

**United States Court of Appeals
For the Tenth Circuit**

Docket No. 02-3443 (10th Cir.)

Case No.: 02-2539-CM

Medical Supply Chain, Inc.

v.

US Bancorp, NA; US Bank; Private Client Group, Corporate Trust,
Institutional Trust And Custody, And Mutual Fund Services, LLC.;
US Bancorp Piper Jaffray; Jerry A. Grundhofer;
Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes;
and Unknown Healthcare Supplier

Interlocutory Appeal from
the United States District Court
for the District of Kansas

BRIEF OF THE APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument.

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Other Authorities

James W. Moore, *Moore's Federal Practice* § 65.23 (1999) pg. 29

CORPORATE DISCLOSURE STATEMENT UNDER F.R.A.P. 26.1

Medical Supply Chain, Inc. has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

PRIOR OR RELATED APPEALS

No prior or related appeals have been taken from this matter.

STATEMENT OF JURISDICTION

The appellate court has unquestionable jurisdiction to review the district court's denial of plaintiff's preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1), which states, in relevant part, "the courts of appeals shall have jurisdiction of appeals from ... [i]nterlocutory orders of the district courts ... refusing ... injunctions." When a district court's interlocutory order expressly denies an injunction, the order "fits squarely within the plain language of 28 U.S.C. § 1292(a)(1)" and is immediately appealable. *Utah State Dep't of Health v. Kennecott Corp.*, 14 F.3d 1489, 1496 (10th Cir.), *cert. denied*, 513 U.S. 872 (1994).

When a federal district court issues an order that has the indirect effect of denying an injunction, the party whose injunction was indirectly denied can appeal pursuant to Section 1292(a)(1) if the indirect denial is causing irreparable injury. *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981).

The trial court entered minutes of its rulings on two hearing dates; November 18th, 2002 and December 12, 2002 that denied Medical Supply urgent injunctive relief to prevent irreparable harm. A journal entry of order has not been entered into the record.

STATEMENT OF THE ISSUES

I. Whether the trial court erred in its conclusions of law in denying preliminary injunctive relief prescribed by the Clayton antitrust Act and the Kansas Trade Secret Misappropriation Act without findings of fact or an evidentiary hearing and where neither facts nor claims were controverted by the opposing party.

II. Whether the trial court erred in reaching negative findings on the merits of preliminary injunctive relief.

STATEMENT OF THE CASE

1. On October 22, 2002, Medical Supply Chain, Inc. filed a complaint for urgent injunctive relief preventing US BANCORP NA, *et al* from denying Medical Supply banking services and obstructing its entry into commerce through violations of the Sherman, Clayton, and Hobbs Acts **A1**. On November 12, 2002, Medical Supply amended its complaint to include declaratory relief and refined its antitrust claims to include allegations and facts making a *prima facie* case that US Bancorp had violated 15 U.S.C. §§ 1,2 and 13, 18 U.S.C. § 1951(b)(2) **B2**.

2. A hearing was held on November 18th, 2002 and the court denied all of Medical Supply's proposed preliminary injunctive relief on its merits and because the proposed order **B1,1** contained relief that was mandatory and relief that was determined to be the final relief sought in the controversy. Medical Supply created new motions for injunctive relief from USA Patriot Act reporting **E** and from trade secret misappropriation **F**.
3. The trial court denied the new relief motions on December 12, 2002 stating that they were the same as the relief rejected on November 18th and that Medical Supply did not merit reconsideration on the relief. Alternatively, Medical Supply had failed to meet the four factors required for preliminary injunctive relief. Medical Supply reserved the right to appeal and stated its intent to pursue interlocutory appeal.

STATEMENT OF THE FACTS

4. Medical Supply Chain, Inc. is a Missouri corporation in good standing with the Secretary of State. **A7 para 18** Medical Supply was formed in October of 2000, by Sam Lipari to commercialize over three years of research and development spent creating an information technology infrastructure standard that allowed hospitals to manage their own procurement including bidding, logistics, and purchasing documentation. A Dun & Bradstreet report dated October 31st stated the company had a clear

credit history and a strong financial condition. Mr. Lipari's innovation is an electronic marketplace that generates profound savings over existing industry offerings. This service innovation works via the Internet so every hospital and supplier can utilize an open market. These automated services increase competitiveness by managing hundreds of thousands of products and thousands of suppliers, allowing hospital-purchasing officers to easily exploit the competitive effect on prices. Medical Supply has shown that this innovation guarantees 20% savings in cost to hospitals, which equals at least a 5% increase in each hospital's bottom line.

