As such, plaintiff failed to plead the essential elements of this tortious interference claim. Thus, this Court must dismiss this tortious interference claim because plaintiff failed to state a claim against HBS for which relief can be granted.

V. Plaintiff Lipari's Claim Of *Prima Facie* Tort Must Be Dismissed Because He Failed To Plead The "Facts Essential To Recovery"

A. Plaintiff Did Not Establish The Necessary Elements Of *Prima Facie* Tort.

"A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). The Court presumes that all averments in the petition are true and determines "if the facts alleged meet the elements of a recognized cause of action . . . ." *Anderson v. Village of Jacksonville*, 103 S.W.3d 190, 193 (Mo. Ct. App. 2003). A Court will grant a motion to dismiss for failure to state a claim when "the petition fails to allege facts essential to a recovery." *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997).

prima facie tort. The petition must be dismissed as to HBS because it fails to state any claim against HBS for which relief can be granted.

Respectfully submitted,

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Michael.thompson@huschblackwell.com

Attorney for Defendant Husch Blackwell Sanders LLP

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 15th day of May, 2008 to:

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

Attorney

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI, (Assignee of Dissolved Medical Supply Chain, Inc.)	)	
Plaintiff,	)	
v.	)	Case No.: 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

MOTION OF HUSCH BLACKWELL SANDERS LLP
TO DISMISS PETITION FOR FAILURE TO STATE A CLAIM

Husch Blackwell Sanders LLP, pursuant to Missouri Supreme Court Rule 55.27(a)(6), moves to dismiss all claims in the petition asserted against it because they fail to state a claim upon which relief can be granted. In support of this motion, Husch Blackwell Sanders LLP relies on the accompanying suggestions in support.

WHEREFORE, Husch Blackwell Sanders LLP respectfully requests that the Court grant this motion and dismiss the plaintiff's claims against it.

Respectfully submitted,

Michael Thompson MO #22153
Sean D. Tassi MO ##59718
Husch Blackwell Sanders LLP
4801 Main Street, Suite 1000
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(816) 983-8000
(816) 983-8080 (FAX)
Michael.thompson@huschblackwell.com

Attorneys for Defendant Husch Blackwell Sanders LLP

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 15th day of May, 2008, to:

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

Attorney

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc., Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al., Defendants.	)	

DEFENDANT GHX'S MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF'S AMENDED COMPLAINT

Defendant GHX, LLC ("GHX") hereby move this Court for a twenty (20) day extension of time, to and including June 4, 2008, in which to respond to the Plaintiff's Amended Complaint. In support of this motion, defendants Heartland Financial Group, Inc. and Christopher McDaniel state as follows:

1. Undersigned counsel was recently engaged to represent the interests of GHX in this matter.

2. Although counsel has reviewed the pleadings in this matter, they need to conduct further investigation in order to properly frame responsive pleadings for the defendant.

3. This request for extension of time is not interposed for delay, but in order to give counsel adequate opportunity to investigate and prepare responsive pleadings.

WHEREFORE the defendant GHX, LLC hereby moves this Court for a twenty (20) day extension of time, to and including June 5, 2008, in which to answer or otherwise respond to Plaintiff's Amended Complaint.

1007190.01

HUSCH & EPPENBERGER, LLC

By: _____

John K. Power #35312
Michael S. Hargens #51077
1200 Main Street, Suite 2300
Kansas City, MO 64105
Telephone: (816) 421-4800
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Michael.hargens@husch.com

ATTORNEYS FOR DEFENDANT GHX, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was forwarded this 16 day of May, 2008, by first class mail, postage prepaid to:

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

_____

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,

Plaintiff,

v.

NOVATION, LLC, et al.,

Defendants.

Case Number 0816-CV04217

Division 2

ORDER

The Court this day takes up Defendant, Shughart, Thomson & Kilroy's Motion for Extension of Time, filed May 13, 2008. Now for good cause shown and being fully advised in the premises, the Court GRANTS the Motion.

The Court also takes up Plaintiff's Motion for Extension of Time in Which to Answer Defendants' Motions for Dismissal, filed May 9, 2008. Now for good cause shown and being fully advised in the premises, the Court GRANTS in part the Motion. The Court grants the Motion insofar as it requests additional time, however, Plaintiff is ordered to respond to Defendants' Motions to Dismiss within 30 days from the date of this Order.

IT IS SO ORDERED.

MICHAEL W. MANNERS
JUDGE, DIVISION 2

Dated: May 19, 2008

I certify a copy of the above was faxed or mailed this 19th day of May, 2008, to:

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

Jay E. Heidrick, Attorney for Defendants Grundhofer, David and Cecere
Fax # (913) 451-3361

William E. Quirk, Attorney for Defendant STK
Fax # (816) 374-0509

M. Brady, Law Clerk, Division 2

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

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.)	)	
Plaintiff,	)	Case No. 0816-CV04217
	)	Division. 02
vs.	)	
NOVATION, LLC, et al.,	)	
Defendants.	)	

DEFENDANT LATHROP & GAGE L.C.'S RESPONSE TO PLAINTIFF'S MOTION TO REQUIRE DEFENDANT LATHROP & GAGE L.C. TO MAKE A MORE DEFINITE ANSWER UNDER RULE 55.27(d)

COMES NOW Defendant, Lathrop & Gage L.C. ("Lathrop") and for its Response to Plaintiff's Motion to Require Defendant Lathrop & Gage L.C. to Make a More Definite Answer Under Rule 55.27(d), states as follows:

Lathrop fully complied with Mo. R. Civ. P. 55.07 in its answer to plaintiff's petition, and plaintiff does not allege that Lathrop violated this Rule. Instead, plaintiff cites Lathrop's lack of specificity in its answer as a reason for this Court to grant a motion for a more definite statement, when Lathrop's duty was merely to respond to the allegations of plaintiff's petition as required under Rule 55.07. Lathrop had to review 108 pages and over 700 paragraphs of allegations against 27 separate defendants to determine which allegations applied to Lathrop and then respond accordingly. Lathrop did so in good faith and with great difficulty due to the length and often nonsensical nature of the petition.

If and when the issues in the petition become clearer through more precise pleading or discovery, Lathrop will endeavor to supplement or amend its answer

accordingly. Until that time, however, Lathrop affirmatively states that its answer complies with Rule 55.07 of the Missouri Rules of Civil Procedure.

WHEREFORE, Lathrop & Gage L.C. respectfully requests that this Court enter an Order denying Plaintiff's Motion to Require Defendant Lathrop & Gage L.C. to Make a More Definite Answer Under Rule 55.27(d).

Respectfully submitted,

Dated: May 27, 2008

LATHROP & GAGE L.C.

By: _____

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Peter F. Daniel (33798)
J. Alison Auxter (59079)
2345 Grand Boulevard, Suite 2800
Kansas City, Missouri 64108-2684
Telephone: (816) 292-2000
Telecopier: (816) 292-2001

ATTORNEY FOR DEFENDANT
LATHROP & GAGE L.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, by First Class United States mail, postage prepaid, on the following parties of record this 27th day of May 2008:

Samuel K. Lipari
297 NE Bayview
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816-365-1306
Plaintiff, *pro se*

Novation LLC, Defendant
125 E. John Carpenter Freeway
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Irving, TX 75062

Neoforma, Inc., Defendant
3061 Zanker Road
San Jose, CA 95134

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

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

Volunteer Hospital Association, Defendant
220 E. Las Colinas Blvd.
Irving, TX 75039

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

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

Thomas F. Spindler, Defendant
Area Senior VO VHA Mid America
8500 West 110th Street, Ste. 118
Overland Park, KS 66210

Robert H. Bezanson, Defendant
President/CEO Coxhealth
1423 North Jefferson
Springfield, MO 65802

Gary Duncan, Defendant
President CEO Freeman Health
1102 W. 32nd Street
Joplin, MO 64804

Maynard Oliverius, Defendant
President and Chief Executive Officer
Stormont-Vail HealthCare
1500 SW 10th Avenue
Topeka, KS 66604

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

Charles V. Robb, Defendant
Saint Luke's Health System
10920 Elm Avenue
Kansas City, MO 64134

Michael Terry, Defendant
President/ Chief Officer
Salina Regional Health Center
400 South Santa Fe
Salina, KS 67401

University Healthsystem Consortium, Defendant
2001 Spring Road, Suite 700
Oak Brook, IL 60523-1890

Robert J. Baker, Defendant
President/CEO of UHC
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Oak Brook, IL 60523

Jerry A. Grundhofer, Defendant
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Minneapolis, MN 55402

Richard K. Davis, Defendant
President/CEO of UN Bancorp
800 Nicollet Mall
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Andrew Cecere, Defendant
Chief Financial Officer
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The Piper Jaffray Companies, Defendant
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Kansas City, KS 66211

Andrew S. Duff, Defendant
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Kansas City, KS 66211

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c/o Robert H. Bezanson
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Springfield, MO 65802

Saint Luke's Health System, Inc., Defendant
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Kansas City, MO 64134

Stormont-Vail Healthcare Inc., Defendant
c/o Michael Lummis RA
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Shugart Thomson and Kilroy PC, Defendant
c/o STK Registered Agent Inc.
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An Attorney for Defendant Lathrop & Gage L.C.

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

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.)		
Plaintiff,	Case No.	0816-CV04217
	Division.	02
vs.		
NOVATION, LLC, et al.,		
Defendants.		

DEFENDANT LATHROP & GAGE L.C.'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT LATHROP & GAGE L.C.'S SECOND THROUGH NINETEENTH AFFIRMATIVE DEFENSES UNDER RULE 55.08

COMES NOW Defendant, Lathrop & Gage L.C. ("Lathrop") and for its Response to Plaintiff's Motion to Strike Defendant Lathrop & Gage L.C.'s Second Through Nineteenth Affirmative Defenses Under Rule 55.08 as follows:

Lathrop fully complied with Mo. R. Civ. P. 55.08 in its answer to plaintiff's petition and assertion of affirmative defenses. Because of the lack of clarity in plaintiff's petition, Lathrop asserted affirmative defenses to the best of its knowledge as of the point in time in which it drafted its answer. Lathrop had to review 108 pages and over 700 paragraphs of allegations against 27 separate defendants to determine which allegations applied to Lathrop and then respond accordingly. Lathrop did so in good faith and with great difficulty due to the length and often nonsensical nature of the petition. For example, plaintiff's motion to strike Lathrop's affirmative defenses contains a paragraph not even remotely related to the motion or to allegations against Lathrop & Gage:

> The plaintiff, like the citizens of Missouri and its courts, has been ill served by the policy of the Missouri Board of Bar Governors to support

> Kansas' racial discrimination, denial of due process, rampant extrinsic fraud for the purposes of rigging the outcomes of Kansas cases and defeating the supremacy of federal law for private profit. A policy incredulously upheld by the Missouri Board of Bar Governors in the name of reciprocal admissions and no doubt to avoid disbarment or other reprisals in Kansas that await any Missouri attorney helping the plaintiff.

Plaintiff's Motion to Strike Affirmative Defenses at p. 4. Lathrop should not be expected to respond to allegations not even drafted in coherent and complete sentences, particularly those not directed at Lathrop but drafted merely to air some unknown and unrelated grievance of plaintiff.

Should further pleading or discovery enable Lathrop to plead its affirmative defenses more clearly, Lathrop will certainly endeavor to do so. Until that time, however, Lathrop must preserve its affirmative defenses to the best of its ability with consideration of the lengthy and unclear petition filed by plaintiff.

WHEREFORE, Lathrop & Gage L.C. respectfully requests that this Court enter an Order denying Plaintiff's Motion to Strike Defendant Lathrop & Gage L.C.'s Second Through Nineteenth Affirmative Defenses Under Rule 55.08.

Respectfully submitted,

Dated: May 27, 2008

LATHROP & GAGE L.C.

By: _____

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ATTORNEY FOR DEFENDANT
LATHROP & GAGE L.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, by First Class United States mail, postage prepaid, on the following parties of record this 27th day of May 2008:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
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Plaintiff, *pro se*

Novation LLC, Defendant
125 E. John Carpenter Freeway
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Neoforma, Inc., Defendant
3061 Zanker Road
San Jose, CA 95134

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

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

Volunteer Hospital Association,
Defendant
220 E. Las Colinas Blvd.
Irving, TX 75039

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

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

Thomas F. Spindler, Defendant
Area Senior VO VHA Mid America
8500 West 110th Street, Ste. 118
Overland Park, KS 66210

Robert H. Bezanson, Defendant
President/CEO Coxhealth
1423 North Jefferson
Springfield, MO 65802

Gary Duncan, Defendant
President CEO Freeman Health
1102 W. 32nd Street
Joplin, MO 64804

Maynard Oliverius, Defendant
President and Chief Executive Officer
Stormont-Vail HealthCare
1500 SW 10th Avenue
Topeka, KS 66604

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

Charles V. Robb, Defendant
Saint Luke's Health System
10920 Elm Avenue
Kansas City, MO 64134

Michael Terry, Defendant
President/ Chief Officer
Salina Regional Health Center
400 South Santa Fe
Salina, KS 67401

CC 2008798v2

University Healthsystem Consortium,
Defendant
2001 Spring Road, Suite 700
Oak Brook, IL 60523-1890

Robert J. Baker, Defendant
President/CEO of UHC
2001 Spring Road Suite 700
Oak Brook, IL 60523

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

Richard K. Davis, Defendant
President/CEO of UN Bancorp
800 Nicollet Mall
Minneapolis, MN 55402

Andrew Cecere, Defendant
Chief Financial Officer
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1 Hallbrook Place, Suite 310
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Andrew S. Duff, Defendant
1 Hallbrook Place, Suite 310
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Cox Health Care Services of the Ozarks
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1423 N. Jefferson Avenue
Springfield, MO 65802

Saint Luke's Health System, Inc.,
Defendant
10920 Elm Avenue
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Stormont-Vail Healthcare Inc.,
Defendant
c/o Michael Lummis RA
1500 Southwest Tenth Avenue
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Shugart Thomson and Kilroy PC,
Defendant
c/o STK Registered Agent Inc.
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4801 Main Street, Suite 1000
Kansas City, MO 64112

An Attorney for Defendant Lathrop & Gage L.C.

CC 2008798v2

IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*	)	
vs.	)	**Case No. 0816-cv-04217**
Novation,LLC *et al*. , *Defendants*	)	

SECOND MOTION FOR EXTENSION OF TIME IN WHICH TO ANSWER
DEFENDANTS' MOTIONS FOR DISMISSALS

Comes now, the plaintiff Samuel K. Lipari appearing pro se and respectfully requests that the court extend the time to reply to the defendants' motions to dismiss until thirty days after all defendants have appeared and answered or filed motions to dismiss.

1. The plaintiff's suggestion for this extension was unopposed at the case management conference of May 27, 2008.

2. The court requested that the court make this motion so that an order permitting the plaintiff a single consolidated reply could be made.

CONCLUSION

Whereas for the above stated reasons and for the conservation of the court's resources, the plaintiff respectfully requests the court extend the time to respond to all dismissals until thirty days after the defendants have answered or otherwise responded to the plaintiff's petition.

Respectively submitted,

S/Samuel K. Lipari
_____
Samuel K. Lipari
Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 29th day of May 2008, to the following by email:

John Power
1200 Main Street, Suite 2300
Kansas City, Missouri 64104
john.power@huschblackwell.com

Michael Thompson
4801 Main Street, Suite 1000
Kansas, Misouri 64112
michael.thompson@huschblackwell.com

Mark Olthoff
120 West 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
molthoff@stklaw.com

Jay Heidrick
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, Kansas 66210
jheidrick@stklaw.com

Veronica Lewis
3700 Trammell Crown Center
2100 Ross Avenue
Dallas, Texas 75201-2975
vlewis@velaw.com

Kathleen Spangler
1001 Fannin Street, Suite 2300
Houston, Texas 77002-6760
kspangler@velaw.com

Peter Daniel
2345 Grand Boulevard, Suite 2800
Kansas City, Missouri 64108-2684

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

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,

Plaintiff,

v.

Case Number 0816-CV04217

NOVATION, LLC, et al.,

Division 2

Defendants.

ORDER

On this day he Court takes up Plaintiff's Motion to Strike, filed May 13, 2008. Defendant, Lathrop & Gage, L.C. filed Suggestions in Opposition to the Motion on May 27, 2008. Now for good cause shown and being fully advised in the premises, the Court DENIES the Motion.

The Court also takes up Plaintiff's Motion for More Definite Statement, filed May 13, 2008. Defendant, Lathrop & Gage, L.C. filed Suggestions in Opposition to the Motion on May 27, 2008. Now for good cause shown and being fully advised in the premises, the Court DENIES the Motion.

IT IS SO ORDERED.

MICHAEL W. MANNERS
JUDGE, DIVISION 2

Dated: May 29, 2008

I certify a copy of the above was faxed or mailed this 29th day of May, 2008, to:

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

Jay E. Heidrick, Attorney for Defendants Grundhofer, David and Cecere
Fax # (913) 451-3361

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,

Plaintiff,

v.

Case Number 0816-CV04217

NOVATION, LLC, et al.,

Division 2

Defendants.

ORDER

On this day he Court takes up Plaintiff's Motion to Strike, filed May 13, 2008. Defendant, Lathrop & Gage, L.C. filed Suggestions in Opposition to the Motion on May 27, 2008. Now for good cause shown and being fully advised in the premises, the Court DENIES the Motion.

The Court also takes up Plaintiff's Motion for More Definite Statement, filed May 13, 2008. Defendant, Lathrop & Gage, L.C. filed Suggestions in Opposition to the Motion on May 27, 2008. Now for good cause shown and being fully advised in the premises, the Court DENIES the Motion.

IT IS SO ORDERED.

MICHAEL W. MANNERS
JUDGE, DIVISION 2

Dated: May 29, 2008

I certify a copy of the above was faxed or mailed this 29th day of May, 2008, to:

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

Jay E. Heidrick, Attorney for Defendants Grundhofer, David and Cecere
Fax # (913) 451-3361

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,

Plaintiff,

v.

Case Number 0816-CV04217

NOVATION, LLC, et al.,

Division 2

Defendants.

ORDER

On this day he Court takes up Plaintiff's Motion to Strike, filed May 13, 2008. Defendant, Lathrop & Gage, L.C. filed Suggestions in Opposition to the Motion on May 27, 2008. Now for good cause shown and being fully advised in the premises, the Court DENIES the Motion.

The Court also takes up Plaintiff's Motion for More Definite Statement, filed May 13, 2008. Defendant, Lathrop & Gage, L.C. filed Suggestions in Opposition to the Motion on May 27, 2008. Now for good cause shown and being fully advised in the premises, the Court DENIES the Motion.

IT IS SO ORDERED.

MICHAEL W. MANNERS
JUDGE, DIVISION 2

Dated: May 29, 2008

I certify a copy of the above was faxed or mailed this 29th day of May, 2008, to:

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

Jay E. Heidrick, Attorney for Defendants Grundhofer, David and Cecere
Fax # (913) 451-3361

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc., Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al., Defendants.	)	

DEFENDANT GHX'S SECOND MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF'S AMENDED COMPLAINT

Defendant GHX, LLC ("GHX") hereby moves this Court for an additional seven (7) day extension of time, to and including June 12, 2008, in which to respond to the Plaintiff's Amended Complaint. In support of this motion, defendant GHX, LLC states as follows:

1. Although counsel has been actively reviewing the pleadings in this matter, they need to conduct further investigation in order to properly frame an appropriate response to Plaintiff's more than 600 paragraph Petition.

2. GHX has been working diligently on the matter but due to various issues outside of his control, he has been unable to complete the response.

3. This request for extension of time is not interposed for delay, but in order to give counsel adequate opportunity to investigate and prepare responsive pleadings.

4. Plaintiff is not prejudiced by this request because he does not have to respond to this (or any of the other) motions to dismiss until after all the motions have been filed.

WHEREFORE the defendant GHX, LLC hereby moves this Court for an additional seven (7) day extension of time, to and including June 12, 2008, in which to answer or otherwise respond to Plaintiff's Amended Complaint.

HUSCH & EPPENBERGER, LLC

By: _____

John K. Power #35312
Michael S. Hargens #51077
1200 Main Street, Suite 2300
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596
john.power@husch.com
Michael.hargens@husch.com

ATTORNEYS FOR DEFENDANT GHX, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was forwarded this 5th day of June, 2008, by first class mail, postage prepaid to:

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

_____

IN THE STATE OF MISSOURI
WESTERN DISTRICT COURT OF APPEALS
AT KANSAS CITY, MISSOURI

Case No. WD70001 (16th Cir. Case No. 0816-04217)

SAMUEL K. LIPARI
Appellant

vs.

NOVATION, LLC; NEOFORMA, INC; GHX, LLC; VOLUNTEER HOSPITAL ASSOCIATION; VHA MID-AMERICA, LLC; CURT NONOMAQUE; THOMAS F. SPINDLER; ROBERT H. BEZANSON; GARY DUNCAN; MAYNARD OLIVERIUS; SANDRA VAN TREASE; CHARLES V. ROBB; MICHEAL TERRY; UNIVERSITY HEALTHSYSTEM CONSORTIUM; ROBERT J. BAKER; JERRY A. GRUNDHOFER; RICHARD K. DAVIS; ANDREW CECERE; COX HEALTH CARE SERVICES OF THE OZARKS, INC.; SAINT LUKE'S HEALTH SYSTEM, INC.; STORMONT-VAIL HEALTHCARE, INC.; SHUGHART THOMSON & KILROY, P.C.; HUSCH BLACKWELL SANDERS LLP[1]

LEGAL FILE OF THE TRIAL RECORD
Volume 3 pages 354-554

Prepared by Samuel K. Lipari
Pro se Plaintiff
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306

[1] Two parties in the trial court action, ROBERT J. ZOLLARS and LATHROP & GAGE L.C. have not been dismissed and are not party to this appeal.

saml@medicalsupplychain.com

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	**Case No. 0816-CV04217**
vs.	)	**Division 2**
	)	
NOVATION, LLC, et al.	)	
	)	
Defendants.	)	

MOTION TO DISMISS OF DEFENDANTS PIPER JAFFRAY COMPANIES AND ANDREW DUFF AND SUGGESTIONS IN SUPPORT

Defendants Piper Jaffray Companies and Andrew Duff, appearing specially to contest service of process and thereby the Court's jurisdiction over them, move for an Order of the Court, pursuant to Mo. R. Civ. P. 55.27, dismissing all of the claims against them. As reasons for this motion and in further support thereof, defendants state:

1. Defendants, by their attorneys, have entered special appearances in this matter for the purpose of contesting service of process and jurisdiction over them.

2. The plaintiff Samuel Lipari filed this lawsuit on February 25, 2008.

3. According to the Court's docket, plaintiff attempted to serve these defendants on March 4, 2008.

4. According to the Court's docket, plaintiff filed returns of service on May 5, 2008 purportedly reflecting his service of process upon these defendants. (Exhibit "A".)

5. Defendants Piper Jaffray Companies and Andrew Duff submit that the service of process, sufficiency of service of process upon them was improper and the Court does not have jurisdiction over them.

6. Neither Piper Jaffray Companies nor Andrew Duff is alleged to be a citizen or resident of the State of Missouri. (Petition ¶¶ 50, 51.)

7. In order to serve an out-of-state defendant, service must be made either by a person specially appointed by the Court to serve process or a person specifically authorized by law to serve process in the state. Mo. R. Civ. P. 54.14(a). In addition, the return of service must be made under oath, sworn before a clerk, judge, or other person authorized to administer oaths. Mo. R. Civ. P. 54.20(b).

8. Plaintiff purported to serve both Piper Jaffray Companies and Andrew Duff by leaving a copy of the summonses and petitions at an address for Piper Jaffray Companies, located at 11150 Overbrook Road, Suite 310, Leawood, Kansas.

9. The Court's docket does not reflect that Samuel Lipari (nor anyone else) was ever appointed a private special process server by Court Order to serve process upon Piper Jaffray Companies or Andrew Duff outside the State of Missouri. The return of service in the Court's docket does not show that the purported service was accomplished by a person authorized under Kansas law to serve a summons and petition. (Exhibit "A".) *See Flair v. Campbell*, 44 S.W.3d 444, 451 (Mo. App. W.D. 2001).

10. Plaintiff did not properly complete the return of service, including but not limited to the fact that his signature is not contained on the return nor is there a notary seal or other indication that the return is sworn. (Exhibit "A".)

11. Plaintiff's attempted service of process upon out-of-state defendants Piper Jaffray Companies and Andrew Duff is insufficient and otherwise unlawful under Missouri Rules of Civil Procedure. *See Russ v. Russ*, 39 S.W.3d 895, 897 (Mo. App. E.D. 2001) (absent proof mandated by Rule 54.20, the Court lacks jurisdiction); *see also State ex rel. Northwest Ark. Produce Co. v. Gaertner*, 573 S.W.2d 391, 395-96 (Mo. App. E.D. 1978) (jurisdiction not

acquired where service is improper); Mo. R. Civ. P. 54.14(a); 54.20(b). Because these defendants have never been served properly, all claims against them must be dismissed.

12. In the alternative, and in addition to the plaintiff's fatal error in his failed service of process which necessitates that his claims be dismissed, defendants Piper Jaffray Companies and Andrew Duff hereby also adopt and incorporate all of the motions to dismiss, arguments and authorities relied upon by all other defendants seeking the dismissal of plaintiff's claims as if fully stated herein.

WHEREFORE, for all of these reasons, defendants Piper Jaffray Companies and Andrew Duff request that the Court dismiss plaintiff's petition and each of its causes of action asserted against them, for their costs and attorneys' fees incurred herein, and for such other and further relief as the Court deems just and equitable.

Respectfully submitted,

MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
120 W 12th Street, Suite 1700
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (FAX)
molthoff@stklaw.com

ANDREW M. DeMAREA MO #45217
JAY E. HEIDRICK MO #54699
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)
ademarea@stklaw.com
jheidrick@stklaw.com

ATTORNEYS FOR DEFENDANTS PIPER JAFFRAY COMPANIES AND ANDREW DUFF

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered via United States Mail, postage prepaid, this 5th day of June, 2008, to:

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

Plaintiff

Peter F. Daniel, Esq.
Lathrop & Gage LC
2345 Grand Boulevard
Suite 2800
Kansas City, MO 64108-2684

Attorneys for Defendant Lathrop & Gage LC

John K. Power, Esq.
Husch Blackwell Sanders LLP
2300 One Kansas City Place
1200 Main Street
Kansas City, MO 64105

Attorneys for Defendant Husch Blackwell Sanders LLP

John K. Power, Esq.
Husch Blackwell Sanders LLP
2300 One Kansas City Place
1200 Main Street
Kansas City, MO 64105

Veronica Lewis, Esq.
Vinson & Elkins LLP
3700 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201-2975

Kathleen Bone Spangler, Esq.
Vinson & Elkins LLP
2300 First City Tower
1001 Fannin Street
Houston, TX 77002-6760

Attorneys for Defendants Novation, LLC, VHA Inc., University Healthsystem Consortium, VHA Mid-America LLC; Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius; Sandra Van Trease; Charles Robb, Michael Terry, Cox Health Care Services of the Ozarks, Inc.; Saint Luke's Health System Inc. and Stormont-Vail Healthcare Inc.

Attorneys for Defendants Piper Jaffray Companies and Andrew Duff

IN THE 16TH JUDICIAL CIRCUIT COURT, JACKSON COUNTY, MISSOURI

Judge or Division: MICHAEL W MANNERS	Case Number: 0816-CV04217
Plaintiff/Petitioner: SAMUEL K LIPARI vs.	Plaintiff's/Petitioner's Attorney/Address: SAMUEL K LIPARI 297 NE BAYVIEW LEES SUMMIT, MO 64064
Defendant/Respondent: NOVATION LLC	Court Address: 308 W Kansas INDEPENDENCE, MO 64050
Nature of Suit: CC Other Tort	

FILED: CIRCUIT COURT
JACKSON COUNTY, MO
2008 MAR 31 AM 10:31

(Date File Stamp)

Summons for Personal Service Outside the State of Missouri
(Except Attachment Action)

The State of Missouri to: ANDREW S DUFF
Alias:

1 HALLBROOK PLACE
SUITE 310
11150 OVERBROOK ROAD
KANSAS CITY, KS 66211

COURT SEAL OF

JACKSON COUNTY

PRIVATE PROCESS SERVER

MAKE YOUR OBJECTION ON THE WRITTEN FORM MAILED TO DEPT OF COURT SERVICES INDEPENDENCE, MO

You are summoned to appear before this court and to file your pleading to the petition, copy of which is attached, and to serve a copy of your pleading upon the attorney for the Plaintiff/Petitioner at the above address all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to file your pleading, judgment by default will be taken against you for the relief demanded in this action.

MAR 01 2008
Date

Clerk

Further Information:

Officer's or Server's Affidavit of Service

I certify that:

1. I am authorized to serve process in civil actions within the state or territory where the above summons was served.
2. My official title is _____ of _____ County, _____ (state).
3. I have served the above summons by: (check one)
   - [X] delivering a copy of the summons and a copy of the petition to the Defendant/Respondent.
   - [ ] leaving a copy of the summons and a copy of the petition at the dwelling place or usual abode of the Defendant/Respondent with _____, a person of the Defendant's/Respondent's family over the age of 15 years.
   - [ ] (for service on a corporation) delivering a copy of the summons and a copy of the petition to _____ (name) _____ (title).
   - [ ] other (describe) _____

Served at 11150 Overbrook Suite 310 (address) in Johnson County, Kansas (state), on 3-4-2008 (date) at 1:30 AM (time).

Process Server (Printed Name of Sheriff or Server) — Signature of Sheriff or Server

Subscribed and Sworn To me before this _____ (day) _____ (month) _____ (year)

I am: (check one)
- [ ] the clerk of the court of which affiant is an officer.
- [ ] the judge of the court of which affiant is an officer.
- [ ] authorized to administer oaths in the state in which the affiant served the above summons. (use for out-of-state officer)
- [ ] authorized to administer oaths. (use for court-appointed server)

(Seal)

Signature and Title

Service Fees, if applicable

Summons	$ _____
Non Est	$ _____
Mileage	$ _____ (_____ miles @ $ _____ per mile)
Total	$ _____

See the following page for directions to clerk and to officer making return on service of summons.

EXHIBIT "A"

Directions to Clerk

Personal service outside the State of Missouri is permitted only upon certain conditions set forth in Rule 54. The clerk should insert in the summons the names of only the Defendant/Respondent or Defendants/Respondents who are to be personally served by the officer to whom the summons is delivered. The summons should be signed by the clerk or deputy clerk under the seal of the court and a copy of the summons and a copy of the petition for each Defendant/Respondent should be mailed along with the original summons to the officer who is to make service. The copy of the summons may be a carbon or other copy and should be signed and sealed in the same manner as the original but it is unnecessary to certify that the copy is a true copy. The copy of the motion may be a carbon or other copy and should be securely attached to the copy of the summons but need not be certified a true copy. If the Plaintiff's/Petitioner has no attorney, the Plaintiff's/Petitioner's address and telephone number should be stated in the appropriate square on the summons. This form is not for use in attachment actions. (See Rule 54.06, 54.07 and 54.14)

Directions to Officer Making Return on Service of Summons

A copy of the summons and a copy of the motion must be served on each Defendant/Respondent. If any Defendant/Respondent refuses to receive the copy of the summons and motion when offered, the return shall be prepared accordingly so as to show the offer of the officer to deliver the summons and motion and the Defendant's/Respondent's refusal to receive the same.

Service shall be made: (1) On Individual. On an individual, including an infant or incompetent person not having a legally appointed guardian, by delivering a copy of the summons and motion to the individual personally or by leaving a copy of the summons and motion at the individual's dwelling house or usual place of abode with some person of the family over 15 years of age, or by delivering a copy of the summons and petition to an agent authorized by appointment or required by law to receive service of process; (2) On Guardian. On an infant or incompetent person who has a legally appointed guardian, by delivering a copy of the summons and motion to the guardian personally; (3) On Corporation, Partnership or Other Unincorporated Association. On a corporation, partnership or unincorporated association, by delivering a copy of the summons and motion to an officer, partner, or managing or general agent, or by leaving the copies at any business office of the Defendant/Respondent with the person having charge thereof or by delivering copies to its registered agent or to any other agent authorized by appointment or required by law to receive service of process; (4) On Public or Quasi-Public Corporation or Body. Upon a public, municipal, governmental or quasi-public corporation or body in the case of a county, to the mayor or city clerk or city attorney in the case of a city, to the chief executive officer in the case of any public, municipal, governmental, or quasi-public corporation or body or to any person otherwise lawfully so designated.

Service may be made by an officer or deputy authorized by law to serve process in civil actions within the state or territory where such service is made.

Service may be made in any state or territory of the United States. If served in a territory, substitute the word "territory" for the word "state."

The office making the service must swear an affidavit before the clerk, deputy clerk, or judge of the court of which the person is an officer or other person authorized to administer oaths. This affidavit must state the time, place, and manner of service, the official character of the affiant, and the affiant's authority to serve process in civil actions within the state or territory where service is made.

Service must not be made less than ten days nor more than 30 days from the date the Defendant/Respondent is to appear in court. The return should be made promptly and in any event so that it will reach the Missouri Court within 30 days after service.

IN THE 16TH JUDICIAL CIRCUIT COURT, JACKSON COUNTY, MISSOURI

Judge or Division: MICHAEL W MANNERS	Case Number: 0816-CV04217
Plaintiff/Petitioner: SAMUEL K LIPARI vs.	Plaintiff's/Petitioner's Attorney/Address: SAMUEL K LIPARI 297 NE BAYVIEW LEES SUMMIT, MO 64064
Defendant/Respondent: NOVATION LLC	Court Address: 308 W Kansas INDEPENDENCE, MO 64050
Nature of Suit: CC Other Tort	(Date File Stamp)

FILED-CIRCUIT COURT
JACKSON CO., MO - IN
2008 MAY -5 AM 10:31

Summons for Personal Service Outside the State of Missouri
(Except Attachment Action)

The State of Missouri to: THE PIPER JAFFRAY COMPANIES
Alias:

1 HALLBROOK PLACE
SUITE 310
11150 OVERBROOK ROAD
KANSAS CITY, KS 66211

PRIVATE PROCESS SERVER

ORIGINAL
MUST ACCOMPANY PETITION
WHEN FILED - NOT TO DEPT
OF CORRECTIONS
PROSECUTING ATTORNEY

COURT SEAL OF
JACKSON COUNTY

You are summoned to appear before this court and to file your pleading to the petition, copy of which is attached, and to serve a copy of your pleading upon the attorney for the Plaintiff/Petitioner at the above address all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to file your pleading, judgment by default may be taken against you for the relief demanded in this action.

MAR 02 2008
Date

Clerk

Further Information:

Officer's or Server's Affidavit of Service

I certify that:

1. I am authorized to serve process in civil actions within the state or territory where the above summons was served.
2. My official title is _____ of _____ County, _____ (state).
3. I have served the above summons by: (check one)

☒ delivering a copy of the summons and a copy of the petition to the Defendant/Respondent.

☐ leaving a copy of the summons and a copy of the petition at the dwelling place or usual abode of the Defendant/Respondent with _____, a person of the Defendant's/Respondent's family over the age of 15 years.

☐ (for service on a corporation) delivering a copy of the summons and a copy of the petition to _____ (name) _____ (title).

☐ other (describe) _____

Served at 11150 Overbrook Road Suite 310 (address) in Kansas City, Kansas (city), Kansas (state), on 3-4-08 (date) at 1:30 PM (time).

Printed Name of Sheriff or Server

Signature of Sheriff or Server

Subscribed and Sworn To me before this _____ (day) _____ (month) _____ (year)

I am: (check one)
☐ the clerk of the court of which affiant is an officer.
☐ the judge of the court of which affiant is an officer.
☐ authorized to administer oaths in the state in which the affiant served the above summons. (use for out-of-state officer)
☐ authorized to administer oaths. (use for court-appointed server)

(Seal)

Signature and Title

Service Fees, if applicable

Summons	$
Non Est	$
Mileage	$ _____ (_____ miles @ $ _____ per mile)
Total	$

See the following page for directions to clerk and to officer making return on service of summons.

IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
Plaintiff	)	
	)	**Case No. 0816-cv-04217**
vs.	)	
	)	
Novation,LLC *et al*. ,	)	
Defendants	)	

SUGGESTION IN OPPOSITION TO LIMITED APPEARANCE

Comes now, the plaintiff Samuel K. Lipari appearing pro se and respectfully opposes the defendants The Piper Jaffray Companies and Andrew S. Duff's contention they are not under the jurisdiction of this court.

SUGGESTION IN OPPOSITION

The defendants are in error over their arguments on service of process. The defendants The Piper Jaffray Companies and Duff are not residents of Missouri. The Missouri rules require that the service in a foreign state be made by a person authorized to make service in that state. The service was made in Kansas. The plaintiff and his agents are authorized to make service on corporations and the offices of employers of individual defendants in Kansas.

The defendants The Piper Jaffray Companies and Duff were subject to the plaintiff's service under R.S.Mo. 54.06:

> "Rule 54.06 Service Outside the State on Persons, Firms or Corporations Who do Certain Acts in This State
> Service outside the state sufficient to authorize a general judgment in personam may be obtained upon any person, executor, administrator or other legal representative, firm or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this Rule 54.06:
> Transacts any business within this state;
> Makes any contract within this state;
> Commits a tortious act within this state;
> Owns, uses or possesses any real estate situated in this state;
> Contracts to insure any person, property or risk located within this state at the time of contracting;…"

The plaintiff's agent was authorized to serve process in Kansas under Kansas law. K.S.A. Chapter 60, Article 3 – Process. The applicable part of the statute K.S.A. 60-303 (c) states:

"(c) Personal and residence service.
(1) When the plaintiff files a written request with the clerk for service other than by certified mail, service of process shall be made by personal or residence service. Personal service shall be made by delivering or offering to deliver a copy of the process and accompanying documents to the person to be served. Residence service shall be made by leaving a copy of the process and petition, or other document to be served, at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion residing therein. If service cannot be made upon an individual, other than a minor or a disabled person, by personal or residence service, service may be made by leaving a copy of the process and petition, or other document to be served, at the defendant's dwelling house or usual place of abode and mailing a notice that such copy has been left at such house or place of abode to the individual by first-class mail."

Kansas restricts service of attachments and other levies to court appointed process servers or the county sheriff under K.S.A. 60-303(c)(3) but the service of process in the initiation of a lawsuit is not a levy, writ of execution, order of attachment, replevin order, order for delivery, writ of restitution or writs of assistance subject to K.S.A. 60-303(c)(3).

The plaintiff's process was properly served on the defendant The Piper Jaffray Companies' office under K.S.A. 60-304 Service of process, on whom made; subsection (e):

"(e) Corporations and partnerships. Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, when by law it may be sued as such, (1) by serving an officer, partner or a resident, managing or general agent, or (2) by leaving a copy of the summons and petition at any business office of the defendant with the person having charge thereof, or (3) by serving any agent authorized by appointment or required by law to receive service of process, and if the agent is one authorized by law to receive service and the law so requires, by also mailing a copy to the defendant. Service by certified mail on an officer, partner or agent shall be addressed to such person at the person's usual place of business."

The plaintiff's process was properly served on the defendant Duff's office under K.S.A. 60-304 Service of process, on whom made; subsection (h):

"(h) Service upon an employee. If the plaintiff or the plaintiff's agent or attorney files an affidavit that to the best of the affiant's knowledge and belief the defendant is a nonresident who is employed in this state, or that the place of residence of the defendant is unknown, the affiant may direct that the service of summons or other process be made by the sheriff or other duly authorized person by directing an officer, partner, managing or general agent, or the person having charge of the office or place of employment at which the defendant is employed, to make the defendant available for the purpose of permitting the sheriff or other duly authorized person to serve the summons or other process."

The plaintiff can amend the affidavit by obtaining the notarized signature of his service agent or in the alternative if directed by the court reserve the defendants by serving the Missouri Secretary of State. The issue may be moot however. The plaintiff mistakenly thought his claims may be subject to the savings statute. However, the litigation in the concurrent federal case is still continuing. Also, the facts determined

by the plaintiff on information and belief and averred in the present complaint describe Piper Jaffray and Duff's guarantee to US Bancorp to reimburse the publicly traded bank holding company for losses from the antitrust misconduct of the former US Bancorp Piper Jaffray, the predecessor in interest to the defendant The Piper Jaffray Companies. Such an agreement is itself a violation of antitrust law and against public policy and is part of the present complaint's averments of subsequent chargeable conduct that has been brought before this court within the applicable statutes of limitation.

Respectively submitted,

S/Samuel K. Lipari
_____
Samuel K. Lipari
Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 12th day of June, 2008, by first class mail postage prepaid to:

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

Jay E. Heidrick, Shughart Thomson & Kilroy, P.C. 32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway Overland Park, Kansas 66210

William G. Beck, Peter F. Daniel, J. Alison Auxter, Lathrop & Gage LC, 2345 Grand Boulevard, Suite 2800, Kansas City, MO 64108

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

IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI	)	
(Assignee of Dissolved	)	
Medical Supply Chain, Inc.)	)	
Plaintiff	)	
	)	**Case No. 0816-cv-04217**
vs.	)	
	)	
Novation,LLC *et al.*,	)	
Defendants	)	

NOTICE OF UNAVAILABILITY OF THE PLAINTIFF

Comes now, the plaintiff Samuel K. Lipari appearing pro se and respectfully gives notice he will be on vacation from June 12th to June 28th, 2008. He can if need be, be reached by email or telephone.

Respectively submitted,

S/Samuel K. Lipari
_____
Samuel K. Lipari
Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 12th day of June, 2008, by email to:

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S/Samuel K. Lipari
_____
Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064
816-365-1306
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Pro se

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

DEFENDANT GHX LLC'S MOTION TO DISMISS PLAINTIFF'S PETITION FOR FAILURE TO STATE A CLAIM

Pursuant to Missouri Rules of Civil Procedure Rule 55.27(a)(6), Defendant GHX, LLC ("GHX") moves this Court for an Order dismissing Plaintiff's Petition because it fails to state a claim upon which relief can be granted against GHX. Plaintiff has brought six separate causes of action against GHX (as well as all the other defendants), including Missouri Antitrust Statute (Counts I, II and III), tortious interference with business relations (Count IV), fraud (Count V) and prima facie tort (Count VI). In none of these counts does Plaintiff establish the presence of all the elements necessary for a valid claim. In short, Plaintiff's antitrust claims should be dismissed because they are (1) time barred; (2) Plaintiff lacks standing to assert them; (3) Plaintiff is collaterally estopped from asserting the claims; (4) the claims are barred by the Noerr-Pennington doctrine; (5) there is no concerted action alleged; and (6) Plaintiff fails to sufficient allege monopoly power or the elements of an attempt to monopolize. Plaintiff's fraud claim should be dismissed because he fails to plead the existence of misleading statement or omission (to the extent GHX had a duty to speak out) made by GHX to Plaintiff, or that Plaintiff relied on any statement by GHX. Plaintiff's tortious interference claim should be dismissed

because Plaintiff fails to plead that GHX knew or intentionally interfered with the contracts or business expectancies that the Plaintiff may have had and they are time barred. Plaintiff's prima facie tort claim should be dismissed because his allegations contract the basis for recovery under the theory of prima facie tort.

For these reasons and those reasons more fully set forth in GHX's Suggestions, Defendant GHX requests that this Court dismiss Plaintiff's Petition.

HUSCH & EPPENBERGER, LLC

By _____

John K. Power #35312
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ATTORNEYS FOR DEFENDANT GHX, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was forwarded this 13th day of June, 2008, by first class mail, postage prepaid to:

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

IN THE CIRCUIT COURT OF JACKSON COUNTY
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.,	)	
Plaintiff,	)	
v.	)	Case No. 0816-CV-04217
NOVATION, LLC, et al.,	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF DEFENDANT GHX LLC'S MOTION TO DISMISS PLAINTIFF'S PETITION FOR FAILURE TO STATE A CLAIM

Pursuant to Mo. R. Civ. P. Rule 55.27(a)(6), Defendant GHX, LLC ("GHX") has moved this Court for an Order dismissing Plaintiff's Petition for Failure to State a Claim. Although Plaintiff's Petition is lengthy, consisting of 119 pages and approximately 600 paragraphs, it is by no means clear, concise or well plead. In fact, a great many of the 600 plus paragraphs appear to have nothing to do with any of the claims raised by Plaintiff. For that reason alone, the Court should dismiss Plaintiff's Petition for failure to comply with Mo. R. Civ. P. Rule 55.05. In addition to the Rule 55.05 problem, however, Plaintiff's Petition is deficient in a number of other respects, any one of which would make dismissal appropriate.

Unfortunately, this is not the first experience that this Court or these defendants have had with this plaintiff or his "company." As the defendants in the Novation Motion to Dismiss point out, either this plaintiff or his now dissolved corporation have made multiple attempts to sue multiple parties for essentially the same fact pattern. Here, Plaintiff is attempting his fourth antitrust case alleging essentially the same facts as his first three antitrust cases. The Court

should treat these claims in the same manner that the previous courts have entertained these claims; by dismissing them.

I. PLEADING STANDARDS

Plaintiff's capacity as a pro se litigant does not alter or change the minimum pleading standards that all litigants must meet as set forth in the Missouri Rules of Civil Procedure. *Scher v. Sindel*, 837 S.W.2d 353, 351 (Mo. App. 1992). Although Plaintiff's allegations are to be treated as true and construed favorably to the plaintiff, the conclusions or opinions of the pleader are not. More importantly, if the pleaded facts do not establish the presence of all elements of a valid claim, the Petition must be dismissed. *Id. See also Klemme v. Best*, 941 S.W.2d 943, 495 (Mo. Banc 1997). Of the facts alleged in the Petition, no cognizable claim is stated against GHX and, the Petition should be dismissed.

II. PLAINTIFF'S MISSOURI ANTITRUST CLAIMS FAIL AS A MATTER OF LAW

Counts I, II and III of Plaintiff's Petition seeks money damages and injunctive relief for violation of Sections 1 and 2 of the Missouri Antitrust Statute and conspiracy to violate Section 2 of Missouri Antitrust Statute. Missouri's Antitrust Statute is construed as being consistent with and equal to the federal Antitrust Statute. Mo. Rev. Stat. § 416.14 (2001). In other words, the Missouri Antitrust Statute and the Sherman Act are analogous. *Zipper v. Health Midwest*, 978 S.W.2d 398, 418 (Mo. App. 1998). Accordingly, it is appropriate for this Court to rely upon federal decisions when interpreting the Missouri Antitrust Statute. *Id.*

1. Lipari's Antitrust Claims are Time Barred.

A plaintiff has four years to bring a Missouri Antitrust claim. Mo. Rev. Stat. § 416.131.2. Here, Lipari alleges that Medical Supply Chain ("MSC") attempted to enter the health care supply market sometime in 2002 but that the attempts to enter the market failed

because of the antitrust conspiracy entered into by the defendants. *See* Plaintiff's Petition at ¶ 100. More specifically, Plaintiff's allegations regarding GHX focus on events between November 2001 and April 2003. *See* Plaintiff's Petition at paragraphs 465-470. According to Plaintiff's admissions in his Petition, more than four years have passed since any alleged event or injury accrued. Because of this gap in time, Plaintiff is precluded from bringing claims relating to MSC's alleged attempt to enter the market, including claims that MSC was denied initial capitalization because of an alleged conspiracy among the defendants. Because all allegations regarding GHX occurred or accrued more than four years ago, all antitrust claims against GHX should be dismissed. *See* Plaintiff's Petition at ¶¶ 465-470.

Lipari is apparently aware that his claims are time barred because he attempts to resurrect them by invoking Missouri's Saving Statute. *See* Mo. Rev. Stat. 516.230. This attempt is inappropriate. Under the Missouri Saving Statute, if a claim is timely asserted in one suit and then dismissed without prejudice or by a designation of a non-suit, the plaintiff has one year from that dismissal or non-suit to refile his claims. If timely done, those re-filed claims are not considered to be time barred. Lipari's attempt to invoke the statute is incorrect, however, because the Missouri Saving Statute does not apply to claims under the Missouri Antitrust Statute, which carries its own statutory limitations. *See Boggs v. Farmers State Bank*, 846 S.W.2d 233 (Mo. App. 1993). Even if the Missouri Saving Statute did apply to Lipari's antitrust claims, the claims are still time barred. Here, Lipari inappropriately alleges that his claims are not barred because he has brought this case within one year of the dismissal of the claims in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp. 2d 1316 (D. Kan 2006). Although Lipari claims that the dismissal occurred on March 7, 2007, the dismissal actually occurred one

year earlier, on March 7, 2006. Thus, Lipari's current lawsuit was not filed within the one year time period of the Saving Statute and the claims are time barred.

2. Lipari Does Not Have Standing to Assert Antitrust Claims.

According to Plaintiff's Petition, the defendants conspired to create an alleged hospital supply cartel to overcharge hospitals for medical supplies. Importantly, Plaintiff does not allege that either he or MSC (which is now defunct) is a hospital. Accordingly, Lipari is not and cannot be directly injured by the alleged conspiracy to charge high prices. Given Lipari's Petition, he actually benefits by an agreement to charge high prices because he could either undercut the monopoly price to win business or profit from the purported cartel's pricing umbrella. *See* Petition at ¶ 385. Thus Plaintiff's allegations establish that he lacks standing because he cannot claim a direct injury by the alleged conspiracy to charge high prices. Simply put, if competitors agree to fix prices, then a third competitor cannot be said to have suffered antitrust injury. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 482-83 (1986); *Anesthesia Advantage, Inc. v. Metz Group*, 759 F. Supp. 638, 645-46 (D. Colo. 1991) (Plaintiffs do not have standing to assert against their competitors a price fixing claim, even if the defendants were price fixing).

Lipari's other allegations of antitrust schemes or conspiracies also fail because in none of these schemes does Lipari claim that either he or MSC was harmed. To the extent Plaintiff has alleged that there are inflated care prices or harm to patients or harm to Medicare and Medicaid, or a change in health insurance in Missouri (as well as any alleged efforts to keep these schemes from being revealed), Plaintiff has failed to allege an antitrust injury because he has not suffered any harm from the conduct. As a result, Plaintiff cannot recover for that alleged conduct.

3. Lipari's Allegations Regarding GHX's Purported Defense is in Prior MSC Lawsuits and Does Not State a Cognizable Antitrust Claim.

Although it is difficult to discern because of Plaintiff's practice to monolithically refer to the "defendants" rather than to an actual defendant, it appears that Plaintiff is asserting that he, in his individual capacity, has a "property interest" in MSC's antitrust claims. Plaintiff further alleges that he was wrongfully deprived of this property interest by defendants' conduct in defending the prior lawsuits brought by MSC. *See* Plaintiff's Petition at ¶¶ 103 and 501.

To the extent that Lipari is claiming that his "property interests" in federal antitrust claims were wrongfully taken from him by the defendants, the claim is nonsensical. Here, Lipari's antitrust claims are really the same claims that he raised, and lost, in federal court, only in slightly different clothing. To the extent that Lipari is arguing that defendants' legal defenses and arguments in the previous cases (which resulted in dismissal and sanctions of Lipari/MSC's federal claims) are, in and of themselves, antitrust violations, such a claim is without any basis. Defending oneself, especially when properly done as here, is not wrongful and is not an antitrust violation.

The *Noerr-Pennington* doctrine further mandates dismissal of Lipari's claims to the extent they involve allegations relating to defendants' defense of the prior lawsuits. Even if the outcome of a given litigation adversely affects or eliminates competition, the conducting of the litigation, if done in a "genuine effort to seek redress through the judicial process," does not constitute an antitrust violation. *See Central Telecommunications, Inc. v. TCI Cable Vision, Inc.*, 610 F.Supp. 891, 896 (W.D.Mo. 1985), *Aff'd*, 800 F.2d 711 (8th Cir. 1986). The onus is on the plaintiff to demonstrate the inapplicability of the *Noerr-Pennington* doctrine. If the plaintiff fails to carry this burden, it has failed to state a claim. *Befino v. Civic Center Corp.*, 780 S.W.2d 655, 668 (Mo. App. 1989). Lipari has failed to carry this burden. The failure is fatal to his case.

Lipari also seems to allege that he suffered an antitrust injury because the defendants (again undifferentiated) conspired to have Plaintiff's former counsel, Bret Landrith, disbarred for incompetence and the defendants prevented MSC from obtaining new counsel to represent it because of the sanctions the Court had imposed against MSC in previous proceedings. *See* Plaintiff's Petition at ¶ 103. Plaintiff does not explain how these conspiracies implicate the antitrust laws. Of course, Plaintiff does not, in any way, identify or set out what role GHX played in any of these alleged conspiracies. In fact, Plaintiff does not allege anything that GHX did with regard to previous litigation or any alleged act it took toward Plaintiff or toward any of MSC's counsel or former counsel. For this failure alone, these claims should be dismissed against GHX.

4. Lipari's Claims are Barred by Collateral Estoppel.

Lipari's antitrust claims in this action should be barred by the doctrine of collateral estoppel because he or someone he is in privity with, has raised these same issues in previous litigation. Under Missouri law, the Court considers four elements to determine whether collateral estoppel applies.

> (1) Whether the issue decided in the prior adjudication is identical with the issue presented in the present action;
> (2) Whether the prior adjudication resulted in a judgment upon the merits;
> (3) Whether the party against whom collateral estoppel is asserted is in privity with the party to the prior adjudication;
> (4) Whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue.

City of Ste. Genevieve v. Ste. Genevieve Ready Mix, Inc., 765 S.W.2d 361, 364 (Mo. App. 1989). These factors are met in this case. The first factor is met because Lipari's claims in this case are the same as the issues previously decided by the federal courts involving MSC's antitrust claims. The second element is met because the prior adjudication resulted in a dismissal with prejudice

and therefore constitutes a judgment on the merits with regard to the antitrust claims. The third element is met because Lipari claims he is the assignee of MSC"s claims. As its assignee, Lipari is in privity with MSC. The fourth and final element of collateral estoppel has been met because MSC had a full and fair opportunity to litigation the legal adequacy of the prior claims.

Lipari's Missouri State Antitrust Law claims have already been decided by the previous federal cases. Under Missouri law, the state antitrust claims are to be interpreted in harmony with the federal antitrust laws. *See* Mo. Rev. Stat. § 416.141. Because Lipari's claims appear to mirror the claims MSC made under the Sherman Act in the prior cases, and because those claims were found to be legally deficient, Lipari is collaterally estopped from asserting those claims in this case. *Defino v. Civic Center Corp.*, 718 S.W.2d 505, 510 (Mo. App. 1986).

5. Count I of the Petition Must be Dismissed Because it Fails to Adequately Plead Concerted Action.

Count I of Lipari's Petition asserts a violation of 416.031(1) of the Missouri Antitrust Statute. If Plaintiff is to establish a violation of 416.031(1), he must demonstrate "(1) that there was a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *See Minnesota Ass'n of Nurse Anesthetists v. University Hosp.*, 5 F. Supp. 2d 694, 703 (D. Minn. 1998), *Aff'd*, 208 F.3d 655 (8th Cir. 2000). Moreover, the "contract, combination or conspiracy" aspect of this claim "requires that defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.*

Although Plaintiff repeatedly states that the defendants acted in concert, he fails to allege any facts concerning GHX's actions or with whom it acted in concert. Plaintiff also fails to allege any facts concerning a common scheme relating to any action against the plaintiff or some other unlawful objective. Plaintiff's conclusory statements (as opposed to factual allegations)

are insufficient under Missouri law. *See Love v. St. Louis City Bd. Of Educ.*, 963 S.W.2d, 364, 365 (Mo. App. 1998) ("Mere conclusions of a pleador not supported by factual allegations cannot be taken as true, and therefore, must be disregarded in determining whether the Petition states a claim upon which relief can be granted."). Plaintiff's Petition simply does not even bother to allege facts sufficient to plead an agreement or concerted action relating to group boycotts or allocations of customers.

At best, Plaintiff's Petition does nothing more than recite antitrust language. However, the mere reciting of statutory or case law does not satisfy the pleading requirements. *See TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992) ("a plaintiff must do more than cite relevant antitrust language to state a claim for relief."). The United States Supreme Court requires an antitrust plaintiff to support a claim with "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007). This "plausibility" requirement prevents a plaintiff with "a largely groundless claim from taking up the time of a number of people. . . ." *Id.* at 1966. Thus, Plaintiff's antitrust claims must be dismissed unless the court believes that the Petition contains "enough fact to raise the reasonable expectation that discovery will reveal evidence of a legal agreement." *Id.*

Plaintiff's claim cannot survive this test. He does not, nor could he, allege that Defendant agreed with anyone to do anything to Plaintiff, including harm him. Plaintiff fails to substantiate the alleged conspiracy other than to state that a conspiracy exists. Plaintiff's failure to allege any of the required particulars should result in a dismissal because "bare bones allegations of antitrust conspiracy without any supporting facts" is appropriate for dismissal. *Estate Constr. Co. v. Miller and Smith Holding Co.*, 14 F.3d 213 at 221 (4th Cir. 1994).

This defect is not new for Plaintiff. In *Medical Supply III*, the court held that "[a]lthough plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations." *Medical Supply Chain III*, 419 F. Supp. 2d at 1327. The Court further noted that MSC's prior complaints had also been deficient in that regard. *Id.* Lipari has repeated the same error that MSC committed in its previous lawsuits, by alleging theories without any facts to support those theories. Lipari's claim fails for its pleading defects and his claim of concerted action is barred by collateral estoppel.

6. Counts II and III of the Petition Must be Dismissed Because Plaintiff has Failed to Adequately Plead a Relevant Market or Market Domination.

A plaintiff is required to establish a relevant market to prevail on a monopolization or attempted monopolization claim. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). The reason for this requirement is simple, without a market definition, there is no way to determine to what extent a defendant has the ability to harm competition. *Id.* Here, Lipari appears to have alleged that there are multiple relevant markets in his antitrust claim: the Missouri hospital supply market, the Missouri e-commerce hospital supply market, and the upstream healthcare technology company capitalization market. Plaintiff's proposed markets are legally deficient and cannot provide a basis for a claim under the Missouri Antitrust Act. A proper relevant market consists of all products or services that are reasonably interchangeable. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Adidas Am., Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1102 (D. Kan. 1999) (In order to survive a motion to dismiss, the plaintiff "must allege a relevant market that includes all [products and services] that are reasonably inter-changeable"). Not only must a market definition consist of all interchangeable products, it also must be plausible. If the definition is not plausible, it cannot survive a motion to dismiss. *See TV Communications Network*, 964 F.2d at 1028.

Here, Lipari attempts to limit the market to "hospital supplies through e-commerce" because that is the only way that MSC planned to sell hospital supplies. However, an antitrust plaintiff may not define a market so as to encompass only the practice complained of, this would be circular or at least results oriented reasoning. *Adidas AM.* 64 F. Supp. 2d at 1102. Under the antitrust laws, the proper method for defining the market must be justified through application of the relevant legal principles for the market definition.

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

Id. at 1102.

Additionally, the manner in which Plaintiff defines hospital supplies does not constitute reasonably interchangeable products. *See Community Publishers, Inc. v. Donnay Corp.*, 892 F. Supp. 1146, 1153 (W.D.R. 1985), *Aff'd. Community Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998) ("products belong in the same market when they are reasonably interchangeable for the same uses and thus exhibit a high cross elasticity of demand."). Lipari cannot explain how the reasonably interchanged test is met when his market definition includes such different items as major medical supplies all the way to bandages.

Any plaintiff claiming monopolization must allege that the defendant possesses "monopoly power in the relevant market." A plaintiff claiming attempted monopolization must allege the defendant has a "dangerous probability of success of monopolizing the relevant market." *Full Draw Productions v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999). Here, Plaintiff alleges, without any factual basis, that GHX has 100% of the market for hospital

supplies distributed through electronic marketplaces in the relevant market. Plaintiff also alleges, however, that all defendants have acquired 100% of the market for hospital supplies distributed through electronic marketplaces in the relevant market. *See* Petition at p. 99. He further alleges that all of the defendants have acquired 80% of the market for hospital supplies in the relevant market. *Id.* Based on these allegations, Plaintiff is aggregating the market shares of multiple defendants. This is impermissible. *See H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (the court rejected plaintiff's attempt to show dangerous probability of success by aggregating shares of two defendants).

To the extent Lipari is contending that GHX has market share, his claim still fails because he does not allege how its market share constitutes an antitrust violation. Monopolization requires proof of monopoly power and anticompetitive or exclusionary conduct. *Deauville Corp. v. Federated Department Stores, Inc.*, 756 F.2d 1183 (5th Cir. 1985).

In any event, Lipari's Section 2 claim is barred by the doctrine of collateral estoppel. His allegations that the relevant market consists of the hospital supply market, the ecommerce hospital supply market, the health care capitalization market, have been repeatedly rejected in prior cases. *See Medical Supply III*, 419 F. Supp. 2d at 1327. Accordingly, this Court should dismiss Lipari's Section 2 claim.

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

Plaintiff fraud claim should be dismissed because he has failed to allege the elements of fraud and he fails to allege them with the proper specificity.

Count IV of Plaintiff's Petition purports to state a claim for "fraud and deceit." Although the Petition sets out the legal elements of a fraud claim, it makes no attempt to apply any facts to the legal elements. Plaintiff fails to set out what any specific defendant said or did as it relates to

any of the fraud claims. Missouri Rules of Civil Procedure 55.15 requires that with "all averments or fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Here, there is no particularity of anything with regard to GHX.

Even if Plaintiff stated any of his fraud allegations with particularity, his claim should still be dismissed because he cannot demonstrate the necessary elements. Under Missouri law, a plaintiff must allege and prove the following elements to maintain a claim of fraudulent misrepresentation: (1) 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 and 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. 2002).

Plaintiff's Petition fails to set forth any facts to support any of these six elements. The plaintiff fails to allege, anywhere in his Petition, that GHX made any representation to him. Moreover, a fair reading of Plaintiff's Petition would indicate that he was never ignorant of the falsity of any statement but rather he was the only one who knew that the alleged statements by any of the defendants (to whomever they were uttered) were not true. Because Lipari alleges that he was aware at all times that the various alleged misrepresentations were not true, he could not have relied on any of them. Plaintiff's fraud claim fails to comply with Rule 55.15 or to plead the necessary elements of fraud, Count V should be dismissed.

IV. PLAINTIFF'S TORTIOUS INTERFERENCE CLAIMS ARE BOTH LEGALLY DEFECTIVE AND TIME BARRED

In Count IV of his Petition, Plaintiff asserts a claim for tortious interference with business relations. Plaintiff alleges two business relations which he claims were interfered with by the defendants. The plaintiff claims to have had a relationship with US Bank and he claims to have

had a sales contract with GE and General Electric Transportation Co. *See* Count IV at page 103. Missouri law requires the following elements to be properly alleged in order to maintain a tortious interference claim: (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) an intentional interference by the defendant including or causing the breach of the contract or relationship; (4) absence of justification; and (5) *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 408 (Mo. App. 1996). Nowhere in Plaintiff's Petition is there an allegation that GHX knew about any contract or expectancy between Plaintiff and US Bank or Plaintiff and GE and General Electric Transportation Co. Nor is there any allegation that GHX acted intentionally and without justification so as to interfere in the relationship between Plaintiff and the other entities. The Court should take judicial notice that Lipari and MSC has filed lawsuits with other courts (as well as with this court) claiming that US Bank and GE and General Electric Transportation Co. on their own and without any participation of a third party, breached their agreements with Lipari or MSC.

Under Mo. Rev. Stat. 516.120(4), a party has up to five years after the cause's accrual to assert a tortious interference claim. Lipari's claims regarding US Bank and GE occurred in October of 2002, more than five years ago. *See* Plaintiff's Petition at ¶ 100. As stated above, Lipari cannot save this cause of action by relying upon the Missouri Saving Statute because of his failure to sue within a year of the claim's dismissal of *Medical Supply III*. Accordingly, Count IV should be dismissed.

V. PLAINTIFF'S PETITION DOES NOT AND CANNOT SET OUT A CLAIM FOR PRIMA FACIE TORT

In order to successfully plead a prima facie tort claim, Plaintiff must plead that the defendants' acts intended to injure the plaintiff, they were intentional and they were without justification or sufficient justification. *See Bradley v. Ray*, 904 S.W.2d 302 (Mo. App. 1995). A

prima facie tort occurs when a defendant intentionally undertakes an otherwise lawful act but does so with the intent to cause injury to the plaintiff and is without any recognized justification. *Wilt v. Kansas City Area Transp. Authority*, 629 S.W.2d 669 (Mo. App. 1982). Here, the plaintiff pleads the opposite. Lipari alleges in his Petition that the "acts and activities of defendants are still unlawful and fraudulent." Petition at p. 107. An unlawful and fraudulent act cannot also be an intentional lawful act that is required to assert a prima facie tort. This failure is fatal. *Bradley*, 904 S.W.2d 302. As a result, Count VI should be dismissed.

WHEREFORE, for the reasons stated above, GHX requests that the Court enter an Order dismissing Plaintiff's Petition in its entirety and for all relief to which it is entitled.

HUSCH & EPPENBERGER, LLC

By: _____

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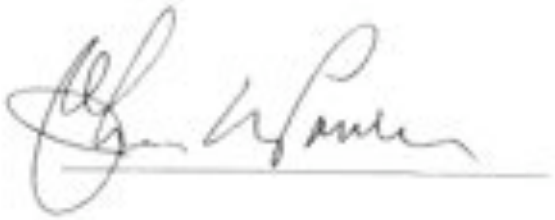
ATTORNEYS FOR DEFENDANT GHX, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was forwarded this 12th day of June, 2008, by first class mail, postage prepaid to:

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



IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	Case No. 0816-CV04217
vs.	)	Division 2
	)	
NOVATION, LLC, et al.	)	
	)	
Defendants.	)	

DEFENDANTS JERRY GRUNDHOFER, RICHARD DAVIS AND ANDREW CECERE'S MOTION TO DISMISS

Defendants Jerry Grundhofer, Richard Davis, and Andrew Cecere, though counsel, file this Motion to Dismiss Plaintiff's Petition. As reasons for this motion, defendants state as follows:

1. This is the sixth lawsuit filed by Mr. Lipari or his failed company from the same set of operative facts.

2. Like his previous suits, Mr. Lipari fails to plead sufficient facts to establish a claim upon which relief may be granted and/or his claims are barred by the applicable statute of limitations. In addition, Lipari's state antitrust claims are barred by collateral estoppel by virtue of the prior dismissals of like claims under the federal antitrust laws. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F.Supp.2d 1316 (D. Kan. 2006); *Medical Supply Chain, Inc. v. U.S. Bancorp*, 2003 WL 21479192 (D. Kan., June 16, 2003).

3. Defendants are contemporaneously filing Suggestions in Support of this Motion and hereby incorporate by reference all arguments made therein. Additionally, defendants incorporate by reference all arguments made by other defendants in their respective Motions to Dismiss and Suggestions in Support.

WHEREFORE, for the above stated reasons, defendants Jerry Grundhofer, Richard Davis, and Andrew Cecere request that this Court dismiss plaintiff's Petition with prejudice and grant all other relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was transmitted via US Mail, postage prepaid, this 13th day of June, 2008, to:

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	Case No. 0816-CV04217
vs.	)	Division 2
	)	
NOVATION, LLC, et al.	)	
	)	
Defendants.	)	

DEFENDANT SHUGHART THOMSON & KILROY'S
SUGGESTIONS IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Shughart Thomson & Kilroy, P.C. ("STK") files these Suggestions in Support of its Motion to Dismiss. In support of its Motion, defendant states as follows:

I. INTRODUCTION

This is the sixth lawsuit instituted by Mr. Lipari or his dissolved company regarding his failure to enter the hospital supplies market. While plaintiff sets forth his version of the tortuous history of this litigation in Appendix One to his Petition,[1] additional history was set forth by Judge Murguia in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316 (D. Kan. 2006), a copy of which is attached as **Exhibit A**.

All but two of the prior cases involving Lipari and his former company Medical Supply Chain, Inc. have been dismissed, sometimes with added sanctions. *Id.*; *see also* 112 Fed. Appx. 730 (10th Cir. 2004), attached as **Exhibit B**. This action likewise lacks merit.

Significantly, it is apparent that STK is a defendant in this matter solely because it has represented U.S. Bank and U.S. Bancorp in the multiple suits filed by Lipari or his company

[1] The defendant does not admit any of the plaintiff's contentions in Appendix One but simply refers the Court to this document for additional background on the repeated litigation over this issue without adding additional length to these Suggestions.

since October 2002.[2] The basis for plaintiff's claim is his inability to secure escrow services from U.S. Bank and a failed real estate transaction with General Electric. There is no allegation – nor can there be – that STK had any involvement in either of these transactions which form the basis of plaintiff's alleged damages.

Lipari's Petition is also just as indecipherable and incoherent as the previous lawsuits. He makes wild accusations involving individuals such as Karl Rove, Kansas Representative Nancy Boyda (and her husband) and implicitly accuses defendants of some involvement in the firing of U.S. Attorney Todd Graves as well as the deaths of two assistant U.S. Attorneys in Texas. Despite pleading approximately 93 pages of "facts" in nearly 600 separate paragraphs prior to setting forth the causes of action, Lipari fails to allege any facts in his causes of action. His Petition suffers from fatal pleading defects; violates Rule 55.05 which requires a short, plain statement of facts;[3] and several of his causes of action are barred by the statute of limitations and/or are not legally actionable. Therefore, his Petition should be dismissed with prejudice.

II. ARGUMENT

A. As the alleged assignee of interests from Medical Supply Chain, Lipari may only acquire those rights held by Medical Supply.

Mr. Lipari brings this suit in his personal capacity as the alleged "Assignee of Dissolved Medical Supply Chain, Inc." STK strongly disputes that Mr. Lipari is a proper assignee to

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[2] Though perhaps included more for effect and aspersion, Lipari also alleges that STK somehow deprived him of counsel during the previously dismissed federal lawsuits when his then-attorney was disbarred, *see In re Landrith*, 124 P.3d 467 (Kan. 2005), attached as **Exhibit C**, or somehow prevented other attorneys from taking his case. Because these suppositions do not form the basis of any cognizable cause of action, STK will resist the temptation of a further response except to say the allegations are wholly conjectural.

[3] In *Medical Supply v. Neoforma, LLC*, 419 F. Supp.2d 1316, 1331 (D. Kan. 2006) Judge Carlos Murguia found, "Plaintiff's 115 page, 613 paragraph complaint falls miles from Rule 8's boundaries." Although Missouri is a fact pleading state, Rule 55.05 also requires a "short and plain statement of facts showing that the pleader is entitled to relief." Lipari's current Petition again "falls miles" from this boundary.

maintain this action. But regardless, 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. Muecke*, 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). Mr. Lipari must stand in Medical Supply's shoes and can occupy no better position than Medical Supply would have if it sued STK directly. *Id.* Thus, "common law principles compel the conclusion that any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari]." *Id.*

B. Count I–Violation of Section 416.031.1 R.S.Mo. (p. 93)

As stated, the allegations in plaintiff's Petition are confusing and incomprehensible. Nonetheless, Count I of plaintiff's Petition must be dismissed for the following reasons:

a. Plaintiff's claim for violation of R.S.Mo. § 416.031.1 is barred by the statute of limitations;

b. Plaintiff's claim is barred by the doctrine of collateral estoppel; and

c. Plaintiff's allegations fail to state a claim upon which relief can be granted.

1. **Under Missouri law, all claims brought pursuant to R.S.Mo. § 416.031.1 must be brought within four years after the cause of action accrues. In October 2002, Medical Supply Chain had actual knowledge of its alleged damages when it filed suit asserting claims under this same statute. Because Lipari's current suit was not filed until February 2008, his claim is barred by the statue of limitations.**

A defendant may seek to dismiss a petition when it is clear from the face of the petition that the action is time barred. *Heintz v. Swimmer*, 922 S.W.2d 772, 775 (Mo. App. E.D. 1996). Missouri law requires all actions under the Missouri Antitrust Act to be commenced "within four years after the cause of action accrued." R.S.Mo. § 416.131(2). A cause of action accrues when

the wrong is sustained and the plaintiff is capable to ascertain damages. *See, e.g., Gaydos v. Imhoff*, 245 S.W.3d 303, 306 (Mo. App. W.D. 2008).

Lipari's cause of action is predicated on the defendants' alleged conspiracy to keep his former company out of the hospital supplies market. But as his Petition notes, Medical Supply brought an identical lawsuit in October 2002, asserting damages for the same alleged antitrust violations he asserts here. *See* Petition, Appendix One, p. 1, ¶¶ 1-5. Plaintiff therefore concedes that Medical Supply Chain's alleged cause of action accrued no later than October 2002 when it filed its first suit for antitrust damages. *See Medical Supply Chain, Inc. v. U.S. Bancorp, et al.*, 2003 WL 21479192 (D. Kan. June 16, 2003) (attached as **Exhibit D**), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004). Lipari did not file this action until February 2008--well after the four-year statute. His cause of action in Count I is therefore barred by the statute of limitations.

Lipari nevertheless attempts to salvage his claim under the savings statute of R.S.Mo. § 516.230 by alleging that he re-filed this action within one year of dismissal in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316 (D. Kan. 2006), *appeal dismissed* 508 F.3d 572 (10th Cir. 2007) (attached as **Exhibit E**). He is wrong. That action was dismissed on March 7, 2006 and the one-year period found in R.S.Mo. § 516.230 does not resurrect his claims. In any event, the savings statute is inapplicable to causes of action that are created by statute and which contain their own statutes of limitation. *Boggs v. Farmers State Bank*, 846 S.W.2d 233 (Mo. App. S.D. 1993).

The face of Lipari's Petition shows that Medical Supply (and Lipari) had actual knowledge that the alleged cause of action accrued at least by October 2002. This action was not filed until February 2008 and, thus, the cause of action for violation of R.S.Mo. § 416.031.1 is time barred.

2. **Under Missouri law, state antitrust statutes are to be construed in accordance with comparable federal statutes. Plaintiff's federal antitrust claims have been previously dismissed on their merits and his state anti-trust claims are therefore barred under the doctrine of collateral estoppel.**

In March 2005, Medical Supply Chain, Inc. filed a third lawsuit for its failure to enter the hospital supplies market. In *Medical Supply Chain, Inc. v. Neoforma, Inc.*, Medical Supply alleged 16 causes of action, including antitrust claims for restraint of trade and monopoly under both federal and Missouri law. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1320 (D. Kan. 2006) (**Exhibit A**). STK was also a defendant in that action and - like here - filed a motion to dismiss Medical Supply's claims.

On March 7, 2006, Judge Carlos Murguia dismissed plaintiff's federal antitrust claims under the Sherman Act for failure to state a claim upon which relief can be granted. *Id.* Judge Murguia declined to exercise jurisdiction over the pendant state claims and dismissed them without prejudice. Nonetheless, his determination of plaintiff's federal antitrust claims on the merits bars Lipari's current state antitrust claims under the doctrine of collateral estoppel/issue preclusion.

Courts apply a four-part test to determine whether an issue is barred by collateral estoppel: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *James v. Paul*, 49 S.W.3d 678, 682-683 (Mo. 2001).

While Lipari, individually, was not a party in the *Neoforma* suit, he is clearly in privity with Medical Supply as the self-proclaimed assignee of Medical Supply's assets. Medical

Supply had a full and fair opportunity to litigate the *Neoforma* matter and Judge Murguia's dismissal of Medical Supply's federal antitrust claims was a dismissal on the merits. *Bachman v. Bachman*, 997 S.W.2d 23, 25 (Mo. App. 1999)(collateral estoppel applies to dismissal for failure to state a claim.). Therefore, the only factor to determine is whether the determined issues in *Neoforma* are identical to those included in the claims Lipari asserts in this suit.

Missouri antitrust law specifically provides that its provisions "shall be construed in harmony with ruling judicial interpretations of comparable federal statutes." R.S.Mo. § 416.141. Missouri courts have consistently looked to federal courts' interpretation of the Sherman Act when construing the provisions of R.S.Mo. § 416.031. *See, e.g., Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582, 586 (Mo. App. E.D. 1987); *Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. 1979) (recognizing that § 416.141 "intended to provide a ready body of precedent for interpreting the law and a single standard of business conduct already known and acquiesced in by businesses in Missouri").

Therefore, federal decisions are very persuasive when determining the adequacy of Lipari's state antitrust claims and, on three separate occasions, a federal court has found Lipari's federal antitrust claims–based on the same set of operative facts as this suit–to be groundless. *Medical Supply Chain, Inc. v. US Bancorp, NA*, 2003 WL 21479192, *3 (D. Kan. 2003) ("[P]laintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1 [of the Sherman Act].") (**Exhibit D**); *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100, *3 (D. Kan. 2004) ("[A]t the most fundamental level, plaintiff's antitrust claims fail.") (**Exhibit F**); *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006), *appeal*

dismissed 508 F.3d 572 (10th Cir. 2007) ("Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations.") (**Exhibit A**).

In *Gregory Marketing Corp. v. Wakefern Food Corp.*, 207 N.J.Super. 607, 504 A.2d 828 (N.J. Super. Ct. 1985), the New Jersey Superior Court squarely decided this same issue and held that collateral estoppel barred the state law antitrust claims following a federal dismissal. In that matter, the plaintiff brought suit in federal court alleging antitrust violations by the defendants. The federal court dismissed the federal claims on the basis that the plaintiff lacked standing and had not suffered antitrust injury. The plaintiff later re-filed his action in state court, asserting state antitrust violations based on the same facts as his earlier federal action.

Like Missouri, New Jersey has enacted as statute requiring that its state antitrust laws be interpreted in accordance with their federal counterparts. Therefore, the defendants moved for dismissal of the state antitrust claims asserting they were barred by the doctrines of *res judicata* and collateral estoppel. Relying upon New Jersey's antitrust statute counseling conformity with federal decisions, the court agreed and stated:

> If that legislative mandate of "harmony," "uniformity" and consistency between the state and federal antitrust statutes is to have any meaning at all, plaintiffs are barred from relitigating here the issues of antitrust standing and injury.

Id., at 623-624[4].

Although Lipari purports to bring this suit under Missouri's antitrust laws, it is the same claim which has been dismissed in three prior federal suits. Because Lipari's state antitrust action presents the same claim as his previous federal suits and R.S.Mo. § 416.141 counsels this

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[4] In *Watkins v. Resorts International Hotel and Casino, Inc.*, 124 N.J. 398, 422 A.2d 592 (N.J. 1991) the New Jersey Supreme Court rejected *Wakefern* to the extent its holding was based upon the incorrect conclusion that dismissal for lack of standing in an earlier suit is not a dismissal on the merits for purposes of *res judicata* and collateral estoppel. *Id.* at 604. In contrast, here, the federal court decisions dismissing the federal antitrust claims were merits dismissals.

Court to rule in conformity with interpretations of the similar federal statutes, he may not attempt to re-litigate those issues in this court. Therefore, Count I is barred by the doctrine of collateral estoppel.

3. **Missouri law requires that petitions contain sufficient facts for each element to show an entitlement to relief. Lipari has failed to allege any facts to show defendants entered into a contract or agreement between two independent actors. Because this is an essential element of his antitrust claim under § 416.031, his claims under Count I must be dismissed.**

Rule 55.05 of the Missouri Rules of Civil Procedure requires that plaintiff's Petition "contain a short and plain statement of the facts showing the pleader is entitled to relief." *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). A party that fails to plead sufficient facts showing entitlement to relief deprives the trial court of jurisdiction in the matter. *Id.* The plaintiff cannot rely on mere conclusions, and courts will disregard conclusions not supported by facts in determining whether or not a petition states a cause of action. *See id.* (citing *Lick Creek Sewer Sys. v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo. App. 1988).

Lipari must plead three elements to state a claim under § 416.031.1: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006) (citing similar 15 U.S.C. § 1).

Like the previous unsuccessful antitrust claims, Lipari has failed to sufficiently plead a contract, combination, or conspiracy among two actors. In Count I of his Petition, Lipari makes the following allegations against STK:

- STK "agreed with Novation, LLC to injure the petitioner";
- STK is a separately incorporated entity from the remaining corporate defendants;

- STK represented clients with conflicting interests against the petitioner;
- STK represented its own organizational interests instead of the interests of its clients;
- STK "injured the petitioner instead of counseling US Bancorp, Inc. to settle with the petitioner paying US Bank [sic]" by not accepting a February 2008 settlement offer "that was neutral and without financial loss for US Bancorp."
- STK elected not to perform professional services for or bill its clients in the hospital supply cartel for legally defending petitioner's antitrust claims and never deposed witnesses or the petitioner.
- STK acted outside the authorization of its clients, outside the scope of lawful conduct, risked the reputational interests, insurability and licensibility [sic] "without proportional compensation solely to acquire narrow and hidden political power in the administration of the state of Missouri and within the Kansas District Court."

Petition, pp. 94, 96-97.

Just as Judge Murguia found in *Neoforma*, "Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations." *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d. at 1327. The only allegation that even remotely resembles a contract, combination or conspiracy is his conclusion that STK "agreed with Novation, LLC to injure petitioner." But simply citing the elements of an antitrust claim and alleging a violation of them is not sufficient. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d at 1327; *TV Comm. Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992) ("Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief."); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must 'provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place.'"); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir.

1952) ("[A] general allegation of conspiracy, without a statement of the facts constituting the conspiracy to restrain trade, its object and accomplishment, is but an allegation of a legal conclusion, which is insufficient to constitute a cause of action."); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (holding that an antitrust complaint must contain enough facts that, when taken as true, show a plausible right to recovery).

In the above cases, allegations like Lipari's were found inadequate under federal rule liberal "notice" pleading standards. If Lipari's allegations fail under the more relaxed standards of notice pleading, they certainly fail under the more stringent "fact pleading" requirements of the Missouri Rules of Civil Procedure. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004) ("Although the petition does not have to plead evidentiary or operative facts showing an entitlement to the relief sought, it must plead ultimate facts demonstrating such an entitlement and cannot rely on mere conclusions.").

The remaining allegations cannot form the basis for an antitrust cause of action. Essentially, Lipari is arguing that actions taken by STK in defending multiple lawsuits *filed by him or his company* have caused him damage or have damaged STK's clients. First, Lipari lacks standing to assert that STK's actions have damaged its clients. Next, it is beyond all rational thought even to consider that Lipari could maintain a cause of action for STK's defense of a lawsuit (1) that is by definition an adversarial proceeding; (2) that was initiated by Lipari; and (3) where courts have found the prior actions frivolous. Moreover, there is no allegation that STK's actions are even remotely related to the sale of hospital supplies or that STK has any relation to the hospital supplies industry.

Thus, even if the Court concludes that Lipari's state antitrust allegations are not barred by collateral estoppel, his claims still fail. Lipari's Petition fails to state adequate facts on an

essential element of his claim. Therefore, Count I of his Petition should be dismissed, pursuant to Rule 55.27(a)(6) of the Missouri Rules of Civil Procedure.

C. Count II–Violation of R.S.Mo. § 416.031.2 (p. 98)

In Count II of his Petition, Lipari asserts a cause of action for violation of R.S.Mo. § 416.031.2, alleging "the defendants have a monopoly or have attempted to monopolize the subject relevant markets." Petition, p. 98. Lipari's claim in Count II also fails because:

a. His state antitrust claim under § 416.031.2 is barred by the statute of limitations;

b. His state antitrust claim under § 416.031.2 is barred by the doctrine of collateral estoppel; and

c. He fails to plead sufficient facts to establish a claim upon which relief may be granted in that:

i. The allegations are mere conclusions; and

ii. He fails to define a relevant market.

For these reasons, Count II of plaintiff's Petitions should be dismissed with prejudice.

1. **Missouri law requires all claims under R.S.Mo. § 416.131(2) to be commenced within four years after the cause of action accrues. Medical Supply Chain had actual knowledge of its alleged damages in October 2002 and brought suit under this same statute for these alleged damages. Because Lipari did not file this suit until February 2008, his claim in Count II is barred by the statute of limitations.**

All claims under Missouri's antitrust statutes must be commenced "within four years after the cause of action accrued." R.S.Mo. § 416.131(2). As noted in Section 2(a) above, Lipari had actual knowledge of the alleged cause of action under the Missouri antitrust laws at least in October 2002, when Medical Supply Chain filed suit for alleged antitrust violations. The facts and analysis in 2(a) above concerning the application of the statute of limitations to Lipari's claims for Count I also apply to Count II of plaintiff's Petition. Rather than restating these

arguments, STK incorporates by reference its arguments and analysis made in Section 2(a) above.

For the reasons set forth in Section 2(a) above, plaintiff's claim in Count II of his Petition is barred by the statute of limitations and should be dismissed with prejudice.

2. **Missouri antitrust statutes must be construed in accordance with comparable federal statutes. Plaintiff's federal antitrust claims based on the same cause of action have been previously dismissed on their merits. Therefore, the corresponding state antitrust claims are barred by collateral estoppel.**

As noted in Section 2(b) above, Missouri law specifically provides that its antitrust statutes "shall be construed in harmony with judicial interpretations of comparable federal statutes." R.S.Mo. § 416.141. Missouri courts look to federal courts' interpretations of the Sherman Act when construing the provisions of R.S.Mo. § 416.031. *See, e.g., Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582, 586 (Mo. App. E.D. 1987); *Fischer, Spehuel, Herzwurm & Assoc., Inc. v. Forrest T. Jones and Co.*, 586 S.W.2d 310, 313 (Mo. 1979). In order to maintain a cause of action pursuant to R.S.Mo. § 416.031.2, the plaintiff must demonstrate (1) the possession of monopoly power in the relevant market and (2) the willful acquisition of maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. *See, e.g., Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1328 (D. Kan. 2006) (referring to similar elements in 15 U.S.C. § 2).

On three separate occasions the United States District Court for the District of Kansas has found that allegations of a monopoly to control the hospital supply market is an insufficient description of a relevant market. *See Medical Supply Chain, Inc. v. U.S. Bancorp, N.A., et al.*, 2003 WL 21479192, at *3 (D. Kan. 2003) (**Exhibit D**); *Medical Supply Chain, Inc. v. General Electric Co., et al.*, 2004 WL 956100, at *3 (D. Kan. 2004) (**Exhibit F**), *aff'd. in part, rev'd in*

part, 144 Fed. Appx. 708, 716 (10th Cir. 2005) (**Exhibit G**); *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1328 (D. Kan. 2006) (**Exhibit A**). In each of these cases, Medical Supply Chain alleged federal antitrust actions for violation of Section 2 of the Sherman Act. Medical Supply had a full opportunity to litigate these issues and all of the decisions found the allegations insufficient and were decisions based on the merits presented. As the alleged assignee of Medical Supply Chain, Inc.'s cause of action, Lipari is a party in privity with Medical Supply Chain. For these reasons, and for the reasons set forth in Section 2(b) above, plaintiff's claims are barred by the doctrine of collateral estoppel, and Count II of his Petition should be dismissed with prejudice.

3. **Count II of plaintiff's Petition fails to identify sufficient facts to state a claim upon which relief may be granted.**

Count II of Lipari's Petition fails to allege sufficient facts to support a cause of action under R.S.Mo. § 416.031.2. He simply alleges conclusions for each necessary element and fails to plead any facts to support his claim. Moreover, Lipari fails to plead sufficient facts to identify a relevant market to support his antitrust claim. Therefore, Count II of Plaintiff's Petition should be dismissed with prejudice.

a. **Missouri law requires that petitions contain sufficient facts for each element to show an entitlement to relief. Count II of Lipari's Petition contains no allegations of fact, but only mere conclusions. Therefore, Lipari has failed to allege sufficient facts to maintain a cause of action under § 416.031.2 and Count II should be dismissed with prejudice.**

The Missouri Rules of Civil Procedure require that a petition contain sufficient facts to show the pleader is entitled to relief. *See* Mo. R. Civ. P. 55.05. The plaintiff must allege facts and not conclusions. Averments of mere conclusions will be disregarded in a court's analysis as to whether the petition states a cause of action. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). Count II of Lipari's Petition is completely devoid of factual assertions.

Lipari simply sets forth the legal elements for a cause of action under Section 416.031.2 and makes a conclusory allegation that mirrors each element. For example, in order to maintain a claim under § 416.031.2, Lipari must allege sufficient facts to show the willful acquisition or maintenance of a monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d at 1328. As to this element, Lipari states on p. 100:

> **(2) defendants willfully acquired and maintained their market power.**
>
> The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.
>
> The petitioner avers the defendants have acted intentionally and willfully to acquire and maintain their market power in the subject area markets.
>
> **a. The defendants did not enjoy market growth or development as a consequence of**
>
> The petitioner avers the defendants did not enjoy market power growth or development as a consequence of any of the following reasons:
>
> **i. a superior product**
>
> The petitioner avers the defendants did not enjoy market power growth or development as a consequence of a superior product.
>
> **ii. business acumen**
>
> The petitioner avers the defendants did not enjoy market growth or development as a consequence of business acumen.
>
> **iii. or historic accident**
>
> The petitioner avers the defendants did not market power growth or development as a consequence of historic accident.
>
> **b. defendants' monopoly power was not obtained for**
>
> The petitioner avers the defendants' monopoly power was not obtained for the following reasons:

i. a valid business reason

The petitioner avers the defendants' monopoly power has not resulted or been created out of a valid business reason.

ii. or concern for efficiency

The petitioner avers the defendants' monopoly power has not resulted or been created out of a concern for efficiency.

Petition, pp. 100-101.

These allegations are wholly insufficient to allege a cause of action against STK under § 416.031.2. It is well established that even under the liberal notice pleading standards of federal courts, a plaintiff must do more than cite relevant antitrust language to state a claim for relief. *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006); *TV Comm., Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1982); *Estate Constr. Co. v. Miller and Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994); *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1953); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Moreover, in Missouri, allegations that contain mere conclusions are insufficient and will be disregarded when considering whether a plaintiff has properly pled a cause of action. *See Brock v. Blackwood*, 143 S.W.3d at 56. Therefore, Count II should be dismissed with prejudice.

b. **Lipari must identify a relevant market in order to state an antitrust claim under § 416.031.2. "Hospital Supplies" does not identify a product that is reasonably interchangeable and has a cross-elasticity of demand. Therefore, Lipari has failed to identify a relevant market and has failed to state a claim for violation of § 416.031.2.**

Even if Lipari's general conclusory allegations somehow meet the basic requirements of Rule 55.05, these allegations are still insufficient to maintain an action under § 416.031.2 because it does not define the relevant market.

In order to maintain a cause of action under § 416.031.2, it is Lipari's burden to properly plead the boundaries of an alleged relevant market or markets. *Adidas America, Inc. v. National Collegiate Athletic Assn.*, 64 F. Supp.2d 1097, 1103 (D. Kan. 1999). The relevant market must be defined by "the interchangeability of or the cross-elasticity of demand between the product in question and substitutes for it." *Id.*, quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502 (1962). Failure to define a relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand renders the Petition insufficient and a motion to dismiss may be granted. *See Adidas America, Inc. v. National Collegiate Athletic Assn.*, 64 F. Supp.2d at 1102. Products belong in the same market when they are reasonably interchangeable for the same uses and must exhibit a high cross-elasticity of demand. *See Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1153 (W.D. Ark. 1995). As stated by the Eighth Circuit, "defining a relevant market is primarily a process of describing those groups of producers which, because of similarity of their products, have the ability–actual or potential–to take significant amounts of business away from each other." *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987). Products have a high cross-elasticity if consumers will shift from one to the other in response to changes in the relative costs. *Community Publishers, Inc. v. Donray Corp.*, 892 F. Supp. at 1153 n.7.

Plaintiff has failed to properly define a relevant market to support his antitrust claim. In fact, plaintiff has failed to identify any specific product. The entirety of plaintiff's claim refers to "hospital supplies." Plaintiff fails to identify any specific product which would constitute "hospital supplies" or how the "hospital supplies" he seeks to sell would be interchangeable and subject to a high cross-elasticity with the "hospital supplies" alleged to be sold by the defendants. Lipari's failure to identify a single product- much less a reasonably interchangeable one – makes

it impossible for him to identify a proper relevant market for his antitrust claims. Accordingly, Count II of his Petition should be dismissed with prejudice.

D. Count III–Conspiracy to violate § 416.031(2) (p. 103)

In Count III, plaintiff attempts to allege a violation of § 416.031.2 by contending the defendants have conspired to create a monopoly. But plaintiff's allegations in Count III fail to allege any facts, much less sufficient facts to support a cause of action. Plaintiff simply sets forth the elements for conspiracy and states under each element "The Petitioner hereby re-alleges the averments of facts in this Complaint and its attachments." While Rule 55.12 allows Lipari to adopt by reference other parts of his Petition, a reference must be sufficiently clear and explicit to advise defendants of the issue tendered for trial. *See Hester v. Barnett*, 723 S.W.2d 544, 561 (Mo. App. W.D. 1987). Lipari's adoption by reference encompasses 102 pages of issues ranging from disbarment of plaintiff's former counsel to an individual named Judy Jewsome not being allowed to sit for the Kansas Bar to Karl Rove's involvement in the alleged hospital supply conspiracy. By incorporating all of his prior allegations, the plaintiff has not concisely set forth the issue to be tendered for trial, and his incorporation by reference is therefore improper.

Additionally, a cause of action for conspiracy to commit antitrust violations under § 416.031.2 is subject to a four-year statute of limitations. As set forth in Sections 2(a) and 2(b) above, plaintiff's state antitrust claims are barred by the statute of limitations. Rather than restating those arguments again here, defendant incorporates by reference those arguments made in Sections 2(a) and 2(b) above.

For these reasons, Count III should be dismissed with prejudice.

E. Count IV–Tortious interference with business relations (p. 103)

In Count IV of his Petition, plaintiff alleges that STK interfered with Medical Supply Chain's individual representative candidate trust accounts with U.S. Bank and a real estate

transaction between Medical Supply Chain and General Electric Transportation Company. *See* Petition, p. 103. Plaintiff's claims fail because:

a. Plaintiff has failed to allege sufficient facts to support a cause of action; and

b. Plaintiff's claims relating to the escrow accounts are barred by the statute of limitations.

Therefore, the Court should dismiss Count IV of plaintiff's Petition with prejudice.

1. **The Missouri Rules of Civil Procedure require plaintiff to plead sufficient facts for each element of his claim. Plaintiff simply makes conclusory allegations that purport to satisfy each element. Because the plaintiff has failed to plead any facts to support his cause of action, his claim must be dismissed.**

As repeatedly set forth above, the Missouri Rules of Civil Procedure require that a petition set forth facts which demonstrate the pleader is entitled to relief. *See* Rule 55.05; *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). Conclusory allegations not supported by facts will be disregarded in determining whether a petition sets forth sufficient facts to maintain a cause of action. *See id.* citing *Lick Creek Sewer System v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo. App. 1988).

In order to maintain a cause of action for tortious interference with contract or business expectancy, Lipari must allege facts to show (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. 1993). While Lipari identifies the contract or business expectancy as the supposed escrow agreement with U.S. Bank and the real estate contract with G.E., he fails to specifically allege any facts as to STK's knowledge or supposed involvement in the remainder of the elements for this cause of action. Rather, he simply sets forth the legal elements and mirrors the elements with a conclusory allegation that purportedly

satisfies the claim. His allegations violate Rule 55.05 of the Missouri Rules of Civil Procedure and his conclusory allegations are disregarded when determining whether he has properly stated a cause of action. *See Brock v. Blackwood*, 143 S.W.3d at 56.

For this reason, Count IV of Lipari's petition should be dismissed with prejudice.

2. **Claims for tortious interference with business expectancy must be brought within five years of the date the cause of action accrues. Plaintiff's alleged cause of action as to the escrow accounts accrued in 2002 and he did not file this claim until February 2008. Therefore, his claim for tortious interference with business expectancy as to the escrow accounts is barred by the statute of limitations.**

A claim for tortious interference with contract or business expectancy must be brought within five years of the action's accrual. R.S.Mo. § 516.120(4); *D'Arcy and Associates, Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 29 (Mo. App. W.D. 2004). A cause of action accrues when the plaintiff knows or should know of the wrong and can ascertain damage. *Id.*

Lipari alleges STK tortiously interfered with an escrow agreement between U.S. Bank and Medical Supply in 2002, purportedly at the time STK was engaged to defend U.S. Bank (which had allegedly already breached the escrow agreement). Petition, p. 103. The Petition also demonstrates that Medical Supply had *actual* knowledge of its alleged damages from the putative escrow transaction in October 2002, when it filed the first of many lawsuits related to the transactions. *See* Petition, Appendix 1, p. 1. Because Lipari did not file this suit until February 2008, his claim for tortious interference, as it relates to the supposed escrow transaction, is beyond the five-year statute and is therefore time barred.

F. Count V–Fraud

Plaintiff's claim for fraud must be dismissed as he fails to allege any facts which meet the particularity pleading requirement of Rule 55.15 of the Missouri Rules of Civil Procedure.

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). Moreover, Rule 55.15 requires that all allegations of fraud be pled with particularity. As stated in *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 126 (Mo. App. W.D. 1993):

> Every essential element of fraud must be plead, and failure to plead any element renders the claim defective and subject to dismissal. (Citations omitted.) All averments of fraud, except malice, intent, knowledge and any other condition of the mind, are to be stated with particularity. (Citations omitted.) In other words, the fraud must clearly appear from the allegations of fact, and be independent of conclusions. (Citations omitted.)

Lipari's Petition alleges no facts to support his fraud claim. For his allegations regarding a false representation, Lipari re-alleges his prior averments and states, "Defendants were engaged in concealed fraudulent conduct." Petition, p. 105. This allegation is devoid of any fact, much less facts with such particularity "to be independent of conclusions." *Id.* Lipari's allegations as to the other elements of fraud are equally cryptic. His allegations fail to meet the basic pleading requirements of Rule 55.05, much less the heightened requirements of Rule 55.15. Neither the parties nor the Court should be forced to scour the Petition in an effort at guesswork as to what plaintiff believes constitutes the substance of his claims. Because Lipari has failed to allege sufficient facts to support his fraud claim, Count V should be dismissed with prejudice.

G. Count VI–*Prima Facie* Tort

On p. 106 of his Petition, Lipari asserts a cause of action for *prima facie* tort. In order to maintain such a claim, Lipari must allege facts to show: (1) an intentional lawful act by defendant; (2) defendant's intent to injure the plaintiff; (3) injury to the plaintiff; and (4) an absence of or insufficient justification for defendant's act. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993); *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc). *Prima facie* tort is not a catchall cause of action or a duplicative remedy. Like any tort, it has specialized elements which must be met to maintain the cause of action. *Nazeri*, 860 S.W.2d at 315.

Lipari's claim for *prima facie* tort should be dismissed because he has failed to plead an intentional lawful act by the defendant. Rather, Lipari alleges:

> To whatever extent said activities of Defendants including procuring the disbarment and interference with the petitioner's potential may not violate antitrust laws or tortuously (*sic*) interfere with contract or business expectancy, *said acts and activities of Defendants are still unlawful and fraudulent.*

Petition, p. 107 (emphasis added).

Plaintiff's allegations specifically state that defendants' alleged misconduct was "unlawful and fraudulent." But a claim for *prima facie* tort is based on a *lawful* act by the defendant. Therefore, Lipari has failed to plead an essential element of *prima facie* tort. *Nazeri*, 860 S.W.2d at 315 (holding that allegations that a defendant's statements were "untrue" failed to state a claim for *prima facie* tort).

Additionally, Lipari's allegations again fall short of the factual pleading requirements found in Rule 55.05 of the Missouri Rules of Civil Procedure. For his *prima facie* tort claim, Lipari simply sets forth each element and makes a conclusory allegation that purports to satisfy

the element. These conclusory allegations are insufficient and should be disregarded. *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004).

Lipari has failed to allege sufficient facts to support his claim for *prima facie* tort. The Court should therefore dismiss Count VI of his Petition with prejudice.

III. INCORPORATION BY REFERENCE

Defendant STK incorporates by reference the arguments, authorities, motions and suggestions of all defendants.

IV. CONCLUSION

WHEREFORE, for the above stated reasons, defendant Shughart, Thomson & Kilroy requests the Court dismiss plaintiff's Petition with prejudice and grant all other relief to which the defendant is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was delivered via United States mail, postage prepaid, this 13th day of June, 2008, to:

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2309375.03

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	Case No. 0816-CV04217
vs.	)	Division 2
	)	
NOVATION, LLC, et al.	)	
	)	
Defendants.	)	

DEFENDANTS JERRY GRUNDHOFER, RICHARD DAVIS AND ANDREW CECERE'S SUGGESTIONS IN SUPPORT OF MOTION TO DISMISS

Defendants Jerry Grundhofer, Richard Davis and Andrew Cecere ("defendants") file these Suggestions in Support of their Motion to Dismiss. In support of their motion, defendants state as follows:

I. INTRODUCTION

This is the sixth lawsuit instituted by Mr. Lipari or his dissolved company regarding his alleged inability to enter the hospital supplies market. Although the plaintiff sets forth his version of the tortuous history of this litigation in Appendix One to his Petition,[1] additional history was set forth by Judge Murguia in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316 (D. Kan. 2006) (a copy of which is attached as Exhibit "A").

All but two of the prior cases involving Lipari and his company Medical Supply Chain, Inc. have been dismissed, sometimes with added sanctions for filing frivolous claims. *Id.*; *see also* 112 Fed. Appx. 730 (10th Cir. 2004) (attached as Exhibit "B"). This action likewise lacks merit.

[1] The defendants do not admit any of the plaintiff's contentions in Appendix One but simply refer the Court to this document for additional background on the repeated litigation over this issue without adding additional length to these Suggestions.

In this suit, rather than asserting claims against the corporations for whom they work, Lipari names individuals Jerry Grundhofer (U.S. Bancorp's CEO); Richard Davis (U.S. Bank's CEO); and Andrew Cecere (U.S. Bancorp's CFO) as defendants. And, while the alleged operative "facts" are no different from the prior unsuccessful complaints, the tale that is told continues to become more fanciful. He makes wild accusations involving individuals such as Karl Rove, Kansas Representative Nancy Boyda (and her husband), and implicitly accuses defendants of some involvement in the firing of U.S. Attorney Todd Graves as well as the deaths of two assistant U.S. Attorneys in Texas. (Petition, ¶¶ 121-39, 140-44, 192-97, 225, 326, 543-45.) He further speculates that the Missouri governor's office is involved in a cover-up (*id.* ¶¶ 247-65) and that the Kansas government should be brought to task for events occurring there, some of which seem oddly far afield (*id.* ¶¶ 389-415).

Despite pleading approximately 93 pages of so-called "facts" in nearly 600 separate paragraphs before setting out his causes of action,[2] Lipari fails to allege any facts within the separate counts. His Petition suffers from fatal pleading defects and several of his causes of action are barred by the statute of limitations and/or are not legally actionable. Therefore, his entire Petition should be dismissed with prejudice for any or all of the following reasons:

1. Count I- Violation of R.S.Mo. § 416.031.1

   a. Plaintiff's claim for violation of R.S.Mo. § 416.031.1 is barred by the statute of limitations;

   b. Plaintiff's state antitrust claim is barred by the doctrine of collateral estoppel;

[2] In *Medical Supply v. Neoforma, LLC*, 419 F.Supp.2d 1316, 1331 (D. Kan., 2006) Judge Carlos Murgia found, "Plaintiff's 115 page, 613 paragraph complaint falls miles from Rule 8's boundaries." Although Missouri is a fact pleading state, Rule 55.05 also requires a "*short and plain* statement of facts showing that the pleader is entitled to relief." Thus, Lipari's current Petition also "falls miles" from the boundaries of Rule 55.05.

c. Plaintiff's allegations fail to state a claim upon which relief can be granted; and

d. The defendants are immune from liability.

2. Count II- Violation of R.S.Mo. § 416.031.2

a. Plaintiff's claim for violation of R.S.Mo. § 416.031.2 is barred by the statute of limitations;

b. Plaintiff's state antitrust claim is barred by the doctrine of collateral estoppel; and

c. Plaintiff fails to plead sufficient facts to establish a claim upon which relief may be granted in that:

i. The allegations are mere conclusions; and

ii. He fails to define a relevant market.

3. Count III- Conspiracy pursuant to § 416.031.2

a. Plaintiff's claim under § 416.031.2 is barred by the statute of limitations; and

b. Plaintiff fails to allege sufficient facts to establish a claim upon which relief may be granted.

4. Count IV- Tortious Interference With Contract or Business Expectancy

a. Plaintiff has failed to allege sufficient facts to state a claim upon which relief may be granted;

b. Defendants are not subject to personal liability under the Corporate Director/Officer Privilege; and

c. Plaintiff's claims as to the escrow transaction are barred by the statute of limitations.

5. Count V- Fraud

a. Plaintiff fails to allege facts with sufficient particularity to establish a fraud claim upon which relief may be granted; and

b. Plaintiff generally fails to allege any facts to establish a claim upon which relief may be granted.

6. Count IV- *Prima Facie* Tort.

a. Plaintiff fails to allege a lawful act committed by the defendants; and

b. Plaintiff generally fails to allege facts to establish a claim upon which relief may be granted.

II. ARGUMENT

A. As the alleged assignee of interests from Medical Supply Chain, Lipari may only acquire those rights held by Medical Supply.

Mr. Lipari brings this suit in his personal capacity as the alleged "Assignee of Dissolved Medical Supply Chain, Inc." The defendants strongly dispute that Mr. Lipari is a proper assignee to maintain this action. But regardless, 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 *Carland 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). Mr. 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.* Thus, "common law principles compel the conclusion that any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari]." *Id.*

B. Count I - Violation of Section 416.031.1 R.S.Mo. (p. 93)

As stated, the allegations in plaintiff's Petition are disjointed and oftentimes incomprehensible. But his claim against defendants Davis, Grumdhofer and Cecere for violation of R.S.Mo. § 416.031.1 appears to rest solely on his allegation that they conspired with Novation, LLC to injure the plaintiff. (p. 94). Nonetheless, Count I of plaintiff's Petition must be dismissed for the following reasons:

a. Plaintiff's claim for violation of R.S.Mo. § 416.031.1 is barred by the statute of limitations;

b. Plaintiff's claim is barred by the doctrine of collateral estoppel;

c. Plaintiff's allegations fail to state a claim upon which relief can be granted; and

d. The defendants are immune from liability.

1. **Under Missouri law, all claims brought pursuant to R.S.Mo. § 416.031.1 must be brought within four years after the cause of action accrues. In October 2002, Medical Supply Chain had actual knowledge of its alleged damages and cause of action when it originally filed suit under this same statute. Because Lipari's current suit was filed in February 2008, his claim is barred by the statue of limitations.**

A defendant may seek to dismiss a petition when it is clear from the face of the petition that the action is time-barred. *Heintz v. Swimmer*, 922 S.W.2d 772, 775 (Mo. App. E.D. 1996). Missouri law requires all actions under the Missouri antitrust Act to be commenced "within four years after the cause of action accrued." R.S.Mo. § 416.131(2). A cause of action accrues when the wrong is sustained and the plaintiff is able to ascertain its damages. *See, e.g., Gaydos v. Imhoff*, 245 S.W.3d 303, 306 (Mo. App. W.D. 2008).

As noted above, plaintiff's cause of action is predicated on the defendants' alleged conspiracy to keep his former company out of the hospital supplies market. But as his Petition notes, Medical Supply brought an identical lawsuit in October 2002, asserting damages for the same alleged antitrust violations he asserts here. *See* Petition, Appendix One, p. 1, ¶¶ 1-5. Therefore, from the face of plaintiff's Petition it is clear that Medical Supply Chain's alleged cause of action accrued no later than October 2002 when it filed its first suit for antitrust damages. *See Medical Supply Chain, Inc. v. U.S. Bancorp, et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003) (Exhibit "C"), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004) (Exhibit "B"). Plaintiff did not file this action until February 2008–well after the four-year statute–and his cause of action for violation of R.S.Mo. § 416.031.1 is barred by the statute of limitations.

Lipari nevertheless attempts to save his claim under the savings statute of R.S.Mo. § 516.230 by alleging that he refiled this action within one year of dismissal in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316 (D. Kan. 2006), *appeal dismissed* 508 F.3d 572 (10th Cir. 2007) (Exhibit "D"). He is wrong. That action was dismissed on March 7, 2006 and the one-year period found in R.S.Mo. § 516.230 does not resurrect his claims. In any event, the savings statute in § 516.230 cannot save his claim because it is inapplicable to causes of action that are created by statute and which contain their own statutes of limitation. *Boggs v. Farmers State Bank*, 846 S.W.2d 233 (Mo. App. S.D. 1993).

The face of Lipari's Petition shows that Medical Supply had actual knowledge that its alleged cause of action accrued at least by October 2002. This action was not filed until February 2008. Thus, the cause of action for violation of R.S.Mo. § 416.031.1 is time-barred.

2. **Under Missouri law, state antitrust statutes are to be construed in accordance with comparable federal statutes. Plaintiff's federal antitrust claims have been previously dismissed on their merits and are therefore barred under the doctrine of collateral estoppel.**

In March 2005, Medical Supply Chain, Inc. filed its third cause of action from its failure to enter the hospital supplies market. In *Medical Supply Chain, Inc. v. Neoforma, Inc.*, Medical Supply brought 16 causes of action, including antitrust claims for restraint of trade and monopoly under both federal and Missouri law. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1320 (D. Kan. 2006). In that case, Jerry Grundhofer and Andrew Cecere were also defendants and filed a motion to dismiss Medical Supply's claims.

On March 7, 2006, Judge Carlos Murguia dismissed plaintiff's federal antitrust claims under the Sherman Act for failure to state a claim upon which relief can be granted. *Id.* Judge Murguia declined to exercise jurisdiction over the pendant state claims and dismissed them

without prejudice. Nonetheless, his determination of plaintiff's federal antitrust claims on the merits bars Lipari's current state antitrust claims under the doctrine of collateral estoppel.

Courts apply a four-part test to determine whether an issue is barred by issue preclusion: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *James v. Paul*, 49 S.W.3d 678, 682-683 (Mo. 2001).

Although Lipari was not a party to the *Neoforma* suit, he is clearly in privity with Medical Supply as the alleged assignee of this cause of action. Medical Supply had a full and fair opportunity to litigate the *Neoforma* matter and Judge Murguia's dismissal of Medical Supply's federal antitrust claims was a dismissal on the merits. Therefore, the only factor to determine is whether the issues in the *Neoforma* matter are identical to the claims brought by Lipari in this suit.

Missouri antitrust law specifically provides that its provisions "shall be construed in harmony with ruling judicial interpretations of comparable federal statutes." R.S.Mo. § 416.141. Missouri courts have consistently looked to federal courts' interpretation of the Sherman Act when construing the provisions of R.S.Mo. § 416.031. *See, e.g., Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582, 586 (Mo. App. E.D. 1987); *Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. 1979) (recognizing that § 416.141 "intended to provide a ready body of precedent for interpreting the law and a single standard of business conduct already known and acquiesced in by businesses in Missouri").

Therefore, federal decisions are very persuasive when determining the adequacy of Lipari's state antitrust claims and, on three separate occasions, a federal court has found Lipari's federal antitrust claims based on the *same* set of operative facts to be groundless. *Medical Supply Chain, Inc. v. US Bancorp, NA*, 2003 WL 21479192, *3 (D. Kan. 2003) ("[P]laintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1 [of the Sherman Act]."). (Exhibit "C"); *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100, *3 (D. Kan. 2004) ("[A]t the most fundamental level, plaintiff's antitrust claims fail.") (Exhibit "E"); *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006) ("Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations.") (Exhibit "A").

In *Gregory Marketing Corp. v. Wakefern Food Corp.*, 207 N.J. Super. 607, 504 A.2d 828 (N.J. Super. Ct., 1985), the New Jersey Superior Court decided a similar issue. In that matter, the plaintiff brought suit in federal court alleging antitrust violations by the defendants. The federal court dismissed the federal claims on the basis that the plaintiff lacked standing and failed to suffer an antitrust injury. The plaintiff later re-filed his action in state court, asserting state antitrust violations based on the same facts as his earlier federal action.

Like Missouri, New Jersey has enacted as statute stating that its state antitrust laws must be interpreted in accordance with their federal counterparts. Therefore, the defendants moved for dismissal of the state antitrust claims asserting they were barred by the doctrines of res judicata and collateral estoppel. The court agreed and stated:

> If that legislative mandate of "harmony," "uniformity" and consistency between the state and federal antitrust statutes is to have any meaning at all, plaintiffs are barred from relitigating here the issues of antitrust standing and injury.

Id. at 623-24[3].

Although Lipari purports to bring this suit under Missouri's antitrust laws, R.S.Mo. § 416.141 counsels this Court to rule in conformity with interpretations of the similar federal statutes. They must be viewed under the same analysis of his prior federal claims and, thus, present the same issues as his prior failed suits. Therefore, his state antitrust claims are barred by the doctrine of collateral estoppel and should be dismissed.

3. **Missouri law requires that petitions contain sufficient facts for each element to show an entitlement to relief. Lipari has failed to allege any facts to show defendants entered into a contract or agreement between two independent actors. Because this is an essential element of his antitrust claim under § 416.031, his claims under Count I must be dismissed.**

Rule 55.05 of the Missouri Rules of Civil Procedure requires that plaintiff's Petition "contain a short and plain statement of the facts showing the pleader is entitled to relief." *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). A party that fails to plead [illegible] facts showing entitlement to relief deprives the trial court of jurisdiction in the matter. *Id.* The plaintiff cannot rely on mere conclusions, and courts will disregard conclusions not supported by facts in determining whether or not a petition states a cause of action. *See id.* (citing *Lick Creek Sewer Sys. v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo. App. 1988).

Lipari must plead three elements to state a claim under § 416.031.1: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. *See Medical Supply*

[3] In *Watkins v. Resorts International Hotel and Casino, Inc.*, 124 N.J. 398, 591 A.2d 592 (N.J. 1991) the New Jersey Supreme Court rejected the *Wakefern* decision to the extent its holding was based upon an incorrect conclusion that dismissal for lack of standing in an earlier suit is a dismissal on the merits for purposes of *res judicata* and collateral estoppel. *Id.* at 604. That same concern is not present here because the prior dismissals of the federal antitrust claims were plainly on the merits.

Chain, Inc. v. Neoforma, Inc., 419 F. Supp.2d 1316, 1327 (D. Kan 2006) (citing similar 15 U.S.C. § 1).

Like the previous unsuccessful antitrust claims, Lipari has failed to sufficiently plead a contract, combination, or conspiracy among two actors. In Count I of his Petition, Lipari merely alleges: "The petitioner avers the following defendants have agreed with Novation, LLC to injure the plaintiff" and he goes on to list as defendants Messrs. Davis, Grundhofer, and Cecere. Petition, p. 94.

Judge Murguia reviewed similar allegations and found in *Neoforma* that "[a]lthough plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations." *Id.* Simply citing the elements of an antitrust claim and alleging a violation of them is not sufficient. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d at 1327; *TV Comm. Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992) ("Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief."); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must 'provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place.'"); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1952) ("[A] general allegation of conspiracy, without a statement of the facts constituting the conspiracy to restrain trade, its object and accomplishment, is but an allegation of a legal conclusion, which is insufficient to constitute a cause of action."); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007); (holding that an antitrust complaint must contain enough facts that, when taken as true, show a plausible right to recovery).

In the above cases, allegations like Lipari's were found to be inadequate under the federal court's liberal "notice" pleading standards. If Lipari's allegations fail under the more relaxed standards of notice pleading, they certainly fail under the more stringent "fact pleading" requirements of the Missouri Rules of Civil Procedure. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004) ("Although the petition does not have to plead evidentiary or operative facts showing an entitlement to the relief sought, it must plead ultimate facts demonstrating such an entitlement and cannot rely on mere conclusions.").

Thus, even if the Court concludes that Lipari's state antitrust allegations are not barred by collateral estoppel, his claims still fail. Lipari's Petition fails to state adequate facts on an essential element of his claim. Therefore, Count I of his Petition should be dismissed, pursuant to Rule 55.27(a)(6) of the Missouri Rules of Civil Procedure.

4. **Under Missouri law, an officer or director of a corporation cannot be liable for tortious acts of the corporation unless the officer or director participated in the acts or had personal knowledge of them.**

In Missouri, a corporate officer or director cannot be liable personally for the alleged misdeeds of a corporation simply by holding a corporate office. *Boyd v. Wimes*, 664 S.W.2d 596, 598 (Mo. App. 1984). In order for a corporate officer or director to be liable, the plaintiff must aver that the officer or director had actual or constructive knowledge of the misconduct and participated therein. *Osterberger v. Heitz Const. Co.*, 599 S.W.2d 221, 229 (Mo. App. E.D. 1980). Lipari's Petition fails to allege any facts that the defendants had actual knowledge of the alleged tortious acts or actually participated in them. Therefore, Lipari's Petition fails to state a claim upon which relief can be granted, and should be dismissed.

Lipari's Petition again asserts mere conclusions and is completely devoid of facts that would support a cause of action against defendants Grundhofer, Davis and Ceccre. The totality of Lipari's allegations are as follows:

iii. co-conspirator officers

The petitioner avers that the defendant co-conspirators' officers had or did the following:

(A) actual knowledge

The petitioner avers that the defendant co-conspirators' officers had actual knowledge the complained of conduct.

(B) or constructive knowledge of,

The petitioner avers that the defendant co-conspirators' officers in the alternative had constructive knowledge of the complained of conduct.

(C) and participated in, actual wrongs

The petitioner avers that the defendant co-conspiratoes' officers in the alternative had constructive knowledge of the complained of conduct.

As noted above, Missouri is a fact-pleading state and Lipari must plead sufficient facts to show entitlement to relief. These allegations against the "defendant co-conspirator officers" are woefully insufficient to show they had actual knowledge of and/or participated in efforts to violate § 416.031.1 in order to be personally liable. They are simply unsupported conclusions and must be disregarded in determining whether his Petition states a cause of action. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004).

Lipari has failed to allege any facts to show that defendants Grundhofer, Davis and Cecere may be subject to personal liability. Therefore, Lipari's Petition fails to state a claim upon which relief may be granted, and Count I should be dismissed with prejudice.

C. Count II – Violation of R.S.Mo. § 416.031.2 (p. 98)

In Count II of his Petition, Lipari attempts to maintain a cause of action for violation of R.S.Mo. § 416.031.2, alleging "the defendants have a monopoly or have attempted to monopolize the subject relevant markets." Petition, p. 98. Lipari's claim in Count II also fails because:

a. His state antitrust claim under § 416.031.2 is barred by the statute of limitations;

b. His state antitrust claim under § 416.031.2 is barred by the doctrine of collateral estoppel;

c. He fails to plead sufficient facts to establish a claim upon which relief may be granted in that:

i. The allegations are mere conclusions; and

ii. He fails to define a relevant market;

d. The defendants are immune from liability.

2. **Missouri law requires all claims under R.S.Mo. § 416.131(2) to be commenced within four years after the cause of action accrues. Medical Supply Chain had actual knowledge of its alleged damages in October of 2002 and brought suit under this same state for these alleged damages. Because Lipari did not file this suit until February 2008, his claim in Count II is barred by the statute of limitations.**

All claims under Missouri's antitrust statutes must be commenced "within four years after the cause of action accrued." R.S.Mo. § 416.131(2). As noted in Section 2(a) above, Medical Supply Chain had actual knowledge of its alleged cause of action under the Missouri antitrust laws at least by October 2002, when it filed suit for defendants' alleged antitrust violations. The facts and analysis in 2(a) above concerning the application of the Statute of Limitations to Lipari's claims for Count I also apply to Count II of plaintiff's Petition. Rather than restating these arguments, defendants incorporate by reference their arguments and analysis made in Section 2(a) above.

For the reasons set forth in Section 2(a) above, plaintiff's claim in Count II of his Petition is barred by the statute of limitations and should be dismissed with prejudice.

3. **Missouri antitrust statutes must be construed in accordance with comparable federal statutes. Plaintiff's federal antitrust claims based on the same cause of action have been previously dismissed on their merits. Therefore, the corresponding state antitrust claims are barred by collateral estoppel.**

As noted in Section 2(b) above, Missouri law specifically provides that its antitrust statutes "shall be construed in harmony with judicial interpretations of comparable federal statutes." R.S.Mo. § 416.141. Missouri courts look to federal courts' interpretations of the Sherman Act when construing the provisions of R.S.Mo. § 416.031. *See, e.g., Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582, 586 (Mo. App. E.D. 1987); *Fischer, Spuhl, Herzwurm & Assoc., Inc. v. Forrest T. Jones and Co.*, 586 S.W.2d 310, 313 (Mo. 1979). In order to maintain a cause of action pursuant to R.S.Mo. § 416.031.2, the plaintiff must demonstrate (1) the possession of monopoly power in the relevant market and (2) the willful acquisition of maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. *See, e.g., Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1328 (D. Kan. 2006) (referring to similar elements in 15 U.S.C. § 2).

On three separate occasions the United States District Court for the District of Kansas has found that allegations of a monopoly to control the hospital supply market is an insufficient description of a relevant market. *See Medical Supply Chain, Inc. v. U.S. Bancorp, N.A., et al.*, 2003 WL 21479192, at *3 (D. Kan. 2003) (Exhibit "C"); *Medical Supply Chain, Inc. v. General Electric Co., et al.*, 2004 WL 956100, at *3 (Exhibit "E"), *aff'd. in part and rev'd in part*, 144 Fed. Appx. 708, 716 (10th Cir. 2005) (Exhibit "F"); *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1328 (D. Kan. 2006) (Exhibit "A"). In each of these cases, Medical Supply Chain alleged federal antitrust actions for violation of Section 2 of the Sherman Act. Medical Supply had a full opportunity to litigate these issues and all of the decisions found the

allegations insufficient and were decisions based on the merits presented. As the alleged assignee of Medical Supply Chain, Inc.'s cause of action, Samuel Lipari is party in privity with Medical Supply Chain. For these reasons, and for the reasons set forth in Section 2(b) above, plaintiff's claims are barred by the doctrine of collateral estoppel, and Count II of his Petition should be dismissed with prejudice.

4. **Count II of plaintiff's Petition fails to identify sufficient facts to state a claim upon which relief may be granted.**

Count II of Lipari's Petition fails to allege sufficient facts to support a cause of action under R.S.Mo. § 416.031.2. His simply alleges conclusions for each necessary element and fails to plead any facts to support his claim. Moreover, Lipari fails to plead sufficient facts to identify a relevant market to support his antitrust claim. Therefore, Count II of Plaintiff's Petition should be dismissed with prejudice.

a. **Missouri law requires that petitions contain sufficient facts for each element to show an entitlement to relief. Count II of Lipari's Petition contains no allegations of fact, but only mere conclusions. Therefore, Lipari has failed to allege sufficient facts to maintain a cause of action under § 416.031.2 and Count II should be dismissed with prejudice.**

The Missouri Rules of Civil Procedure require that a petition contain sufficient facts to show the pleader is entitled to relief. *See* Mo. R. Civ. P. 55.05. The plaintiff must allege facts and not conclusions. Averments of mere conclusions will be disregarded in a court's analysis as to whether the petition states a cause of action. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). Count II of Lipari's Petition is completely devoid of factual assertions. Lipari simply sets forth the element for a cause of action under Section 416.031.2 and makes a conclusory allegation that mirrors each element. For example, in order to maintain a claim under § 416.031.2, Lipari must allege sufficient facts to show the willful acquisition or maintenance of a monopoly power as distinguished from growth or development as a consequence of a superior

product, business acumen or historic accident. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d at 1328. As to this element, Lipari states on p. 100:

> **(2) defendants willfully acquired and maintained their market power.**
>
> The Petitioner hereby re-alleges the averments of facts in this complaint and its attachments.
>
> The petitioner avers the defendants have acted intentionally and willfully to acquire and maintain their market power in the subject area markets.
>
> **a. The defendants did not enjoy market growth or development as a consequence of**
>
> The Petitioner avers the defendants did not enjoy market power growth or development as a consequence of any of the following reasons:
>
> **i. a superior product**
>
> The Petitioner avers the defendants did not enjoy market power growth or development as a consequence of a superior product.
>
> **ii. business acumen**
>
> The Petitioner avers the defendants did not enjoy market growth or development as a consequence of business acumen.
>
> **iii. or historic accident**
>
> The Petitioner avers the defendants did not market power growth or developement as a consequence of historic accident.
>
> **b. defendants monopoly power was not obtained for**
>
> The Petitioner avers the defendants' monopoly power was not obtained for the following reasons:
>
> **i. a valid business reason**
>
> The Petitioner avers the defendants' monopoly power has not resulted or been created out of a valid business reason.
>
> **ii. or concern for efficiency**
>
> The Petitioner avers the defendants' monopoly power has not resulted or been created out of a concern for efficiency.

Petition, pp. 100-101.

These allegations are wholly insufficient to allege a cause of action under § 416.031.2. It is well established that even under the liberal notice pleading standards of federal courts, a plaintiff must do more than cite relevant antitrust language to state a claim for relief. *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006); *TV Comm., Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1982); *Estate Constr. Co. v. Miller and Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994); *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir., 1953); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Moreover, in Missouri, allegations that contain mere conclusions are insufficient and will be disregarded when considering whether a plaintiff has properly pled a cause of action. *See Brock v. Blackwood*, 143 S.W.3d at 56. Therefore, Count II should be dismissed with prejudice.

b. **Lipari must identify a relevant market in order to state an antitrust claim under § 416.031.2. "Hospital Supplies" does not identify a product that is reasonably interchangeable and has a cross-elasticity of demand. Therefore, Lipari has failed to identify a relevant market and has failed to state a claim for violation of § 416.031.2.**

Even if Lipari's general conclusory allegations somehow meet the basic requirements of Rule 55.05, these allegations are still insufficient to maintain an action under § 416.031.2.

In order to maintain a cause of action under § 416.031.2, it is Lipari's burden to properly plead the boundaries of an alleged relevant market or markets. *Adidas America, Inc. v. National Collegiate Athletic Assn.*, 64 F. Supp.2d 1097, 1103 (D. Kan. 1999). The relevant market must be defined by "the interchangeability of or the cross-elasticity of demand between the product in question and substitutes for it." *Id.*, quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502 (1962). Failure to define a relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand renders the Petition insufficient and

a motion to dismiss may be granted. *See Adidas America, Inc.*, 64 F. Supp. 2d at 1102. Products belong in the same market when they are reasonably interchangeable for the same uses and must exhibit a high cross-elasticity of demand. *See Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1153 (W.D. Ark. 1995). As stated by the Eighth Circuit, "defining a relevant market is primarily a process of describing those groups of producers which, because of similarity of their products, have the ability–actual or potential–to take significant amounts of business away from each other." *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987). Products have a high cross-elasticity if consumers will shift from one to the other in response to changes in the relative costs. *Community Publishers, Inc.*, 892 F. Supp. at 1153 n.7.

Plaintiff has failed to properly define a relevant market to support his antitrust claim. In fact, plaintiff has failed to identify any specific product. The entirety of plaintiff's claim refers to "hospital supplies." Plaintiff fails to identify any specific product which would constitute "hospital supplies" or how the "hospital supplies" he seeks to sell would be interchangeable and subject to a high cross-elasticity with the "hospital supplies" alleged to be sold by the defendants. Because the plaintiff has failed to identify a single product, his claim under § 416.031.2 fails.

The plaintiff has failed to identify a reasonably interchangeable product that would have high cross-elasticity of demand. Therefore, plaintiff has failed to identify a proper relevant market for his antitrust claims and Count II of his Petition should be dismissed with prejudice.

D. Count III – Conspiracy to violate § 416.031(2) (p. 103)

In Count III, plaintiff attempts to allege a violation of § 416.031.2 by contending the defendants have conspired to create a monopoly. But plaintiff's allegations in Count III fail to allege any facts, much less sufficient facts to support a cause of action. Plaintiff simply sets forth the elements for conspiracy and states under each element, "The Petitioner hereby re-

alleges the averments of facts in this Complaint and its attachments." While Rule 55.12 allows Lipari to adopt by reference other parts of his Petition, a reference must be sufficiently clear and explicit to advise defendants of the issue tendered for trial. *See Hester v. Barnett*, 723 S.W.2d 544, 561 (Mo. App. W.D. 1987). Lipari's adoption by reference encompasses 102 pages of issues ranging from disbarment of plaintiff's former counsel to an individual named Judy Jewsome not being allowed to sit for the Kansas Bar to Karl Rove's involvement in the alleged hospital supply conspiracy. By incorporating all of his prior allegations, the plaintiff has not concisely set forth the issue to be tendered for trial, and his incorporation by reference is therefore improper.

Additionally, a cause of action for conspiracy to commit antitrust violations under § 416.031.2 is subject to a four-year statute of limitations. As set forth in Sections 2(a) and 2(b) above, plaintiff's state antitrust claims are barred by the statute of limitations. Rather than restating those arguments again here, defendants incorporate by reference those arguments made in Sections 2(a) and 2(b) above.

E. Count IV – Tortious interference with business relations

In Count IV of his Petition, plaintiff alleges that defendants personally interfered with Medical Supply Chain's putative escrow agreement with U.S. Bank and a real estate transaction between Medical Supply Chain and General Electric Transportation Company. *See* Petition, p. 103. Plaintiff's claims as to defendants Grundhofer, Davis and Cecere fail because:

a. Plaintiff has failed to allege sufficient facts to support a cause of action;

b. Defendants are not subject to personal liability under the Corporate Director/Officer Privilege; and

c. Plaintiff's claims relating to the escrow accounts are barred by the statute of limitations.

2. **The Missouri Rules of Civil Procedure require plaintiff to plead sufficient facts for each element of his claim. Plaintiff simply makes conclusory allegations that purport to satisfy each element. Because the plaintiff has failed to plead any facts to support his cause of action, his claim must be dismissed.**

As repeatedly set forth above, the Missouri Rules of Civil Procedure require that a petition set forth facts which demonstrate the pleader is entitled to relief. *See* Rule 55.05; *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). Conclusory allegations not supported by facts will be disregarded in determining whether a petition sets forth sufficient facts to maintain a cause of action. *See id.*, citing *Lick Creek Sewer System v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo. App. 1988).

In order to maintain a cause of action for tortious interference with contract or business expectancy, Lipari must allege facts to show (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. 1993). While Lipari identifies the contract or business expectancy as the supposed escrow agreement with U.S. Bank and the real estate contract with G.E., he fails to allege any facts as to the remainder of the elements for this cause of action. Rather, he simply sets forth the element and mirrors that element with a conclusory allegation that purportedly satisfies the claim. His allegations violate Rule 55.05 of the Missouri Rules of Civil Procedure and his conclusory allegations are disregarded when determining whether he has properly stated a cause of action. *See Brock v. Blackwood*, 143 S.W.3d at 56.

For this reason, Count IV of Lipari's petition should be dismissed with prejudice.

3. **Under Missouri law, corporate officers and directors are generally privileged from liability when inducing a corporation to breach a contract. The plaintiff has not pled any facts to depart from this general rule and his claim for tortious interference with business expectancy should therefore be dismissed with prejudice.**

Under Missouri law, corporate agents, employees, and representatives are privileged to induce a corporation to breach a contract, unless the person uses improper means, lacks good faith, was motivated by personal benefit, or the action was not taken with the best interest of the corporation in mind. *Nola v. Merollis Chevrolet Kansas City, Inc.*, 537 S.W.2d 627, 634 (Mo. App. 1976); *Meyer v. Enoch*, 807 S.W.2d 156, 159 (Mo. App. E.D. 1991). This is true even if the corporate officer or director committed an error of judgment in taking an action. *Nola*, 537 S.W.2d at 634 (citing to *Wilson v. McClenny*, 136 S.E.2d 569, 570 (N.C. 1964)). To show that corporate officials are not justified in inducing a corporation's breach of contract, a plaintiff must show that the officials were motivated by malice, and not by a desire to act in their official capacity for the benefit of the corporation. *Forkin v. Container Recovery Corporation*, 835 S.W.2d 500, 503 (Mo. App. E.D. 1992). Absence of justification is defined as the "absence of any legal right to take the actions complained of." *Meyer*, 807 S.W.2d at 159.

Plaintiff's Petition fails to allege facts that show the defendants' alleged conduct was outside their normal duties, motivated by personal benefit, or were committed contrary to the best interests of the corporation. Plaintiff fails to plead any facts to disregard the corporate officer privilege and submit defendants Grundhofer, Davis and Cecere to personal liability for their alleged tortious interference with plaintiffs' business expectancy. Therefore, Count IV of plaintiff's Petition should be dismissed with prejudice.

4. **Claims for tortious interference with business expectancy must be brought within five years of the date the cause of action accrues. Plaintiff's alleged cause of action as to the escrow accounts accrued in 2002 and he did not file this claim until February 2008. Therefore, his**

claim for tortious interference with business expectancy as to the escrow accounts is barred by the statute of limitations.

A claim for tortious interference with contract or business expectancy must be brought within five years of the action's accrual. R.S.Mo. § 516.120(4); *D'Arcy and Associates, Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 29 (Mo. App. W.D. 2004). A cause of action accrues when the plaintiff knows or should know of the wrong and can ascertain damage. *Id.*

Lipari alleges the defendants tortiously interfered with a supposed escrow agreement between U.S. Bank and Medical Supply in 2002. Petition, p. 103. The Petition also demonstrates that Medical Supply had *actual* knowledge of its alleged damages from the putative escrow transaction in October 2002, when it filed the first of many lawsuits related to the transactions. *See* Petition, Appendix 1, p. 1. Because Lipari did not file this suit until February 2008, his claim for tortious interference, as it relates to the supposed escrow transaction, is beyond the five-year statute and is therefore time-barred.

F. Count V – Fraud

Plaintiff's claim for fraud must be dismissed as he fails to allege any facts which meet the particularity pleading requirement of Rule 55.15 of the Missouri Rules of Civil Procedure.

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). Moreover, Rule

55.15 requires that all allegations of fraud be pled with particularity. As stated in *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 126 (Mo. App. W.D. 1993):

> Every essential element of fraud must be plead, and failure to plead any element renders the claim defective and subject to dismissal. (citations omitted). All averments of fraud, except malice, intent, knowledge and any other condition of the mind, are to be stated with particularity. (citations omitted). In other words, the fraud must clearly appear from the allegations of fact, and be independent of conclusions. (Citations omitted.)

Lipari's Petition alleges no facts to support his fraud claim. For his allegations regarding a false representation, Lipari re-alleges his prior averments and states, "Defendants were engaged in concealed fraudulent conduct." Petition, p. 105. This allegation is devoid of any fact, much less facts with such particularity "to be independent of conclusions." *Id.* Lipari's allegations as to the other elements of fraud are equally cryptic. His allegations fail to meet the basic pleading requirements of Rule 55.05, much less the heightened requirements of Rule 55.15. Neither the parties nor the Court should be forced to scour the Petition in an effort at guesswork as to what plaintiff believes constitutes the substance of his claims.[4] Because Lipari has failed to allege sufficient facts to support his fraud claim, Count V should be dismissed with prejudice.

G. Count VI - *Prima Facie* Tort

On p. 106 of his Petition, Lipari asserts a cause of action for *prima facie* tort. In order to maintain such a claim, Lipari must allege facts to show: (1) an intentional lawful act by defendant; (2) defendant's intent to injure the plaintiff; (3) injury to the plaintiff; and (4) an absence of or insufficient justification for defendant's act. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993); *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc). *Prima facie* tort is not a catchall cause of action or a duplicative remedy. Like any tort, it has

[4] Because the allegations of "fraud" are so vague, defendants are unable to raise other probable reasons for dismissal, including the statute of limitations. Since fraud allegations were also raised in the October 2002 action, it is likely at least some of the claims are time-barred.

specialized elements which must be met to maintain the cause of action. *Nazeri*, 860 S.W.2d at 315.

Lipari's claim for *prima facie* tort should be dismissed because he has failed to plead an intentional lawful act by the defendant. Rather, Lipari alleges:

> To whatever extent said activities of Defendants including procuring the disbarment and interference with the petitioner's potential may not violate antitrust laws or tortuously (*sic*) interfere with contract or business expectancy, *said acts and activities of Defendants are still unlawful and fraudulent.*

Petition, p. 107 (emphasis added).

Plaintiff's allegations specifically state that defendants' alleged misconduct was "unlawful and fraudulent." Therefore, Lipari has failed to plead an essential element of *prima facie* tort. *Nazeri*, 860 S.W.2d, at 315 (holding that allegations that a defendants' statements were "untrue" failed to state a claim for *prima facie* tort.).

Additionally, Lipari's allegations again fall short of the factual pleading requirements found in Rule 55.05 of the Missouri Rules of Civil Procedure. For his *prima facie* tort claim, Lipari simply sets forth each element and makes a conclusory allegation that purports to satisfy the element. These conclusory allegations are insufficient and should be disregarded. *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004).

Lipari has failed to allege sufficient facts to support his claim for *prima facie* tort. The Court should therefore dismiss Count VI of his Petition with prejudice.

III. INCORPORATION BY REFERENCE

Defendants Grundhofer, Davis, and Cecere hereby adopt and incorporate by this reference the arguments, authorities, motions, and suggestions of all defendants.

IV. CONCLUSION

For the above stated reasons, defendants Jerry Grundhofer, Richard Davis, and Andrew Cecere request the Court dismiss plaintiff's Petition with prejudice and grant all other relief to which the defendants are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was transmitted via US Mail, postage prepaid, this 13th day of June, 2008, to:

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Medical Supply Chain, Inc. v. Neoforma, Inc.
D.Kan.,2006.

United States District Court,D. Kansas.
MEDICAL SUPPLY CHAIN, INC., Plaintiff,
v.
NEOFORMA, INC., et al., Defendants.
No. Civ.A. 05-2299-CM.

March 7, 2006.

Background: Corporation that developed a health care supply strategist certification program brought action against bank and others, alleging that defendants engaged in trade restraint in market for hospital supplies, and asserting 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 Racketeer Influenced and Corrupt Organizations Act (RICO) and the USA PATRIOT Act. The United States District Court for the Western District of Missouri transferred case. Defendants filed motions to dismiss and for sanctions, and plaintiffs moved for reconsideration of order transferring venue, to strike defendants' renewed motion to dismiss and/or strike, and for clarification of order.

Holdings: The District Court, Murguia, J., held that:
(1) reconsideration of order transferring venue was not warranted;
(2) defendants' renewed motions to dismiss would not be stricken;
(3) plaintiff failed to state a claim under the Sherman Act, the Clayton Act, or RICO;
(4) no private cause of action existed to enforce the USA PATRIOT Act; and
(5) sanctions were warranted against plaintiff's attorney in antitrust action, in the form of attorney fees and costs, pursuant to both Rule 11 and statute providing for sanctions against attorney who multiplies proceedings.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 170A ⇐928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak928 k. Determination. Most Cited Cases
Whether to grant or deny a motion for reconsideration is committed to the court's discretion.

[2] Federal Civil Procedure 170A ⇐928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak928 k. Determination. Most Cited Cases
A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider.

[3] Federal Courts 170B ⇐145

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)4 Proceedings and Effect of Change
170Bk145 k. Ruling or Order and Effect of Change. Most Cited Cases
Reconsideration of order transferring venue of antitrust litigation was not warranted, where plaintiff's arguments in support of reconsideration did not assert a change in controlling law or the availability of new evidence, and plaintiff did not raise any arguments that it could not have raised in its motions opposing transfer.

[4] Federal Civil Procedure 170A ⇐1101

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(N) Striking Pleading or Matter Therein
170Ak1101 k. In General. Most Cited

Exhibit A

Cases)
Defendants' renewed motions to dismiss antitrust case, which contained new arguments and authorities that were available when defendants filed their original motions to dismiss, did not fall within purview of rule permitting a court to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," where defendants renewed their motions only after case was transferred, and striking the motions was inconsequential, since even if the court struck the motions, none of its instant rulings would change. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⇐1771

170A Federal Civil Procedure
170AX Dismissal
170AX(B) Involuntary Dismissal
170AX(B)1 Pleading, Defects In, in General
170Ak1771 k. In General. Most Cited Cases)
Dismissal for failure to state a claim upon which relief can be granted is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[6] Antitrust and Trade Regulation 29T ⇐972(3)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(3) k. In General. Most Cited Cases)
(Formerly 265k28(6.4))
A plaintiff must plead three elements to state a claim under the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. Sherman Act, § 1, 15 U.S.C.A. § 1.

[7] Antitrust and Trade Regulation 29T ⇐972(4)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(4) k. Conspiracy or Combination. Most Cited Cases)
(Formerly 265k28(6.4))
Corporation that developed a health care supply strategist certification program failed to allege a contract, combination, or conspiracy among two or more independent actors, as required to state a claim under the Sherman Act, although corporation asserted many conspiracy theories, where it did not allege any facts that supported its assertions. Sherman Act, § 1, 15 U.S.C.A. § 1.

[8] Antitrust and Trade Regulation 29T ⇐641

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(C) Market Power; Market Share
29Tk641 k. In General. Most Cited Cases)
(Formerly 265k12(1.3))
Conduct violates Sherman Act section which prohibits monopolies in interstate trade or commerce when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. Sherman Act, § 2, 15 U.S.C.A. § 2.

[9] Antitrust and Trade Regulation 29T ⇐620

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(A) In General
29Tk619 Elements in General
29Tk620 k. In General. Most Cited Cases)
(Formerly 265k12(1.3))
The offense of monopoly under the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Sherman Act, § 2, 15 U.S.C.A. § 2.

[10] Antitrust and Trade Regulation 29T ⇐972(4)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(4) k. Conspiracy or Combination. Most Cited Cases
(Formerly 265k28(6.3))
Assertion that defendants collectively maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies was not sufficient to allege defendants' possession of monopoly power, a relevant product and geographic market, or that defendants controlled prices and excluded competition, as required to state a monopoly claim under the Sherman Act. Sherman Act, § 2, 15 U.S.C.A. § 2.

[11] Antitrust and Trade Regulation 29T ⇐972(3)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(3) k. In General. Most Cited Cases
(Formerly 265k28(6.3))
Corporation that developed a health care supply strategist certification program failed to allege who alleged interlocking directors were, for which defendants' companies they served, or that corporations in question were actual competitors, as required to state a claim under Clayton Act section which prohibits persons from serving, at the same time, as a director or officer of any two corporations that were engaged in commerce and were competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws. Clayton Act, § 8(a)(1), 15 U.S.C.A. § 19(a)(1).

[12] Racketeer Influenced and Corrupt Organizations 319H ⇐3

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319H(A) In General
319Hk3 k. Elements of Violation in General. Most Cited Cases
To plead a viable civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, the plaintiff must allege that a defendant: (1) participated in the conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. 18 U.S.C.A. § 1962(c).

[13] Federal Civil Procedure 170A ⇐636

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity
170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases
Under rule requiring that fraud be pled with particularity, a plaintiff must allege with particularity not only each element of a Racketeer Influenced and Corrupt Organizations Act (RICO) violation, but also the predicate acts of racketeering; to properly allege the predicate acts, plaintiff must specify the "who, what, where, and when" of each purported act. 18 U.S.C.A. § 1961 et seq.; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[14] Federal Civil Procedure 170A ⇐636

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity
170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases

Racketeer Influenced and Corrupt Organizations 319H ⇐70

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319H(B) Civil Remedies and Proceedings

31918k68 Pleading
31918k70 k. Racketeering or Criminal Activity; Predicate Acts. Most Cited Cases
Assertions that defendants "engaged in conduct of an enterprise through a pattern of racketeering activity," and that a law firm violated RICO by conspiring with other unspecified defendants to shut a corporation that developed a health care supply strategist certification program out of the healthcare supply industry, were insufficient to allege the "who, what, where, and when" of each purported predicate act of racketeering, as required to state a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim. 18 U.S.C.A. § 1962(c); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[15] Action 13 ⇐3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
No private cause of action exists to enforce the USA PATRIOT Act. 31 U.S.C.A. § 5318.

[16] Federal Courts 170B ⇐18

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction
170Bk18 k. Validity or Substantiality of Federal Claims and Disposition Thereof. Most Cited Cases
District Court would not retain supplemental jurisdiction over plaintiff's state law claims, where plaintiff's federal claims had been dismissed. 28 U.S.C.A. § 1367(a).

[17] Judgment 228 ⇐634

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k634 k. Nature and Requisites of Former Adjudication as Ground of Estoppel in General. Most Cited Cases

Judgment 228 ⇐713(1)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(1) k. In General. Most Cited Cases
Under the doctrine of issue preclusion, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

[18] Judgment 228 ⇐540

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k540 k. Nature and Requisites of Former Recovery as Bar in General. Most Cited Cases
Claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits.

[19] Judgment 228 ⇐570(11)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(11) k. Defects in Pleading. Most Cited Cases

Judgment 228 ⇐585(2)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k585 Identity of Cause of Action in General
228k585(2) k. What Constitutes Identical Causes. Most Cited Cases

Claim preclusion barred plaintiff's claims under the Sherman Act, the Hobbs Act, and the USA PATRIOT Act, as well as several state claims, where claims had ended in a judgment on the merits in a prior case, claims involved many of the same defendants, and claims involved the same causes of action. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; 18 U.S.C.A. § 1951(b)(2); 31 U.S.C.A. § 5318.

[20] Antitrust and Trade Regulation 29T ⇐972(3)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(3) k. In General. Most Cited Cases
(Formerly 265k28(6.2))
Plaintiff's 115 page, 613 paragraph complaint in antitrust case violated rules requiring a "short and plain statement of the claim showing that the pleader is entitled to relief," and that each averment be "simple, concise, and direct." Fed.Rules Civ.Proc.Rule 8(a), (e)(1), 28 U.S.C.A.

[21] Federal Civil Procedure 170A ⇐2769

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2769 k. Reasonableness or Bad Faith in General; Objective or Subjective Standard. Most Cited Cases
The standard for Rule 11 sanctions is an objective one; subjective bad faith is not required to trigger Rule 11 sanctions. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[22] Federal Civil Procedure 170A ⇐2766

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2766 k. Multiplication of Proceedings in General. Most Cited Cases
Sanctions may be imposed under statute providing for sanctions against attorney who multiplies proceedings for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court. 28 U.S.C.A. § 1927.

[23] Federal Civil Procedure 170A ⇐2769

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2769 k. Reasonableness or Bad Faith in General; Objective or Subjective Standard. Most Cited Cases
The court must apply an objective standard in determining whether to impose sanctions under statute providing for sanctions against attorney who multiplies proceedings, and subjective bad faith is not a necessary showing. 28 U.S.C.A. § 1927.

[24] Federal Civil Procedure 170A ⇐2766

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2766 k. Multiplication of Proceedings in General. Most Cited Cases
Because statute providing for sanctions against attorney who multiplies proceedings is penal in nature, an award should only be made in instances evidencing a serious and standard disregard for the orderly process of justice, and the court must be aware of the need to ensure that the statute does not dampen attorneys' zealous representation of their clients' interests. 28 U.S.C.A. § 1927.

[25] Federal Civil Procedure 170A ⇐2771(4)

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2771 Complaints, Counterclaims and Petitions
170Ak2771(4) k. Anti-Trust or Trade Regulation Cases. Most Cited Cases

Federal Civil Procedure 170A ⇐2805

170A Federal Civil Procedure
170AXX Sanctions
170AXX(C) Persons Liable for or Entitled to Sanctions
170Ak2805 k. Joint and Several Liability. Most Cited Cases

Federal Civil Procedure 170A ⇐2814

170A Federal Civil Procedure
170AXX Sanctions
170AXX(D) Type and Amount
170Ak2811 Monetary Sanctions
170Ak2814 k. Computation, Items and Services Compensable. Most Cited Cases
Sanctions were warranted against plaintiff and plaintiff's attorney in antitrust action, jointly and severally, in the form of attorney fees and costs, pursuant to both Rule 11 and statute providing for sanctions against attorney who multiplies proceedings, where mere fact that plaintiff filed a nearly unintelligible 115 page complaint suggests that suit was brought for purpose of harassing defendants or the court, complaint consisted of frivolous claims, not one of which supported a viable claim for which relief could be granted, plaintiff's insistence on re-litigating claims barred by claim preclusion unreasonably and vexatiously multiplied the proceedings, and plaintiff failed to heed court's previous admonitions and sanctions, but, rather, chose instead to proceed with the case. 28 U.S.C.A. § 1927; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[26] **Federal Civil Procedure 170A ⇐2800**

170A Federal Civil Procedure
170AXX Sanctions
170AXX(C) Persons Liable for or Entitled to Sanctions
170Ak2800 k. In General. Most Cited Cases
A district court may impose sanctions against plaintiff, plaintiff's counsel, or against both with joint and several liability.

[27] **Federal Civil Procedure 170A ⇐2830**

170A Federal Civil Procedure
170AXX Sanctions
170AXX(E) Proceedings
170Ak2830 k. Determination; Order. Most Cited Cases
The sanctioning of a party requires specific findings that the party was aware of the wrongdoing.

***1320** Ira Dennis Hawver, Ozawkie, KS, for Plaintiff.
Janice Vaughn Mock, Sophie N. Froelich, Stephen N. Roberts, Nossaman, Guthner, Knox & Elliott, LLP, San Francisco, CA, John K. Power, Husch & Eppenberger, LLC, Jonathan H. Gregor, Mark A. Olthoff, Kathleen A. Hardee, Shughart Thomson & Kilroy, PC, Kansas City, MO, Andrew M. Demarea, Shughart Thomson & Kilroy, Overland Park, KS, for Defendants.

MEMORANDUM AND ORDER

MURGUIA, District Judge.
On March 9, 2005, plaintiff Medical Supply Chain, Inc. filed the above-captioned case in the United States District Court for the District of Western 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, U.S. Bancorp NA, U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cesare, [FN1] Piper Jaffray Companies, Andrew S. Duff, Shughart Thomson & Kilroy, P.C.,[FN2] 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.

FN1. 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 plaintiff's counsel.

FN2. Plaintiff's complaint names "Shughart Thomson & Kilroy Watkins Boulware, P.C." but the law firm's correct name is "Shughart Thomson & Kilroy, P.C.".

On June 15, 2005, Judge Ortrie D. Smith of the Western District of Missouri granted defendants' Motions to Transfer the case to the District of Kansas, citing this district court's experience with "the almost identical previous lawsuit" and the interests of justice. (Doc. 26, at 2).

Each group of defendants have filed a motion to dismiss, and two groups of defendants have filed renewed motions after the case was transferred, resulting in seven motions to dismiss. The motions to dismiss pending before the court are defendant Robert Zollars' Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 2); Defendant Neoforma, Inc.'s Motion to Dismiss, [sic] Complaint, or Alternatively to Require Amendment, Pursuant to F.R.C.P. Rules 8 and 9 (Doc. 4); Defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion to Transfer, Dismiss and/or Strike (Doc. 6); Defendants Curt Nonomaque and Robert Baker's Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim (Doc. 11); Defendant Shughart Thomson & Kilroy, P.C.'s Motion to Transfer, Dismiss and/or Strike (Doc. 13); Defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Renewed Motion to Dismiss and/or Strike (Doc. 32); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and ***1321** Curt Nonomaque's Renewed Motion to Dismiss Complaint for Failure to State a Claim (Doc. 34).

Additional motions before the court are defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion for Sanctions (Doc. 22); Defendants' Motion to Stay Rule 26(f) Conference and Discovery (Doc. 24); plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28); Novation, LLC, VHA, University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion for Sanctions (Doc. 36); plaintiff's Motion to Strike Defendants' Renewed Motion to Dismiss and/or Strike (Doc. 38); plaintiff's Motion to Consolidate Under Rule 42 (Doc. 39); plaintiff's Motion to Require Consolidation Arguments to be in the Form of Pleadings on the Record and Notice of Threat of Unlawful Sanctions (Doc. 42); plaintiff's Motion to Strike Novation Defendants' Renewed Motion to Dismiss (Doc. 43); plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45); First Plaintiff's Motion for Partial Summary Judgment Under F.R. Civ. P. Local Rule 56.1 (Doc. 46); plaintiff's Motion for Leave to Join Additional Defendants Under Fed.R.Civ.P. 29(a) (Doc. 49); plaintiff's Motion to Substitute Plaintiff Under F.R.C.P. Rules [sic] 17(a), 15(a) and 25(a) (Doc. 56); plaintiff's Motion to Substitute Defendant Under F.R.C.P. Rules [sic] 17(a) (Doc. 57); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion to Set Oral Hearing on Motion to Dismiss (Doc. 76).

I. Background

A. Bret D. Landrith

Plaintiff's counsel for all of the pending motions before the court, Bret D. Landrith, withdrew as counsel for plaintiff on January 30, 2006 after being disbarred from the practice of law in the state of Kansas on December 9, 2005 for violating [illegible] 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. *See In re Landrith*, 124 P.3d 467, 485-86 (Kan.2005). On February 7, 2006, Ira Dennis Hawver entered his appearance on behalf of Medical Supply Chain, Inc.

B. Prior Relevant Cases

Plaintiff has brought two other cases in this court that are relevant to the court's analysis. The first, captioned *Medical Supply Chain, Inc. v. U.S. Bancorp, NA, et al.*, 02-2539-CM, 2003 WL 21479192 (D.Kan.2003) ("*Medical Supply I*"), was filed on October 22, 2002 against defendants U.S. Bancorp, NA; US Bank Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC, a subsidiary of U.S. Bancorp; Piper Jaffray; Andrew Cesare; Susan Paine; Lars Anderson; Brian Kabbes; and Unknown Healthcare Supplier. Plaintiff contended these defendants engaged in conduct violating (1) the Sherman Antitrust Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act. Plaintiff also alleged

defendants (4) "fail[ed] to properly train [their] employees on the USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under the USA PATRIOT Act"; and (6) violated "criminal laws to influence policy under section 802 of the USA PATRIOT Act."The complaint further charged defendants with (7) misappropriation of trade secrets under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good ***1322** faith and fair dealing. Plaintiff sought over $943 million in damages and declaratory relief.

On June 16, 2003, this court granted defendants' motions to dismiss for failure to state any claims upon which relief could be granted and dismissed the case. *Medical Supply I*, 2003 WL 21479192, at *9 (D.Kan. June 16, 2003). When discussing plaintiff's USA PATRIOT Act claims, the undersigned judge advised Mr. Landrith to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *Id.* at *6. Furthermore, with regard to the same claims, the undersigned judge noted that "the court finds plaintiff's allegation so completely divorced from rational thought that the court will refrain from further comment until such time as federal criminal proceedings are commenced, if indeed they ever are." *Id.* at *8. On November 8, 2004, the Tenth Circuit affirmed the district court's dismissal, and ordered plaintiff to show cause why he should not be sanctioned for filing a frivolous appeal pursuant to Fed. R. App. P. 38. *Medical Supply I*, 112 Fed.Appx. 730, 731-32 (10th Cir.2004). On December 30, 2004, the undersigned judge assessed attorney fees and double costs as a sanction against Mr. Landrith. Defendants were awarded $23,956 in attorney fees. *Medical Supply I*, 2005 WL 2122675, at *1 (D.Kan. May 13, 2005).

The second case brought by plaintiff in this court, captioned *Medical Supply Chain, Inc. v. General Electric Company, et al.*, case number 03-2324-CM ("Medical Supply II"), was filed on June 18, 2003. Defendants included General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, and Jeffrey Immelt. Plaintiff's amended complaint alleged violations of the Sherman Act, the Robinson-Patman Act, and various state law claims. Specifically, plaintiff alleged that it

> suffered antitrust injury from the defendants' breach of a written contract to buy out the remainder of a lease and provide financing for Medical Supply's entry into the hospital supply market. This contract was a unique credit agreement and an essential facility required for entry into the e-commerce market for hospital supplies.

Plaintiff further alleged that "GE founded a cartel or trust with its horizontal and vertical competitors, centered around an electronic marketplace that now has over 80% of the hospital e-commerce market," and that "GE's refusal to deal and group boycott, preventing Medical Supply's entry into a market GE has monopoly power in[,] is a violation of the Sherman and Clayton Antitrust Acts."

On January 29, 2004, the undersigned judge granted defendants' motions to dismiss, but opted not to impose Rule 11 sanctions against plaintiff. *Medical Supply II*, 2004 WL 956100, at *5 (D.Kan. Jan.29, 2004). In granting defendants' motions to dismiss, the court noted that "at the most fundamental level, plaintiff's antitrust claims fail." *Id.* at *3. On July 20, 2005, the Tenth Circuit affirmed the district court's dismissal of plaintiff's complaint, but reversed and remanded on the issue of sanctions against plaintiff finding that "at least [plaintiff's] claims against Jeffrey Immelt in his individual capacity were frivolous in that no allegation was made that Immelt had any personal connection with [plaintiff's] alleged injury or even that he knew [plaintiff] existed." *Medical Supply II*, 144 Fed. Appx. 708, 716 (10th Cir.2005). The issue of sanctions remains pending.

C. Instant Allegations

Plaintiff asserts federal question subject matter jurisdiction based on several federal***1323** acts including the Clayton Act, the Sherman Act, the Declaratory Judgment Act,[FN1] the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the USA PATRIOT Act. Plaintiff also asserts diversity jurisdiction, despite acknowledging that both plaintiff and at least one defendant reside in Missouri. (Compl., at 4-6). Therefore, this court does not have diversity jurisdiction over plaintiff's case. 28

U.S.C. § 1332. Plaintiff alleges that this court has personal jurisdiction "over the parties who are in the territorial limits of the United States and who have sufficient contacts with the State of Missouri." (Compl., at 5).

> FN3. Plaintiff asserts subject matter jurisdiction under the Declaratory Judgment Act, but did not assert any claims against any defendants under that act.

In addition to the captioned defendants, plaintiff also lists eight "coconspirators not named as defendants in this action," several of which are relevant for purposes of this Order, including General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, and Jeffrey R. Immelt.

The court is unclear on the bulk of plaintiff's allegations. On page 84 of its complaint, plaintiff lists its "summary of claims" as follows: [FN4]

> FN4. For convenience and clarity, the court has copied plaintiff's summary of claims in its entirety, and did not designate any mistakes or typographical errors in the language.

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. U.S. 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 U.S. 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 U.S. Bancorp refused to deal with Medical Supply Chain, Inc. U.S. 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. U.S. 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.

***1324** 426. Medical Supply attempted to obtain preliminary injunctive relief against U.S. 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 U.S. 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 U.S. 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 U.S. Bancorp and consulting with representatives for U.S. Bancorp, U.S. 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 ***1325** 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 U.S. 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.

(Compl., at ¶4-86).

Plaintiff seeks "approximately $1,500,000,000.00 for the conduct related to the refusal to provide trust accounts and ... 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." (Compl., at 114). Plaintiff also seeks $1 million for damages sustained as a "consequence of Defendants' tortuous [sic] interference with contract or business expectancy and/or in prima facie tort ... together with punitive or exemplary damages for the same, in an amount in excess of $10,000," "approximately" $1.5 million in damages for defendants' violations of "civil racketeering laws," $500,000 for damages plaintiff sustained as a result of defendants' USA PATRIOT Act violations, and costs and reasonable attorney fees. (Compl., at 114-15).

II. Legal Standard for Motions to Dismiss

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir.1998), or when an issue of law is dispositive, Neitzke v. Williams, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, Maher, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff, Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir.1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to

offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

III. Analysis

A. Plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28)

[1][2][3] Whether to grant or deny a motion for reconsideration is committed to the court's discretion. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1386 (10th Cir.1997); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10th Cir.1988). In exercising that discretion, courts in general have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Marx v. Schnuck Mkts., Inc.*, 869 F.Supp. 895, 897 (D.Kan.1994) (citations omitted); D. Kan. Rule 7.3 (listing three bases for reconsideration of order). "A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." ***1326***Sithon Maritime Co. v. Holiday Mansion*, 177 F.R.D. 504, 505 (D.Kan.1998). Plaintiff's arguments in support of reconsideration do not assert a change in controlling law or the availability of new evidence. Moreover, in arguing that the U.S. District Court for the Western District of Missouri committed clear error by transferring the instant case to this district, plaintiff did not raise any arguments that it could not have raised in its motions opposing transfer. Because plaintiff is not entitled to a second chance at presenting its strongest case, *Sithon Maritime Co.*, 177 F.R.D. at 505, plaintiff's motion for reconsideration is denied.

B. Plaintiff's Motions to Strike (Docs. 38 and 43)

[4] Plaintiff requests that the court strike two renewed motions to dismiss. The bulk of plaintiff's arguments simply respond to defendants' motions to dismiss rather than argue in support of striking the motions. Plaintiff's on-point argument is that the renewed motions to dismiss include new arguments and authorities that were available when defendants filed their original motions to dismiss.

The court may "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). The court finds that defendants' renewed motions do not fall within the purview of Rule 12(f). Rather, defendants renewed their motions only after the instant case was transferred from the U.S. District Court for the Western District of Missouri (in the 8th Circuit) to this court (in the 10th Circuit). Moreover, the court finds that striking the motions is inconsequential; even if the court struck the motions at issue, none of its instant rulings would change. Plaintiff's motions to strike are denied.

C. Motions to Dismiss

Pending before the court are five motions to dismiss and two renewed motions to dismiss. Defendants assert several different arguments in support of dismissal, including that this court does not have personal jurisdiction over certain defendants, plaintiff did not properly serve certain defendants, all of plaintiff's claims fail to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), several of plaintiff's claims are barred by claim and/or issue preclusion, and plaintiff's complaint violates Federal Rules of Civil Procedure 8 and 9. In addition, several defendants contend that some of plaintiff's allegations against specific defendants and third parties are so immaterial, impertinent and scandalous that they should be stricken by the court.

The court has reviewed the pending motions to dismiss and responses, along with the complaint and plaintiff's prior cases in this district. Even presuming all well-pleaded allegations as true, resolving doubts in favor of plaintiff, and viewing the pleadings in the light most favorable to plaintiff, the court finds that dismissal of plaintiff's complaint is warranted for several reasons.[FN5]

FN5. Although the court limited its analysis to Rule 12(b)(6), claim preclusion and Rule 8, the court does not intend to imply that defendants' additional grounds for dismissal are without merit. Rather, three separate grounds for dismissal are sufficient, and the court declines to continue its analysis.

1. Rule 12(b)(6)

[5] Plaintiff's complaint fails at the most basic level to allege sufficient facts to support cognizable legal claims. Federal Rule of Civil Procedure 12(b)(6) allows the court to dismiss a cause of action for "failure to state a claim upon which relief can ***1327** be granted." The court recognizes that "[d]ismissal under Rule 12(b)(6) is a 'harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.' " *Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1127 (10th Cir.1998) (quoting *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir.1989)). However, even considering the harshness of this remedy, dismissal under 12(b)(6) is warranted in this case.

a. Sherman Act, § 1 (Counts I and II)

[6][7] A plaintiff must plead three elements to state a claim under § 1 of the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. 15 U.S.C. § 1; *TV Communic'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir.1992); 1 Irving Scher, et al., *Antitrust Advisor* (4th ed.2001) § 1.04. Accepting the allegations contained in the complaint as true, the court finds that plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors. Plaintiff's complaint alleges numerous conspiracies and agreements between various defendants. For example, plaintiff alleges that "Defendants entered into a combinations [sic] and or conspiracies in unreasonable restraint of trade or commerce ... in the markets for hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies." (Compl., at ¶7). Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations. *See TV Communic'ns Network, Inc.*, 964 F.2d at 1024 ("Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief.") (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir.1980)); *Covington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1373 (10th Cir.1979) (holding that to survive a motion to dismiss, a complaint stating violations of the Sherman Act "must allege facts sufficient, if they are proven, to allow the court to conclude that claimant has a legal right to relief") (citation omitted); *see also Medical Supply II*, 2004 WL 956100, at *3 ("dismissing plaintiff's antitrust claims for, inter alia, failure to allege that the named defendants were parties to an unlawful agreement"), *rev'd on other grounds*, 144 Fed.Appx. 708 (10th Cir.2005); *Medical Supply I*, 2003 WL 21479192, at *3 (D.Kan. June 16, 2003), *aff'd*, 112 Fed.Appx. 730 (10th Cir.2004) ("Accepting the allegations contained in the complaint as true, the court finds plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1."). Counts I and II fail to state a claim upon which relief can be granted.

b. Sherman Act, § 2 (Counts III and IV)

[8][9]Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, ... shall be deemed guilty of a felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); ***1328***Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir.1987). "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). In the Tenth Circuit, "monopoly power is defined as the ability both to control prices and exclude competition." *Tanaka v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1567 (10th Cir.1991). Further, "determination of the existence of monopoly power requires proof of relevant product and geographic markets." *Id.*

[10] Plaintiff's relevant allegations regarding § 2 of

the Sherman Act specifically consists of the following paragraph:

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 [sic] 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 [sic] of the same in the several States of the United States in violation of 15 U.S.C. § 2.

(Compl., at 96).

Thus, even accepting each of plaintiff's allegations as true, plaintiff has clearly failed to allege (1) defendants' possession of monopoly power, (2) a relevant product and geographic market, or (3) that defendants either controlled prices and excluded competition. *See Medical Supply II*, 144 Fed.Appx. at 713 (affirming the district court's holding on plaintiff's Sherman Act, § 2 claim, and stating that "we see no reason to disturb the district court's conclusion that [plaintiff] failed to state a claim that GE had illegally monopolized or attempted to monopolize the North American hospital supply e-commerce market"); *Medical Supply I*, 2003 WL 21479192, at *3 ("Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, plaintiff has not pled the existence of a relevant product market or geographic market. Plaintiff has not stated that defendants' alleged market power stems from defendants' willful acquisition or maintenance of that power rather than from defendants' development of a superior product, business acumen, or historic accident."). The court finds that Counts III and IV fail to state a claim of monopoly under § 2.

c. Clayton Act (Count V)

[11] A provision of the Clayton Act, 15 U.S.C. § 19, prohibits persons from serving, at the same time, as a director or officer of any two corporations that are engaged in commerce and are competitors, "so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." 15 U.S.C. § 19(a)(1). Plaintiff's complaint, however, fails to allege who the alleged interlocking directors are, for which defendants' companies they serve, or that the corporations in question are actual competitors. For these reasons, plaintiff's Count V is dismissed for failure to state a claim.

d. RICO (Count XV)

[12][13] To plead a viable civil RICO claim under 18 U.S.C. § 1962(c), plaintiff ***1329** must allege that a defendant " '(1) participated in the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' " *Abbott v. Chem. Trust*, 2001 WL 492388, at *15 (D.Kan. Apr.26, 2001) (quoting *BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1100 (10th Cir.1999)). Plaintiff also alleges that defendants conspired to violate 18 U.S.C. § 1962(c). *See* 18 U.S.C. § 1962(d). Under Rule 9(b), plaintiff must allege with particularity not only each element of a RICO violation, but also the predicate acts of racketeering. *Phillips USA, Inc. v. Allflex USA, Inc.*, 1995 WL 191615, at *2 (D.Kan. Mar. 31, 1995) (quoting *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir.1992)). To properly allege the predicate acts, plaintiff must specify the "who, what, where, and when" of each purported act. *Id.* (citation omitted).

[14] Here, plaintiff failed to sufficiently allege the "who, what, where, and when" its RICO claim. Plaintiff's specific RICO allegations consists of the following: "The Defendants engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," as well as numerous assertions that defendant Shughart Thomson & Kilroy, a law firm based in Kansas City, Missouri, violated RICO by conspiring with other unspecified defendants to shut plaintiff out of the healthcare supply industry. Again, plaintiff offers no specific facts in support of its numerous allegations. Thus, plaintiff's RICO claim fails to state a claim for which relief may be granted.

Plaintiff also cites to 18 U.S.C. §§ 1503 and 1513 in its RICO discussion. Section 1503 prohibits

influencing, intimidating, impeding or injuring a juror or officer of the court, 18 U.S.C. § 1503(a), while § 1513 prohibits retaliation against a witness for attending or testifying in an official proceeding, or for providing information relating to the commission of a federal offense to a law enforcement officer, 18 U.S.C. § 1513(a)(1). Plaintiff seems to argue that defendant Shughart Thomson & Kilroy violated these statutes when it lodged ethics complaints against Mr. Landrith. Plaintiff's allegations have nothing to do with unlawfully influencing a juror or officer of the court, or retaliating against a witness or informant. Therefore, these allegations fail to state a claim.

Also as part of its RICO claim, plaintiff alleges that defendants violated 17 U.S.C. § 506 when it "stole copyrighted works to keep Medical Supply from realizing its plan to enter the market for hospital suppliers ... 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." (Compl., at 110). This is the entirety of detail plaintiff gives regarding its criminal copyright claim. Thus, plaintiff does not allege exactly what material was stole by whom, how the allegedly stolen material fits the definition of copyrighted material, or how the material was stolen.

Plaintiff also alleges that defendants violated 18 U.S.C. § 2319. However, because plaintiff makes absolutely no allegations regarding this statute other than to state that "Defendants [sic] violation falls under 18 USC § 2319," this claim fails to state a valid claim.

As part of its RICO claims, plaintiff also alleges that defendants violated the Hobbs Act "by preventing Medical Supply's entry into commerce under color of official right," citing to 18 U.S.C. § 1951. Section 1951 prohibits the obstruction, delay or affection of commerce by robbery or extortion. Significantly, extortion is defined as the "wrongful use of actual or threatened force, violence, or fear, under color of official right." 18 U.S.C. § 1951(b)(2). Here, ***1330** there is no allegation that defendants, who are private parties, acted under color of official right, or acted with any force, violence or fear. Therefore, plaintiff's claim under the Hobbs Act fails to state a claim.

e. USA PATRIOT Act (Count XVI)

[15] Plaintiff alleges that all defendants, through defendants U.S. Bancorp NA and U.S. Bank National Association, violated two sections of the USA PATRIOT Act, 31 U.S.C. § 5318(g)(3) and 18 U.S.C. § 1030, by "maliciously" filing a suspicious activity report regarding plaintiff and its founder Samuel Lipari. No private cause of action exists to enforce the USA PATRIOT Act.*Medical Supply I*, 112 Fed.Appx. at 731. Therefore, plaintiff's USA PATRIOT Act claims are dismissed.

f. State Law Claims

[16] Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir.2002) (quotation marks, alterations, and citation omitted). Having dismissed each of plaintiff's federal claims, this court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice.

2. Issue/Claim Preclusion

Several defendants argue that issue and/or claim preclusion bar several of plaintiff's claims. Claim and issue preclusion are rules of "fundamental and substantial justice that enforce[ ] the public policy that there be an *end* to litigation." *May v. Parker-Hibbett Transfer & Storage, Inc.*, 899 F.2d 1007, 1009 (10th Cir.1990) (internal citation and quotation omitted). Claim and issue preclusion serve to "avoid[ ] unnecessary expense and vexation for parties, conserve[ ] judicial resources, and encourage[ ] reliance on judicial action." *Id.*

[17] Under the doctrine of issue preclusion, " '[w]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' " *Botefuhr*, 309 F.3d at 1282 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25

L.Ed.2d 469 (1970)).

Four elements must be demonstrated in order to trigger issue preclusion: "(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been fully adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

Id. at 1282 (quotations omitted).

[18] On the other hand, "claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits." *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir.2005) (citations omitted). "If these requirements are met, [claim preclusion] is appropriate unless the party seeking to avoid preclusion did not have a 'full and fair opportunity' to litigate the claim in the prior suit." *Id.* (quoting *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n. 4 (10th Cir.1999)).

***1331**[19] Here, at least five of plaintiff's claims against three defendants are barred by claim preclusion. In *Medical Supply I*, plaintiff brought suit against three of the same defendants as the instant case: US Bancorp NA, Piper Jaffray, and Andrew Cesare. This court reached final judgment on the merits of each of plaintiff's claims in *US Bancorp* by dismissing each claim for failure to state a claim for which relief can be granted pursuant to Rule 12(b)(6). *See Medical Supply I*, 2003 WL 21479192. Moreover, the Tenth Circuit affirmed this court's dismissal. *See Medical Supply I*, 112 Fed.Appx. (10th Cir.2004). The identical claims include Sherman Act § 1 claims, 15 U.S.C. § 1 (Counts I and II of the instant action), Sherman Act § 2 claims, 15 U.S.C. § 2 (Counts III and III), the Hobbs Act claims, 18 U.S.C. § 1951(b)(2) (Count XV), the USA PATRIOT Act claims, 31 U.S.C. § 5318 (Count XVI), as well as several state claims. Finding that each of these claims (1) ended in a judgment on the merits in a prior case, (2) involved the many of the same defendants and (3) involved the same causes of action, the court finds that claim preclusion bars plaintiff's claims as to the identical defendants.[16]

[16] The court is confident that several of plaintiff's instant claims, to the extend that the court understands them, are also precluded by issue preclusion. However, because the court has several other grounds on which to base dismissal of plaintiff's claims, the court opts to not wade through the details of plaintiff's claims looking for previously-litigated issues.

3. Rule 8

[20] Plaintiff's complaint, as a whole, violates Federal Rules of Civil Procedure Rule 8(a) and 8(e)(1). Rule 8(a) states: "A pleading ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(e)(1) elaborates on the short and plain requirement in requiring each averment to be "simple, concise, and direct." Plaintiff's 115 page, 613 paragraph complaint falls miles from Rule 8's boundaries. Pages seven through fifty of plaintiff's complaint are organized under the heading of "The Relative Markets" and consist of a multitude of unsupported, unauthenticated commentary about the healthcare industry in the United States. These "facts" include quotes from President George W. Bush, U.S. Senate Committee hearing testimony, quotations from newspaper articles and study findings. Also included is wholly irrelevant information such as paragraph eighty-eight, which seeks to educate the court about the number of deaths in 2003 resulting from the lack of affordable health insurance, as well as unsubstantiated and very weighty allegations, such as that "defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged $30,000,000,000.00 (thirty billion dollars) in 2002." (Compl., at 11). Pages fifty to eighty-four comprise a section entitled "Events," which includes some background of this case and others, allegations regarding defendants and other third persons, caselaw, newspaper article quotations, and discussion about disciplinary complaints lodged against Mr. Landrith, to name a few. The "Claims for Relief" section starts on page eighty-six, and continues in the same style. For instance, the discussion of plaintiff's first count spans eleven pages, excluding the fact that plaintiff begins each count by realleging all previous paragraphs. In sum, plaintiff's complaint is so exceptionally verbose

and cryptic that dismissal is appropriate.

Although the short and plain requirement of Rule 8 is a low burden, several courts have dismissed complaints like plaintiff's. *See* ***1332***United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378-79 (7th Cir.2003) (affirming dismissal of plaintiff's 155 page, 400 paragraph complaint, holding that "[l]ength may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter") (citing *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 702-03 (3d Cir.1996) (240 pages, 600 paragraphs); *Knehl v. FDIC*, 8 F.3d 905, 908-09 (1st Cir.1993) (43 pages, 358 paragraphs); *Michaelis v. Neb. State Bar Assoc.*, 717 F.2d 437, 439 (8th Cir.1983) (98 pages, 144 paragraphs)).

The court is unwilling to allow plaintiff to amend its complaint for three reasons. First, for reasons explained more fully below, the court believes amendment would be futile. Second, before requesting sanctions against plaintiff, two groups of defendants gave plaintiff at least twenty-one days notice pursuant to Federal Rule of Civil Procedure 11(c)(1)(A). After receiving such notice, plaintiff chose not to withdraw or amend its complaint. Therefore, any additional opportunity is not necessary. Third, the author of the complaint is plaintiff's original counsel, Mr. Landrith. Mr. Hawver recently entered his appearance on behalf of plaintiff, but has chosen not to amend the complaint in this case. Thus, Mr. Hawver has chosen to step into the shoes of Mr. Landrith and adopt the complaint as his own.

D. Defendants' Requests for Sanctions (Docs. 22 and 36)

Two groups of defendants filed two separate motions for sanctions against plaintiff and plaintiff's counsel. Defendants argue that sanctions are warranted pursuant to Federal Civil Procedure Rule 11 and 28 U.S.C. § 1927 in light of plaintiff's decision to disregard previous admonitions from this court and the Tenth Circuit. Defendants also contend that plaintiff and its counsel filed the instant lawsuit unnecessarily to harass and annoy defendants with frivolous and costly litigation.

[21]Federal Rule of Civil Procedure 11(b) states that by filing a pleading, an attorney is certifying that the information contained in the motion,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Violation of these requirements will result in sanctions imposed by the court. Fed.R.Civ.P. 11(c); *see Griffon v. City of Okla. City*, 3 F.3d 336, 342 (10th Cir.1993) ("Rule 11 requires the district court to impose sanctions if a document is signed in violation of the Rule."). The standard for Rule 11 sanctions is an objective one. *See White v. Gen. Motors Corp.*, 908 F.2d 675, 680 (10th Cir.1990) ("A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances."). Likewise, subjective bad faith is not required to trigger Rule 11 sanctions. *Burkhart ex rel. Meeks v. Kinsley Bank*, 804 F.2d 588, 589 (10th Cir.1986).

***1333**[22][23][24]Section 1927 provides that "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Sanctions may be imposed under § 1927 "for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir.1987). Like Rule 11, the court must apply an objective standard, and subjective bad faith is not

a necessary showing for application of § 1927 sanctions. Because § 1927 is penal in nature, an award should only be made " 'in instances evidencing a serious and standard disregard for the orderly process of justice' " and the court must be aware of the "need to ensure that the statute does not dampen attorneys' zealous representation of their clients' interests." *Ford Audio Video Sys., Inc. v. AMI Corp., Inc.*, 1998 WL 658386, at *3 (10th Cir. Sept.15, 1998) (quoting *Dreiling v. Peugeot Motors of Am., Inc.*, 768 F.2d 1159, 1165 (10th Cir.1985) (internal quotations omitted)).

[25] The court notes that, pursuant to Rule 11(c)(1)(A), both groups of defendants requesting sanctions gave plaintiff at least twenty-one days notice before filing their motions for sanctions. "The basic requirements of due process with respect to the assessment of costs, expenses, or attorney's fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond." *Braley*, at 1514. Plaintiff responded to defendants' motions by arguing that claim and issue preclusion do not bar plaintiff's claims, and that defendants violated Rule 11 and § 1927 by requesting sanctions. Plaintiff chose not to withdraw or amend its complaint.

The court finds that sanctions against plaintiff in the form of attorney fees and costs are appropriate and necessary pursuant to both Rule 11 and § 1927 for four reasons. First, the mere fact that plaintiff filed a nearly unintelligible 115 page complaint, which the court already found violates Rule 8, suggests that plaintiff's complaint, and the instant suit as a whole, was brought for the purpose of harassing defendants or the court, causing unnecessary delay and/or needlessly increasing the cost of litigation in violation of Rule 11(b)(1). Second, as discussed above, not one of plaintiff's federal claims supports a viable claim for which relief can be granted pursuant to Rule 12(b)(6). As such, plaintiff's complaint consists of frivolous claims in violation of Federal Rule of Civil Procedure 11(b)(2). Moreover, each of plaintiff's federal claims lack the evidentiary support needed to avoid violating Rule 11(b)(3). Third, plaintiff's insistence on re-litigating claims barred by claim preclusion "unreasonably and vexatiously" "multiplies the proceedings" in violation of § 1927.

Fourth, and most importantly, plaintiff failed to heed the court's previous admonitions and sanctions, choosing instead to proceed with the instant suit and attempt another bite at the proverbial apple. Plaintiff's previous two claims in this court were dismissed for failure to state a claim pursuant to Rule 12(b)(6). *Medical Supply I*, 2003 WL 21479192, at *9; *Medical Supply II*, 2004 WL 956100, at *5. In *Medical Supply I*, the undersigned judge advised plaintiff's counsel to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *Id.* at *6. In the same Order, the undersigned judged found plaintiff's allegations "completely divorced from rational thought." *Id.* at *8. In *Medical Supply II*, the undersigned judge noted that "at the most fundamental level, **1334** plaintiff's antitrust claims fail." 2004 WL 956100, at *3.

Both prior dismissals were affirmed by the Tenth Circuit. *Medical Supply I*, 112 Fed. Appx. at 731-32; *Medical Supply II*, 144 Fed. Appx. at 716. In *Medical Supply I*, the Tenth Circuit ordered plaintiff to show cause why sanctions should not be imposed. 112 Fed.Appx. at 731-32. The undersigned judge imposed attorney fees totaling $23,956 and double costs as a sanction against Mr. Landrith. *Medical Supply I*, 2005 WL 2122675, at *1. In *Medical Supply II*, the Tenth Circuit reversed and remanded on the issue of sanctions against plaintiff, and "the issue of sanctions remains pending. 144 Fed.Appx. at 716.

Plaintiff and its counsel have had plenty of warning about filing frivolous claims from both this court and the Tenth Circuit. But plaintiff persisted, filing a third lawsuit against many of the same defendants and alleging many of the same claims. Enough is enough. *See Brooks v. Couchman*, 2006 WL 137415, at *1 (10th Cir. Jan.19, 2006) (affirming the district court's dismissal of plaintiff's third attempt at the same argument, stating that "we have expended valuable court resources on at least two occasions dealing with [plaintiff] and his various meritless theories. We repeat our sentiment ...: 'We will spend no more judicial time or resources addressing his frivolous claims.' " (internal citation omitted)); *Sweeney v. Resolution Trust Corp.*, 16 F.3d 1, 6-7 (1st Cir.1994) (finding that the district court did not abuse its discretion in imposing sanctions on plaintiffs for filing a third and "repetitive" motion to remand when the court had previously denied two "almost identical motions and made detailed findings of fact").

[26][27] The court may impose sanctions against plaintiff, plaintiff's counsel, or against both with joint and several liability. *White*, 908 F.2d at 685-86. However, "the sanctioning of a party requires specific findings that the party was aware of the wrongdoing." *Id.* at 685 (citations omitted); *Barrett v. Tallon*, 30 F.3d 1296, 1303 (10th Cir.1994) ("Thus, in the case of a frivolously pleaded RICO claim, it seems that the court should sanction the responsible attorneys rather than the plaintiffs, unless it finds that the plaintiffs insisted, against the advice of counsel, that the RICO claim be asserted, or that the plaintiffs had a sufficient understanding of the nature, elements, and limitations of the attempted RICO claim to independently evaluate its applicability to the alleged facts.").

Certainly plaintiff's former counsel, Bret D. Landrith, is culpable. Mr. Landrith was the attorney of record when each of the sanctionable motions were filed, and Mr. Landrith signed and authored the complaint and each of the motions before the court. Nonetheless, sanctions against plaintiff are also appropriate for two reasons. First, plaintiff's CEO and sole shareholder, Samuel Lipari, takes responsibility for the decisions to knowingly bring the instant lawsuit after the result of plaintiff's previous attempts at litigation. For instance, Mr. Lipari's affidavit, entitled "Affidavit of Sam Lipari on The Unsuitability of Transfer," states:

> I chose to bring this new action in Missouri District court because I have a responsibility to Medical Supply's stakeholders ... to adjudicate these claims. I brought two earlier and related actions to Kansas District court based on the advice of my counsel. I have witnessed first hand that no decision or outcome in either case including from the Tenth Circuit Court of Appeals had any relationship to the pleadings of my company or applicable law. I make this determination based on my considerable personal experience as a clerk and researcher ***1335** for a Missouri legal firm and upon discussion with what I believe are the foremost healthcare antitrust authorities in our nation.

(Doc. 30, exh. 1). Mr. Lipari's affidavit continues with a litany of conspiracy theories involving defendants, this court, and other government agencies and employees. Significantly, however, Mr. Lipari's affidavit also discusses numerous instances when he actively participated in prior and current litigation. Mr. Lipari's affidavit also discusses attending one of Mr. Landrith's disciplinary conferences. Thus, Mr. Lipari was well-aware of the legal arguments and allegations being brought by his attorney, as well as the disciplinary allegations against Mr. Landrith prior to his disbarment. Even so, plaintiff chose to continue vigorously litigating the instant case. Second, after Mr. Landrith was disbarred, plaintiff chose to retain new counsel and continue litigating this case. Therefore, sanctioning plaintiff as well as Mr. Landrith serves to deter both from future frivolous filings.

In sum, the court finds that defendants' reasonable attorney fees and costs against plaintiff and Mr. Landrith jointly and severally is the minimum amount of sanctions necessary to "adequately deter the undesirable behavior." *White v. Gen. Motors*, 977 F.2d 499, 502 (10th Cir.1992) (internal quotations and citations omitted).

E. Plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45)

Plaintiff's motion for clarification seems to request this court to clarify its ruling in a separate case, case number 03-2324, which found that plaintiff's request to consolidate case number 03-2324 with the instant case is moot. Case number 03-2324 was closed as of February 13, 2004, with attorney fees the only remaining issue. The court need not address this motion for two reasons. First, plaintiff has previously requested the court to "clarify" its decision in case number 03-2324, and the court found plaintiff's request moot in light of the posture of the case. Second, plaintiff's instant case will soon be closed, as the instant Memorandum and Order's holdings dismiss plaintiff's entire complaint. Therefore, the issue of whether to consolidate two closed cases is a moot one.

IT IS THEREFORE ORDERED that defendant Robert Zollars' Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 2); Defendant Neoforma, Inc.'s Motion to Dismiss, [sic] Complaint, or Alternatively to Require Amendment, Pursuant to F.R.C.P. Rules 8 and 9 (Doc. 4); Defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew

Cesare and Andrew S. Duffi' Motion to Transfer, Dismiss and/or Strike (Doc. 6); Defendants Curt Nonomaque and Robert Baker's Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim (Doc. 11); Defendant Shughart Thomson & Kilroy, P.C.'s Motion to Transfer, Dismiss and/or Strike (Doc. 13); Defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffi' Renewed Motion to Dismiss and/or Strike (Doc. 32); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Renewed Motion to Dismiss Complaint for Failure to State a Claim (Doc. 34) are granted. Plaintiff's case is hereby dismissed.

IT IS FURTHER ORDERED that defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffi' Motion for Sanctions (Doc. 22), and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion***1336** for Sanctions (Doc. 36) are granted. Plaintiff and Mr. Bret D. Landrith are hereby jointly and severally sanctioned in the amount of defendants' reasonable attorney fees and costs. **Defendants shall submit an accounting of their attorney fees and costs within twenty (20) days of this Memorandum and Order.**

IT IS FURTHER ORDERED that plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28); plaintiff's Motion to Strike Defendants' Renewed Motion to Dismiss and/or Strike (Doc. 38); plaintiff's Motion to Strike Novation Defendants' Renewed Motion to Dismiss (Doc. 43); and plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45) are denied.

IT IS FURTHER ORDERED that Defendants' Motion to Stay Rule 26(f) Conference and Discovery (Doc. 24); plaintiff's Motion to Consolidate Under Rule 42 (Doc. 39); plaintiff's Motion to Require Consolidation Arguments to be in the Form of Pleadings on the Record and Notice of Threat of Unlawful Sanctions (Doc. 42); First Plaintiff's Motion for Partial Summary Judgment Under F.R. Civ. P. Local Rule 56.1 (Doc. 46); plaintiff's Motion for Leave to Join Additional Defendants Under Fed.R.Civ.P. 29(a) (Doc. 49); plaintiff's Motion to Substitute Plaintiff Under F.R.C.P. Rules [sic] 17(a), 15(a) and 25(a) (Doc. 56); plaintiff's Motion to Substitute Defendant Under F.R.C.P. Rules [sic] 17(a) (Doc. 57); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion to Set Oral Hearing on Motion to Dismiss (Doc. 76) are denied as moot.

SO ORDERED.

D.Kan.,2006.
Medical Supply Chain, Inc. v. Neoforma, Inc.
419 F.Supp.2d 1316, 2006-1 Trade Cases P 75,160

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HMedical Supply Chain, Inc. v. U.S. Bancorp, NA C.A.10 (Kan.),2004.
This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,Tenth Circuit.
MEDICAL SUPPLY CHAIN, INC., Plaintiff-Appellant,
v.
US BANCORP, NA; Us Bank Private Client Group; Corporate Trust; Institutional Trust and Custody; Mutual Fund Services, LLC.; Piper Jaffray; Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes; Unknown Healthcare Supplier, Defendants-Appellees.
No. 03-3342.

Nov. 8, 2004.

Bret D. Landrith, Topeka, KS, for Plaintiff-Appellant.
Andrew M. Demarea, Shughart, Thomson & Kilroy, Overland Park, KS, Mark A. Olthoff, Shughart, Thomson & Kilroy, Kansas City, MO, for Defendants-Appellees.

Before McCONNELL, HOLLOWAY, and PORFILIO, Circuit Judges.

ORDER AND JUDGMENT[FN*]

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

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

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

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

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

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

Exhibit B

plaintiff and plaintiff's counsel to SHOW CAUSE in writing within twenty *732 days of the date of this order why they, jointly or severally, should not be sanctioned for this frivolous appeal pursuant to Fed. R.App. P. 38. *See Braley v. Campbell*, 832 F.2d 1504, 1510-11 (10th Cir.1987) (discussing court's ability to impose sanctions against clients and their attorneys under Fed. R.App. P. 38).

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

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HMedical Supply Chain, Inc. v. U.S. Bancorp, NA
D.Kan.,2003.

United States District Court,D. Kansas.
MEDICAL SUPPLY CHAIN, INC., Plaintiff,
v.
US BANCORP, NA, et al., Defendants.
No. Civ.A. 02-2539-CM.

June 16, 2003.

MEMORANDUM AND ORDER

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

I. Background [FN1]

FN1. The court exercises jurisdiction under 28 U.S.C. §§ 1331 and 1337.

1. The Parties

Plaintiff is a Missouri corporation which has developed a health care supply strategist certification program. According to plaintiff, defendant U.S. Bancorp NA (hereinafter "US Bancorp") is a bank holding corporation headquartered in Minnesota and is the parent company of the employees and subsidiaries named as co-defendants. Defendant U.S. Bancorp operates banks in several states under the name U.S. Bank. Defendant Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC (hereinafter "defendant LLC"), is a subsidiary of defendant U.S. Bancorp, also headquartered in Minneapolis. Defendant LLC is the division of defendant U.S. Bancorp that is responsible for escrow accounts for health care systems. Defendant U.S. Bancorp Piper Jaffray, Inc. is the investment banking subsidiary of defendant U.S. Bancorp, and is headquartered in Minneapolis. It has underwriting and investment relationships with healthcare suppliers. Defendant Unknown Healthcare Entity is "believed to be a supplier or purchasing organization who has communicated with U.S. Bancorp, its employees or its subsidiaries about plaintiff for the purpose of obstructing or delaying plaintiff's entry into commerce."Jerry A. Grundhofer is President and CEO of defendant U.S. Bancorp. Defendant Andrew Cesere is Vice Chairman of the U.S. Bancorp trust division. Defendant Susan Paine is the supervisor for U.S. Bank's St. Louis, Missouri corporate trust office. Defendant Lars Anderson is the customer acquisition manager for U.S. Bank's St. Louis, Missouri corporate trust office. Defendant Brian Kabbes is Vice President of Corporate Trusts for U.S. Bank.

B. Plaintiff's Claims

Plaintiff contends defendants engaged in conduct violating (1) the Sherman Antitrust Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act. Plaintiff also alleges defendants (4) "fail[ed] to properly train [their] employees on the USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under the USA PATRIOT Act"; and (6) violated "criminal laws to influence policy under section 802 of the USA PATRIOT Act."The complaint further charges defendants with (7) misappropriation of trade secrets, under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good faith and fair dealing. Plaintiff seeks over $943 million in damages and declaratory relief.[FN2] Defendants request dismissal of the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff has failed to state a claim for which relief can be granted.

FN2. On January 9, 2003, the Tenth Circuit affirmed this court's order denying plaintiff's requests for preliminary injunction.

Exhibit C

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

II. Legal Standard for Motions to Dismiss

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

III. Analysis

A. Sherman Act (Count I)

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

1. Section 1

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

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

a. Contract, Combination, or Conspiracy

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

First, the court finds that plaintiff has not

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

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

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

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

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

Second, the court finds that even if the allegations of conspiracy alleged in plaintiff's complaint encompassed a plurality of actors, plaintiff has failed to state a claim for relief. Here, plaintiff has not pled the existence of a pricing agreement, or agreement of any kind, among the defendants in restraint of trade. "Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief." *TV Communications Network, Inc.*, 964 F.2d at 1024 (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir.1980)). A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. *Id.*; *see also Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir.1979) (holding that to survive a motion to dismiss, a complaint stating violations of the Sherman Act "must allege facts sufficient, if they are proved, to allow the court to conclude that claimant has a legal right to relief"). Conclusory allegations that the defendant violated those laws are insufficient. *Id.* (citing *Klehamow v. N.Y. Produce Ex.*, 344 F.2d 294, 299 (2d Cir.1965)). The court grants defendants' motion to dismiss plaintiff's claim under § 1 of the Sherman Act.

2. Section 2

*4Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed guilty of a felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90, (1956); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir.1987).

Plaintiff states defendants "have violated Section 2," and that they "have acquired, maintained and extended their monopoly power through improper means, including attempting to extort healthcare technology companies into using U.S. Bancorp as the underwriter of capitalization against securities regulations and in denying [plaintiff] the escrow accounts it required to capitalize its entry into commerce through extortion under the color of

official right-the USA PATRIOT Act."Further, plaintiff alleges defendants' "vertical integration is part of a calculated scheme to gain control over the $1.3 trillion health care supplier and distribution segment of the health care industry and to restrain or suppress competition," and that defendants "engage in predatory tactics and dirty tricks including ... extortion [and] 'laddering' schemes to fraudulently inflate equity values of competitors they own interests in."Plaintiff claims defendants "invest in and promote engage in [sic] anticompetitive predatory sole source contract agreements."In addition, according to plaintiff, defendants have gained "the power to control prices of health care supplies ... that are higher than those negotiated directly by hospitals."

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

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

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

*5 Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, plaintiff has not pled the existence of a relevant product market or geographic market. Plaintiff has not stated that defendants' alleged market power stems from defendants' willful acquisition or maintenance of that power rather than from defendants' development "of a superior product, business acumen, or historic accident."The court finds plaintiff has failed to state a claim of monopoly under § 2.

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

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

B. Clayton Act (Count II)

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

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

C. Hobbs Act (Count III)

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

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

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

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

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

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

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

*7 (h) Anti-money laundering programs.-

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

(A) the development of internal policies, procedures, and controls;

(B) the designation of a compliance officer,

(C) an ongoing employee training program, and

(D) an independent audit function to test programs.

31 U.S.C. § 5318(h).

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

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

Second, the court finds that, even if Count IV were justiciable, no private right of action exists to enforce the Patriot Act. As a result, Counts IV, V, and VI fail to state a claim for which relief can be granted. Plaintiff has not identified a provision of the Patriot Act expressly authorizing enforcement by private citizens. In its response to the motion to dismiss, plaintiff states that the failure to train and excessive use of force claims are actionable under 42 U.S.C. § 1983.

Section 1983 provides a cause of action against any person who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws."§ 1983 (emphasis added). The complaint has failed to allege that defendants acted under color of state law, an essential element of a § 1983 suit. *E.g., Sooner Prods. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir.1983). Although plaintiff later states in its response that defendants acted "as an agent for the Department of the Treasury"[FN3] and that § 1983 liability may extend to private individuals if they engage in joint action with state officials, these allegations do not appear in the complaint and are, nevertheless, so conclusory that they cannot state a claim. *See, e.g., Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir.1994); *Sooner Prods. Co.*, 708 F.2d at 512 ("When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action."). In *Blessing v. Freestone*, the Supreme Court explained the factors courts must consider in determining whether a statute gives rise to a right enforceable under § 1983:

> FN3. Plaintiff's argument implicates action under color of federal rather than state law thus giving rise to an action under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), rather than § 1983.

***8** In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

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

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

Finally, with regard to Count VI in particular, in which plaintiff actually contends defendants "are preventing [plaintiff]'s entry into commerce in violation of Section 802 of the USA Patriot Act which creates a federal crime of 'domestic terrorism' that broadly extends to 'acts dangerous to human life that are a violation of the criminal laws,' the court finds plaintiff's allegation so completely divorced from rational thought that the court will refrain from further comment until such time as federal criminal proceedings are commenced, if indeed they ever are.

Counts IV, V, and VI are dismissed.

E. State Law Claims (Counts VII-XIII)

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

IV. Order

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

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

IT IS FURTHER ORDERED THAT this case is hereby dismissed.

D.Kan.,2003.
Medical Supply Chain, Inc. v. US Bancorp, NA
Not Reported in F.Supp.2d, 2003 WL 21479192 (D.Kan.), 2003-2 Trade Cases P 74,069

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HMedical Supply Chain, Inc. v. Neoforma, Inc.
C.A.10 (Kan.),2007.

United States Court of Appeals,Tenth Circuit.
MEDICAL SUPPLY CHAIN, INC., Plaintiff-Appellant,
v.
NEOFORMA, INC.; Robert J. Zollars; Volunteer Hospital Association; Curt Nonomaque; University Healthsystem Consortium; Robert J. Baker; US Bancorp NA; US Bank NA; Jerry A. Grundhofer; Andrew Cecere; Piper Jaffray Companies; Andrew S. Duff; Shugart Thomson & Kilroy; Watkins Boulware, P.C.; Novation, LLC, Defendants-Appellees,
Samuel K. Lipari, Interested Party-Appellant.
No. 06-3331.

Nov. 16, 2007.

Background: Corporation that developed health-care supply strategist certification program brought action against bank and others asserting violations of Sherman Act, Racketeer Influenced and Corrupt Organizations Act (RICO), USA PATRIOT Act, and state law. Case was transferred, complaint was dismissed, and sanctions were imposed against company. 419 F.Supp.2d 1316.The United States District Court for the District of Kansas, Carlos Murguia, J., 2006 WL 2570312, denied company's motion for reconsideration, and it appealed.

Holding: The Court of Appeals, Hartz, Circuit Judge, held that district court's entry in its docket of memorandum and order striking plaintiff's motion for reconsideration commenced 30-day period for filing notice of appeal.
Appeal dismissed.

West Headnotes

Federal Courts 170B ⇐669

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk669 k. Commencement and Running of Time for Filing; Extension of Time. Most Cited Cases
District court's entry in its docket of memorandum and order striking plaintiff's motion for reconsideration of order dismissing its complaint commenced 30-day period for filing notice of appeal, even though no separate document was filed, and court did not decide motion's merits. Fed.Rules Civ.Proc.Rule 58(a)(1)(D), 28 U.S.C.A. App. (2000 Ed.)

573 Submitted on the briefs: [FN]

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

Ira Dennis Hawver, Ozawkie, Kansas, for Plaintiff-Appellant.
Mark A. Olthoff, Shughart Thomson & Kilroy, P.C., Kansas City, MO, Andrew M. DeMarea, Shughart Thomson & Kilroy, P.C., Overland Park, KS, for Defendants-Appellees, U.S. Bancorp, N.A., U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cecere, Piper Jaffray Companies, and Andrew S. Duff.
Stephen N. Roberts, Janice Vaughn Mock Nossaman, Guthner, Knox & Elliott, LLP, San Francisco, CA, and John K. Power, Husch & Eppenberger, Kansas City, MO, for Defendants-Appellees, Neoforma, Inc. and Robert J. Zollars.
Kathleen Bone Spangler, Vinson & Elkins, L.L.P., Houston, TX, and John K. Power, Husch & Eppenberger, Kansas City, MO, for Defendants-Appellees Novation, LLC, Curt Nonomaque, Volunteer Hospital Association, University Healthsystem Consortium and Robert J. Baker.
William E. Quirk, Kathleen A. Hardee, Shughart Thomson & Kilroy, P.C., Kansas City, MO, for Defendant-Appellee, Shughart Thomson & Kilroy, P.C., and Watkins Boulware, P.C.
Before HARTZ, Circuit Judge, BRORBY, Senior

Exhibit D

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

We begin by summarizing the rules that govern the timeliness of this appeal. Federal Rule of Appellate Procedure 4(a)(1)(A) states the general rule that the notice of appeal "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." *Cf.* Fed. R.App. P. 4(a)(1)(B) (setting 60-day limit "[w]hen the United States or its officer or agency is a party"). Federal Rule of Civil Procedure 58 sets forth how a judgment or order is to be entered. Under Rule 58(a)(1) ordinarily a "judgment [or] amended judgment must be set forth on a separate document." (Federal Rule of Civil Procedure 54(a) defines *judgment* as "any order from which an appeal lies.") But there are exceptions to the separate-document requirement; a separate document is not required for orders disposing of motions under Rules 50(b), 52(b), 54, 59, and 60. *See* Fed.R.Civ.P. 58(a)(1)(A), (B), (C), (D), (E). Entry is straightforward when a separate document is not required; in that circumstance, the order is "entered" when it is "entered in the civil docket under Rule 79(a)." *Id.* Rule 58(b)(1). But if a separate document is required, the judgment is entered only "when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs: (A) when it is set forth on a separate document, or (B) when 150 days have run from entry in the civil docket under Rule 79(a)." *Id.* Rule 58(b)(2). We now apply these provisions to the case before us.[fn1]

> FN1. Effective December 1, 2007, Rule 58 will be restyled, so that Rule 58(a)(1) becomes Rule 58(a) and its subparagraphs (A), (B), (C), (D), and (E) become paragraphs (1), (2), (3), (4), and (5) of Rule 58(a).

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

On March 14, 2006, Samuel K. Lipari, MSC's chief executive officer, filed an entry of appearance and the motion at issue on this appeal, a motion for reconsideration of the March 7, 2006, order. Mr. Lipari is not an attorney. His entry of appearance informed the court that he had dissolved MSC, had fired its attorney, and was now going to represent himself. Three days later, MSC's attorney filed a motion for leave to withdraw. On March 27 Mr. Lipari filed a motion for leave to rewrite and amend MSC's complaint if the court were to grant his motion to reconsider. On March 30 he filed a motion to strike a number of filings by various defendants on the ground that they had not been properly served upon him as a pro se litigant. Finally, on July 24, 2006, Mr. Lipari filed in district court a motion to have the case transferred back to the federal district court for the Western District of Missouri, where it had originated.

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

Although the notice of appeal could be read to encompass several rulings by the district court, MSC's appellate briefs make clear that the only ruling it challenges is the rejection of the motion to reconsider. Therefore, we need address only the timeliness of the notice of appeal with respect to that order. As MSC appears to concede, the motion to reconsider was a motion under either Federal Rule of Civil Procedure 59, Rule 60, or both. *See Jennings v. Rivers*, 394 F.3d 850, 855 & n. 4 (10th Cir.2005). An order denying such a motion need not be set forth on

a separate document in order to be considered "entered" under the rules. *See* Fed.R.Civ.P. 58(a)(1)(D), (E). Thus, entry of the M & O in the district court's docket on August 7 commenced the 30-day period for filing the notice of appeal. Because the notice of appeal was not filed until September 8-32 days later-it was untimely.

We are not persuaded that any circumstance present in this case delayed the commencement of the 30-day period beyond August 7. One possibility is that an appeal of a motion to reconsider a final judgment, as in this case, is not ripe until the final judgment has been entered. As it turns out, however, the final judgment was entered (in accordance with the 150-day provision of Federal Rule of Civil Procedure 58(b)(2)) on August 4, 2006, three days before the M & O was entered in the court's docket. As a result, we have no reason to decide whether entry of the final judgment was required for ripeness; even ***575** if it were required, that requirement was satisfied here.

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

First, MSC contends that the exception to the separate-document rule does not apply because the court did not decide the merits of the motion to reconsider, but rather "struck" it. The exception, however, depends only on whether the order "dispos[es] of" a Rule 59 (or Rule 60) motion, *id.* Rule 58(a)(1), and striking a motion certainly disposes of it.

Second, MSC contends that the exception for orders denying motions under Rule 59 or 60 does not apply in this case, because the denial order was part of an M & O that also disposed of additional motions. We disagree. To be sure, to the extent that the M & O contains a judgment disposing of a nonexcepted motion, a separate document should be filed disposing of that motion. But each order in the M & O should be considered separately for compliance with the separate-document requirement. Rule 58(a) does not say that an order disposing of an excepted motion must be set forth in a separate document if it is disposed of in the same legal paper as an order disposing of a nonexcepted motion. It is unnecessary for all the orders in the M & O to be "entered" at the same time. The purpose of the separate-document rule is to clarify for all concerned that the time for appeal and for postverdict motions has begun. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978); Fed.R.Civ.P. 58 advisory committee's note to 1963 Amendment. The exceptions to the separate-document rule reflect the view that such clarification is not necessary for orders disposing of certain motions, including motions under Rule 59 or 60. The parties are unlikely to be confused about when a district court has finally disposed of a motion to reconsider, whether the court disposes of the motion by itself or disposes of it in a memorandum that also resolves other motions. Accordingly, entry on the district court's civil docket of the M & O, which contained the order denying MSC's motion for reconsideration, was sufficient for entry of that order.

Finally, we reject the possibility that the appeal from denial of the motion to reconsider might be timely if the time had not yet expired for appeal of another order in the M & O (if, say, entry of the other order required a separate document). We recognize that we have said that "a notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment." *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir.2002). Thus, if the order denying the motion to reconsider "merged in" another order in the M & O, and that order was not "entered" at the time that the M & O was entered in the district court's docket, perhaps there would be additional time to appeal the order denying the motion to reconsider. In this case, however, the striking of the motion to reconsider was hardly merged in the order denying the motion to withdraw as counsel or any of the other orders in the August 7 M & O. Striking the motion was not an interlocutory order "leading up to" ***576** one of the other orders. *Id.* (internal quotation marks omitted). Therefore, we need not consider whether a separate document was required for any other order in the M & O.

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

C.A.10 (Kan.),2007.
Medical Supply Chain, Inc. v. Neoforma, Inc.
508 F.3d 572, 2007-2 Trade Cases P 75,943

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Medical Supply Chain, Inc. v. General Elec. Co. D.Kan.,2004.
Only the Westlaw citation is currently available.
United States District Court,D. Kansas.
MEDICAL SUPPLY CHAIN, INC., Plaintiff,
v.
GENERAL ELECTRIC COMPANY, et al., Defendants.
No. Civ.A. 03-2324-CM.

Jan. 29, 2004.

Brett D. Landrith, Pittsburg, KS, for Plaintiff.
Jonathan I. Gleklen, Arnold & Porter, Washington, DC, Ryan Z. Watts, Arnold & Porter, Washington, DC, John K. Power, Husch & Eppenberger, LLC, Kansas City, MO, for Defendants.

MEMORANDUM AND ORDER

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

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

On August 21, 2003, defendants filed their Motion to Dismiss Amended Complaint (Doc. 8). On September 9, 2003, plaintiff requested an extension of time in which to answer defendants' motion. The court hereby grants plaintiff's request for an extension of time. Accordingly, the court will consider plaintiff's response brief, which was filed on October 1, 2003.

II. Motion to Dismiss Amended Complaint

A. Standards

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir.1998), or when an issue of law is dispositive, Neitzke v. Williams, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, Maher, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff, Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir.1991). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds*, Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

B. Background Facts

1. The Parties

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

Plaintiff alleges that defendant GE distributes equipment, parts, and credit services to hospitals. Plaintiff does not allege that GE provides any service (Internet-based or otherwise) relating to the healthcare supply chain or that it competes in the

Exhibit E

business of selling "hospital supplies through e-commerce." GE is a shareholder of Global Healthcare Exchange (GHX), which plaintiff alleges is an "electronic marketplace promising online distribution at lower prices to hospitals" that competes in the market to provide hospital supplies through e-commerce. GE's share of the ownership of GHX is not alleged, and GHX is not a named defendant in this action.

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

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

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

2. The Dispute

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

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

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

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

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

C. Discussion

1. Federal Antitrust Claims

*3 Counts 1 through 4 of plaintiff's Amended Complaint are based on Section 1 of the Sherman Act, 15 U.S.C. § 1. In order to withstand a motion to dismiss a Section 1 claim, a plaintiff must allege an agreement between two separate entities. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). Counts 5 through 9 allege violations of Section 2 of the Sherman Act, 15 U.S.C. § 2. A plaintiff is required to establish a relevant market to prevail on a monopolization or attempted monopolization claim under Section 2 of the Sherman Act *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir.2002).

Defendants set forth a variety of arguments why this

case should be dismissed. However, the court need not address each and every argument because, at the most fundamental level, plaintiff's antitrust claims fail.

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

Plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America."The fact that defendant GE owns an interest in GHX, the percentage of which plaintiff does not allege, does not make defendant GE (let alone the other defendants) a competitor in the market in which GHX allegedly competes. For example, in *Spanish Broadcasting System, Inc. v. Clear Channel Communications, Inc.*, 242 F.Supp.2d 1350 (S.D.Fla.2003), the defendant did not compete in the alleged relevant market, but did own 26% of a firm that did compete. The court dismissed the plaintiff's antitrust claims, holding that this ownership interest did not convert the defendant into a competitor in the relevant market. *Id.* at 1363;*Accord Inverness, Inc. v. Rare Labs., Inc.*, 32 F.Supp.2d 210, 219 (S.D.N.Y.1998) ("that the [defendants] possess market power through their alleged ownership interests in [a market participant], standing alone, does not satisfy the pleading requirements of a monopolization or attempted monopolization claim.").

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

In the Amended Complaint, plaintiff alludes to an agreement between defendants and "other healthcare suppliers" and agreements with "other suppliers and electronic marketplaces." (Am.Compl.¶¶ 33, 36.) As such, even if the Amended Complaint adequately alleged an agreement between any defendant and GHX, or any defendant and Neoforma, Inc., it would be a vertical agreement, because no defendant is alleged to compete with either of these companies. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

***4** With that in mind, a vertical agreement in which firms agree that they will deal only with each other (or not deal with each others' competitors) is considered an "exclusive dealing arrangement." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 473 n. 2 (3rd Cir.1992). Exclusive dealing arrangements, like other non-price vertical restraints, are analyzed under the rule of reason. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44-45, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984).

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

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

commercial real estate market and the related market of potential financiers.

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

There simply exists no allegation that defendants had the ability, through their denial of financing or the lease of office space, to lessen or destroy competition in the market of hospital supplies through e-commerce. Coastal Fuels v. Caribbean Petroleum Corp., 79 F.3d 182, 196 (1st Cir.1996) ("To determine whether a party has or could acquire monopoly power in a market, 'courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.' ") (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993)). Accordingly, even assuming as true the facts alleged in the Amended Complaint, the court concludes that defendants' conduct was not unlawful under the federal antitrust laws.

3. Robinson-Patman Act Claim

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

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

15 U.S.C. § 13(e) (emphasis added).

As a threshold matter, the Robinson-Patman Act only bars price discrimination in the sale of commodities. *See, e.g., FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 355-57, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968). Plaintiff asserts that defendants have discriminated in the supply of a real estate lease or financing, but neither is a "commodity" within the ambit of Section 2(e). *See Rosales v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1328 (6th Cir.1983) ("[D]iscriminatory practices in the extension of credit ... are beyond the scope of either § 2(d) or § 2(e)); *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir.1970) (lease is not a commodity); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 652 (C.D.Cal.1978) ("It suffices to say that real estate and intangibles are not commodities within the meaning of the Act."). As such, the court dismisses plaintiff claim under the Robinson-Patman Act.

4. State Law Claims

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

III. Motion for Rule 11 Sanctions

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

The court recognizes that in a related case entitled *Medical Supply Chain, Inc. v. U.S. Bancorp, NA*, this court reminded plaintiff's counsel, Bret Landrith, of his obligations under Fed.R.Civ.P. 11 and cautioned him "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts."No. Civ. A. 02-2539-CM, 2003 WL 21479192, at *6 (D.Kan. June 16, 2003). Notwithstanding, the court is unwilling at this juncture to conclude that plaintiff's Amended Complaint was so meritless or otherwise frivolous that sanctions are warranted.*Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648, (1978) (district court must resist the "understandable temptation" of concluding that the action was unreasonable or without foundation simply because the plaintiff did not ultimately prevail). Moreover, the court dismissed plaintiff's state law claims, thereby leaving open the question of whether or not those claims have a basis in law or fact. The court denies defendants' motion for sanctions.

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

D.Kan.,2004.
Medical Supply Chain, Inc. v. General Elec. Co.
Not Reported in F.Supp.2d, 2004 WL 956100 (D.Kan.)

END OF DOCUMENT

HMedical Supply Chain, Inc. v. General Elec. Co.
C.A.10 (Kan.),2005.
This case was not selected for publication in the Federal Reporter Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,Tenth Circuit.
MEDICAL SUPPLY CHAIN, INC., Plaintiff-Appellant.
v.
GENERAL ELECTRIC COMPANY; General Electric Capital Business Asset Funding Corporation; GE Transportation Systems Global Signaling, LLC; Jeffrey Immelt, Defendants-Appellees.
Nos. 04-3075, 04-3102.

July 26, 2005.

Background: Entrepreneur brought action against competitors alleging violation of federal antitrust law and state law. The United States District Court for the District of Kansas dismissed action, 2004 WL 956100. Entrepreneur appealed.

Holdings: The Court of Appeals, Carlos F. Lucero, Circuit Judge, held that:
(1) defendants could not have held monopoly power, or attempted to obtain monopoly power, in North American hospital supply e-commerce market;
(2) per se restraint of trade analysis could not be based upon entrepreneur's weak status as borrower;
(3) Robinson-Patman Act did not apply to price discrimination in financing; and
(4) Sherman Act claims against corporate officer in his individual capacity were frivolous.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Antitrust and Trade Regulation 29T ⇐689

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(E) Particular Industries or Businesses
29Tk689 k. Medical Supplies and Pharmaceuticals. Most Cited Cases
(Formerly 265k12(1.3))
Mere status of multinational corporation, as initial shareholder of entity that subsequently obtained 80 percent of North American hospital supply e-commerce market with other entity, was not sufficient to show under Sherman Act that corporation and its subsidiaries competed in that market, and, therefore, corporation could not have held monopoly power, or attempted to obtain monopoly power, in that market. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

[2] Antitrust and Trade Regulation 29T ⇐575

29T Antitrust and Trade Regulation
29TVI Antitrust Regulation in General
29TVI(E) Particular Industries or Businesses
29Tk575 k. In General. Most Cited Cases
(Formerly 265k12(1.10))
Per se restraint of trade analysis under Sherman Act could not be based upon entrepreneur's weak status as borrower that was denied loan after lender allegedly learned that entrepreneur was attempting to start business to compete with entity that parent corporation controlled, since lender did not possess market power or exclusive access in market of lending money. Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

[3] United States 393 ⇐122

393 United States
393VIII Claims Against United States
393k120 Making or Presentation of False Claims and Other Offenses Relating to Claims
393k122 k. Penalties and Actions Therefor. Most Cited Cases
Qui tam False Claims Act claim was not raised on allegation, in description of parties of suit, that one defendant knew that alleged conspiracy would "caus[e] Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel's supplies" and that "decreased access to healthcare" caused by

Exhibit F

conspiracy "would cause employers and health insurers to reduce coverage and benefits to the nation's citizens leading to injury and death," where amended complaint otherwise clearly set forth and numbered claims that were being raised. 31 U.S.C.A. § 3729 et seq.; Fed.Rules Civ.Proc.Rule 8, 28 U.S.C.A.

[4] Antitrust and Trade Regulation 29T ⇐849

29T Antitrust and Trade Regulation
29TX Antitrust and Prices
29TX(E) Price Discrimination
29Tk849 k. Sales of Commodities. Most Cited Cases
(Formerly 382k911 Trade Regulation)

Antitrust and Trade Regulation 29T ⇐865

29T Antitrust and Trade Regulation
29TX Antitrust and Prices
29TX(G) Particular Industries or Businesses
29Tk865 k. In General. Most Cited Cases
(Formerly 382k911 Trade Regulation)
Robinson-Patman Act only barred price discrimination in sale of commodities, not discrimination in supply of real estate lease or financing. Clayton Act, § 2, as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13.

[5] Federal Civil Procedure 170A ⇐2771(4)

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2771 Complaints, Counterclaims and Petitions
170Ak2771(4) k. Anti-Trust or Trade Regulation Cases. Most Cited Cases

Federal Civil Procedure 170A ⇐2779

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2779 k. Partially Valid or Colorable Papers or Claims. Most Cited Cases
Sherman Act claims against corporate officer in his individual capacity were "frivolous," for purpose of Rule 11 sanctions, where no allegation was made that officer had any personal connection to alleged antitrust injury or that he knew complainant existed, although complaint otherwise was not so meritless or otherwise frivolous as to warrant sanctions, Rule 11 sanctions could be imposed even when some claims were not frivolous. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

***709**Bret D. Landrith, Topeka, KS, for Plaintiff-Appellant.
John K. Power, Leonard J. Wagner, Husch & Eppenberger, Kansas City, MO, Jonathan I. Gleklen, Ryan Z. Watts, Arnold & Porter, Washington, DC, for Defendants-Appellees.

Before LUCERO, PORFILIO, and BALDOCK, Circuit Judges.

ORDER AND JUDGMENT[FN*]

FN* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' requests for decisions on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). These cases are therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.CARLOS F. LUCERO, Circuit Judge.

****1** Medical Supply Chain, Inc. ("MSC") appeals the district court's dismissal of its federal complaint alleging violations of the antitrust provisions at 15 U.S.C. §§ 1, 2, and 13(e). MSC's complaint also alleges various violations of state law which the district court dismissed without prejudice after dismissing MSC's federal claims. Appellees/cross-appellants General Electric Company ("GE"), General Electric Capital Business Asset Funding Corporation ("GE Capital"), GE Transportation

Systems Global Signaling, LLC ("GETS"), and Jeffrey Immelt appeal the denial of their motion for sanctions under ***710**Fed.R.Civ.P. 11. After reviewing both appeals, we **AFFIRM** the district court's dismissal of MSC's complaint, but **REVERSE** its determination that no sanctions were required against MSC.

I

MSC sought to establish a business providing an e-commerce marketplace to support suppliers and purchasers of hospital supplies. Although other companies existed with similar business models, MSC was convinced its superior technology would give it a competitive advantage over its rivals. MSC suffered various setbacks in attempting to begin operations, one of which-the search for office space-serves as the basis for this suit.

In June 2002, the chief executive officer of MSC contacted a leasing agent regarding a commercial office property in Blue Springs, Missouri, and was told that the building in question was already leased and the lessee, GETS, would only consider a sub-lease of the entire building. Instead of pursuing a sub-lease, MSC contacted the building's owner and obtained a letter of intent to sell the building to MSC, with the sales price being the balance owed on GETS's seven-year lease. In 2003, armed with the letter of intent, MSC approached George Fricke, a property manager at GE Commercial Properties and offered a deal. Under the terms of the May 15, 2003, offer, MSC would purchase the building and agree to release GETS from its lease obligation provided (1) that GETS would pay MSC $350,000 (representing the remainder of the 2003 lease payment), (2) that GETS would provide MSC a bill of sale for the building's furniture and equipment, (3) that the City of Blue Springs would approve MSC's purchase and occupation of the building, and (4) that GE Capital would loan MSC the entire $6,400,000 purchase price for the building and land secured by a twenty-year mortgage on the property, having a 5.4% interest rate with a moratorium on the first full year of mortgage payments. The offer was contingent upon GE's acceptance by May 23, 2003.

The day the offer was made, Fricke responded with (1) a voice mail message stating, "we will accept that transaction," and (2) an e-mail message stating, "GE will accept your proposal to terminate the existing Lease." (1 Appellant's App. at 64.) MSC thereafter provided GE Capital with a loan package including MSC's financial information. GE Capital later decided not to provide financing and MSC filed its complaint on June 18, 2003.

***2** MSC's complaint is grounded in the belief that certain parties wish to prevent competition in the hospital supply e-commerce market in North America. According to MSC, two e-commerce marketplaces, neither of which are parties to the present suit, Global Health Exchange L.L.C. ("GHX") and Neoforma, Inc., effectively control the hospital supply e-commerce market in North America in that 80% of the hospital supply e-commerce business passes through these marketplaces. MSC alleged that these marketplaces each require that suppliers or purchasers who use either of these marketplaces agree to (1) become a member of the other marketplace as well and (2) deal exclusively with GHX and Neoforma. GE is an initial shareholder of GHX.[n1]

> FN1. A March 29, 2000, press release attached to MSC's amended complaint refers to "GE Medical Systems" as "equal shareholders" of GHX with four other initial shareholders: Johnson & Johnson, Baxter International, Inc., Abbott Laboratories, and Medtronic, Inc. (1 Appellant's App. at 109.) For the purposes of this opinion, we will assume that GE Medical Systems is a wholly owned subsidiary of GE.

***711** In its complaint, MSC raises four federal claims under 15 U.S.C. § 1, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." In these four claims, MSC alleged that the refusal of GE, through its subsidiaries GE Capital and GETS, to provide it with a loan under the terms of the proposed agreement was an improper restraint on trade in that it was a "Concerted Refusal to Deal" (count 1), a "Refusal to Deal in Furtherance of a Monopoly" (count 2), a "Refusal to Deal/Denial of Unique Financial Instrument" (count 3), and a "Conspiracy in Restraint of Trade" (count 4).

MSC also raised five claims under 15 U.S.C. § 2, which states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...." In these five claims, MSC alleged "Restraint of Trade Through Monopoly" (count 5), "Restraint of Trade Through Attempted Monopolization" (count 6), "Single Firm Refusal to Deal" (count 7), "Refusal to Deal 'Change of Pattern' " (count 8), and "Refusal to Deal Denial of Essential Facility" (count 9). MSC's final federal claim alleged "Discrimination in Services or Facilities" (count 10), under the Robinson-Patman Act, 15 U.S.C. § 13(e), which reads:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Finally, MSC raises four state law claims, including breach of contract.

Although the only defendants named in the complaint were Mr. Immelt and the three GE companies, MSC alleged an agreement existed among some combination of (1) the major suppliers/distributors of hospital supplies, (2) the major organizations making group purchases of hospital supplies, (3) GHX, and (4) Neoforma, to prevent other marketplaces from threatening the allegedly inflated costs associated with conducting business through GHX and Neoforma. In its amended complaint MSC alleges that GE, under the direction of Mr. Immelt, was the driving force behind, and controls, the agreement.

**3 Following the filing of MSC's complaint and amended complaint, the defendants filed their motion for dismissal and a motion seeking the imposition of sanctions under Fed.R.Civ.P. 11. The district court granted the defendants' motion to dismiss, dismissing the federal claims on the merits for failure to state a claim and declining to exercise supplemental jurisdiction over the state claims once the federal claims had been dismissed. *See*28 U.S.C. 1367(c)(3). Because none of the defendants were competitors in the "market of 'hospital supplies delivered through e-commerce in North America.' " (II Appellant's App. at 492), the district court held that any agreement between a defendant and a competitor in that market to refuse to lend money to MSC would be a vertical agreement to be analyzed under the "rule of reason." Under that rule, MSC would have to demonstrate that GE possessed market power in the relevant market in order to be able to restrain trade unreasonably, and that the relevant markets in this case were the **712 commercial real estate market and the related market of potential financiers. Because the defendants did not have market power in these two areas, the district court dismissed the complaint. Although the district court ordered MSC to pay defendants' costs, it denied defendants' motion for sanctions. Both parties appeal.

II

A motion to dismiss under Fed.R.Civ.P. 12(b)(6)"admits all well-pleaded facts in the complaint as distinguished from conclusory allegations." *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir.1976). Exhibits attached to a complaint are properly treated as part of the pleadings for purposes of ruling on a motion to dismiss. *Indus. Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 964-65 (10th Cir.1994). Because the legal sufficiency of a complaint is a question of law, we review de novo a Rule 12(b)(6) dismissal. *Elliot Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1123 (10th Cir.2005). In reviewing the district court's grant of a Rule 12(b)(6) motion to dismiss,

> all well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. A 12(b)(6) motion should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Sutton v. Utah State Sch. for Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir.1999) (quotations and citations omitted).

A

[1] In its appeal, MSC brought claims under the first two sections of the Sherman Act.

> The Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression.
>
> ****4** ...
>
> Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination ... or conspiracy" between *separate* entities. It does not reach conduct that is wholly unilateral. Concerted activity subject to § 1 is judged more stently than unilateral activity under § 2.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (quotations, citations, and footnotes omitted).

MSC alleges that GE, as a sole entity, monopolized or attempted to monopolize the market of hospital supplies delivered though e-commerce in North America. This claim appears to be the bedrock upon which MSC's 15 U.S.C. § 2 claims rest. MSC argues that a cartel was formed through an agreement or conspiracy among GE and other separate entities such as GHX, Neoforma, and other hospital supply providers. MSC's 15 U.S.C. § 1 claims rest on these allegations. We examine MSC's claim under 15 U.S.C. § 2 first.[FN2]

> FN2. While a conspiracy to monopolize is also forbidden under § 2, we restrict our analysis under that section to GE's actions as a single entity since we do not read MSC's complaint as alleging conspiracy to monopolize.

I

Under the Sherman Act § 2, to state a claim for attempted monopolization, a ***713** plaintiff must plead: "(1) relevant market (including geographic market and relevant product market); (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt." *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1025 (10th Cir.1992) (quotation omitted). To state a monopolization claim under § 2, a plaintiff must allege: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* (quotation omitted); *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir.1999). The district court held that GE and its subsidiaries do not compete in the relevant market of hospital supply e-commerce in North America and that GE could not, therefore, hold monopoly power, or be attempting to obtain monopoly power, in that market. MSC presents nothing on appeal that would convince us of district court error in this regard.

Although MSC often treats GHX and Neoforma in its filings as mere tools of GE, evidently because of GE's status as an initial shareholder of GHX and GHX's relationship with Neoforma, and alleges, among other things, that "[t]he defendants have monopoly power in the relevant North American hospital supply e-commerce market through their subsidiaries," (1 Appellant's App. at 24), and that GHX was the "alter ego" of GE, MSC presents no factual allegations to support these conclusory statements. The bald allegations in the complaint that GE alone controlled GHX are nothing more than conclusory allegations that GE violated antitrust laws. *See TV Communications*, 964 F.2d at 1024 ("Conclusory allegations that the defendant violated [antitrust] laws are insufficient."). Not only is the allegation that GE and GHX should be considered one and the same company conclusory, it is inconsistent with the press releases attached to the amended complaint showing that GHX is a limited liability company owned by a number of other companies.[FN3] It is also inconsistent with MSC's contention that these companies were actually working together to restrict entry into the relevant market. Since MSC makes no well-pleaded factual allegations that would support its conclusory legal allegation that GHX was GE's alter ego and should be held responsible for GE's actions, we see no reason to disturb the district court's conclusion that MSC failed to state a claim that GE had illegally monopolized or

attempted to monopolize the North American hospital supply e-commerce market.

> FN3. One of the press releases attached to MSC's amended complaint and dated before the time period at issue in this case states that "the privately held company [GHX] was founded in March 2000 and its membership now includes more than 100 supplier members and more than 400 hospital members ... [and that e]quity members of GHX include [the five initial members discussed in footnote 1, *supra*, and] Becton, Dickinson & Co.; Boston Scientific Corporation; C.R. Bard, Inc.; Guidant Corporation; Siemens Medical Solutions and Tyco International, Ltd." (I Appellant's App. at 112.)

2

5[2] MSC's four claims under 15 U.S.C. § 1 also fail. To establish a violation of the Sherman Act § 1, "the plaintiff must allege facts which show: the defendant[s] entered a contract, combination or conspiracy that unreasonably restrains trade in the relevant market." *Full Draw Prods.*, 182 F.3d at 756 (quoting *TV Communications*, 964 F.2d at 1027). Here, MSC alleges that GE's refusal to finance MSC's purchase of the Blue Springs office building714** improperly restrained trade in that it prevented MSC's entry into the hospital supply e-commerce market.

Even if MSC's amended complaint were read to allege that defendants agreed with GHX, a competitor of MSC, not to loan money to MSC, the district court found that this would be considered a vertical agreement and subject to the rule of reason. "The rule of reason ... requires" "the fact finder [to] weigh [ ] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Diaz v. Farley*, 215 F.3d 1175, 1182 (10th Cir.2000) (citation omitted). MSC argues that the district court should have read the amended complaint as alleging a horizontal agreement to harm MSC and that such an agreement is a *per se* restraint of trade. "*Per se* analysis is reserved for agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* (quotation omitted). MSC has two different theories as to why a horizontal and not vertical agreement was alleged: (1) that the amended complaint alleged that GE, a supplier, agreed with GHX, a customer, to injure another customer, MSC, and that this type of agreement should be treated as a horizontal restraint on trade, and (2) that the formation and operation of GHX should be treated as a horizontal agreement between suppliers with the purpose of, among other things, boycotting other hospital supply e-commerce marketplaces including MSC, and that GE refused to extend financing to MSC pursuant to this boycott.

MSC's argument fails because even if a horizontal agreement to boycott MSC existed, GE's failure to provide financing would not be considered an antitrust violation. First, "unless the defendants in a group boycott situation 'possess market power or exclusive access to an element essential to effective competition, the conclusion that expulsion of the plaintiff is virtually always likely to have an anticompetitive effect thereby invoking a *per se* analysis is not warranted.' " *Id.* at 1182-83 (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985)). "To demonstrate market power a plaintiff may show evidence of *either* power to control prices *or* the power to exclude competition." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 n. 7 (10th Cir.1986) (quotations omitted). Second, even where a per se violation of 15 U.S.C. § 1 is involved, a plaintiff must still show that it suffered an antitrust injury. "The per se rule ... does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990).

**6 MSC's allegation that GE's refusal to loan it money prevented MSC from entering the hospital supply e-commerce market and that it, therefore, suffered an antitrust injury is untenable. First, MSC did not have to purchase an office building to enter the hospital supply e-commerce market. In fact, its initial plan was to rent office space. Second, while like any new business it did need funds to start

operations, there was no requirement that it obtain these funds from GE. GE does not have market power in the financial market. The potential anti-competitive danger presented by an alleged agreement between major players in any market is that those players will use the power they hold in that market to stifle competition. An ***715** agreement between those same players to take actions in markets where they are not major players and hold no market power poses no danger because consumers in those markets have other options from which to choose. Even if all the members of the alleged cartel agreed that GE should not make any loans to MSC, such an agreement is not illegal in the absence of some sort of power in the commercial loan market.

MSC's attempt to catagorize the loan it sought as a "unique financial instrument" that it could not replicate at any bank or in the venture funds markets is unpersuasive. Any "uniqueness" of MSC's loan needs was caused by MSC's weak financial position, not GE's status as a lender.

3

[3][4] MSC also raised one Robinson-Patman Act Claim, 15 U.S.C. § 13(e), which was dismissed by the district court on the ground that the Act only bars price discrimination in the sale of commodities, not discrimination in the supply of a real estate lease or financing. MSC does not argue trial court error in regard to the dismissal of this claim, nor do we discern any error in that ruling or in the district court's dismissal of the state law claims without prejudice following dismissal of all of the federal claims.[FN4]

[FN4]. MSC's appellate briefs also present a truncated argument that the amended complaint raised a *qui tam* False Claims Act claim. MSC's only support for this argument is the fact that the amended complaint alleged, in its description of the parties of the suit, that Jeffrey Immelt knew that the alleged conspiracy would "caus[e] Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel's supplies" and that the "decreased access to healthcare" caused by the conspiracy "would cause employers and health insurers to reduce coverage and benefits to the nation's citizens leading to injury and death." (1 Appellant's App. at 55-56.) This claim was not properly plead in the complaint. The amended complaint clearly set forth and numbered the claims that were being raised. The complaint "must give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Green Country Food Mkt., Inc. v. Bottling Group, LLC*, 371 F.3d 1275, 1279 (10th Cir.2004). Neither the parties nor the district court ever discussed the False Claims Act and it is unreasonable to argue that defendants should have been on notice of such a claim.

B

[5] Defendants argue in their cross-appeal that the district court abused its discretion by denying its motion for sanctions. Defendants allege that MSC's amended complaint violated the requirements of Fed.R.Civ.P. 11(b) that a pleading not be "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" and that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed.R.Civ.P. 11(b). If a court determines that a party has violated Rule 11(b), a court may in its discretion impose sanctions. Fed.R.Civ.P. 11(c). In making its decision whether Rule 11 sanctions are merited: "a district court must apply an objective standard; it must determine whether a reasonable and competent attorney would believe in the merit of an argument. In reviewing a district court's decision to impose Rule 11 sanctions, we apply an abuse of discretion standard." *Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1155 (10th Cir.1991) (quotation omitted). In its Memorandum and Order, the district court recognized that in an earlier related case it had reminded MSC's counsel of his obligations under ***716** Fed.R.Civ.P. 11 and cautioned him to take greater care in the future in ensuring that claims be brought on behalf of clients were supported by the law and the facts. Nevertheless, the district court was unwilling to conclude that MSC's Amended Complaint was so meritless or otherwise frivolous as

to warrant sanctions. The court also pointed to the fact that it had not addressed MSC's state law claims as a factor in its decision.

***7** Defendants are correct that Rule 11 sanctions can be imposed even when some claims are not frivolous. *Dodd Am. Servs., Inc.*, 935 F.2d at 1158. It is clear that at least MSC's claims against Jeffrey Immelt in his individual capacity were frivolous in that no allegation was made that Immelt had any personal connection to MSC's alleged injury or even that he knew MSC existed. Therefore, it was abuse of discretion not to find that portion of the amended complaint frivolous. As for MSC's other claims, the district court did not address the state claims and, considering our deferential standard of review, we cannot say that the district court abused its discretion in refusing to award sanctions against MSC for bringing those claims.

III

Consequently, we **AFFIRM** the district court's dismissal of MSC's federal claims on the merits and its dismissal of MSC's state claims without prejudice. We **REVERSE** the district court's order denying defendants' motion for Rule 11 sanctions and **REMAND** to the district court for a determination of the proper sanction to be assessed for MSC's inclusion of Jeffrey Immelt as a defendant in his individual capacity.

C.A.10 (Kan.),2005.
Medical Supply Chain, Inc. v. General Elec. Co.
144 Fed.Appx. 708, 2005 WL 1745590 (C.A.10 (Kan.))

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

SAMUEL K. LIPARI,	)	
	)	
Plaintiff,	)	
	)	Case No. 0816-CV04217
vs.	)	Division 2
	)	
NOVATION, LLC, et al.	)	
	)	
Defendants.	)	

DEFENDANT SHUGHART THOMSON & KILROY'S SUGGESTIONS IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Shughart Thomson & Kilroy, P.C. ("STK") files these Suggestions in Support of its Motion to Dismiss. In support of its Motion, defendant states as follows:

I. INTRODUCTION

This is the sixth lawsuit instituted by Mr. Lipari or his dissolved company regarding his failure to enter the hospital supplies market. While plaintiff sets forth his version of the tortuous history of this litigation in Appendix One to his Petition,[1] additional history was set forth by Judge Murguia in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316 (D. Kan. 2006), a copy of which is attached as **Exhibit A**.

All but two of the prior cases involving Lipari and his former company Medical Supply Chain, Inc. have been dismissed, sometimes with added sanctions. *Id.*; *see also* 112 Fed. Appx. 730 (10th Cir. 2004), attached as **Exhibit B**. This action likewise lacks merit.

Significantly, it is apparent that STK is a defendant in this matter solely because it has represented U.S. Bank and U.S. Bancorp in the multiple suits filed by Lipari or his company

[1] The defendant does not admit any of the plaintiff's contentions in Appendix One but simply refers the Court to this document for additional background on the repeated litigation over this issue without adding additional length to these Suggestions.

since October 2002.[2] The basis for plaintiff's claim is his inability to secure escrow services from U.S. Bank and a failed real estate transaction with General Electric. There is no allegation – nor can there be – that STK had any involvement in either of these transactions which form the basis of plaintiff's alleged damages.

Lipari's Petition is also just as indecipherable and incoherent as the previous lawsuits. He makes wild accusations involving individuals such as Karl Rove, Kansas Representative Nancy Boyda (and her husband) and implicitly accuses defendants of some involvement in the firing of U.S. Attorney Todd Graves as well as the deaths of two assistant U.S. Attorneys in Texas. Despite pleading approximately 93 pages of "facts" in nearly 600 separate paragraphs prior to setting forth the causes of action, Lipari fails to allege any facts in his causes of action. His Petition suffers from fatal pleading defects; violates Rule 55.05 which requires a short, plain statement of facts;[3] and several of his causes of action are barred by the statute of limitations and/or are not legally actionable. Therefore, his Petition should be dismissed with prejudice.

II. ARGUMENT

A. As the alleged assignee of interests from Medical Supply Chain, Lipari may only acquire those rights held by Medical Supply.

Mr. Lipari brings this suit in his personal capacity as the alleged "Assignee of Dissolved Medical Supply Chain, Inc." STK strongly disputes that Mr. Lipari is a proper assignee to

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[2] Though perhaps included more for effect and aspersion, Lipari also alleges that STK somehow deprived him of counsel during the previously dismissed federal lawsuits when his then-attorney was disbarred, *see In re Landrith*, 124 P.3d 467 (Kan. 2005), attached as **Exhibit C**, or somehow prevented other attorneys from taking his case. Because these suppositions do not form the basis of any cognizable cause of action, STK will resist the temptation of a further response except to say the allegations are wholly conjectural.

[3] In *Medical Supply v. Neoforma, LLC*, 419 F. Supp.2d 1316, 1331 (D. Kan. 2006) Judge Carlos Murguia found, "Plaintiff's 115 page, 613 paragraph complaint falls miles from Rule 8's boundaries." Although Missouri is a fact pleading state, Rule 55.05 also requires a "short and plain statement of facts showing that the pleader is entitled to relief." Lipari's current Petition again "falls miles" from this boundary.

maintain this action. But regardless, 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). Mr. Lipari must stand in Medical Supply's shoes and can occupy no better position than Medical Supply would have if it sued STK directly. *Id.* Thus, "common law principles compel the conclusion that any defense valid against [Medical Supply] is valid against its assignee, [Samuel Lipari]." *Id.*

B. Count I–Violation of Section 416.031.1 R.S.Mo. (p. 93)

As stated, the allegations in plaintiff's Petition are confusing and incomprehensible. Nonetheless, Count I of plaintiff's Petition must be dismissed for the following reasons:

a. Plaintiff's claim for violation of R.S.Mo. § 416.031.1 is barred by the statute of limitations;

b. Plaintiff's claim is barred by the doctrine of collateral estoppel; and

c. Plaintiff's allegations fail to state a claim upon which relief can be granted.

1. **Under Missouri law, all claims brought pursuant to R.S.Mo. § 416.031.1 must be brought within four years after the cause of action accrues. In October 2002, Medical Supply Chain had actual knowledge of its alleged damages when it filed suit asserting claims under this same statute. Because Lipari's current suit was not filed until February 2008, his claim is barred by the statue of limitations.**

A defendant may seek to dismiss a petition when it is clear from the face of the petition that the action is time barred. *Heintz v. Swimmer*, 922 S.W.2d 772, 775 (Mo. App. E.D. 1996). Missouri law requires all actions under the Missouri Antitrust Act to be commenced "within four years after the cause of action accrued." R.S.Mo. § 416.131(2). A cause of action accrues when

the wrong is sustained and the plaintiff is capable to ascertain damages. *See, e.g., Gayden v. Imhoff*, 245 S.W.3d 303, 306 (Mo. App. W.D. 2008).

Lipari's cause of action is predicated on the defendants' alleged conspiracy to keep his former company out of the hospital supplies market. But as his Petition notes, Medical Supply brought an identical lawsuit in October 2002, asserting damages for the same alleged antitrust violations he asserts here. *See* Petition, Appendix One, p. 1, ¶¶ 1-5. Plaintiff therefore concedes that Medical Supply Chain's alleged cause of action accrued no later than October 2002 when it filed its first suit for antitrust damages. *See Medical Supply Chain, Inc. v. U.S. Bancorp, et al.*, 2003 WL 21479192 (D. Kan. June 16, 2003) (attached as **Exhibit D**), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004). Lipari did not file this action until February 2008–well after the four-year statute. His cause of action in Count I is therefore barred by the statute of limitations.

Lipari nevertheless attempts to salvage his claim under the savings statute of R.S.Mo. § 516.230 by alleging that he re-filed this action within one year of dismissal in *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316 (D. Kan. 2006), *appeal dismissed* 508 F.3d 572 (10th Cir. 2007) (attached as **Exhibit E**). He is wrong. That action was dismissed on March 7, 2006 and the one-year period found in R.S.Mo. § 516.230 does not resurrect his claims. In any event, the savings statute is inapplicable to causes of action that are created by statute and which contain their own statutes of limitation. *Boggs v. Farmers State Bank*, 846 S.W.2d 233 (Mo. App. S.D. 1993).

The face of Lipari's Petition shows that Medical Supply (and Lipari) had actual knowledge that the alleged cause of action accrued at least by October 2002. This action was not filed until February 2008 and, thus, the cause of action for violation of R.S.Mo. § 416.031.1 is time barred.

2. **Under Missouri law, state antitrust statutes are to be construed in accordance with comparable federal statutes. Plaintiff's federal antitrust claims have been previously dismissed on their merits and his state anti-trust claims are therefore barred under the doctrine of collateral estoppel.**

In March 2005, Medical Supply Chain, Inc. filed a third lawsuit for its failure to enter the hospital supplies market. In *Medical Supply Chain, Inc. v. Neoforma, Inc.*, Medical Supply alleged 16 causes of action, including antitrust claims for restraint of trade and monopoly under both federal and Missouri law. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1320 (D. Kan. 2006) (**Exhibit A**). STK was also a defendant in that action and - like here - filed a motion to dismiss Medical Supply's claims.

On March 7, 2006, Judge Carlos Murguia dismissed plaintiff's federal antitrust claims under the Sherman Act for failure to state a claim upon which relief can be granted. *Id.* Judge Murguia declined to exercise jurisdiction over the pendant state claims and dismissed them without prejudice. Nonetheless, his determination of plaintiff's federal antitrust claims on the merits bars Lipari's current state antitrust claims under the doctrine of collateral estoppel/issue preclusion.

Courts apply a four-part test to determine whether an issue is barred by collateral estoppel: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *James v. Paul*, 49 S.W.3d 678, 682-683 (Mo. 2001).

While Lipari, individually, was not a party in the *Neoforma* suit, he is clearly in privity with Medical Supply as the self-proclaimed assignee of Medical Supply's assets. Medical

Supply had a full and fair opportunity to litigate the *Neoforma* matter and Judge Murguia's dismissal of Medical Supply's federal antitrust claims was a dismissal on the merits. *Bachman v. Bachman*, 997 S.W.2d 23, 25 (Mo. App. 1999)(collateral estoppel applies to dismissal for failure to state a claim.). Therefore, the only factor to determine is whether the determined issues in *Neoforma* are identical to those included in the claims Lipari asserts in this suit.

Missouri antitrust law specifically provides that its provisions "shall be construed in harmony with ruling judicial interpretations of comparable federal statutes." R.S.Mo. § 416.141. Missouri courts have consistently looked to federal courts' interpretation of the Sherman Act when construing the provisions of R.S.Mo. § 416.031. *See, e.g., Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582, 586 (Mo. App. E.D. 1987); *Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. 1979) (recognizing that § 416.141 "intended to provide a ready body of precedent for interpreting the law and a single standard of business conduct already known and acquiesced in by businesses in Missouri").

Therefore, federal decisions are very persuasive when determining the adequacy of Lipari's state antitrust claims and, on three separate occasions, a federal court has found Lipari's federal antitrust claims–based on the same set of operative facts as this suit–to be groundless. *Medical Supply Chain, Inc. v. US Bancorp, NA*, 2003 WL 21479192, *3 (D. Kan. 2003) ("[P]laintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1 [of the Sherman Act].") **(Exhibit D)**; *Medical Supply Chain, Inc. v. General Elec. Co.*, 2004 WL 956100, *3 (D. Kan. 2004) ("[A]t the most fundamental level, plaintiff's antitrust claims fail.") **(Exhibit F)**; *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006), *appeal*

dismissed 508 F.3d 572 (10th Cir. 2007) ("Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations.") (**Exhibit A**).

In *Gregory Marketing Corp. v. Wakefern Food Corp.*, 207 N.J.Super. 607, 504 A.2d 828 (N.J. Super. Ct. 1985), the New Jersey Superior Court squarely decided this same issue and held that collateral estoppel barred the state law antitrust claims following a federal dismissal. In that matter, the plaintiff brought suit in federal court alleging antitrust violations by the defendants. The federal court dismissed the federal claims on the basis that the plaintiff lacked standing and had not suffered antitrust injury. The plaintiff later re-filed his action in state court, asserting state antitrust violations based on the same facts as his earlier federal action.

Like Missouri, New Jersey has enacted as statute requiring that its state antitrust laws be interpreted in accordance with their federal counterparts. Therefore, the defendants moved for dismissal of the state antitrust claims asserting they were barred by the doctrines of *res judicata* and collateral estoppel. Relying upon New Jersey's antitrust statute counseling conformity with federal decisions, the court agreed and stated:

> If that legislative mandate of "harmony," "uniformity" and consistency between the state and federal antitrust statutes is to have any meaning at all, plaintiffs are barred from relitigating here the issues of antitrust standing and injury.

Id., at 623-624[4].

Although Lipari purports to bring this suit under Missouri's antitrust laws, it is the same claim which has been dismissed in three prior federal suits. Because Lipari's state antitrust action presents the same claim as his previous federal suits and R.S.Mo. § 416.141 counsels this

[4] In *Watkins v. Resorts International Hotel and Casino, Inc.*, 124 N.J. 398, 422 A.2d 592 (N.J. 1991) the New Jersey Supreme Court rejected *Wakefern* to the extent its holding was based upon the incorrect conclusion that dismissal for lack of standing in an earlier suit is not a dismissal on the merits for purposes of *res judicata* and collateral estoppel. *Id.* at 604. In contrast, here, the federal court decisions dismissing the federal antitrust claims were merits dismissals.

Court to rule in conformity with interpretations of the similar federal statutes, he may not attempt to re-litigate those issues in this court. Therefore, Count I is barred by the doctrine of collateral estoppel.

3. **Missouri law requires that petitions contain sufficient facts for each element to show an entitlement to relief. Lipari has failed to allege any facts to show defendants entered into a contract or agreement between two independent actors. Because this is an essential element of his antitrust claim under § 416.031, his claims under Count I must be dismissed.**

Rule 55.05 of the Missouri Rules of Civil Procedure requires that plaintiff's Petition "contain a short and plain statement of the facts showing the pleader is entitled to relief." *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). A party that fails to plead sufficient facts showing entitlement to relief deprives the trial court of jurisdiction in the matter. *Id.* The plaintiff cannot rely on mere conclusions, and courts will disregard conclusions not supported by facts in determining whether or not a petition states a cause of action. *See id.* (citing *Lick Creek Sewer Sys. v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo. App. 1988).

Lipari must plead three elements to state a claim under § 416.031.1: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006) (citing similar 15 U.S.C. § 1).

Like the previous unsuccessful antitrust claims, Lipari has failed to sufficiently plead a contract, combination, or conspiracy among two actors. In Count I of his Petition, Lipari makes the following allegations against STK:

- STK "agreed with Novation, LLC to injure the petitioner";
- STK is a separately incorporated entity from the remaining corporate defendants;

- STK represented clients with conflicting interests against the petitioner;
- STK represented its own organizational interests instead of the interests of its clients;
- STK "injured the petitioner instead of counseling US Bancorp, Inc. to settle with the petitioner paying US Bank [sic]" by not accepting a February 2008 settlement offer "that was neutral and without financial loss for US Bancorp."
- STK elected not to perform professional services for or bill its clients in the hospital supply cartel for legally defending petitioner's antitrust claims and never deposed witnesses or the petitioner.
- STK acted outside the authorization of its clients, outside the scope of lawful conduct, risked the reputational interests, insurability and licensibility [sic] "without proportional compensation solely to acquire narrow and hidden political power in the administration of the state of Missouri and within the Kansas District Court."

Petition, pp. 94, 96-97.

Just as Judge Murguia found in *Neoforma*, "Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations." *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d. at 1327. The only allegation that even remotely resembles a contract, combination or conspiracy is his conclusion that STK "agreed with Novation, LLC to injure petitioner." But simply citing the elements of an antitrust claim and alleging a violation of them is not sufficient. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d at 1327; *TV Comm. Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1992) ("Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief."); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must 'provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place.'"); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir.

1952) ("[A] general allegation of conspiracy, without a statement of the facts constituting the conspiracy to restrain trade, its object and accomplishment, is but an allegation of a legal conclusion, which is insufficient to constitute a cause of action."); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (holding that an antitrust complaint must contain enough facts that, when taken as true, show a plausible right to recovery).

In the above cases, allegations like Lipari's were found inadequate under federal rule liberal "notice" pleading standards. If Lipari's allegations fail under the more relaxed standards of notice pleading, they certainly fail under the more stringent "fact pleading" requirements of the Missouri Rules of Civil Procedure. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004) ("Although the petition does not have to plead evidentiary or operative facts showing an entitlement to the relief sought, it must plead ultimate facts demonstrating such an entitlement and cannot rely on mere conclusions.").

The remaining allegations cannot form the basis for an antitrust cause of action. Essentially, Lipari is arguing that actions taken by STK in defending multiple lawsuits *filed by him or his company* have caused him damage or have damaged STK's clients. First, Lipari lacks standing to assert that STK's actions have damaged its clients. Next, it is beyond all rational thought even to consider that Lipari could maintain a cause of action for STK's defense of a lawsuit (1) that is by definition an adversarial proceeding; (2) that was initiated by Lipari; and (3) where courts have found the prior actions frivolous. Moreover, there is no allegation that STK's actions are even remotely related to the sale of hospital supplies or that STK has any relation to the hospital supplies industry.

Thus, even if the Court concludes that Lipari's state antitrust allegations are not barred by collateral estoppel, his claims still fail. Lipari's Petition fails to state adequate facts on an

essential element of his claim. Therefore, Count I of his Petition should be dismissed, pursuant to Rule 55.27(a)(6) of the Missouri Rules of Civil Procedure.

C. Count II–Violation of R.S.Mo. § 416.031.2 (p. 98)

In Count II of his Petition, Lipari asserts a cause of action for violation of R.S.Mo. § 416.031.2, alleging "the defendants have a monopoly or have attempted to monopolize the subject relevant markets." Petition, p. 98. Lipari's claim in Count II also fails because:

a. His state antitrust claim under § 416.031.2 is barred by the statute of limitations;

b. His state antitrust claim under § 416.031.2 is barred by the doctrine of collateral estoppel; and

c. He fails to plead sufficient facts to establish a claim upon which relief may be granted in that:

i. The allegations are mere conclusions; and

ii. He fails to define a relevant market.

For these reasons, Count II of plaintiff's Petitions should be dismissed with prejudice.

1. **Missouri law requires all claims under R.S.Mo. § 416.131(2) to be commenced within four years after the cause of action accrues. Medical Supply Chain had actual knowledge of its alleged damages in October 2002 and brought suit under this same statute for these alleged damages. Because Lipari did not file this suit until February 2008, his claim in Count II is barred by the statute of limitations.**

All claims under Missouri's antitrust statutes must be commenced "within four years after the cause of action accrued." R.S.Mo. § 416.131(2). As noted in Section 2(a) above, Lipari had actual knowledge of the alleged cause of action under the Missouri antitrust laws at least in October 2002, when Medical Supply Chain filed suit for alleged antitrust violations. The facts and analysis in 2(a) above concerning the application of the statute of limitations to Lipari's claims for Count I also apply to Count II of plaintiff's Petition. Rather than restating these

arguments, STK incorporates by reference its arguments and analysis made in Section 2(a) above.

For the reasons set forth in Section 2(a) above, plaintiff's claim in Count II of his Petition is barred by the statute of limitations and should be dismissed with prejudice.

2. **Missouri antitrust statutes must be construed in accordance with comparable federal statutes. Plaintiff's federal antitrust claims based on the same cause of action have been previously dismissed on their merits. Therefore, the corresponding state antitrust claims are barred by collateral estoppel.**

As noted in Section 2(b) above, Missouri law specifically provides that its antitrust statutes "shall be construed in harmony with judicial interpretations of comparable federal statutes." R.S.Mo. § 416.141. Missouri courts look to federal courts' interpretations of the Sherman Act when construing the provisions of R.S.Mo. § 416.031. *See, e.g., Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582, 586 (Mo. App. E.D. 1987); *Fischer, Spehuel, Herzwurm & Assoc., Inc. v. Forrest T. Jones and Co.*, 586 S.W.2d 310, 313 (Mo. 1979). In order to maintain a cause of action pursuant to R.S.Mo. § 416.031.2, the plaintiff must demonstrate (1) the possession of monopoly power in the relevant market and (2) the willful acquisition of maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. *See, e.g., Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1328 (D. Kan. 2006) (referring to similar elements in 15 U.S.C. § 2).

On three separate occasions the United States District Court for the District of Kansas has found that allegations of a monopoly to control the hospital supply market is an insufficient description of a relevant market. *See Medical Supply Chain, Inc. v. U.S. Bancorp, N.A., et al.*, 2003 WL 21479192, at *3 (D. Kan. 2003) (**Exhibit D**); *Medical Supply Chain, Inc. v. General Electric Co., et al.*, 2004 WL 956100, at *3 (D. Kan. 2004) (**Exhibit F**), *aff'd. in part, rev'd in*

part, 144 Fed. Appx. 708, 716 (10th Cir. 2005) **(Exhibit G)**; *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1328 (D. Kan. 2006) **(Exhibit A)**. In each of these cases, Medical Supply Chain alleged federal antitrust actions for violation of Section 2 of the Sherman Act. Medical Supply had a full opportunity to litigate these issues and all of the decisions found the allegations insufficient and were decisions based on the merits presented. As the alleged assignee of Medical Supply Chain, Inc.'s cause of action, Lipari is a party in privity with Medical Supply Chain. For these reasons, and for the reasons set forth in Section 2(b) above, plaintiff's claims are barred by the doctrine of collateral estoppel, and Count II of his Petition should be dismissed with prejudice.

3. **Count II of plaintiff's Petition fails to identify sufficient facts to state a claim upon which relief may be granted.**

Count II of Lipari's Petition fails to allege sufficient facts to support a cause of action under R.S.Mo. § 416.031.2. He simply alleges conclusions for each necessary element and fails to plead any facts to support his claim. Moreover, Lipari fails to plead sufficient facts to identify a relevant market to support his antitrust claim. Therefore, Count II of Plaintiff's Petition should be dismissed with prejudice.

a. **Missouri law requires that petitions contain sufficient facts for each element to show an entitlement to relief. Count II of Lipari's Petition contains no allegations of fact, but only mere conclusions. Therefore, Lipari has failed to allege sufficient facts to maintain a cause of action under § 416.031.2 and Count II should be dismissed with prejudice.**

The Missouri Rules of Civil Procedure require that a petition contain sufficient facts to show the pleader is entitled to relief. *See* Mo. R. Civ. P. 55.05. The plaintiff must allege facts and not conclusions. Averments of mere conclusions will be disregarded in a court's analysis as to whether the petition states a cause of action. *See Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). Count II of Lipari's Petition is completely devoid of factual assertions.

Lipari simply sets forth the legal elements for a cause of action under Section 416.031.2 and makes a conclusory allegation that mirrors each element. For example, in order to maintain a claim under § 416.031.2, Lipari must allege sufficient facts to show the willful acquisition or maintenance of a monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *See Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d at 1328. As to this element, Lipari states on p. 100:

> **(2) defendants willfully acquired and maintained their market power.**
>
> The petitioner hereby re-alleges the averments of facts in this complaint and its attachments.
>
> The petitioner avers the defendants have acted intentionally and willfully to acquire and maintain their market power in the subject area markets.
>
> **a. The defendants did not enjoy market growth or development as a consequence of**
>
> The petitioner avers the defendants did not enjoy market power growth or development as a consequence of any of the following reasons:
>
> **i. a superior product**
>
> The petitioner avers the defendants did not enjoy market power growth or development as a consequence of a superior product.
>
> **ii. business acumen**
>
> The petitioner avers the defendants did not enjoy market growth or development as a consequence of business acumen.
>
> **iii. or historic accident**
>
> The petitioner avers the defendants did not market power growth or development as a consequence of historic accident.
>
> **b. defendants' monopoly power was not obtained for**
>
> The petitioner avers the defendants' monopoly power was not obtained for the following reasons:

i. a valid business reason

The petitioner avers the defendants' monopoly power has not resulted or been created out of a valid business reason.

ii. or concern for efficiency

The petitioner avers the defendants' monopoly power has not resulted or been created out of a concern for efficiency.

Petition, pp. 100-101.

These allegations are wholly insufficient to allege a cause of action against STK under § 416.031.2. It is well established that even under the liberal notice pleading standards of federal courts, a plaintiff must do more than cite relevant antitrust language to state a claim for relief. *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 419 F. Supp.2d 1316, 1327 (D. Kan. 2006); *TV Comm., Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir. 1982); *Estate Constr. Co. v. Miller and Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994); *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1953); *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Moreover, in Missouri, allegations that contain mere conclusions are insufficient and will be disregarded when considering whether a plaintiff has properly pled a cause of action. *See Brock v. Blackwood*, 143 S.W.3d at 56. Therefore, Count II should be dismissed with prejudice.

b. **Lipari must identify a relevant market in order to state an antitrust claim under § 416.031.2. "Hospital Supplies" does not identify a product that is reasonably interchangeable and has a cross-elasticity of demand. Therefore, Lipari has failed to identify a relevant market and has failed to state a claim for violation of § 416.031.2.**

Even if Lipari's general conclusory allegations somehow meet the basic requirements of Rule 55.05, these allegations are still insufficient to maintain an action under § 416.031.2 because it does not define the relevant market.

In order to maintain a cause of action under § 416.031.2, it is Lipari's burden to properly plead the boundaries of an alleged relevant market or markets. *Adidas America, Inc. v. National Collegiate Athletic Assn.*, 64 F. Supp.2d 1097, 1103 (D. Kan. 1999). The relevant market must be defined by "the interchangeability of or the cross-elasticity of demand between the product in question and substitutes for it." *Id.*, quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502 (1962). Failure to define a relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand renders the Petition insufficient and a motion to dismiss may be granted. *See Adidas America, Inc. v. National Collegiate Athletic Assn.*, 64 F. Supp.2d at 1102. Products belong in the same market when they are reasonably interchangeable for the same uses and must exhibit a high cross-elasticity of demand. *See Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1153 (W.D. Ark. 1995). As stated by the Eighth Circuit, "defining a relevant market is primarily a process of describing those groups of producers which, because of similarity of their products, have the ability–actual or potential–to take significant amounts of business away from each other." *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987). Products have a high cross-elasticity if consumers will shift from one to the other in response to changes in the relative costs. *Community Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. at 1153 n.7.

Plaintiff has failed to properly define a relevant market to support his antitrust claim. In fact, plaintiff has failed to identify any specific product. The entirety of plaintiff's claim refers to "hospital supplies." Plaintiff fails to identify any specific product which would constitute "hospital supplies" or how the "hospital supplies" he seeks to sell would be interchangeable and subject to a high cross-elasticity with the "hospital supplies" alleged to be sold by the defendants. Lipari's failure to identify a single product- much less a reasonably interchangeable one – makes

it impossible for him to identify a proper relevant market for his antitrust claims. Accordingly, Count II of his Petition should be dismissed with prejudice.

D. Count III–Conspiracy to violate § 416.031(2) (p. 103)

In Count III, plaintiff attempts to allege a violation of § 416.031.2 by contending the defendants have conspired to create a monopoly. But plaintiff's allegations in Count III fail to allege any facts, much less sufficient facts to support a cause of action. Plaintiff simply sets forth the elements for conspiracy and states under each element "The Petitioner hereby re-alleges the averments of facts in this Complaint and its attachments." While Rule 55.12 allows Lipari to adopt by reference other parts of his Petition, a reference must be sufficiently clear and explicit to advise defendants of the issue tendered for trial. *See Hester v. Barnett*, 723 S.W.2d 544, 561 (Mo. App. W.D. 1987). Lipari's adoption by reference encompasses 102 pages of issues ranging from disbarment of plaintiff's former counsel to an individual named Judy Jewsome not being allowed to sit for the Kansas Bar to Karl Rove's involvement in the alleged hospital supply conspiracy. By incorporating all of his prior allegations, the plaintiff has not concisely set forth the issue to be tendered for trial, and his incorporation by reference is therefore improper.

Additionally, a cause of action for conspiracy to commit antitrust violations under § 416.031.2 is subject to a four-year statute of limitations. As set forth in Sections 2(a) and 2(b) above, plaintiff's state antitrust claims are barred by the statute of limitations. Rather than restating those arguments again here, defendant incorporates by reference those arguments made in Sections 2(a) and 2(b) above.

For these reasons, Count III should be dismissed with prejudice.

E. Count IV–Tortious interference with business relations (p. 103)

In Count IV of his Petition, plaintiff alleges that STK interfered with Medical Supply Chain's individual representative candidate trust accounts with U.S. Bank and a real estate

transaction between Medical Supply Chain and General Electric Transportation Company. *See* Petition, p. 103. Plaintiff's claims fail because:

a. Plaintiff has failed to allege sufficient facts to support a cause of action; and

b. Plaintiff's claims relating to the escrow accounts are barred by the statute of limitations.

Therefore, the Court should dismiss Count IV of plaintiff's Petition with prejudice.

1. **The Missouri Rules of Civil Procedure require plaintiff to plead sufficient facts for each element of his claim. Plaintiff simply makes conclusory allegations that purport to satisfy each element. Because the plaintiff has failed to plead any facts to support his cause of action, his claim must be dismissed.**

As repeatedly set forth above, the Missouri Rules of Civil Procedure require that a petition set forth facts which demonstrate the pleader is entitled to relief. *See* Rule 55.05; *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004). Conclusory allegations not supported by facts will be disregarded in determining whether a petition sets forth sufficient facts to maintain a cause of action. *See id.* citing *Lick Creek Sewer System v. Bank of Bourbon*, 747 S.W.2d 317, 322 (Mo. App. 1988).

In order to maintain a cause of action for tortious interference with contract or business expectancy, Lipari must allege facts to show (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. 1993). While Lipari identifies the contract or business expectancy as the supposed escrow agreement with U.S. Bank and the real estate contract with G.E., he fails to specifically allege any facts as to STK's knowledge or supposed involvement in the remainder of the elements for this cause of action. Rather, he simply sets forth the legal elements and mirrors the elements with a conclusory allegation that purportedly

satisfies the claim. His allegations violate Rule 55.05 of the Missouri Rules of Civil Procedure and his conclusory allegations are disregarded when determining whether he has properly stated a cause of action. *See Brock v. Blackwood*, 143 S.W.3d at 56.

For this reason, Count IV of Lipari's petition should be dismissed with prejudice.

2. **Claims for tortious interference with business expectancy must be brought within five years of the date the cause of action accrues. Plaintiff's alleged cause of action as to the escrow accounts accrued in 2002 and he did not file this claim until February 2008. Therefore, his claim for tortious interference with business expectancy as to the escrow accounts is barred by the statute of limitations.**

A claim for tortious interference with contract or business expectancy must be brought within five years of the action's accrual. R.S.Mo. § 516.120(4); *D'Arcy and Associates, Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 29 (Mo. App. W.D. 2004). A cause of action accrues when the plaintiff knows or should know of the wrong and can ascertain damage. *Id.*

Lipari alleges STK tortiously interfered with an escrow agreement between U.S. Bank and Medical Supply in 2002, purportedly at the time STK was engaged to defend U.S. Bank (which had allegedly already breached the escrow agreement). Petition, p. 103. The Petition also demonstrates that Medical Supply had *actual* knowledge of its alleged damages from the putative escrow transaction in October 2002, when it filed the first of many lawsuits related to the transactions. *See* Petition, Appendix 1, p. 1. Because Lipari did not file this suit until February 2008, his claim for tortious interference, as it relates to the supposed escrow transaction, is beyond the five-year statute and is therefore time barred.

F. Count V–Fraud

Plaintiff's claim for fraud must be dismissed as he fails to allege any facts which meet the particularity pleading requirement of Rule 55.15 of the Missouri Rules of Civil Procedure.

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). Moreover, Rule 55.15 requires that all allegations of fraud be pled with particularity. As stated in *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 126 (Mo. App. W.D. 1993):

> Every essential element of fraud must be plead, and failure to plead any element renders the claim defective and subject to dismissal. (Citations omitted.) All averments of fraud, except malice, intent, knowledge and any other condition of the mind, are to be stated with particularity. (Citations omitted.) In other words, the fraud must clearly appear from the allegations of fact, and be independent of conclusions. (Citations omitted.)

Lipari's Petition alleges no facts to support his fraud claim. For his allegations regarding a false representation, Lipari re-alleges his prior averments and states, "Defendants were engaged in concealed fraudulent conduct." Petition, p. 105. This allegation is devoid of any fact, much less facts with such particularity "to be independent of conclusions." *Id.* Lipari's allegations as to the other elements of fraud are equally cryptic. His allegations fail to meet the basic pleading requirements of Rule 55.05, much less the heightened requirements of Rule 55.15. Neither the parties nor the Court should be forced to scour the Petition in an effort at guesswork as to what plaintiff believes constitutes the substance of his claims. Because Lipari has failed to allege sufficient facts to support his fraud claim, Count V should be dismissed with prejudice.

G. Count VI–*Prima Facie* Tort

On p. 106 of his Petition, Lipari asserts a cause of action for *prima facie* tort. In order to maintain such a claim, Lipari must allege facts to show: (1) an intentional lawful act by defendant; (2) defendant's intent to injure the plaintiff; (3) injury to the plaintiff; and (4) an absence of or insufficient justification for defendant's act. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315 (Mo. 1993); *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc). *Prima facie* tort is not a catchall cause of action or a duplicative remedy. Like any tort, it has specialized elements which must be met to maintain the cause of action. *Nazeri*, 860 S.W.2d at 315.

Lipari's claim for *prima facie* tort should be dismissed because he has failed to plead an intentional lawful act by the defendant. Rather, Lipari alleges:

> To whatever extent said activities of Defendants including procuring the disbarment and interference with the petitioner's potential may not violate antitrust laws or tortuously (*sic*) interfere with contract or business expectancy, *said acts and activities of Defendants are still unlawful and fraudulent.*

Petition, p. 107 (emphasis added).

Plaintiff's allegations specifically state that defendants' alleged misconduct was "unlawful and fraudulent." But a claim for *prima facie* tort is based on a *lawful* act by the defendant. Therefore, Lipari has failed to plead an essential element of *prima facie* tort. *Nazeri*, 860 S.W.2d at 315 (holding that allegations that a defendant's statements were "untrue" failed to state a claim for *prima facie* tort).

Additionally, Lipari's allegations again fall short of the factual pleading requirements found in Rule 55.05 of the Missouri Rules of Civil Procedure. For his *prima facie* tort claim, Lipari simply sets forth each element and makes a conclusory allegation that purports to satisfy

the element. These conclusory allegations are insufficient and should be disregarded. *Brock v. Blackwood*, 143 S.W.3d 47, 56 (Mo. App. W.D. 2004).

Lipari has failed to allege sufficient facts to support his claim for *prima facie* tort. The Court should therefore dismiss Count VI of his Petition with prejudice.

III. INCORPORATION BY REFERENCE

Defendant STK incorporates by reference the arguments, authorities, motions and suggestions of all defendants.

IV. CONCLUSION

WHEREFORE, for the above stated reasons, defendant Shughart, Thomson & Kilroy requests the Court dismiss plaintiff's Petition with prejudice and grant all other relief to which the defendant is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was delivered via United States mail, postage prepaid, this 13th day of June, 2008, to:

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Attorney for Defendants

Medical Supply Chain, Inc. v. Neoforma, Inc.
D.Kan.,2006.

United States District Court,D. Kansas.
MEDICAL SUPPLY CHAIN, INC., Plaintiff,
v.
NEOFORMA, INC., et al., Defendants.
No. Civ.A. 05-2299-CM.

March 7, 2006.

Background: Corporation that developed a health care supply strategist certification program brought action against bank and others, alleging that defendants engaged in trade restraint in market for hospital supplies, and asserting 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 Racketeer Influenced and Corrupt Organizations Act (RICO) and the USA PATRIOT Act. The United States District Court for the Western District of Missouri transferred case. Defendants filed motions to dismiss and for sanctions, and plaintiffs moved for reconsideration of order transferring venue, to strike defendants' renewed motion to dismiss and/or strike, and for clarification of order.

Holdings: The District Court, Murguia, J., held that:
(1) reconsideration of order transferring venue was not warranted;
(2) defendants' renewed motions to dismiss would not be stricken;
(3) plaintiff failed to state a claim under the Sherman Act, the Clayton Act, or RICO;
(4) no private cause of action existed to enforce the USA PATRIOT Act; and
(5) sanctions were warranted against plaintiff's attorney in antitrust action, in the form of attorney fees and costs, pursuant to both Rule 11 and statute providing for sanctions against attorney who multiplies proceedings.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure 170A ⇐928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(J) Motions in General
170Ak928 k. Determination. Most Cited Cases
Whether to grant or deny a motion for reconsideration is committed to the court's discretion.

[2] Federal Civil Procedure 170A ⇐928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(J) Motions in General
170Ak928 k. Determination. Most Cited Cases
A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider.

[3] Federal Courts 170B ⇐145

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)4 Proceedings and Effect of Change
170Bk145 k. Ruling or Order and Effect of Change. Most Cited Cases
Reconsideration of order transferring venue of antitrust litigation was not warranted, where plaintiff's arguments in support of reconsideration did not assert a change in controlling law or the availability of new evidence, and plaintiff did not raise any arguments that it could not have raised in its motions opposing transfer.

[4] Federal Civil Procedure 170A ⇐1101

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(N) Striking Pleading or Matter Therein
170Ak1101 k. In General. Most Cited

Exhibit A

Cases
Defendants' renewed motions to dismiss antitrust case, which contained new arguments and authorities that were available when defendants filed their original motions to dismiss, did not fall within purview of rule permitting a court to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," where defendants renewed their motions only after case was transferred, and striking the motions was inconsequential, since even if the court struck the motions, none of its instant rulings would change. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⇐1771

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)3 Pleading, Defects In, in General
170Ak1771 k. In General. Most Cited Cases
Dismissal for failure to state a claim upon which relief can be granted is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[6] Antitrust and Trade Regulation 29T ⇐972(3)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(3) k. In General. Most Cited Cases
(Formerly 265k28(6.4))
A plaintiff must plead three elements to state a claim under the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. Sherman Act, § 1, 15 U.S.C.A. § 1.

[7] Antitrust and Trade Regulation 29T ⇐972(4)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(4) k. Conspiracy or Combination. Most Cited Cases
(Formerly 265k28(6.4))
Corporation that developed a health care supply strategist certification program failed to allege a contract, combination, or conspiracy among two or more independent actors, as required to state a claim under the Sherman Act, although corporation asserted many conspiracy theories, where it did not allege any facts that supported its assertions. Sherman Act, § 1, 15 U.S.C.A. § 1.

[8] Antitrust and Trade Regulation 29T ⇐641

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(C) Market Power; Market Share
29Tk641 k. In General. Most Cited Cases
(Formerly 265k12(1.3))
Conduct violates Sherman Act section which prohibits monopolies in interstate trade or commerce when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. Sherman Act, § 2, 15 U.S.C.A. § 2.

[9] Antitrust and Trade Regulation 29T ⇐620

29T Antitrust and Trade Regulation
29TVII Monopolization
29TVII(A) In General
29Tk619 Elements in General
29Tk620 k. In General. Most Cited Cases
(Formerly 265k12(1.3))
The offense of monopoly under the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Sherman Act, § 2, 15 U.S.C.A. § 2.

[10] Antitrust and Trade Regulation 29T ⇐972(4)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(4) k. Conspiracy or Combination. Most Cited Cases
(Formerly 265k28(6.3))
Assertion that defendants collectively maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the sale of hospital supplies was not sufficient to allege defendants' possession of monopoly power, a relevant product and geographic market, or that defendants controlled prices and excluded competition, as required to state a monopoly claim under the Sherman Act. Sherman Act, § 2, 15 U.S.C.A. § 2.

[11] Antitrust and Trade Regulation 29T ⇐972(3)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(3) k. In General. Most Cited Cases
(Formerly 265k28(6.3))
Corporation that developed a health care supply strategist certification program failed to allege who alleged interlocking directors were, for which defendants' companies they served, or that corporations in question were actual competitors, as required to state a claim under Clayton Act section which prohibits persons from serving, at the same time, as a director or officer of any two corporations that were engaged in commerce and were competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws. Clayton Act, § 8(a)(1), 15 U.S.C.A. § 19(a)(1).

[12] Racketeer Influenced and Corrupt Organizations 319H ⇐3

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(A) In General
319Hk3 k. Elements of Violation in General. Most Cited Cases
To plead a viable civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, the plaintiff must allege that a defendant: (1) participated in the conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. 18 U.S.C.A. § 1962(c).

[13] Federal Civil Procedure 170A ⇐636

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity
170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases
Under rule requiring that fraud be pled with particularity, a plaintiff must allege with particularity not only each element of a Racketeer Influenced and Corrupt Organizations Act (RICO) violation, but also the predicate acts of racketeering; to properly allege the predicate acts, plaintiff must specify the "who, what, where, and when" of each purported act. 18 U.S.C.A. § 1961 et seq.; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[14] Federal Civil Procedure 170A ⇐636

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak633 Certainty, Definiteness and Particularity
170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases

Racketeer Influenced and Corrupt Organizations 319H ⇐70

319H Racketeer Influenced and Corrupt Organizations
319HI Federal Regulation
319HI(B) Civil Remedies and Proceedings

319Hk68 Pleading
319Hk70 k. Racketeering or Criminal Activity; Predicate Acts. Most Cited Cases
Assertions that defendants "engaged in conduct of an enterprise through a pattern of racketeering activity," and that a law firm violated RICO by conspiring with other unspecified defendants to shut a corporation that developed a health care supply strategist certification program out of the healthcare supply industry, were insufficient to allege the "who, what, where, and when" of each purported predicate act of racketeering, as required to state a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim. 18 U.S.C.A. § 1962(c); Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[15] Action 13 ⇐3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
No private cause of action exists to enforce the USA PATRIOT Act. 31 U.S.C.A. § 5318.

[16] Federal Courts 170B ⇐18

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction
170Bk18 k. Validity or Substantiality of Federal Claims and Disposition Thereof. Most Cited Cases
District Court would not retain supplemental jurisdiction over plaintiff's state law claims, where plaintiff's federal claims had been dismissed. 28 U.S.C.A. § 1367(a).

[17] Judgment 228 ⇐634

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k634 k. Nature and Requisites of Former Adjudication as Ground of Estoppel in General. Most Cited Cases

Judgment 228 ⇐713(1)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(1) k. In General. Most Cited Cases
Under the doctrine of issue preclusion, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

[18] Judgment 228 ⇐540

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k540 k. Nature and Requisites of Former Recovery as Bar in General. Most Cited Cases
Claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits.

[19] Judgment 228 ⇐570(11)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k570 Judgment on Discontinuance, Dismissal, or Nonsuit
228k570(11) k. Defects in Pleading. Most Cited Cases

Judgment 228 ⇐585(2)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k585 Identity of Cause of Action in General
228k585(2) k. What Constitutes Identical Causes. Most Cited Cases

Claim preclusion barred plaintiff's claims under the Sherman Act, the Hobbs Act, and the USA PATRIOT Act, as well as several state claims, where claims had ended in a judgment on the merits in a prior case, claims involved many of the same defendants, and claims involved the same causes of action. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; 18 U.S.C.A. § 1951(b)(2); 31 U.S.C.A. § 5318.

[20] Antitrust and Trade Regulation 29T ⇐972(3)

29T Antitrust and Trade Regulation
29TXVII Antitrust Actions, Proceedings, and Enforcement
29TXVII(B) Actions
29Tk972 Pleading
29Tk972(2) Complaint
29Tk972(3) k. In General. Most Cited Cases
(Formerly 265k28(6.2))
Plaintiff's 115 page, 613 paragraph complaint in antitrust case violated rules requiring a "short and plain statement of the claim showing that the pleader is entitled to relief;" and that each averment be "simple, concise, and direct." Fed.Rules Civ.Proc.Rule 8(a), (e)(1), 28 U.S.C.A.

[21] Federal Civil Procedure 170A ⇐2769

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2769 k. Reasonableness or Bad Faith in General; Objective or Subjective Standard. Most Cited Cases
The standard for Rule 11 sanctions is an objective one; subjective bad faith is not required to trigger Rule 11 sanctions. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[22] Federal Civil Procedure 170A ⇐2766

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2766 k. Multiplication of Proceedings in General. Most Cited Cases
Sanctions may be imposed under statute providing for sanctions against attorney who multiplies proceedings for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court. 28 U.S.C.A. § 1927.

[23] Federal Civil Procedure 170A ⇐2769

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2769 k. Reasonableness or Bad Faith in General; Objective or Subjective Standard. Most Cited Cases
The court must apply an objective standard in determining whether to impose sanctions under statute providing for sanctions against attorney who multiplies proceedings, and subjective bad faith is not a necessary showing. 28 U.S.C.A. § 1927.

[24] Federal Civil Procedure 170A ⇐2766

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2766 k. Multiplication of Proceedings in General. Most Cited Cases
Because statute providing for sanctions against attorney who multiplies proceedings is penal in nature, an award should only be made in instances evidencing a serious and standard disregard for the orderly process of justice, and the court must be aware of the need to ensure that the statute does not dampen attorneys' zealous representation of their clients' interests. 28 U.S.C.A. § 1927.

[25] Federal Civil Procedure 170A ⇐2771(4)

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2771 Complaints, Counterclaims and Petitions
170Ak2771(4) k. Anti-Trust or Trade Regulation Cases. Most Cited Cases

Federal Civil Procedure 170A ⇐2805

170A Federal Civil Procedure
170AXX Sanctions
170AXX(C) Persons Liable for or Entitled to Sanctions
170Ak2805 k. Joint and Several Liability. Most Cited Cases

Federal Civil Procedure 170A ⇐2814

170A Federal Civil Procedure
170AXX Sanctions
170AXX(D) Type and Amount
170Ak2811 Monetary Sanctions
170Ak2814 k. Computation; Items and Services Compensable. Most Cited Cases
Sanctions were warranted against plaintiff and plaintiff's attorney in antitrust action, jointly and severally, in the form of attorney fees and costs, pursuant to both Rule 11 and statute providing for sanctions against attorney who multiplies proceedings, where mere fact that plaintiff filed a nearly unintelligible 115 page complaint suggests that suit was brought for purpose of harassing defendants or the court, complaint consisted of frivolous claims, not one of which supported a viable claim for which relief could be granted, plaintiff's insistence on re-litigating claims barred by claim preclusion unreasonably and vexatiously multiplied the proceedings, and plaintiff failed to heed court's previous admonitions and sanctions, but, rather, chose instead to proceed with the case. 28 U.S.C.A. § 1927; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[26] **Federal Civil Procedure 170A ⇐2800**

170A Federal Civil Procedure
170AXX Sanctions
170AXX(C) Persons Liable for or Entitled to Sanctions
170Ak2800 k. In General. Most Cited Cases
A district court may impose sanctions against plaintiff, plaintiff's counsel, or against both with joint and several liability.

[27] **Federal Civil Procedure 170A ⇐2830**

170A Federal Civil Procedure
170AXX Sanctions
170AXX(E) Proceedings
170Ak2830 k. Determination; Order. Most Cited Cases
The sanctioning of a party requires specific findings that the party was aware of the wrongdoing.

***1320** Ira Dennis Hawver, Ozawkie, KS, for Plaintiff.
Janice Vaughn Mock, Sophie N. Froelich, Stephen N. Roberts, Nossaman, Guthner, Knox & Elliott, LLP, San Francisco, CA, John K. Power, Husch & Eppenberger, LLC, Jonathan H. Gregor, Mark A. Olthoff, Kathleen A. Hardee, Shughart Thomson & Kilroy, PC, Kansas City, MO, Andrew M. Demarea, Shughart Thomson & Kilroy, Overland Park, KS, for Defendants.

MEMORANDUM AND ORDER

MURGUIA, District Judge.
On March 9, 2005, plaintiff Medical Supply Chain, Inc. filed the above-captioned case in the United States District Court for the District of Western 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, U.S. Bancorp NA, U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cesare, [fn1] Piper Jaffray Companies, Andrew S. Duff, Shughart Thomson & Kilroy, P.C.,[fn2] 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.

FN1. 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 plaintiff's counsel.

FN2. Plaintiff's complaint names "Shughart Thomson & Kilroy Watkins Boulware, P.C." but the law firm's correct name is "Shughart Thomson & Kilroy, P.C.".

On June 15, 2005, Judge Ortrie D. Smith of the Western District of Missouri granted defendants' Motions to Transfer the case to the District of Kansas, citing this district court's experience with "the almost identical previous lawsuit" and the interests of justice. (Doc. 26, at 2).

Each group of defendants have filed a motion to dismiss, and two groups of defendants have filed renewed motions after the case was transferred, resulting in seven motions to dismiss. The motions to dismiss pending before the court are defendant Robert Zollars' Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 2); Defendant Neoforma, Inc.'s Motion to Dismiss, [sic] Complaint, or Alternatively to Require Amendment, Pursuant to F.R.C.P. Rules 8 and 9 (Doc. 4); Defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion to Transfer, Dismiss and/or Strike (Doc. 6); Defendants Curt Nonomaque and Robert Baker's Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim (Doc. 11); Defendant Shughart Thomson & Kilroy, P.C.'s Motion to Transfer, Dismiss and/or Strike (Doc. 13); Defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Renewed Motion to Dismiss and/or Strike (Doc. 32); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and ***1321** Curt Nonomaque's Renewed Motion to Dismiss Complaint for Failure to State a Claim (Doc. 34).

Additional motions before the court are defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion for Sanctions (Doc. 22); Defendants' Motion to Stay Rule 26(f) Conference and Discovery (Doc. 24); plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28); Novation, LLC, VHA, University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion for Sanctions (Doc. 36); plaintiff's Motion to Strike Defendants' Renewed Motion to Dismiss and/or Strike (Doc. 38); plaintiff's Motion to Consolidate Under Rule 42 (Doc. 39); plaintiff's Motion to Require Consolidation Arguments to be in the Form of Pleadings on the Record and Notice of Threat of Unlawful Sanctions (Doc. 42); plaintiff's Motion to Strike Novation Defendants' Renewed Motion to Dismiss (Doc. 43); plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45); First Plaintiff's Motion for Partial Summary Judgment Under F.R. Civ. P. Local Rule 56.1 (Doc. 46); plaintiff's Motion for Leave to Join Additional Defendants Under Fed.R.Civ.P. 29(a) (Doc. 49); plaintiff's Motion to Substitute Plaintiff Under F.R.C.P. Rules [sic] 17(a), 15(a) and 25(a) (Doc. 56); plaintiff's Motion to Substitute Defendant Under F.R.C.P. Rules [sic] 17(a) (Doc. 57); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion to Set Oral Hearing on Motion to Dismiss (Doc. 76).

I. Background

A. Bret D. Landrith

Plaintiff's counsel for all of the pending motions before the court, Bret D. Landrith, withdrew as counsel for plaintiff on January 30, 2006 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. *See In re Landrith*, 124 P.3d 467, 485-86 (Kan.2005). On February 7, 2006, Ira Dennis Hawver entered his appearance on behalf of Medical Supply Chain, Inc.

B. Prior Relevant Cases

Plaintiff has brought two other cases in this court that are relevant to the court's analysis. The first, captioned *Medical Supply Chain, Inc. v. U.S. Bancorp, NA, et al.*, 02-2539-CM, 2003 WL 21479192 (D.Kan.2003) (*"Medical Supply I"*), was filed on October 22, 2002 against defendants U.S. Bancorp, NA; US Bank Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC, a subsidiary of U.S. Bancorp; Piper Jaffray; Andrew Cesare; Susan Paine; Lars Anderson; Brian Kabbes; and Unknown Healthcare Supplier. Plaintiff contended these defendants engaged in conduct violating (1) the Sherman Antitrust Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act. Plaintiff also alleged

defendants (4) "fail[ed] to properly train [their] employees on the USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under the USA PATRIOT Act"; and (6) violated "criminal laws to influence policy under section 802 of the USA PATRIOT Act."The complaint further charged defendants with (7) misappropriation of trade secrets under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good ***1322** faith and fair dealing. Plaintiff sought over $943 million in damages and declaratory relief.

On June 16, 2003, this court granted defendants' motions to dismiss for failure to state any claims upon which relief could be granted and dismissed the case. *Medical Supply I*, 2003 WL 21479192, at *9 (D.Kan. June 16, 2003). When discussing plaintiff's USA PATRIOT Act claims, the undersigned judge advised Mr. Landrith to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *Id.* at *6. Furthermore, with regard to the same claims, the undersigned judge noted that "the court finds plaintiff's allegation so completely divorced from rational thought that the court will refrain from further comment until such time as federal criminal proceedings are commenced, if indeed they ever are." *Id.* at *8. On November 8, 2004, the Tenth Circuit affirmed the district court's dismissal, and ordered plaintiff to show cause why he should not be sanctioned for filing a frivolous appeal pursuant to Fed. R.App. P. 38. *Medical Supply I*, 112 Fed.Appx. 730, 731-32 (10th Cir.2004). On December 30, 2004, the undersigned judge assessed attorney fees and double costs as a sanction against Mr. Landrith. Defendants were awarded $23,956 in attorney fees. *Medical Supply I*, 2005 WL 2122675, at *1 (D.Kan. May 13, 2005).

The second case brought by plaintiff in this court, captioned *Medical Supply Chain, Inc. v. General Electric Company, et al.*, case number 03-2324-CM ("Medical Supply II"), was filed on June 18, 2003. Defendants included General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, and Jeffrey Immelt. Plaintiff's amended complaint alleged violations of the Sherman Act, the Robinson-Patman Act, and various state law claims. Specifically, plaintiff alleged that it

> suffered antitrust injury from the defendants' breach of a written contract to buy out the remainder of a lease and provide financing for Medical Supply's entry into the hospital supply market. This contract was a unique credit agreement and an essential facility required for entry into the e-commerce market for hospital supplies.

Plaintiff further alleged that "GE founded a cartel or trust with its horizontal and vertical competitors, centered around an electronic marketplace that now has over 80% of the hospital e-commerce market," and that "GE's refusal to deal and group boycott, preventing Medical Supply's entry into a market GE has monopoly power in[,] is a violation of the Sherman and Clayton Antitrust Acts."

On January 29, 2004, the undersigned judge granted defendants' motions to dismiss, but opted not to impose Rule 11 sanctions against plaintiff. *Medical Supply II*, 2004 WL 956100, at *5 (D.Kan. Jan.29, 2004). In granting defendants' motions to dismiss, the court noted that "at the most fundamental level, plaintiff's antitrust claims fail." *Id.* at *3. On July 26, 2005, the Tenth Circuit affirmed the district court's dismissal of plaintiff's complaint, but reversed and remanded on the issue of sanctions against plaintiff, finding that "at least [plaintiff's] claims against Jeffrey Immelt in his individual capacity were frivolous in that no allegation was made that Immelt had any personal connection with [plaintiff's] alleged injury or even that he knew [plaintiff] existed." *Medical Supply II*, 144 Fed. Appx. 708, 716 (10th Cir.2005). The issue of sanctions remains pending.

C. Instant Allegations

Plaintiff asserts federal question subject matter jurisdiction based on several federal***1323** acts including the Clayton Act, the Sherman Act, the Declaratory Judgment Act,[fn1] the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the USA PATRIOT Act. Plaintiff also asserts diversity jurisdiction, despite acknowledging that both plaintiff and at least one defendant reside in Missouri. (Compl., at 4-6). Therefore, this court does not have diversity jurisdiction over plaintiff's case. 28

U.S.C. § 1332. Plaintiff alleges that this court has personal jurisdiction "over the parties who are in the territorial limits of the United States and who have sufficient contacts with the State of Missouri." (Compl., at 5).

> FN3. Plaintiff asserts subject matter jurisdiction under the Declaratory Judgment Act, but did not assert any claims against any defendants under that act.

In addition to the captioned defendants, plaintiff also lists eight "coconspirators not named as defendants in this action," several of which are relevant for purposes of this Order, including General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, LLC, and Jeffrey R. Immelt.

The court is unclear on the bulk of plaintiff's allegations. On page 84 of its complaint, plaintiff lists its "summary of claims" as follows: [FN4]

> FN4. For convenience and clarity, the court has copied plaintiff's summary of claims in its entirety, and did not designate any mistakes or typographical errors in the language.

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. U.S. 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 U.S. 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 U.S. Bancorp refused to deal with Medical Supply Chain, Inc. U.S. 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. U.S. 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.

***1324** 426. Medical Supply attempted to obtain preliminary injunctive relief against U.S. 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 U.S. 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 U.S. 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 U.S. Bancorp and consulting with representatives for U.S. Bancorp, U.S. 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 ***1325** 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 U.S. 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.

(Compl., at ¶4-86).

Plaintiff seeks "approximately $1,500,000,000.00 for the conduct related to the refusal to provide trust accounts and ... 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." (Compl., at 114). Plaintiff also seeks $1 million for damages sustained as a "consequence of Defendants' tortuous [sic] interference with contract or business expectancy and/or in prima facie tort ... together with punitive or exemplary damages for the same, in an amount in excess of $10,000," "approximately" $1.5 million in damages for defendants' violations of "civil racketeering laws," $500,000 for damages plaintiff sustained as a result of defendants' USA PATRIOT Act violations, and costs and reasonable attorney fees. (Compl., at 114-15).

II. Legal Standard for Motions to Dismiss

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir.1998), or when an issue of law is dispositive, Neitzke v. Williams, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, Maher, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff, Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir.1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to

offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), overruled on other grounds, *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

III. Analysis

A. Plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28)

[1][2][3] Whether to grant or deny a motion for reconsideration is committed to the court's discretion. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1386 (10th Cir.1997); *Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (10th Cir.1988). In exercising that discretion, courts in general have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See Marx v. Schnuck Mkts., Inc.*, 869 F.Supp. 895, 897 (D.Kan.1994) (citations omitted); D. Kan. Rule 7.3 (listing three bases for reconsideration of order). "A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." ***1326***Sithon Maritime Co. v. Holiday Mansion*, 177 F.R.D. 504, 505 (D.Kan.1998). Plaintiff's arguments in support of reconsideration do not assert a change in controlling law or the availability of new evidence. Moreover, in arguing that the U.S. District Court for the Western District of Missouri committed clear error by transferring the instant case to this district, plaintiff did not raise any arguments that it could not have raised in its motions opposing transfer. Because plaintiff is not entitled to a second chance at presenting its strongest case, *Sithon Maritime Co.*, 177 F.R.D. at 505, plaintiff's motion for reconsideration is denied.

B. Plaintiff's Motions to Strike (Docs. 38 and 43)

[4] Plaintiff requests that the court strike two renewed motions to dismiss. The bulk of plaintiff's arguments simply respond to defendants' motions to dismiss rather than argue in support of striking the motions. Plaintiff's on-point argument is that the renewed motions to dismiss include new arguments and authorities that were available when defendants filed their original motions to dismiss.

The court may "order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). The court finds that defendants' renewed motions do not fall within the purview of Rule 12(f). Rather, defendants renewed their motions only after the instant case was transferred from the U.S. District Court for the Western District of Missouri (in the 8th Circuit) to this court (in the 10th Circuit). Moreover, the court finds that striking the motions is inconsequential; even if the court struck the motions at issue, none of its instant rulings would change. Plaintiff's motions to strike are denied.

C. Motions to Dismiss

Pending before the court are five motions to dismiss and two renewed motions to dismiss. Defendants assert several different arguments in support of dismissal, including that this court does not have personal jurisdiction over certain defendants, plaintiff did not properly serve certain defendants, all of plaintiff's claims fail to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), several of plaintiff's claims are barred by claim and/or issue preclusion, and plaintiff's complaint violates Federal Rules of Civil Procedure 8 and 9. In addition, several defendants contend that some of plaintiff's allegations against specific defendants and third parties are so immaterial, impertinent and scandalous that they should be stricken by the court.

The court has reviewed the pending motions to dismiss and responses, along with the complaint and plaintiff's prior cases in this district. Even presuming all well-pleaded allegations as true, resolving doubts in favor of plaintiff, and viewing the pleadings in the light most favorable to plaintiff, the court finds that dismissal of plaintiff's complaint is warranted for several reasons.[FN5]

FN5. Although the court limited its analysis to Rule 12(b)(6), claim preclusion and Rule 8, the court does not intend to imply that defendants' additional grounds for dismissal are without merit. Rather, three separate grounds for dismissal are sufficient, and the court declines to continue its analysis.

1. Rule 12(b)(6)

[5] Plaintiff's complaint fails at the most basic level to allege sufficient facts to support cognizable legal claims. Federal Rule of Civil Procedure 12(b)(6) allows the court to dismiss a cause of action for "failure to state a claim upon which relief can ***1327** be granted." The court recognizes that "[d]ismissal under Rule 12(b)(6) is a 'harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.' " *Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1127 (10th Cir.1998) (quoting *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 (10th Cir.1989)). However, even considering the harshness of this remedy, dismissal under 12(b)(6) is warranted in this case.

a. Sherman Act, § 1 (Counts I and II)

[6][7] A plaintiff must plead three elements to state a claim under § 1 of the Sherman Act: (1) a contract, combination, or conspiracy among two or more independent actors; (2) that unreasonably restrains trade; and (3) is in, or substantially affects, interstate commerce. 15 U.S.C. § 1; *TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1027 (10th Cir.1992); 1 Irving Scher, et al., *Antitrust Advisor* (4th ed.2001) § 1.04. Accepting the allegations contained in the complaint as true, the court finds that plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors. Plaintiff's complaint alleges numerous conspiracies and agreements between various defendants. For example, plaintiff alleges that "Defendants entered into a combinations [sic] and or conspiracies in unreasonable restraint of trade or commerce ... in the markets for hospital supplies, hospital supplies sold in e-commerce and the capitalization of healthcare technology and supply chain management companies." (Compl., at 87). Although plaintiff asserts many conspiracy theories, it does not allege any facts that support its allegations. *See TV Commc'ns Network, Inc.*, 964 F.2d at 1024 ("Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief.") (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir.1980)); *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1373 (10th Cir.1979) (holding that to survive a motion to dismiss, a complaint stating violations of the Sherman Act "must allege facts sufficient, if they are proven, to allow the court to conclude that claimant has a legal right to relief") (citation omitted); *see also Medical Supply II*, 2004 WL 956100, at *3 ("dismissing plaintiff's antitrust claims for, inter alia, failure to allege that the named defendants were parties to an unlawful agreement"), *rev'd on other grounds*, 144 Fed.Appx. 708 (10th Cir.2005); *Medical Supply I*, 2003 WL 21479192, at *3 (D.Kan. June 16, 2003), *aff'd*, 112 Fed.Appx. 730 (10th Cir.2004) ("Accepting the allegations contained in the complaint as true, the court finds plaintiff has failed to allege a contract, combination, or conspiracy among two or more independent actors, and thus has not stated a claim under § 1."). Counts I and II fail to state a claim upon which relief can be granted.

b. Sherman Act, § 2 (Counts III and IV)

[8][9]Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed guilty of a felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); ***1328***Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir.1987). "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). In the Tenth Circuit, "monopoly power is defined as the ability both to control prices and exclude competition." *Tarabishi v. McAlester Reg'l Hosp.*, 951 F.2d 1558, 1567 (10th Cir.1991). Further, "determination of the existence of monopoly power requires proof of relevant product and geographic markets." *Id.*

[10] Plaintiff's relevant allegations regarding § 2 of

the Sherman Act specifically consists of the following paragraph:

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 States [sic] 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 [sic] of the same in the several States of the United States in violation of 15 U.S.C. § 2.

(Compl., at 96).

Thus, even accepting each of plaintiff's allegations as true, plaintiff has clearly failed to allege (1) defendants' possession of monopoly power, (2) a relevant product and geographic market, or (3) that defendants either controlled prices and excluded competition. *See Medical Supply II*, 144 Fed.Appx. at 713 (affirming the district court's holding on plaintiff's Sherman Act, § 2 claim, and stating that "we see no reason to disturb the district court's conclusion that [plaintiff] failed to state a claim that GE had illegally monopolized or attempted to monopolize the North American hospital supply e-commerce market"); *Medical Supply I*, 2003 WL 21479192, at *3 ("Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, plaintiff has not pled the existence of a relevant product market or geographic market. Plaintiff has not stated that defendants' alleged market power stems from defendants' willful acquisition or maintenance of that power rather than from defendants' development of a superior product, business acumen, or historic accident."). The court finds that Counts III and IV fail to state a claim of monopoly under § 2.

c. Clayton Act (Count V)

[11] A provision of the Clayton Act, 15 U.S.C. § 19, prohibits persons from serving, at the same time, as a director or officer of any two corporations that are engaged in commerce and are competitors, "so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws." 15 U.S.C. § 19(a)(1). Plaintiff's complaint, however, fails to allege who the alleged interlocking directors are, for which defendants' companies they serve, or that the corporations in question are actual competitors. For these reasons, plaintiff's Count V is dismissed for failure to state a claim.

d. RICO (Count XV)

[12][13] To plead a viable civil RICO claim under 18 U.S.C. § 1962(c), plaintiff ***1329** must allege that a defendant " '(1) participated in the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' " *Abbott v. Chem. Trust*, 2001 WL 492388, at *15 (D.Kan. Apr.26, 2001) (quoting *Rural/Metro/Oklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1100 (10th Cir.1999)). Plaintiff also alleges that defendants conspired to violate 18 U.S.C. § 1962(c). *See* 18 U.S.C. § 1962(d). Under Rule 9(b), plaintiff must allege with particularity not only each element of a RICO violation, but also the predicate acts of racketeering. *Phillips USA, Inc. v. Allflex USA, Inc.*, 1993 WL 191615, at *2 (D.Kan. May 21, 1993) (quoting *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir.1992)). To properly allege the predicate acts, plaintiff must specify the "who, what, where, and when" of each purported act. *Id.* (citation omitted).

[14] Here, plaintiff failed to sufficiently allege the "who, what, where, and when" its RICO claim. Plaintiff's specific RICO allegations consists of the following: "The Defendants engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," as well as numerous assertions that defendant Shughart Thomson & Kilroy, a law firm based in Kansas City, Missouri, violated RICO by conspiring with other unspecified defendants to shut plaintiff out of the healthcare supply industry. Again, plaintiff offers no specific facts in support of its numerous allegations. Thus, plaintiff's RICO claim fails to state a claim for which relief may be granted.

Plaintiff also cites to 18 U.S.C. §§ 1503 and 1513 in its RICO discussion. Section 1503 prohibits

influencing, intimidating, impeding or injuring a juror or officer of the court, 18 U.S.C. § 1503(a), while § 1513 prohibits retaliation against a witness for attending or testifying in an official proceeding, or for providing information relating to the commission of a federal offense to a law enforcement officer, 18 U.S.C. § 1513(a)(1). Plaintiff seems to argue that defendant Shughart Thomson & Kilroy violated these statutes when it lodged ethics complaints against Mr. Landrith. Plaintiff's allegations have nothing to do with unlawfully influencing a juror or officer of the court, or retaliating against a witness or informant. Therefore, these allegations fail to state a claim.

Also as part of its RICO claim, plaintiff alleges that defendants violated 17 U.S.C. § 506 when it "stole copyrighted works to keep Medical Supply from realizing its plan to enter the market for hospital suppliers ... 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." (Compl., at 110). This is the entirety of detail plaintiff gives regarding its criminal copyright claim. Thus, plaintiff does not allege exactly what material was stole by whom, how the allegedly stolen material fits the definition of copyrighted material, or how the material was stolen.

Plaintiff also alleges that defendants violated 18 U.S.C. § 2319. However, because plaintiff makes absolutely no allegations regarding this statute other than to state that "Defendants [sic] violation falls under 18 USC § 2319," this claim fails to state a valid claim.

As part of its RICO claims, plaintiff also alleges that defendants violated the Hobbs Act "by preventing Medical Supply's entry into commerce under color of official right," citing to 18 U.S.C. § 1951. Section 1951 prohibits the obstruction, delay or affection of commerce by robbery or extortion. Significantly, extortion is defined as the "wrongful use of actual or threatened force, violence, or fear, under color of official right." 18 U.S.C. § 1951(b)(2). Here, ***1330** there is no allegation that defendants, who are private parties, acted under color of official right, or acted with any force, violence or fear. Therefore, plaintiff's claim under the Hobbs Act fails to state a claim.

e. USA PATRIOT Act (Count XVI)

[15] Plaintiff alleges that all defendants, through defendants U.S. Bancorp NA and U.S. Bank National Association, violated two sections of the USA PATRIOT Act, 31 U.S.C. § 5318(g)(3) and 18 U.S.C. § 1030, by "maliciously" filing a suspicious activity report regarding plaintiff and its founder Samuel Lipari. No private cause of action exists to enforce the USA PATRIOT Act.*Medical Supply I*, 112 Fed.Appx. at 731. Therefore, plaintiff's USA PATRIOT Act claims are dismissed.

f. State Law Claims

[16] Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir.2002) (quotation marks, alterations, and citation omitted). Having dismissed each of plaintiff's federal claims, this court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice.

2. Issue/Claim Preclusion

Several defendants argue that issue and/or claim preclusion bar several of plaintiff's claims. Claim and issue preclusion are rules of "fundamental and substantial justice that enforce[ ] the public policy that there be an *end* to litigation." *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1009 (10th Cir.1990) (internal citation and quotation omitted). Claim and issue preclusion serve to "avoid[ ] unnecessary expense and vexation for parties, conserve[ ] judicial resources, and encourage[ ] reliance on judicial action." *Id.*

[17] Under the doctrine of issue preclusion, " '[w]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' " *Botefuhr*, 309 F.3d at 1282 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25

L.Ed.2d 469 (1970)).

Four elements must be demonstrated in order to trigger issue preclusion: "(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been fully adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

Id. at 1282 (quotations omitted).

[18] On the other hand, "claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits." *McCTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir.2005) (citations omitted). "If these requirements are met, [claim preclusion] is appropriate unless the party seeking to avoid preclusion did not have a 'full and fair opportunity' to litigate the claim in the prior suit." *Id.* (quoting *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n. 4 (10th Cir.1999)).

***1331**[19] Here, at least five of plaintiff's claims against three defendants are barred by claim preclusion. In *Medical Supply I*, plaintiff brought suit against three of the same defendants as the instant case: US Bancorp NA, Piper Jaffray, and Andrew Cesare. This court reached final judgment on the merits of each of plaintiff's claims in *US Bancorp* by dismissing each claim for failure to state a claim for which relief can be granted pursuant to Rule 12(b)(6). *See Medical Supply I*, 2003 WL 21479192. Moreover, the Tenth Circuit affirmed this court's dismissal. *See Medical Supply I*, 112 Fed.Appx. (10th Cir.2004). The identical claims include Sherman Act § 1 claims, 15 U.S.C. § 1 (Counts I and II of the instant action), Sherman Act § 2 claims, 15 U.S.C. § 2 (Counts III and III), the Hobbs Act claims, 18 U.S.C. § 1951(b)(2) (Count XV), the USA PATRIOT Act claims, 31 U.S.C. § 5318 (Count XVI), as well as several state claims. Finding that each of these claims (1) ended in a judgment on the merits in a prior case, (2) involved the many of the same defendants and (3) involved the same causes of action, the court finds that claim preclusion bars plaintiff's claims as to the identical defendants.[FN6]

FN6. The court is confident that several of plaintiff's instant claims, to the extend that the court understands them, are also precluded by issue preclusion. However, because the court has several other grounds on which to base dismissal of plaintiff's claims, the court opts to not wade through the details of plaintiff's claims looking for previously-litigated issues.

3. Rule 8

[20] Plaintiff's complaint, as a whole, violates Federal Rules of Civil Procedure Rule 8(a) and 8(e)(1). Rule 8(a) states: "A pleading ... shall contain .. a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(e)(1) elaborates on the short and plain requirement in requiring each averment to be "simple, concise, and direct." Plaintiff's 115 page, 613 paragraph complaint falls miles from Rule 8's boundaries. Pages seven through fifty of plaintiff's complaint are organized under the heading of "The Relative Markets" and consist of a multitude of unsupported, unauthenticated commentary about the healthcare industry in the United States. These "facts" include quotes from President George W. Bush, U.S. Senate Committee hearing testimony, quotations from newspaper articles and study findings. Also included is wholly irrelevant information such as paragraph eighty-eight, which seeks to educate the court about the number of deaths in 2003 resulting from the lack of affordable health insurance, as well as unsubstantiated and very weighty allegations, such as that "defendants in combinations and or conspiracies with hospital suppliers, distributors and manufacturers caused hospitals to be overcharged $30,000,000,000.00 (thirty billion dollars) in 2002." (Compl., at 11). Pages fifty to eighty-four comprise a section entitled "Events," which includes some background of this case and others, allegations regarding defendants and other third persons, caselaw, newspaper article quotations, and discussion about disciplinary complaints lodged against Mr. Landrith, to name a few. The "Claims for Relief" section starts on page eighty-six, and continues in the same style. For instance, the discussion of plaintiff's first count spans eleven pages, excluding the fact that plaintiff begins each count by realleging all previous paragraphs. In sum, plaintiff's complaint is so exceptionally verbose

and cryptic that dismissal is appropriate.

Although the short and plain requirement of Rule 8 is a low burden, several courts have dismissed complaints like plaintiff's. *See* ***1332***United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378-79 (7th Cir.2003) (affirming dismissal of plaintiff's 155 page, 400 paragraph complaint, holding that "[l]ength may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter") (citing *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 702-03 (3d Cir.1996) (240 pages, 600 paragraphs); *Kuehl v. FDIC*, 8 F.3d 905, 908-09 (1st Cir.1993) (43 pages, 358 paragraphs); *Michaelis v. Neb. State Bar Assoc.*, 717 F.2d 437, 439 (8th Cir.1983) (98 pages, 144 paragraphs)).

The court is unwilling to allow plaintiff to amend its complaint for three reasons. First, for reasons explained more fully below, the court believes amendment would be futile. Second, before requesting sanctions against plaintiff, two groups of defendants gave plaintiff at least twenty-one days notice pursuant to Federal Rule of Civil Procedure 11(c)(1)(A). After receiving such notice, plaintiff chose not to withdraw or amend its complaint. Therefore, any additional opportunity is not necessary. Third, the author of the complaint is plaintiff's original counsel, Mr. Landrith. Mr. Hawver recently entered his appearance on behalf of plaintiff, but has chosen not to amend the complaint in this case. Thus, Mr. Hawver has chosen to step into the shoes of Mr. Landrith and adopt the complaint as his own.

D. Defendants' Requests for Sanctions (Docs. 22 and 36)

Two groups of defendants filed two separate motions for sanctions against plaintiff and plaintiff's counsel. Defendants argue that sanctions are warranted pursuant to Federal Civil Procedure Rule 11 and 28 U.S.C. § 1927 in light of plaintiff's decision to disregard previous admonitions from this court and the Tenth Circuit. Defendants also contend that plaintiff and its counsel filed the instant lawsuit unnecessarily to harass and annoy defendants with frivolous and costly litigation.

[21]Federal Rule of Civil Procedure 11(b) states that by filing a pleading, an attorney is certifying that the information contained in the motion,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Violation of these requirements will result in sanctions imposed by the court. Fed.R.Civ.P. 11(c); *see Griffen v. City of Okla. City*, 3 F.3d 336, 342 (10th Cir.1993) ("Rule 11 requires the district court to impose sanctions if a document is signed in violation of the Rule."). The standard for Rule 11 sanctions is an objective one. *See White v. Gen. Motors Corp.*, 908 F.2d 675, 680 (10th Cir.1990) ("A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances."). Likewise, subjective bad faith is not required to trigger Rule 11 sanctions. *Burkhart ex rel. Meeks v. Kinsley Bank*, 804 F.2d 588, 589 (10th Cir.1986).

***1333**[22][23][24]Section 1927 provides that "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Sanctions may be imposed under § 1927"for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir.1987). Like Rule 11, the court must apply an objective standard, and subjective bad faith is not

a necessary showing for application of § 1927 sanctions. Because § 1927 is penal in nature, an award should only be made " 'in instances evidencing a serious and standard disregard for the orderly process of justice' " and the court must be aware of the "need to ensure that the statute does not dampen attorneys' zealous representation of their clients' interests." *Ford Audio Video Sys., Inc. v. AMX Corp., Inc.*, 1998 WL 658386, at *3 (10th Cir. Sept.15, 1998) (quoting *Dreiling v. Peugeot Motors of Am., Inc.*, 768 F.2d 1159, 1165 (10th Cir.1985) (internal quotations omitted)).

[25] The court notes that, pursuant to Rule 11(c)(1)(A), both groups of defendants requesting sanctions gave plaintiff at least twenty-one days notice before filing their motions for sanctions. "The basic requirements of due process with respect to the assessment of costs, expenses, or attorney's fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond." *Braley*, at 1514. Plaintiff responded to defendants' motions by arguing that claim and issue preclusion do not bar plaintiff's claims, and that defendants violated Rule 11 and § 1927 by requesting sanctions. Plaintiff chose not to withdraw or amend its complaint.

The court finds that sanctions against plaintiff in the form of attorney fees and costs are appropriate and necessary pursuant to both Rule 11 and § 1927 for four reasons. First, the mere fact that plaintiff filed a nearly unintelligible 115 page complaint, which the court already found violates Rule 8, suggests that plaintiff's complaint, and the instant suit as a whole, was brought for the purpose of harassing defendants or the court, causing unnecessary delay and/or needlessly increasing the cost of litigation in violation of Rule 11(b)(1). Second, as discussed above, not one of plaintiff's federal claims supports a viable claim for which relief can be granted pursuant to Rule 12(b)(6). As such, plaintiff's complaint consists of frivolous claims in violation of Federal Rule of Civil Procedure 11(b)(2). Moreover, each of plaintiff's federal claims lack the evidentiary support needed to avoid violating Rule 11(b)(3). Third, plaintiff's insistence on re-litigating claims barred by claim preclusion "unreasonably and vexatiously" "multiplies the proceedings" in violation of § 1927.

Fourth, and most importantly, plaintiff failed to heed the court's previous admonitions and sanctions, choosing instead to proceed with the instant suit and attempt another bite at the proverbial apple. Plaintiff's previous two claims in this court were dismissed for failure to state a claim pursuant to Rule 12(b)(6). *Medical Supply I*, 2003 WL 21479192, at *9;*Medical Supply II*, 2004 WL 956100, at *5. In *Medical Supply I*, the undersigned judge advised plaintiff's counsel to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." *Id.* at *6. In the same Order, the undersigned judged found plaintiff's allegations "completely divorced from rational thought." *Id.* at *8. In *Medical Supply II*, the undersigned judge noted that "at the most fundamental level, **1334** plaintiff's antitrust claims fail." 2004 WL 956100, at *3.

Both prior dismissals were affirmed by the Tenth Circuit. *Medical Supply I*, 112 Fed. Appx. at 731-32;*Medical Supply II*, 144 Fed. Appx. at 716. In *Medical Supply I*, the Tenth Circuit ordered plaintiff to show cause why sanctions should not be imposed. 112 Fed.Appx. at 731-32. The undersigned judge imposed attorney fees totaling $23,956 and double costs as a sanction against Mr. Landrith. *Medical Supply I*, 2005 WL 2122675, at *1. In *Medical Supply II*, the Tenth Circuit reversed and remanded on the issue of sanctions against plaintiff, and the issue of sanctions remains pending. 144 Fed.Appx. at 716.

Plaintiff and its counsel have had plenty of warning about filing frivolous claims from both this court and the Tenth Circuit. But plaintiff persisted, filing a third lawsuit against many of the same defendants and alleging many of the same claims. Enough is enough. *See Brooks v. Cochenour*, 2006 WL 137415, at *1 (10th Cir. Jan.19, 2006) (affirming the district court's dismissal of plaintiff's third attempt at the same argument, stating that "we have expended valuable court resources on at least two occasions dealing with [plaintiff] and his various meritless theories. We repeat our sentiment ...: 'We will spend no more judicial time or resources addressing his frivolous claims.' " (internal citation omitted)); *Sweeney v. Resolution Trust Corp.*, 16 F.3d 1, 6-7 (1st Cir.1994) (finding that the district court did not abuse its discretion in imposing sanctions on plaintiffs for filing a third and "repetitive" motion to remand when the court had previously denied two "almost identical motions and made detailed findings of fact").

[26][27] The court may impose sanctions against plaintiff, plaintiff's counsel, or against both with joint and several liability. *White*, 908 F.2d at 685-86. However, "the sanctioning of a party requires specific findings that the party was aware of the wrongdoing." *Id.* at 685 (citations omitted); *Barrett v. Tallon*, 30 F.3d 1296, 1303 (10th Cir.1994) ("Thus, in the case of a frivolously pleaded RICO claim, it seems that the court should sanction the responsible attorneys rather than the plaintiffs, unless it finds that the plaintiffs insisted, against the advice of counsel, that the RICO claim be asserted, or that the plaintiffs had a sufficient understanding of the nature, elements, and limitations of the attempted RICO claim to independently evaluate its applicability to the alleged facts.").

Certainly plaintiff's former counsel, Bret D. Landrith, is culpable. Mr. Landrith was the attorney of record when each of the sanctionable motions were filed, and Mr. Landrith signed and authored the complaint and each of the motions before the court. Nonetheless, sanctions against plaintiff are also appropriate for two reasons. First, plaintiff's CEO and sole shareholder, Samuel Lipari, takes responsibility for the decisions to knowingly bring the instant lawsuit after the result of plaintiff's previous attempts at litigation. For instance, Mr. Lipari's affidavit, entitled "Affidavit of Sam Lipari on The Unsuitability of Transfer," states:

> I chose to bring this new action in Missouri District court because I have a responsibility to Medical Supply's stakeholders ... to adjudicate these claims. I brought two earlier and related actions to Kansas District court based on the advice of my counsel. I have witnessed first hand that no decision or outcome in either case including from the Tenth Circuit Court of Appeals had any relationship to the pleadings of my company or applicable law. I make this determination based on my considerable personal experience as a clerk and researcher ***1335** for a Missouri legal firm and upon discussion with what I believe are the foremost healthcare antitrust authorities in our nation.

(Doc. 30, exh. 1). Mr. Lipari's affidavit continues with a litany of conspiracy theories involving defendants, this court, and other government agencies and employees. Significantly, however, Mr. Lipari's affidavit also discusses numerous instances when he actively participated in prior and current litigation. Mr. Lipari's affidavit also discusses attending one of Mr. Landrith's disciplinary conferences. Thus, Mr. Lipari was well-aware of the legal arguments and allegations being brought by his attorney, as well as the disciplinary allegations against Mr. Landrith prior to his disbarment. Even so, plaintiff chose to continue vigorously litigating the instant case. Second, after Mr. Landrith was disbarred, plaintiff chose to retain new counsel and continue litigating this case. Therefore, sanctioning plaintiff as well as Mr. Landrith serves to deter both from future frivolous filings.

In sum, the court finds that defendants' reasonable attorney fees and costs against plaintiff and Mr. Landrith jointly and severally is the minimum amount of sanctions necessary to "adequately deter the undesirable behavior." *White v. Gen. Motors*, 977 F.2d 499, 502 (10th Cir.1992) (internal quotations and citations omitted).

E. Plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45)

Plaintiff's motion for clarification seems to request this court to clarify its ruling in a separate case, case number 03-2324, which found that plaintiff's request to consolidate case number 03-2324 with the instant case is moot. Case number 03-2324 was closed as of February 13, 2004, with attorney fees the only remaining issue. The court need not address this motion for two reasons. First, plaintiff has previously requested the court to "clarify" its decision in case number 03-2324, and the court found plaintiff's request moot in light of the posture of the case. Second, plaintiff's instant case will soon be closed, as the instant Memorandum and Order's holdings dismiss plaintiff's entire complaint. Therefore, the issue of whether to consolidate two closed cases is a moot one.

IT IS THEREFORE ORDERED that defendant Robert Zollars' Motion to Dismiss for Lack of Personal Jurisdiction (Doc. 2); Defendant Neoforma, Inc.'s Motion to Dismiss, [sic] Complaint, or Alternatively to Require Amendment, Pursuant to F.R.C.P. Rules 8 and 9 (Doc. 4); Defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew

Cesare and Andrew S. Duffs' Motion to Transfer, Dismiss and/or Strike (Doc. 6); Defendants Curt Nonomaque and Robert Baker's Motion to Dismiss Plaintiff's Complaint for Lack of Personal Jurisdiction and for Failure to State a Claim (Doc. 11); Defendant Shughart Thomson & Kilroy, P.C.'s Motion to Transfer, Dismiss and/or Strike (Doc. 13); Defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Renewed Motion to Dismiss and/or Strike (Doc. 32); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Renewed Motion to Dismiss Complaint for Failure to State a Claim (Doc. 34) are granted. Plaintiff's case is hereby dismissed.

IT IS FURTHER ORDERED that defendants U.S. Bancorp, U.S. Bank National Association, Piper Jaffray Companies, Jerry A. Grundhofer, Andrew Cesare and Andrew S. Duffs' Motion for Sanctions (Doc. 22); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion***1336** for Sanctions (Doc. 36) are granted. Plaintiff and Mr. Bret D. Landrith are hereby jointly and severally sanctioned in the amount of defendants' reasonable attorney fees and costs. **Defendants shall submit an accounting of their attorney fees and costs within twenty (20) days of this Memorandum and Order.**

IT IS FURTHER ORDERED that plaintiff's Motion for Reconsideration of Order Transferring Venue (Doc. 28); plaintiff's Motion to Strike Defendants' Renewed Motion to Dismiss and/or Strike (Doc. 38); plaintiff's Motion to Strike Novation Defendants' Renewed Motion to Dismiss (Doc. 43); and plaintiff's Motion for Clarification of Order in Case No. 03-2324 (Doc. 45) are denied.

IT IS FURTHER ORDERED that Defendants' Motion to Stay Rule 26(f) Conference and Discovery (Doc. 24); plaintiff's Motion to Consolidate Under Rule 42 (Doc. 39); plaintiff's Motion to Require Consolidation Arguments to be in the Form of Pleadings on the Record and Notice of Threat of Unlawful Sanctions (Doc. 42); First Plaintiff's Motion for Partial Summary Judgment Under F.R. Civ. P. Local Rule 56.1 (Doc. 46); plaintiff's Motion for Leave to Join Additional Defendants Under Fed.R.Civ.P. 29(a) (Doc. 49); plaintiff's Motion to Substitute Plaintiff Under F.R.C.P. Rules [sic] 17(a), 15(a) and 25(a) (Doc. 56); plaintiff's Motion to Substitute Defendant Under F.R.C.P. Rules [sic] 17(a) (Doc. 57); and Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker and Curt Nonomaque's Motion to Set Oral Hearing on Motion to Dismiss (Doc. 76) are denied as moot.

SO ORDERED.

D.Kan.,2006.
Medical Supply Chain, Inc. v. Neoforma, Inc.
419 F.Supp.2d 1316, 2006-1 Trade Cases P 75,160

END OF DOCUMENT

HMedical Supply Chain, Inc. v. U.S. Bancorp, NA
C.A.10 (Kan.),2004.
This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,Tenth Circuit.
MEDICAL SUPPLY CHAIN, INC., Plaintiff-Appellant,
v.
US BANCORP, NA; Us Bank Private Client Group; Corporate Trust; Institutional Trust and Custody; Mutual Fund Services, LLC.; Piper Jaffray; Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes; Unknown Healthcare Supplier, Defendants-Appellees.
No. 03-3342.

Nov. 8, 2004.

Bret D. Landrith, Topeka, KS, for Plaintiff-Appellant.
Andrew M. Demarea, Shughart, Thomson & Kilroy, Overland Park, KS, Mark A. Olthoff, Shughart, Thomson & Kilroy, Kansas City, MO, for Defendants-Appellees.

Before McCONNELL, HOLLOWAY, and PORFILIO, Circuit Judges.

ORDER AND JUDGMENT[FN*]

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

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

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

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

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

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

Exhibit B

plaintiff and plaintiff's counsel to SHOW CAUSE in writing within twenty *732 days of the date of this order why they, jointly or severally, should not be sanctioned for this frivolous appeal pursuant to Fed. R.App. P. 38. *See Braley v. Campbell*, 832 F.2d 1504, 1510-11 (10th Cir.1987) (discussing court's ability to impose sanctions against clients and their attorneys under Fed. R.App. P. 38).

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

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In re Landrith
Kan. 2005.

Supreme Court of Kansas.
In the Matter of Bret D. LANDRITH, Respondent.
No. 94,333.

Dec. 9, 2005.

Background: In an attorney disciplinary hearing, the Kansas Board for Discipline of Attorneys recommended disbarment.

Holdings: The Supreme Court held that:
(1) constitutional free speech guarantee did not protect attorney from receiving professional discipline for making inflammatory and false accusations against opposing counsel, judges, state district court employees, state court of appeals staff, and municipal officers and employees, and
(2) disbarment was appropriate disciplinary sanction for attorney's misconduct relating to the inflammatory and false accusations and his filing of pleadings and motions that were frivolous and that showed attorney's incompetence.

Disbarred.

West Headnotes

[1] Attorney and Client 45 ⇐42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases
Attorney's repeated assertions, to trial court, that he had properly served six new defendants named in amended complaint filed by attorney violated professional conduct rule prohibiting lawyers from making frivolous assertions. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 3.1.

[2] Attorney and Client 45 ⇐42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases
Attorney's conduct in failing to follow Supreme Court Rules for appellate practice violated professional conduct rule prohibiting lawyers from knowingly disobeying an obligation under the rules of a tribunal. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 3.4(c).

[3] Attorney and Client 45 ⇐42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases
Attorney's repeated, unsupported accusations of wrongdoing by judges, attorneys, and court personnel violated professional conduct rule regarding respect for rights of third parties. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 4.4.

[4] Attorney and Client 45 ⇐57

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases
In an attorney disciplinary proceeding, the Supreme Court considers the evidence, the findings of the disciplinary panel, and the arguments of the parties and determines whether violations of the Kansas Rules of Professional Conduct (KRPC) exist and, if so, what discipline should be imposed.

[5] Attorney and Client 45 ⇐53(2)

EXHIBIT C

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k53 Evidence
45k53(2) k. Weight and Sufficiency. Most Cited Cases
Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence, in an attorney disciplinary proceeding. Sup.Ct.Rules, Rule 211(f).

[6] Attorney and Client 45 ⇐46

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k46 k. Defenses. Most Cited Cases

Constitutional Law 92 ⇐2046

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2046 k. Statements Regarding Judge or Court Officials. Most Cited Cases
(Formerly 92k90.1(1.5))

Constitutional Law 92 ⇐2047

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2047 k. Statements Regarding Other Attorneys. Most Cited Cases
(Formerly 92k90.1(1.5))
Constitutional free speech guarantee did not protect attorney from receiving professional discipline for making inflammatory and false accusations against opposing counsel, judges, state district court employees, state court of appeals staff, and municipal officers and employees, in pleadings and motions filed in court, orally at disciplinary panel hearing, and at oral argument before Supreme Court in attorney disciplinary proceeding. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⇐2040

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(S) Attorneys, Regulation of
92k2040 k. In General. Most Cited Cases
(Formerly 92k90.1(1.5))
When the unbridled speech of an attorney, acting in his professional capacity or in nonlegal matters, amounts to misconduct that threatens a significant state interest, a State may restrict the lawyer's exercise of personal rights guaranteed by the federal and state Constitutions. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⇐3867

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3867 k. Procedural Due Process in General. Most Cited Cases
(Formerly 92k251.5)
In considering a procedural due process claim, the court must first determine whether a protected liberty or property interest is involved, and if so, the court must then determine the nature and extent of the process due. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 92 ⇐3867

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3867 k. Procedural Due Process in General. Most Cited Cases
(Formerly 92k251.5)
A procedural due process violation can be established only if a claimant is able to establish that he or she was denied a specific procedural protection to which he or she was entitled. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 ⇐3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases

(Formerly 92k278(1), 92k255(1))
The question of the procedural protection that must accompany a deprivation of a particular property right or liberty interest is resolved by a balancing test, weighing: (1) the individual interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail. U.S.C.A. Const.Amend. 14.

[11] Appeal and Error 30 ⇐842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases
The question of what process is due in a given case is a question of law over which an appellate court has unlimited review. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 ⇐3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In General. Most Cited Cases
(Formerly 92k251.6)
The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ⇐4273(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4273 Attorneys
92k4273(3) k. Conduct and Discipline. Most Cited Cases
(Formerly 92k306(5))
The procedural due process rights of an attorney, in a lawyer disciplinary proceeding, include fair notice of the disciplinary charges sufficient to inform and provide a meaningful opportunity for explanation and defense. U.S.C.A. Const.Amend. 14.

[14] Attorney and Client 45 ⇐54

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k54 k. Trial or Hearing. Most Cited Cases

Constitutional Law 92 ⇐4273(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4273 Attorneys
92k4273(3) k. Conduct and Discipline. Most Cited Cases
(Formerly 92k306(5))
Hearing panel did not violate attorney's procedural due process rights, at lawyer disciplinary hearing, by admonishing attorney not to attempt to relitigate the merits of the underlying civil cases in which attorney filed pleadings and motions that allegedly violated the rules of professional conduct. U.S.C.A. Const.Amend. 14.

[15] Attorney and Client 45 ⇐57

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases

Constitutional Law 92 ⇐4273(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4273 Attorneys
92k4273(3) k. Conduct and Discipline. Most Cited Cases
(Formerly 92k306(5))
Attorney's general allegation of the "vindictiveness" of Disciplinary Administrator, without attorney's complaining of any specific instance of conduct, did not establish cumulative prosecutorial misconduct that violated attorney's procedural due process rights in attorney disciplinary proceeding. U.S.C.A. Const.Amend. 14.

[16] **Attorney and Client 45 ⇐57**

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases

Constitutional Law 92 ⇐4273(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4273 Attorneys
92k4273(3) k. Conduct and Discipline. Most Cited Cases
(Formerly 92k306(5))
Attorney's mere allegation that exculpatory evidence provided by complainants had been withheld from attorney in probable cause hearings, without any indication of what exculpatory evidence might have existed, did not establish a violation of attorney's procedural due process rights, in lawyer disciplinary proceeding. U.S.C.A. Const.Amend. 14.

[17] **Attorney and Client 45 ⇐54**

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k54 k. Trial or Hearing. Most Cited Cases

Constitutional Law 92 ⇐4273(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4273 Attorneys
92k4273(3) k. Conduct and Discipline. Most Cited Cases
(Formerly 92k306(5))
Affidavits filed in client's civil action challenging city's condemnation and demolition of client's houses, stating that city officials retaliated against client for filing the action, did not establish that State retaliated against people whom attorney named as witnesses who would support him in lawyer disciplinary proceeding, in alleged violation of attorney's procedural due process rights. U.S.C.A. Const.Amend. 14.

[18] **Attorney and Client 45 ⇐53(1)**

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k53 Evidence
45k53(1) k. In General. Most Cited Cases

Constitutional Law 92 ⇐4273(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and

Regulations
92k4273 Attorneys
92k4273(3) k. Conduct and Discipline. Most Cited Cases
(Formerly 92k306(5))
Hearing panel's refusal to allow a number of attorney's proposed witnesses to testify at lawyer disciplinary hearing did not violate attorney's procedural due process rights; panel determined that the witnesses had no information or only irrelevant information, panel allowed attorney to call 18 of his initial 40 witnesses, and panel stated it would allow testimony of the others if there was a showing that they had relevant testimony to offer. U.S.C.A. Const.Amend. 14.

[19] **Attorney and Client 45 ⇐48**

45 Attorney and Client
451 The Office of Attorney
451(C) Discipline
45k47 Proceedings
45k48 k. Notice and Preliminary Proceedings. Most Cited Cases

Constitutional Law 92 ⇐4273(3)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4273 Attorneys
92k4273(3) k. Conduct and Discipline. Most Cited Cases
(Formerly 92k306(5))
Hearing panel did not violate attorney's procedural due process rights in lawyer disciplinary proceeding by refusing to subpoena records and witnesses; panel informed attorney that he could use whatever authority state statute and Supreme Court Rule provided but that neither panel nor Disciplinary Administrator's office would issue subpoenas on his behalf. U.S.C.A. Const.Amend. 14; Rules Civ.Proc., K.S.A. 60-245; Sup.Ct.Rules, Rule 216.

[20] **Attorney and Client 45 ⇐46**

45 Attorney and Client
451 The Office of Attorney
451(C) Discipline
45k46 k. Defenses. Most Cited Cases
Alleged hardship caused by delay in attorney disciplinary proceeding did not violate attorney's procedural due process rights; much of the delay was due to extensive number of prehearing motions filed by attorney, and attorney had voluntarily decided not to accept legal work while disciplinary proceeding was pending, so that attorney himself created any hardship. U.S.C.A. Const.Amend. 14.

[21] **Attorney and Client 45 ⇐59.14(1)**

45 Attorney and Client
451 The Office of Attorney
451(C) Discipline
45k59.1 Punishment; Disposition
45k59.14 Disbarment; Revocation of License
45k59.14(1) k. In General. Most Cited Cases
(Formerly 45k58)
Disbarment was appropriate disciplinary sanction for attorney's misconduct in making false accusations against judges, attorneys, court personnel, and state, county, and municipal employees, and filing pleadings and motions that were frivolous and that showed attorney's incompetence. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rules 1.1, 3.1, 3.3(a)(1), 3.4(c), 4.4, 8.4(c, d, g).

****469** Stanton A. Hazlett, disciplinary administrator, argued the cause and was on the brief for petitioner.
Bret D. Landrith, respondent, argued the cause and was on the brief pro se.
David Martin Price, of Topeka, was on an amicus curiae brief.

***619** ORIGINAL PROCEEDING IN DISCIPLINE

PER CURIAM:
This is an original contested proceeding in discipline filed by the Disciplinary Administrator****470** against Respondent Bret D. Landrith of Topeka, an attorney admitted to the practice of law in Kansas in September 2002. The complaints arise out of Landrith's representation of two of his first four clients.

The hearing panel found that Respondent violated the following Kansas Rules of Professional Conduct (KRPC): KRPC 1.1 (competence) (2004 Kan. Ct. R. Annot. 342); KRPC 3.1 (meritorious claims) (2004 Kan. Ct. R. Annot. 438); KRPC 3.3(a)(1) (candor toward the tribunal) (2004 Kan. Ct. R. Annot. 444); KRPC 3.4(c) (fairness to opposing party and counsel) (2004 Kan. Ct. R. Annot. 449); KRPC 4.4 (respect for rights of third persons) (2004 Kan. Ct. R. Annot. 464); and KRPC 8.4(c), (d), and (g) (misconduct) (2004 Kan. Ct. R. Annot. 485).

This matter was heard by the duly appointed panel of the Kansas Board for Discipline of Attorneys on January 18, 19, and 20, 2005. The panel rendered a comprehensive 57-page report, making specific findings of fact and conclusions of law, and unanimously recommended disbarment.

Respondent argues to this court that the hearing panel's findings were not supported by clear and convincing evidence, that his actions were protected by the First Amendment, that the proceedings violated his due process rights, and that the proceedings were conducted in bad faith.

***620** We have reviewed the record in this case, which contains the formal complaint, transcripts of the proceedings before the panel, and supporting material. The record also contains numerous pleadings and motions filed by the Respondent, as well as responses, replies, and orders related to the two cases. Respondent's language is occasionally incoherent, and, more than occasionally, inflammatory. In the pleadings and motions, Respondent consistently fails to cite a factual basis for his allegations or to develop sensible legal arguments.

We affirm the factual findings and conclusions of law of the panel, and we unanimously concur in its recommendation of disbarment.

Factual Background

Respondent Landrith graduated from Washburn University School of Law in 2001. These proceedings arose out of his representation of David Price and James Bolden.

Respondent represented Price on appeal in what has been designated the "Baby C" case, which resulted in termination of Price's parental rights and a decree for adoption of Price's natural child.

Respondent represented Bolden in what has been designated the "Bolden Litigation": an appeal to the Court of Appeals and a lawsuit in federal court arising from a Shawnee County District Court condemnation case.

The Baby C Case

A petition for the adoption of Baby C was filed on May 4, 2001, in the Shawnee County District Court. The petition included a consent by the birth mother and a home assessment prepared by a licensed agency in Colorado, where the proposed adoptive parents resided. The judge granted a temporary custody order to the adoptive parents the same day, pursuant to K.S.A. 59-2131. The adoptive parents were eventually approved under the Interstate Compact for Placement of Children (ICPC).

As required, a hearing was set for June 22, 2001, to among other things, terminate the parental rights of Baby C's father, Price. A return receipt showing delivery of notice of that hearing was signed ***621** by Price. Price failed to respond or appear at the hearing, and the judge terminated his parental rights and granted the petition for adoption.

A few hours later, Price showed up at the judge's chambers, saying he had been unable to find the right courtroom for the hearing. An attorney was appointed for Price, and a motion to set aside the adoption and the order terminating Price's parental rights was filed without objection.

A second hearing was set for July 2002. After 2 days of testimony and 13 witnesses, the judge found that Price knew about the pregnancy of Baby's C's mother and failed to support her and that he knew about the birth of Baby C and failed to support and communicate****471** with the baby. The judge concluded Price was unfit and terminated Price's parental rights. A notice of appeal was filed.

In late 2002, counsel for the adoptive parents, Topeka lawyer Austin Vincent, received an entry of

appearance on behalf of Price from Respondent. Vincent contacted Respondent to ask if he needed any information or if he wished to discuss the case. Respondent told Vincent that he wanted nothing from him and that Respondent intended to sue Vincent for depriving Price of his civil rights under 42 U.S.C. § 1983 (2000).

Respondent and Price went to the Shawnee County court clerk's office several times, seeking records that they asserted were being withheld. In fact, nothing had been withheld from Respondent or Price, except the home study of the Department of Social and Rehabilitation Services, which was confidential and required a judge's signature to release. The home study was later provided to Respondent after he entered his appearance in the case.

Respondent's docketing statement, filed January 6, 2003, requested that

> "the Court Clerk to wit; Kerri Orton, be named to produce any and all transcripts within this case. The Respondent has been denied access on several occasions, to obtain any information or specific documents. The Respondent also request [sic], that the Kansas Court of Appeals forward this matter for prosecution for interfering and impeding with due process within this case."

On January 13, 2003, Respondent filed a Motion to Compel asking the Court of Appeals to compel the Shawnee County District***622** Court to produce "[a]ny and all records, filed in the Matter of Baby C." The motion contained a " Memorandum In [sic] Support Of Motion to Compel" stating that "Appellant has reason to believe that crimes have been committed under the color of law, to wit; concealment, fraud, and conspiracy to kidnapping [sic]." This motion was denied on February 14, 2003, for lack of a factual basis.

On February 21, 2003, Respondent filed a Motion to Allow the Biological Father to Have Access to the Records, alleging that "[f]undamental prima facie error" existed as to the district court's determinations. The motion also contained allegations that Shawnee County District Court employees were obstructing justice; that Vincent had a conflict of interest; that the district judge "frustrated" Price's "effort to mitigate the damage done by ineffective [trial] counsel"; and that another judge, through his clerk, "continued to obstruct [Price's] constitutionally protected rights."

Judge G. Joseph Pierron of the Court of Appeals signed an order on March 3, 2003, allowing Price access to the district court's records as long as he was accompanied by counsel, who would be responsible for the security and the integrity of the records.

Respondent then filed a Motion for Appellate Court Order to Gain Access to Adoption Records, apparently seeking records he believed that the Shawnee County District Court was still withholding, and alleging alteration of documents, fraud, and circumvention of the ICPC by the adoptive parents.

The appellees filed two responses, denying all allegations. The appellees then filed a motion to clarify counsel of record, stating that Price had filed pro se pleadings before and that, although other pleadings filed by appellant appeared to be signed by appellant's counsel, they bore "a remarkable resemblance to the pro se pleadings previously filed." Respondent filed a response, affirming that he was counsel of record; Judge Lee Johnson denied the appellees' motion on March 10, 2003.

Respondent filed a Notice Transcripts Have Not Been Provided, seeking a transcript of the "custody hearings for Baby C taking place on 5/04/01 or earlier." Appellees filed a response stating that, to their knowledge, there were no judicial proceedings involving ***623** Baby C before the filing of the original petition for adoption on May 4, 2001, and that no such transcripts existed. Appellees affirmed that transcripts for all proceedings on the record in the case had been included in the record for some time and requested a date certain for briefs.

On March 20, 2003, Judge Johnson ordered Respondent to be specific, pursuant to ****472**Supreme Court Rule 3.02(c) (2002 Kan. Ct. R. Annot. 20), in his request for transcripts, warning that failure to comply would result in dismissal of the appeal. Respondent filed yet another motion requesting transcripts and notices, which was not in compliance with the order, and which sought additions by the Shawnee County District Court. The Court of Appeals ignored the unimproved motion requesting nonexistent transcripts; stated that the request for additions was only properly brought in the district

court; and ordered that briefs be filed by May 2, 2003. Respondent filed a Second Motion to Compel Shawnee County District Court Additions to Record.

Both parties filed briefs in the Court of Appeals.

Respondent also filed two habeas corpus motions in September 2003, while the appeal was pending in the Baby C case. Because the issues raised in each of the motions were identical to the issues on appeal and set for argument, the motions were denied.

In a December 19, 2003, opinion, the Court of Appeals affirmed the district court's termination of Price's parental rights. In conclusion, the court stated:

> "[W]e are compelled to express consternation over most of the issues framed and argued by the appellant in this appeal. We generally conclude that, with the exception of a legitimate appeal from the termination of parental rights, [Price] and his counsel have asserted claims that have no factual or legal basis, often citing only conclusory and unsupported allegations of fact or without providing any supportive legal authority. We are inclined to admonish that vigorous advocacy certainly does not require or tolerate such conduct. We have diligently reviewed and addressed all claims asserted, but our objective discussion and determinations should not be viewed as condoning the assertion of such unsupported claims in our court." *In re Adoption of Baby C*, No. 90,035, Slip op. at 20, 2003 WL 22990194, unpublished opinion filed Dec. 19, 2003.

Throughout his representation in the Baby C case, Respondent filed numerous pleadings containing serious allegations of misconduct***624** by opposing counsel, members of the judiciary, Shawnee County District Court employees, and Kansas Court of Appeals staff.

While the litigation was still ongoing, an ethics complaint was filed against Respondent on May 9, 2003, by Jonathan Paretsky, Motions Attorney for the Kansas Court of Appeals. His complaint was joined by Judge Pierron, Judge David Knudson, and Judge Johnson. Both Paretsky and the district judge testified in the disciplinary proceeding, along with other judicial employees. The deposition of Jason Oldham, Chief Deputy Clerk for the Clerk of Appellate Courts, also appears in the record.

Bolden Litigation

Respondent's representation of Bolden began in an appeal of a civil suit against the City of Topeka (City). Bolden had purchased two houses in a tax sale. One of the homes had already been ordered to be demolished by the city. Bolden challenged the demolition order, lost, and appealed to the Shawnee County District Court. Judge Eric Rosen directed a verdict in favor of the City, finding Bolden had failed to present evidence to overturn an earlier decision by an administrative hearing officer.

Before entering his appearance in the appeal of the case, Respondent attempted to obtain the record from the district court. Carol Barnes, Trial Court Clerk IV, testified that Respondent came in to check out the Bolden file in late December 2002. Because he was not an attorney of record, Barnes told Respondent he could view the file, but he could not remove it from the courthouse, pursuant to Supreme Court Rule 106 (2004 Kan. Ct. R. Annot. 162). Respondent admitted he had had trouble accessing the Shawnee County District Court's case file, that he contacted Judge Rosen, and that Judge Rosen gave Respondent permission to remove the record from the courthouse.

Respondent took the record the same day and returned it the next day. Several days later, he returned to the clerk's office, bringing documents he had not returned when initially bringing back the record. The file was checked, and it was determined that ****473** Exhibit J was missing. Barnes called Respondent about the missing ***625** exhibit. Barnes testified that he was defensive, denied losing the exhibit, told her that he had "brought all the papers that had holes in them back," and hung up on her. In a subsequent conversation, he again became defensive, denied losing the exhibit, and hung up. At Judge Rosen's request, the record was then checked again, and it was determined that a total of five documents were missing. The clerk's office was able to create duplicates of the missing documents because they had been stored on microfilm.

Respondent has maintained that he returned the file in the best condition possible, although he has admitted he was guilty of failing to restaple some of the documents.

124 P.3d 467
280 Kan. 619, 124 P.3d 467
(Cite as: 280 Kan. 619, 124 P.3d 467)

Respondent officially entered his appearance, appearing with Bolden at the Clerk of the Appellate Court's office to docket the appeal. Allison Schneider, docket clerk with the Court of Appeals, informed Respondent that he did not have the necessary paper-work to docket the appeal. Respondent became loud and angry. Schneider then asked Kathie Garman, her supervisor, to handle the situation. Respondent threatened to file a mandamus action if the appeal was not docketed. The documents were then filed even though they were deficient; Garman informed Respondent that a show cause order probably would be issued. Such an order was issued on April 1, 2003.

On March 17, 2003, Respondent sent a runner to the appellate clerk's office to file his brief in the Bolden Litigation. The brief recited numerous facts not in the record and facts not keyed to the record. Oldham later testified that he called Respondent to let him know the brief would be filed but that corrections would be necessary. Respondent demanded Oldham send him a notice of denial to file the brief. Oldham again told Respondent the brief would be filed; it merely needed to be corrected. Respondent again demanded a notice of denial and threatened to file a mandamus action to force the clerk's office to accept his brief as written.

The same day, Judge Johnson issued an order stating that Respondent's brief failed to comply with Supreme Court Rule 6.02(d) (2002 Kan. Ct. R. Annot. 34), requiring factual statements to be keyed to the record on appeal. Respondent's Statement of Facts ***626** contained no reference to the record. Respondent was given 30 days to file a corrected brief.

On March 24, 2003, Respondent filed a Motion for Reconsideration of Order and Assignment of Costs. He asked the court to "rescind" its order and demanded that "the costs and attorney's fees resulting from the need to seek reconsideration of this order designated chargeable to the appellee, the City of Topeka as they are incurred as a result of the actions of the office of the Clerk of The Court of Appeals [*sic*]."

In this motion, Respondent also stated that he had "met great resistance to filing the docketing statement. The supervisor refused to accept the docketing statement" and "[c]ounsel [referring to himself] then informed the supervisor that the outcome of the Clerk of Appellate court in refusing to accept the docketing statement would not be an attempt to re-file it on another day but instead an action in mandamus seeking to have the clerk perform this duty," at which point the supervisor "acquiesced and accepted the docketing statement."

Respondent also stated that "[e]mployees of the Clerk of the Appellant Court objected to receipt of the brief because they stated in error that the brief did not contain a Statement of Facts" and "was not keyed to the record."

In a further "Memorandum of Law," Respondent stated that his allegations established "a pattern and practice indicative of training and management of Kansas Judicial Branch employees that emphasizes enforcing interests of an administrative or bureaucratic nature at the expense of injuring fundamental Due Process rights of Kansas citizens who are guaranteed a republican form of government." He further accused judicial branch employees of "demoralizing" him and his client by "consistently obstructing this appeal."

On April 11, 2003, Respondent filed a Motion for Clarification of Rulings in which he compared the Kansas appellate judiciary and ****474** its staff to those who had obstructed justice in the prosecution of civil rights murders in Mississippi.

He subsequently filed a Notice of Further Requirement to Amend Complaint, and finally, a Motion for Voluntary Withdraw ***627** [*sic*] and Disclosure of Costs, stating that the "Clerk of the Appellate Court's bad faith prosecution of the appeal" forced Bolden to withdraw. He made the following accusations in this motion: that judicial branch employees continually obstructed justice; that Carol Green, Clerk of the Appellate Courts, justified denial of access to the public record; that Bolden's due process rights were violated "in this appeal by the agencies of the State of Kansas-Judicial Branch and the City of Topeka."

Respondent never filed a corrected brief and voluntarily dismissed the appeal on April 21, 2003.

Respondent also filed a complaint in the United States District Court for the District of Kansas on December 20, 2002. Its allegations arose from the condemnation as well as a janitorial contract Bolden had held with the City of Topeka, which the City had declined to renew. Three days later, Respondent filed a Request For Emergency Temporary Restraining Order Hearing, alleging corruption and discrimination by the City. The TRO request was denied because it set forth no factual basis.

On April 29, 2003, after the state court appeal had been dismissed, Respondent filed an Amended Complaint for Declaratory and Injunctive Relief in the federal district court. In that pleading, Respondent purported to add six defendants, including Meg Perry, a municipal employee, whom he accused of using "software created data to manufacture evidence that had the effect of taking away property from James L. Bolden."

When the City sought to dismiss the federal case, Respondent filed a late reply, alleging his failure to respond in a timely fashion was attributable to: (1) The necessity of filing an amicus brief on Bolden's behalf in another proceeding; and (2) the "appellate court motion panel filed a lengthy and vehement ethics complaint" against him.

The federal district court held a scheduling conference and issued a Scheduling Order on June 26, 2003. This order required all discovery to be completed by October 31, 2003.

Respondent filed a Second Amended Complaint in the federal suit on August 15, 2003. He alleged that the City refused to renew Bolden's janitorial contract in retaliation for his appeal of the condemnation***628** and demolition of his houses. Respondent provided no factual support for this allegation.

Respondent then filed a Motion for Interim Attorney's Fees. The federal district court denied this motion on August 26, 2003. Respondent filed a Motion for a More Definite Ruling regarding this denial, stating that "the City of Topeka may not be aware that regardless of the resolution of the present case ... the law of Kansas and the United States requires the City as a recipient of federal funding to repay Bolden for his attorney fees and court costs." No citations to supporting facts or law appeared in this motion.

The federal district court issued an order on October 14, 2003, denying the Motion for a More Definite Ruling and holding that the fees motion was completely without merit. The court also noted that the motions had not been filed correctly. Despite repeated attempts by the appellate clerk's office designed to encourage Respondent to withdraw and refile the motions, he had failed to do so.

On November 13, 2003, Respondent filed a motion to extend the discovery deadline to January 24, 2004. The discovery period had ended on October 31, pursuant to the earlier scheduling order. Respondent argued that "he had no reason to know before [November 13, 2003]" that an extension would be required. The court responded that it was "baffled by this statement." Respondent had responded to discovery propounded by the defense on October 24, and he had served his own discovery requests on October 30. The court found that Respondent had failed to comply with the federal rules of civil procedure, with local rules of the court, and with the scheduling order. The court also found inexcusable neglect and denied the motion to extend the discovery deadline.

****475** Respondent did not seek to serve the six new defendants he had named in his Second Amended Complaint until November 19, 2003, 11 months after filing his original complaint, and 2 days before pretrial conference.

At the pretrial conference, United States Magistrate Judge James O'Hara considered whether the Second Amended Complaint should be dismissed because of Respondent's failure to obtain***629** proper service on the six new defendants. Respondent admitted that he did not know he had to serve the individual defendants at all, much less within the time limit set forth in Rule 4 of the Federal Rules of Civil Procedure. He argued that service was not necessary because: (1) Kansas statutes imputed knowledge of lawsuits against a municipality to all employees of the municipality; (2) the defendants had already entered an appearance; (3) the defendants had actual notice of the lawsuit.

Judge O'Hara, in his December 2, 2003, recommendation and report to Judge Kathryn Vratil,

advocated dismissal of the Second Amended Complaint without prejudice. He stated that Respondent did not understand that the federal case was a wholly separate case and had not been "transferred" from state to federal court. Judge O'Hara further held that Respondent's ignorance did not amount to good cause for additional time to obtain service. Judge O'Hara further stated that Respondent failed to exercise "even a modicum of diligence" or to conduct "a scintilla of legal research with regard to the requirements of the Federal Rules of Civil Procedure." He continued:

> "In closing, the undersigned wishes to express some words of caution to both plaintiff and Mr. Landrith. This case has been handled in an extremely haphazard manner. The court is mindful of and sympathetic to plaintiff's statement during the recent pretrial conference ... that no attorney other than Mr. Landrith was willing to take plaintiff's case and that plaintiff is therefore thankful for Mr. Landrith's loyalty. But plaintiff would be prudent to bear in mind that loyalty and competence are different qualities. Stated more directly, the court is deeply troubled by Mr. Landrith's apparent incompetence. The pleadings he has filed [citations omitted], and his non-responsive, rambling, ill-formed legal arguments during the pretrial conference, suggest that he is not conversant with even the most basic aspects of the Federal Rules of Civil Procedure. The court doubts that Mr. Landrith has any better grasp of the substantive law that applies to this case.
>
> "Based on what transpired at the pretrial conference, plaintiff appears more articulate that Mr. Landrith. Plaintiff may be better served by representing himself without any attorney if indeed Mr. Landrith is the only attorney willing to take the case."

In response to Judge O'Hara's recommendation, Respondent filed an Objection To Magistrate's Report and Recommendation that stated: "The plaintiff finds the report ... a written manifestation***630** of the magistrate's continuing bias" and "Magistrate O'Hara has consistently dismissed material information on the law and facts relevant to this case, ... has become embroiled in the controversy and he has demonstrated a disrespect for the plaintiff's counsel." Respondent also alleged that Judge O'Hara communicated an "utter disrespect toward plaintiff's counsel, repeatedly asking where he went to school, and forgetting the answer, asking if he had even had a class in civil procedure and asking if he had passed."

On February 2, 2004, Judge Vratil dismissed the six new defendants. She also dismissed that portion of the case arising from the condemnation because it had been litigated in state court.

The case went to trial only on the janitorial contract claim, with Bolden represented by Dennis Hawver. Respondent remained involved in the case, however, filing various motions, responses to objections, jury instructions, and, after the trial, a notice of appeal. As of this writing, the appeal was set for oral argument in the Tenth Circuit on November 17, 2005. Although Respondent was the attorney designated to appear at that oral argument, he had not filed the form required to confirm his anticipated appearance.

****476** Sherri Price, Assistant City Attorney for the City of Topeka, filed the disciplinary complaint arising out of the Bolden Litigation on December 3, 2003. In response to Sherri Price's complaint, Respondent accused her of ethics violations and of taking "deliberate actions to deprive Mr. Bolden and myself of the resources to prosecute his case." He called Judge O'Hara's pretrial conference a "surprise" hearing. He accused Shawnee County District Attorney Robert Hecht's office of violations of the law and ethical misconduct, and accused Assistant U.S. Attorney David Plinsky of coaching defendants to deny valid service of process.

Disciplinary Proceeding

The complaints from the Baby C case and the Bolden Litigation were consolidated, and a formal disciplinary complaint with two counts was filed on September 14, 2004.

Respondent reacted to the disciplinary complaints in two ways.

First, he filed suit in federal court, naming the following individuals as defendants: Stanton Hazlett, Disciplinary Administrator; ***631** Judge Pierron; Judge Henry W. Green of the Court of Appeals;

Judge Johnson; now Justice Marla Luckert; Judge Richard Anderson, now chief judge of the Shawnee County District Court; Paretsky; Sherri Price; and Brenden Long, Topeka City Attorney. This complaint was dismissed with prejudice on September 22, 2004, for lack of a legal basis.

Second, Respondent filed an 85-page document in this disciplinary proceeding, repeating accusations he had made in previous filings and adding new accusations. He accused now Justice Luckert and Judge Anderson of mismanaging funds; Justice Luckert of backdating an entry of appearance; the Shawnee County District Court staff of telling deliberate falsehoods; Chief Justice Kay McFarland and appellate clerk Green of obstructing justice and denying Price his constitutional rights; two other district judges of obstructing justice; Judge Pierron of deliberate and knowing falsehoods; and Vincent of altering records and other crimes, including operating "a baby export business." Additional accusations continued in this vein.

Respondent also stated that, having "since researched and investigated the matter further," he was "now certain" that Vincent, Wichita attorney Martin Bauer, attorney Alan Hazlett, and Stanton Hazlett, were engaged "in a common enterprise to kidnap Kansas babies through deception and coercion and sell the infants in an illicit commerce that is entirely dependent upon the participation of some officials in the Kansas Judicial Branch."

Respondent also made numerous accusations against specific named Topeka city officials and generally against the Topeka Police Department for harassing and stalking his clients and his witnesses. Both Price and Bolden, as well as several of Respondent's witnesses, presented affidavits attesting to the conspiracy involved in these cases and to the fact that Topeka police began harassing and stalking them once Respondent instituted the appeals for Price and Bolden.

Respondent also praised Shawnee County District Judge Terry Bullock's ethics course, which instilled in him "the ethical duty a Kansas attorney has to represent someone even if they [*sic*] are controversial." Respondent maintained that the only ethical violation***632** of which he was guilty was his failure to mandatorily report the ethical violations of others. He argued that this failure was excused, however, because he was denied access to material evidence of unethical conduct by the court; therefore he was not required to make ethical complaints.

Respondent denied that he exhibited a lack of competence and argued that "[h]is conduct throughout the litigation was not prejudicial to the administration of justice and he continues to acquit himself as befits a first time attorney unexpectedly prosecuting a complex civil rights action."

Respondent requested that the ethics complaint be dismissed with prejudice.

Disciplinary Administrator Harlett filed an amended complaint, clarifying two points Respondent had disputed. Respondent filed a response, which primarily alleged various instances****477** of misconduct and crimes committed by the Disciplinary Administrator.

Respondent asserted that he would require 3 full days to present testimony from 40 individuals to the disciplinary panel. Among those named were the six complaining witnesses, *i.e.*, the three members of the Court of Appeals motions panel who had dealt with Respondent's behavior and pleadings in the Baby C case; Paretsky; Sherri Price; and Judge O'Hara. He also sought the testimony of six individuals involved in his cases, including three judges and three attorneys. He also sought the testimony of Chief Justice McFarland and Justice Luckert, as well as the testimony of 20 non-attorney witnesses. Respondent also requested "testimony of the [six] members of the common enterprise of adoption attorneys who obtained dismissals of ethics complaints against members of their associates by the adoption industry captured agency." He also sought to access the entire record of certain court cases.

Respondent's many motions, along with the Disciplinary Administrator's responses and Respondent's replies, were duly considered by the hearing panel, which issued a prehearing report. The panel provided for a 3-day hearing, with a fourth day left open if needed.

Throughout the hearing, the Disciplinary Administrator entered a number of relevance and competence objections. Respondent's ***633** questions

were often difficult to understand and appeared frequently to go to the merits of the Baby C case and the Bolden Litigation. Respondent was admonished by the panel to refrain from relitigating those matters.

Respondent also had served a subpoena to testify on Judge O'Hara. At the hearing, Respondent argued that the panel should refuse to admit certain witness testimony and exhibits because Judge O'Hara would not be appearing. Respondent said that Judge O'Hara was properly served but "has a very sophisticated legal argument-and he's represented by a U.S. Attorney-that because he's a federal officer, he doesn't have to appear before the state court."

The Disciplinary Administrator then presented a document faxed by Judge O'Hara, stating that the "Respondent has failed to comply with the judicial regulations of issuing a subpoena to a federal official," which required the subpoena to be requested 15 working days in advance. Despite this failure of compliance, Judge O'Hara did appear to testify.

During Respondent's testimony, when asked by the Disciplinary Administrator about Judge O'Hara's findings regarding his performance, Respondent stated, "I think that Magistrate O'Hara didn't show a-an understanding of Rule 4 and the state exception for effecting service of process. And in not understanding that, he alleges that I'm the one that's incompetent. I-I laid out my reasons why I disagreed with that." He also accused Judge O'Hara of ruling against Bolden because Bolden was black.

Judge O'Hara testified there were three grounds for his belief that Respondent's representation in the federal portion of the Bolden Litigation was incompetent: Respondent's pleadings were "rambling, disjointed and sloppy"; Respondent sought no discovery until it was too late for the discovery to be answered by the opposing side; and Respondent's conduct at the pretrial conference was "the worst performance I've seen by a lawyer in the 25 years since I've now been out of law school."

Judge O'Hara further testified that, if a pleading the quality of Respondent's pleading had been put on his desk "by an intern ... [or] a first year law clerk while I was still in private practice,***634** that intern and clerk probably would be summarily fired as opposed to worked with any further because the quality or lack of quality was so appalling that there was nothing salvageable." Judge O'Hara also flatly rejected the idea that there was any good faith basis for Respondent's Second Amended Complaint; he said that Respondent's argument that the six new defendants somehow waived service of process was frivolous.

Respondent testified in his own defense. He stated that the United States Constitution gave him immunity from liability for making the allegations he had made. He ****478** stated that Janice Lynn King, Price's secretary, typed and signed most, if not all, of the pleadings he had filed, although he was responsible for their content and was proud of them. He refused to agree that he had violated K.S.A. 60-211, which states that "[e]very pleading, motion and other paper provided for by this article of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name." Respondent further testified that he did not think he had violated the Kansas Rules of Professional Conduct in either the Baby C case or the Bolden Litigation but that he nevertheless expected to be disbarred.

Both Price and Bolden submitted affidavits attesting to their satisfaction with Respondent's representation and their gratefulness for his loyalty.

Price also filed an amicus curiae brief before this court to "preserve the truth, justice and set the record straight." In the brief, Price called the disciplinary complaint against Respondent "bogus" and part of continual harassment by the Disciplinary Administrator. He alleged that the State of Kansas and Kansas ethics boards were corrupt, have perjured testimony, have conspired to cover up crimes, and have violated laws. Price urged the Disciplinary Administrator to "dismiss all charges" as "Mr. Bret Landrith had clearly met his 51% of proof during the testimony."

Respondent also has cited the hardship he has incurred because of this disciplinary proceeding, including the loss of his house and wife and his inability to practice law. It is clear, however, that Respondent has continued to be involved in the practice of law. He has worked on a case in federal court in Kansas City, Kansas, involving***635** a

medical supply company. He has represented a Missouri company on a contract claim arising in Kansas. He has represented himself in his divorce proceedings, apparently in three different courts. He also has filed a mandamus action against the appellate clerk.

Respondent also has remained involved in other activities. In particular, he has filed an antitrust complaint in federal court in the Western District of Missouri, although it is unclear whether he had the authority to do so. At the time of the panel hearing in December 2004, Respondent had not taken the Missouri bar examination.

[1][2][3] The hearing panel made 99 findings of fact. The panel determined that Respondent violated the following sections of the Kansas Rules of Professional Conduct in connection with his representation of Price and of Bolden:

KRPC 1.1 (2004 Kan. Ct. R. Annot. 342)-Competence-Repeated violations in connection with his representation of Price in the Bolden Litigation.

KRPC 3.1 (2004 Kan. Ct. R. Annot. 438)-Meritorious Claims and Contentions-Repeated violations through assertions that he had properly served defendants in the Bolden Litigation.

KRPC 3.3(a)(1) (2004 Kan. Ct. R. Annot. 444)-Candor Toward the Tribunal-"systematically violated" KRPC 3.3(a)(1).

KRPC 3.4(c) (2004 Kan. Ct. R. Annot. 449)-Fairness to Opposing Party and Counsel-violations by knowingly and intentionally disobeying rules of the tribunal, including failing to follow the Supreme Court rules for appellate practice.

KRPC 4.4 (2004 Kan. Ct. R. Annot. 464)-Respect for Rights of Third Persons-Numerous violations by repeated accusations against the judiciary, attorneys, and court personnel of wrongdoing.

KRPC 8.4(c), (d), and (g) (2004 Kan. Ct. R. Annot. 485)-Misconduct-Numerous violations through false accusations against others and failure to comply with Supreme Court rules for appellate practice.

In recommending disbarment, the panel noted Respondent's "total incompetence in the practice of law" and concluded that he was "not equipped with the ethical or intellectual characteristics ***636** necessary to ever become an active and productive member of the bar of the state of Kansas." The panel found that Respondent felt his law license granted him the ability to allege whatever he wanted against whatever person or entity, regardless of whether the allegations were true or false. ****479** The panel further found that Respondent was "either unwilling or unable to understand basic principles in the practice of law"; that he would be a detriment to future clients, the public, the legal profession, and the legal system; and that his performance as a lawyer and his allegations of misconduct on the part of others were reprehensible.

Analysis

[4][5] In a disciplinary proceeding, this court considers the evidence, the findings of the disciplinary panel, and the arguments of the parties and determines whether violations of the KRPC exist and, if so, what discipline should be imposed. *In re Berg*, 264 Kan. 254, 269, 955 P.2d 1240 (1998). Attorney misconduct must be established by substantial, clear, convincing, and satisfactory evidence. *In re Lober*, 276 Kan. 633, 636, 78 P.3d 442 (2003); see also Supreme Court Rule 211(f) (2004 Kan. Ct. R. Annot. 275) (misconduct to be established by clear and convincing evidence).

Factual Findings

Respondent challenges the panel's finding that faults him for seeking nonexistent adoption hearing records and argues Hazlett sought to "fraudulently obtain a finding of probable cause against the respondent."

Respondent also argues that the panel "fraudulently asserted that the respondent failed to adequately cite to the record in [Price's] appeal brief." He asserts the brief made 67 citations to the record to support Price's contentions and curiously contends the supported points were the same points as those for which the panel charged him with untruthfulness.

Respondent also again alleges that an adoption conspiracy caused the hearing panel to find against him.

Respondent also faults the panel for relying heavily on Judge O'Hara's recommendation and report, which he again alleges was based on "profound bias" because Judge O'Hara once was managing*637 partner in a firm now opposing Respondent in a pending Missouri case.

Concerning the panel's finding that he breached an ethical duty of competence in failing to serve the six new defendants in the Bolden case, Respondent says he "does not believe it to be a violation."

He maintained these positions in front of this court and continued to argue that he was being prosecuted for representing minorities, and that the hearing panel, the Disciplinary Administrator, the judiciary and judicial employees and others were biased against him based on his representation of such minorities. He maintained that he had done nothing wrong.

Each of the panel's 99 findings is well supported by the record. The factual findings of the panel were identical in substance to the facts set out above, and these facts were drawn from the record created in these proceedings. Respondent's argument to the contrary is completely without merit. Respondent failed during the panel hearing to present even an iota of factual support for his positions, instead continuing to rely on unsupported allegations. The panel's findings of facts are affirmed by this court, and we find that there was clear and convincing evidence of each of the violations.

Legal Arguments

A. Invocation of First Amendment Protection

[6] Respondent asserts that this proceeding somehow violates his First Amendment rights. He cites no fact or law to support this contention, except his allegation that the underlying ethical complaints made him unable to accept work representing other clients.

Respondent's brief contains no coherent argument as to how his First Amendment rights were violated. His discussion on this issue centers on an alleged conflict of interest of Hazlett and the Disciplinary Administrator's office, as well as accusations against Judge Pierron, Parrish, and Oldham.

Respondent does cite to a Tenth Circuit case for the proposition that "[i]t is public policy ... everywhere to encourage the disclosure of criminal activity,"*638**480 *Lockman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir.1972); and he further states that the "public policy interest is clearly in the respondent representing James Bolden and David Price lawfully to accomplish their goals."

The Disciplinary Administrator suggests that Respondent intends to argue that he has a right to make the accusations contained in his pleadings against members of the judiciary, judicial staff members, opposing counsel, city officials, and others and that this right is guaranteed by the First Amendment. During the hearing, Respondent testified that he believed the First Amendment gave him immunity to make the claims he had made.

In re Johnson, 240 Kan. 334, 729 P.2d 1175 (1986), was a contested case in which this court found a respondent should be disciplined for false, unsupported criticisms of and misleading statements about his opponent in a county attorney election campaign. In our discussion of the First Amendment in relation to attorney speech, we said:

> "A lawyer, as a citizen, has a right to criticize a judge or other adjudicatory officer publicly. To exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified." *Johnson*, 240 Kan. at 336, 729 P.2d 1175.

Likewise, in *State v. Russell*, 227 Kan. 897, 610 P.2d 1122,*cert. denied*449 U.S. 983, 101 S.Ct. 400, 66 L.Ed.2d 245 (1980), a respondent made false statements while running for a position on the Board of Public Utilities, and the comments were not deemed to be protected speech.

> "Upon admission to the bar of this state, attorneys assume certain duties as officers of the

> court. Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to judicial officers. A lawyer is bound by the Code of Professional Responsibility in every capacity in which the lawyer acts, whether he is acting as an attorney or not, and is subject to discipline even when involved in nonlegal matters, including campaigns for nonjudicial public office. *State v. Russell*, 227 Kan. 897, 610 P.2d 1122,*cert. denied*449 U.S. 983, [101 S.Ct. 400, 66 L.Ed.2d 245] (1980)." *In re Johnson*, 240 Kan. at 337, 729 P.2d 1175.

[7] The case at bar does not involve an attorney acting in nonlegal matters. It involves the conduct of an attorney acting in his professional***639** capacity. In either situation, when a lawyer's unbridled speech amounts to misconduct that threatens a significant state interest, it is clear that a State may restrict the lawyer's exercise of personal rights guaranteed by the Constitutions. See *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

Respondent has made and continues to make serious accusations against members of the judiciary, court staff, attorneys, municipal officers and employees, and others. The panel found that he failed to provide even "one scintilla of proof of such wrongdoing, through exhibits, witnesses, or his own testimony." The panel further found that "[i]t is patently obvious that the Respondent either failed to conduct any investigation whatsoever into the claims made by his client or that he personally invented the serious allegations of wrongdoing."

Moreover, the panel found that Respondent had based many of these allegations on information provided to him by his client, Price. At the hearing, the presiding officer asked whether, after the passage of a couple of years, Respondent now believed that some of these statements were untrue. Respondent replied "No, sir, I don't know of anything that is not true." Rather, he went on to reaffirm the accusations against the court employees, Judge Pierron, Vincent, and others. When asked about his allegation that now Justice Luckert backdated an entry of appearance in a previous case involving Price, Respondent admitted he was uncertain whether such an entry of appearance even existed.

The First Amendment provides no defense for the inflammatory and false accusations that Respondent has repeatedly made in his pleadings and motions, and which he maintained****481** orally in the panel hearing and in oral argument before this court.

B. Invocation of Due Process

Respondent argues eight violations of due process, asserting he was: (1) prevented from presenting a record; (2) barred from raising constitutional claims; (3) subjected to cumulative prosecutorial misconduct; (4) subjected to "bad faith participation in [an] unlawful motive"; (5) denied access to exculpatory evidence; (6) subjected***640** to retaliation against his witnesses; (7) victimized by racial discrimination; and (8) selectively prosecuted.

[8] In reviewing a procedural due process claim the court must first determine whether a protected liberty or property interest is involved and, if so, the court must then determine the nature and extent of the process due. *Winston v. Kansas Dept. of SRS*, 274 Kan. 396, 409, 49 P.3d 1274 (2002).

[9][10] A due process violation can be established only if a claimant is able to establish that he or she was denied a specific procedural protection to which he or she was entitled. The question of the procedural protection that must accompany a deprivation of a particular property right or liberty interest is resolved by a balancing test, weighing (1) the individual interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[11] The question of what process is due in a given case is a question of law over which an appellate court has unlimited review. *State v. Wilkinson*, 269 Kan. 603, 608-09, 9 P.3d 1 (2000).

[12] The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Winston*, 274 Kan. at 409, 49 P.3d 1274.

[13] The United States Supreme Court has held that the Due Process Clause applies to lawyer disciplinary proceedings. That due process includes fair notice of the charges sufficient to inform and provide a meaningful opportunity for explanation and defense. *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117,*reh. denied*391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed.2d 874 (1968). Kansas has specifically adopted this holding. *State v. Cannon*, 235 Kan. 451, 458-59, 681 P.2d 639 (1984); see *In re Daugherty*, 277 Kan. 257, 261, 83 P.3d 789 (2004).

To the extent that the substance of Respondent's arguments can be discerned, there is nothing in his brief or in his oral argument before this court that indicates his arguments regarding due process***641** violations have any basis in fact. However, we briefly address each of his arguments below.

1. Prevented From Presenting A Record

[14] Respondent argues that he was "prevented from presenting the record related to the charges against him" and that "[w]itnesses were prevented from making reference to documents answering the arguments of Stanton Hazlett's case on the tribunal's constantly repeated admonishments of the respondent not to question witnesses on issues that turned out to be the tribunal's report recommendation for disbarment."

Neither Respondent's brief nor his oral argument have indicated which specific relevant records he was prevented from producing or exactly which issues or documents witnesses were "admonished" not to speak of. He may be referring to the panel's admonishment that he not attempt to relitigate the Baby C or Bolden claims. This was not a violation of due process, and this argument lacks merit.

2. Barred from Raising Constitutional Claims

Respondent argues he was barred from raising "selective prosecution" as a constitutional claim during the hearings. However, in no instance was Respondent barred from raising this or any constitutional claim. He did in fact raise constitutional claims in the ****482** proceeding before the panel and before this court.

For example, he testified that the ethics violations he was charged with, arising from his accusations of criminal activity against various persons, infringed protected speech. He further testified that he was upholding the Constitution by his actions. He was not barred from so testifying at the disciplinary hearing, and he raised the claims again in his brief to this court and his argument before us. This argument lacks merit.

3. Subjected to Cumulative Prosecutorial Misconduct

[15] In support of this contention, Respondent references only the "prosecutorial misconduct, discussed above."

This court's recent decision in *State v. Tosh*, 278 Kan. 83, 91 P.3d 1204 (2004), provides a two-step analysis under which we analyze allegations of prosecutorial misconduct in criminal cases. ***642** This court need not reach the *Tosh* analysis here, however, because Respondent fails to complain of any specific instance of conduct, accusing the Disciplinary Administrator only of general "vindictiveness." In truth, in view of Respondent's many wild unsupported allegations, in appears to us the Disciplinary Administrator has been extremely patient and professional throughout these proceedings. Respondent's argument on this point is incoherent and lacks merit.

4. Subjected to "Bad Faith Participation in Unlawful Motive"

This argument appears to refer again to Respondent's unsupported allegations against the Disciplinary Administrator, who, he states, is embroiled with other state and judicial employees in a "common enterprise to kidnap Kansas babies through deception and coercion and sell the infants in an illicit commerce." He also argues that Judge Pierron, who joined in Paretsky's initial complaint regarding the Baby C case, "had an undisclosed fiduciary interest that was directly affected financially by the resolution of the issues." These allegations are completely without factual basis, and the tandem argument is without merit.

5. Denied Access to Exculpatory Evidence

[16] Respondent argues that "material affidavits and other exculpatory evidence contained as attachments from both complainants" were omitted from "the first and second *ex parte* probable cause hearings." Respondent does not indicate what exculpatory evidence might exist or have been withheld.

6. Subjected to Retaliation Against His Witnesses

[17] Respondent alleges specific instances in which witnesses he named to support him in this proceeding were retaliated against.

Respondent states that a few days after he named Frank Williams as a witness in support of "Stan Hazlett's pattern and practice," the State "sought to seize [Mr. Williams'] stock" in satisfaction of "a long dormant judgment." Respondent also argues that "[s]everal natural parents" were prepared to testify against a number of attorneys involved in the alleged adoption/kidnapping conspiracy,***643** but that the Disciplinary Administrator dismissed the complaints against the attorneys.

At Respondent's request, the panel reviewed confidential records of possible disciplinary complaints against four attorneys representing adoptive parents in camera. The panel concluded that any complaints that existed were not relevant and that they would fail to establish a connection between those attorneys' treatment by the Disciplinary Administrator's office and any alleged conspiracy.

Respondent also pointed to several affidavits alleging retaliation by Topeka city officials and Topeka police. The record is otherwise totally devoid of facts to support the argument that Respondent's due process rights were violated by retaliatory actions taken against his witnesses. The affidavits were submitted in connection with the Bolden Litigation. No connection is established between those affidavits and Respondent's due process rights in this hearing.

****483***7. Victimized by Racial Discrimination*

Respondent also argues the Equal Protection Clause precludes selective enforcement of the law based on race or ethnicity. He argues that he presented witnesses who testified that the proceedings were "deliberately based on an arbitrary, illegal, or otherwise unjustifiable standards [*sic*]." Presumably Respondent is referring to his own testimony alleging that the basis for Judge O'Hara's ruling was Price's race, and to the testimony of Price, whose ideas largely formed Respondent's allegations.

Judge O'Hara strenuously denied this charge of racial discrimination.

Respondent also alleges that Paretsky singled his motions out because he was representing an African-American and further alleges that racial discrimination was the initial motivation for the disciplinary action against him. Paretsky categorically denied these allegations in his reply and again in his testimony at the disciplinary hearing; he singled out the motions because they resembled pro se complaints, and he was concerned the client might be injured by the representation.

***644** Respondent further alleges that he "was charged for representing an African-American and an American Indian who were at all times treated differently than litigants who were members of a majority race." Several witnesses, including Oldham, Paretsky, and Barnes, testified that the plaintiffs in Respondent's cases were treated no differently than other litigants.

Respondent makes several other accusations that are unsupported by the record. At oral argument before this court he persevered in his allegations against Judge O'Hara, Paretsky, and others with no apparent ability or willingness to support those allegations with facts. In essence, he evidently resorted to such allegations whenever challenged. His beliefs-or, more likely, excuses for the bad outcomes flowing from his incompetent legal work-do not support his racial discrimination argument.

8. Selectively Prosecuted

Respondent argues that the Disciplinary Administrator and the panel "recognized a substantial basis existed to find that the respondent was selectively prosecuted so they denied the respondent his Sixth Amendment right to call witnesses and put on evidence of Selective Prosecution."

Respondent seems to base this argument on the fact

that Stanton Hazlett did not testify at the panel hearing. Stanton Hazlett was named on Respondent's list of witnesses; it is unclear whether Respondent ever sought to have him testify beyond that. Stanton Hazlett acted as the prosecutor in these proceedings.

Respondent's argument of selective prosecution is without merit.

General Due Process Analysis

Having examined and rejected Respondent's multiple specific due process arguments, we pause finally to note that there is absolutely no other basis for any argument that a due process violation existed in this case.

Kansas Supreme Court Rule 211(b) (2004 Kan. Ct. R. Annot. 275) requires the formal complaint in a disciplinary proceeding to be sufficiently clear and specific to inform the respondent of the ***645** alleged misconduct. The complaint in this case was sufficiently clear.

In all other respects, Respondent was provided abundant due process of law in these proceedings. Respondent's many motions, along with the Disciplinary Administrator's responses and Respondent's replies, were duly considered by the hearing panel, which issued a prehearing report, ruling on each issue and addressing any due process concerns. The panel also provided for a 3-day hearing, as Respondent desired, with a fourth day left open if needed.

[18] The Disciplinary Administrator objected to only two of the forty individuals Respondent sought to have testify. These two, Chief Justice McFarland and Justice Luckert, did not have any information relevant to the charges against Respondent. The panel also went through the witness list with both Respondent and the Disciplinary Administrator. Its refusal to allow a number of suggested witnesses because they had no ****484** information, or had only irrelevant information, was sound. The panel specifically allowed Respondent to call 18 of his initial 40 witnesses, and stated it would allow testimony of the others if there was a showing that they had relevant testimony to offer. The fact that certain witnesses never testified was due to Respondent's failure to ensure their appearance or to his voluntary decision not to call them.

[19] Regarding Respondent's request to subpoena records and witnesses, the panel referred Respondent to Supreme Court Rule 216 (2004 Kan. Ct. R. Annot. 293) and to K.S.A. 60-245 and informed him that, while he could use whatever authority those statutes provided him, neither the panel nor the Disciplinary Administrator's office would issue subpoenas on his behalf. The Disciplinary Administrator objected to the introduction of records on the basis that they contained confidential information pursuant to Supreme Court Rule 222 (2004 Kan. Ct. R. Annot. 322) and were not relevant to the charges against Respondent. The panel noted that it was not passing on the admissibility of the records or witnesses within the prehearing order.

[20] The panel denied Respondent's motion to dismiss based on hardship from delay, finding that the hardship, if any, was the result of Respondent's voluntary decision not to accept legal work. The ***646** panel recognized that Respondent had been informed and clearly understood that he was under no obligation to refrain from practicing law during the pendency of this proceeding. Moreover, much of the delay was due to the extensive number of prehearing motions filed by Respondent, which the hearing panel reviewed and to which it responded.

The panel also denied Respondent's motion to dismiss based on alleged bad faith prosecution and the Disciplinary Administrator's alleged conflict of interest. After reviewing the motion, the Disciplinary Administrator's response, and Respondent's reply, the panel heard argument at a prehearing conference. It attributed the conflict of interest allegation to Respondent's unsupported belief that the Disciplinary Administrator was and is part of a conspiracy regarding adoption cases in Kansas.

Respondent was also allowed an in camera review of possible disciplinary complaints against four attorneys representing adoptive parents, in order to evaluate his allegation of bias. The panel concluded that any complaints were not relevant and would fail to establish a connection between the lawyers' treatment by the Disciplinary Administrator's office and the alleged conspiracy.

In summary, Respondent received all the process he

was due and more. He had notice of the proceedings, he had an opportunity to be heard, to present testimony, to confront and cross-examine witnesses; he had a right to counsel if he so desired. There was no violation of due process in this proceeding.

C. Was Respondent Prosecuted in Bad Faith?

Respondent also alleges that the Disciplinary Administrator and the disciplinary committee instituted these proceedings in bad faith. He argues that no action should be taken against him because "there is substantial evidence of prosecutorial misconduct requiring the conclusion that these charges were brought in bad faith."

In support of this allegation, Respondent appears to rely on his answer to the first ethics complaint, in which he argued that he had "civil probable cause" under *Bergstrom v. Noah*, 266 Kan. 829, 974 P.2d 520 (1999); and that the court had been "deceived ***647** through fraud, which has the effect of voiding an adoption. To prove this, I needed the records or to determine they did not exist."

In *Bergstrom*, this court held that attorneys had probable cause to bring an action under Kansas antitrust statutes and could not be held liable for malicious prosecution. That case cited *Nelson v. Miller*, 227 Kan. 271, 276, 607 P.2d 438 (1980), for the proposition that,

> " '[t]o maintain an action for malicious prosecution of a civil action the plaintiff must prove the following elements:
>
> (a) That the defendant initiated, continued, or procured civil procedures against the plaintiff.
>
> ****485** (b) That the defendant in so doing acted without probable cause.
>
> (c) That the defendant acted with malice, that is he acted primarily for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based.
>
> (d) That the proceeding terminated in favor of the plaintiff.
>
> (e) That the plaintiff sustained damages.' " *Bergstrom v. Noah*, 266 Kan. 829, 836-37, 974 P.2d 520 (1999).

Respondent fails to allege or prove a single one of the elements necessary to establish a malicious prosecution claim, and, but for his cite to *Bergstrom*, his argument also is completely unsupported by legal citation. Thus this argument also is rejected.

[21] We adopt the findings of fact and conclusions of law made by the hearing panel. We hold that Respondent has violated the following rules: KRPC 1.1 relating to competence; KRPC 3.1 relating to meritorious claims; KRPC 3.3(a)(1), relating to candor toward the tribunal; KRPC 3.4(c) relating to fairness to opposing party and counsel; KRPC 4.4, relating to respect for rights of third persons; and KRPC 8.4(c), (d), and (g), misconduct.

We also have considered the hearing panel's analysis of the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (Standards): (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the misconduct; (4) and the existence of aggravating or mitigating factors.

Respondent violated his duty to his clients to provide competent representation. He violated his duty to refrain from interfering with the administration of justice. He violated his duty to the legal profession***648** to maintain personal integrity. He violated these duties intentionally. As a result of his misconduct, Respondent caused actual injury to the adoptive parents of Baby C; to Vincent, their counsel; and to the legal system and the legal profession. Respondent's behavior cost Baby C's adoptive parents more than $20,000. Vincent forgave the parents an additional $10,000 in attorney fees. In addition, the personal anxiety and stress experienced by the adoptive parents in their experience with the legal system was dramatically increased due to Respondent's conduct.

Furthermore, the legal system itself suffered injury as a result of Respondent's misconduct. The Kansas Court of Appeals and the United States District Court for the District of Kansas wasted valuable resources because of Respondent's absolute incompetence and interference with the administration of justice.

Finally, the legal profession has been damaged by Respondent's false accusations against members of the judiciary; attorneys; court personnel; and other state, county, and municipal employees.

We also adopt the hearing panel's findings regarding the following aggravating factors: pattern of misconduct; multiple violations; lack of acknowledgment of wrongdoing or remorse. Even at oral argument, Respondent refused to acknowledge the wrongfulness of his conduct.

This court also adopts the panel's findings regarding certain mitigating factors in this case: Respondent has no previous disciplinary record. Further, although Respondent repeatedly engaged in reprehensible conduct, it does not appear that he was motivated by dishonesty or selfishness. The panel acknowledged that at the time Respondent first engaged in misconduct, he had only been practicing law for 4 months. He was certainly inexperienced. However, Respondent persisted in his misbehavior up to the date of his oral argument before this court. Whether this is due to ignorance or stubbornness, the public must be protected from his further practice.

As noted above, the panel recommended disbarment. Respondent seeks dismissal of this action.

Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that he or she does not understand the most ***649** fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client. ABA Standard 4.51. Furthermore, disbarment is generally appropriate when a lawyer engages in any ****486** other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on his or her fitness to practice. ABA Standard 5.11.

We have performed the exhaustive review of the record urged by Respondent at oral argument. It provides a wealth of evidence supporting the panel's recommendation and none supporting Respondent's plea for dismissal. We therefore unanimously adopt the hearing panel's recommendation of disbarment.

IT IS THEREFORE ORDERED that Respondent Bret D. Landrith be and he is hereby disbarred from the practice of law in the state of Kansas, that his privilege to practice law in the state of Kansas is revoked, and that the Clerk of the Appellate Courts of Kansas strike the name of Bret D. Landrith from the roll of attorneys licensed to practice in the state of Kansas.

IT IS FURTHER ORDERED that this opinion shall be published in the official Kansas Reports, that the costs herein be assessed to the respondent, and that respondent forthwith comply with Supreme Court Rule 218 (2004 Kan. Ct. R. Annot. 301).

McFARLAND, C.J., and LUCKERT, J., not participating.
LOCKETT, J., Retired, LARSON, S.J., and BUSER, J., assigned.[FN1]

FN1. **REPORTER'S NOTE:** Justice Tyler C. Lockett, Retired, was assigned to hear case No. 94,333 pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616 to fill the vacancy on the court resulting from Justice Gernon's death. Senior Judge Edward Larson was appointed to hear case No. 94,333 vice Chief Justice McFarland pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616. Judge Buser, of the Kansas Court of Appeals, was appointed to hear this case vice Justice Luckert pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c).

Kan.,2005.
In re Landrith
280 Kan. 619, 124 P.3d 467

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HMedical Supply Chain, Inc. v. U.S. Bancorp, NA D.Kan.,2003.

United States District Court,D. Kansas.
MEDICAL SUPPLY CHAIN, INC., Plaintiff,
v.
US BANCORP, NA, et al., Defendants.
No. Civ.A. 02-2539-CM.

June 16, 2003.

MEMORANDUM AND ORDER

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

I. Background [FN1]

FN1. The court exercises jurisdiction under 28 U.S.C. §§ 1331 and 1337.

1. The Parties

Plaintiff is a Missouri corporation which has developed a health care supply strategist certification program. According to plaintiff, defendant U.S. Bancorp NA (hereinafter "US Bancorp") is a bank holding corporation headquartered in Minnesota and is the parent company of the employees and subsidiaries named as co-defendants. Defendant U.S. Bancorp operates banks in several states under the name U.S. Bank. Defendant Private Client Group, Corporate Trust, Institutional Trust and Custody, and Mutual Fund Services, LLC (hereinafter "defendant LLC"), is a subsidiary of defendant U.S. Bancorp, also headquartered in Minneapolis. Defendant LLC is the division of defendant U.S. Bancorp that is responsible for escrow accounts for health care systems. Defendant U.S. Bancorp Piper Jaffray, Inc. is the investment banking subsidiary of defendant U.S. Bancorp, and is headquartered in Minneapolis. It has underwriting and investment relationships with healthcare suppliers. Defendant Unknown Healthcare Entity is "believed to be a supplier or purchasing organization who has communicated with U.S. Bancorp, its employees or its subsidiaries about plaintiff for the purpose of obstructing or delaying plaintiff's entry into commerce."Jerry A. Grundhofer is President and CEO of defendant U.S. Bancorp. Defendant Andrew Cesere is Vice Chairman of the U.S. Bancorp trust division. Defendant Susan Paine is the supervisor for U.S. Bank's St. Louis, Missouri corporate trust office. Defendant Lars Anderson is the customer acquisition manager for U.S. Bank's St. Louis, Missouri corporate trust office. Defendant Brian Kabbes is Vice President of Corporate Trusts for U.S. Bank.

B. Plaintiff's Claims

Plaintiff contends defendants engaged in conduct violating (1) the Sherman Antitrust Act; (2) the Clayton Antitrust Act; and (3) the Hobbs Act. Plaintiff also alleges defendants (4) "fail[ed] to properly train [their] employees on the USA PATRIOT Act or to provide a compliance officer"; (5) misused "authority and excessive use of force as enforcement officers under the USA PATRIOT Act"; and (6) violated "criminal laws to influence policy under section 802 of the USA PATRIOT Act."The complaint further charges defendants with (7) misappropriation of trade secrets, under state law; (8) tortious interference with prospective contracts; (9) tortious interference with contracts; (10) breach of contract; (11) promissory estoppel; (12) fraudulent misrepresentation; and (13) violation of the covenant of good faith and fair dealing. Plaintiff seeks over $943 million in damages and declaratory relief.[FN2] Defendants request dismissal of the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff has failed to state a claim for which relief can be granted.

FN2. On January 9, 2003, the Tenth Circuit affirmed this court's order denying plaintiff's requests for preliminary injunction.

Exhibit D

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

II. Legal Standard for Motions to Dismiss

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

III. Analysis

A. Sherman Act (Count I)

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

1. Section 1

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

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

a. Contract, Combination, or Conspiracy

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

First, the court finds that plaintiff has not

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

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

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

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

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

Second, the court finds that even if the allegations of conspiracy alleged in plaintiff's complaint encompassed a plurality of actors, plaintiff has failed to state a claim for relief. Here, plaintiff has not pled the existence of a pricing agreement, or agreement of any kind, among the defendants in restraint of trade. "Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief."*TV Communications Network, Inc.*, 964 F.2d at 1024 (citing *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387 (10th Cir.1980)). A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. *Id.*; *see also Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir.1979) (holding that to survive a motion to dismiss, a complaint stating violations of the Sherman Act "must allege facts sufficient, if they are proved, to allow the court to conclude that claimant has a legal right to relief"). Conclusory allegations that the defendant violated those laws are insufficient. *Id.* (citing *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir.1965)). The court grants defendants' motion to dismiss plaintiff's claim under § 1 of the Sherman Act.

2. Section 2

*4Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed guilty of a felony."). Conduct violates this section when an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-90, (1956); *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir.1987).

Plaintiff states defendants "have violated Section 2," and that they "have acquired, maintained and extended their monopoly power through improper means, including attempting to extort healthcare technology companies into using U.S. Bancorp as the underwriter of capitalization against securities regulations and in denying [plaintiff] the escrow accounts it required to capitalize its entry into commerce through extortion under the color of

official right-the USA PATRIOT Act."Further, plaintiff alleges defendants' "vertical integration is part of a calculated scheme to gain control over the $1.3 trillion health care supplier and distribution segment of the health care industry and to restrain or suppress competition," and that defendants "engage in predatory tactics and dirty tricks including ... extortion [and] 'laddering' schemes to fraudulently inflate equity values of competitors they own interests in."Plaintiff claims defendants "invest in and promote engage in [sic] anticompetitive predatory sole source contract agreements."In addition, according to plaintiff, defendants have gained "the power to control prices of health care supplies ... that are higher than those negotiated directly by hospitals."

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

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

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

*5 Here, plaintiff has failed to allege that defendants both controlled prices and excluded competition. Further, plaintiff has not pled the existence of a relevant product market or geographic market. Plaintiff has not stated that defendants' alleged market power stems from defendants' willful acquisition or maintenance of that power rather than from defendants' development "of a superior product, business acumen, or historic accident."The court finds plaintiff has failed to state a claim of monopoly under § 2.

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

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

B. Clayton Act (Count II)

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

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

C. Hobbs Act (Count III)

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

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

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

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

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

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

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

*7 (h) Anti-money laundering programs.-

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

(A) the development of internal policies, procedures, and controls;

(B) the designation of a compliance officer,

(C) an ongoing employee training program; and

(D) an independent audit function to test programs.

31 U.S.C. § 5318(h).

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

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

Second, the court finds that, even if Count IV were justiciable, no private right of action exists to enforce the Patriot Act. As a result, Counts IV, V, and VI fail to state a claim for which relief can be granted. Plaintiff has not identified a provision of the Patriot Act expressly authorizing enforcement by private citizens. In its response to the motion to dismiss, plaintiff states that the failure to train and excessive use of force claims are actionable under 42 U.S.C. § 1983.

Section 1983 provides a cause of action against any person who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." § 1983 (emphasis added). The complaint has failed to allege that defendants acted under color of state law, an essential element of a § 1983 suit. *E.g., Sooner Prods. Co. v. McBride*, 708 F.2d 510, 512 (10th Cir.1983). Although plaintiff later states in its response that defendants acted "as an agent for the Department of the Treasury"[FN3] and that § 1983 liability may extend to private individuals if they engage in joint action with state officials, these allegations do not appear in the complaint and are, nevertheless, so conclusory that they cannot state a claim. *See, e.g., Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir.1994); *Sooner Prods. Co.*, 708 F.2d at 512. ("When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action."). In *Blessing v. Freestone*, the Supreme Court explained the factors courts must consider in determining whether a statute gives rise to a right enforceable under § 1983:

> FN3. Plaintiff's argument implicates action under color of federal rather than state law, thus giving rise to an action under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), rather than § 1983.

**8 In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

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

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

Finally, with regard to Count VI in particular, in which plaintiff actually contends defendants "are preventing [plaintiff]'s entry into commerce in violation of Section 802 of the USA Patriot Act which creates a federal crime of 'domestic terrorism' that broadly extends to 'acts dangerous to human life that are a violation of the criminal laws,' the court finds plaintiff's allegation so completely divorced from rational thought that the court will refrain from further comment until such time as federal criminal proceedings are commenced, if indeed they ever are.

Counts IV, V, and VI are dismissed.

E. State Law Claims (Counts VII-XIII)

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

IV. Order

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

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

IT IS FURTHER ORDERED THAT this case is hereby dismissed.

D.Kan.,2003.
Medical Supply Chain, Inc. v. US Bancorp, NA
Not Reported in F.Supp.2d, 2003 WL 21479192 (D.Kan.), 2003-2 Trade Cases P 74,069

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