5. Sam Lipari put great effort into selecting an appropriate national bank with a full range of services, including nation wide checking, escrow services, short and long term credit facilities, receivables financing and international clearing of transactions between thousands of hospitals and their suppliers world wide. Several national banks were evaluated and on April 15, 2002 US BANCORP NA subsidiary, US BANK was selected because it also had an investment arm called US BANCORP PIPER JAFFRAY that targeted healthcare and participated as underwriter and funds manager for pre public offering healthcare manufacturers and service providers in addition to acting as underwriter for corporate bonds of

healthcare companies. Mr. Lipari also established a personal checking account with US BANK following an investigation by Chex Systems, Inc.

6. On June 5th, 2002 Sam Lipari contacted US BANCORP PIPER JAFFRAY'S to speak with Heath Lukatch, managing director of the US BANCORP PIPER JAFFRAY healthcare venture fund about Medical Supply being considered for venture capital and other financial services. Medical Supply was instructed to send an executive summary of its business plan via email. Sam Lipari sent the summary and financial projections for Medical Supply with a restriction on disclosure notice. US BANCORP PIPER JAFFRAY made no response to the receipt of the executive summary and financial projections from Medical Supply. Again, Sam Lipari contacted US BANCORP PIPER JAFFRAY and his calls were not taken and not returned. Sam Lipari also attempted to speak to a US BANCORP PIPER JAFFRAY venture fund manger at their San Francisco office but again, his calls were not taken or returned.

7. Leading healthcare strategists advised Sam Lipari on the need to quickly enter the market and take advantage of the opportunity created by the healthcare industry's sudden willingness to reject the existing supply distribution channels which are primarily maintained by Group Purchasing Organizations. The New York Times began uncovering corruption

performed by Group Purchasing Organization including price rigging and the elimination of access to innovative medical devices and supplies. The New York Times articles showed the lack of a competitive market imperiled the lives of patients. During these advisory meetings the first news of WorldCom's debacle was breaking. Medical Supply's management felt that with the exception of US BANCORP PIPER JAFFRAY, which concentrated its investments in healthcare; much of the assets venture funds reported were in fact overvalued equities in telecom technology companies further depressing the venture capital markets.

8. Medical Supply resolved to develop a way to internally capitalize a roll out of its supply chain empowerment program and management technology. Instead of seeking venture capital funds from US BANCORP PIPER JAFFRAY Medical Supply created its own capitalization plan that would utilize the intellectual assets of its healthcare supply chain property by offering a comprehensive 12 month education and healthcare supply chain certification program. **A8 para 18**

9. Medical Supply's plan put representatives in the field nationwide that possessed the knowledge and skills to communicate with all levels of hospital management and assist in the adoption of Medical Supply's health system empowerment program. **C19 para 42-45** The representatives would

pay for their certification and be responsible for their marketing and sales operations, consistent with organizations that rely on independent manufacturer's representatives. Since Medical Supply's services were new to the market, Sam Lipari and his advisors decided that it would be critical for the certification fee to be held in escrow until the candidates had a chance to meet Medical Supply's certification team and evaluate their abilities in mastering healthcare supply chain empowerment knowledge. After a week long orientation, the candidates would decide whether or not to commit to the certification program and Medical Supply reserved the opportunity to reject any candidates it felt would not succeed in the program.

10. Medical Supply developed a curriculum and contracted with the industry's foremost logistics and supply chain experts to provide instruction during the weeklong orientation and advise candidates throughout the certification process that included the 12-month practicum. Medical Supply made arrangements to include information and presenters from companies with expertise in healthcare supply chain fundamentals and financial analysis of healthcare purchasing in addition to human resource evaluations. Medical Supply representatives would then be able to assist with products, services, and technologies outside of those offered through Medical Supply's capabilities that would complement Medical Supply's supply chain

empowerment program in allowing a health system/hospital to break free of its Group Purchasing Organization supplier.

11. Beginning August 1st, 2002, Medical Supply advertised nationwide to recruit experienced account executives and sales professionals. Medical Supply processed hundreds of applicants with details of resumes, job history, and financial disclosure. For the first of what were to be quarterly classes, Medical Supply selected 15 candidates that had the potential to succeed as independent representatives for its services. After numerous telephone interviews ten applicants had committed to becoming certification candidates and attend the certification classes beginning the first week of December 2002. During this same time, Medical Supply was preparing the escrow account system that the candidates would utilize when making payment.

12. The US BANK representative Becky Hainje offered to provide escrow account services and on October 3, 2002 put Sam Lipari in contact with, PRIVATE CLIENT GROUP in St. Louis, Missouri. Sam Lipari described Medical Supply's need for escrow accounts to vice president BRIAN KABBES, and emailed him an escrow contract that Medical Supply counsel had prepared for its candidates. BRIAN KABBES asked questions about the candidates, the certification program and how many candidates

had been selected so far. Sam Lipari negotiated with BRIAN KABBES to reduce the escrow fee per account since all escrow accounts would be identical, and US BANK had refused to have the funds in a single account. BRIAN KABBES agreed to lower the fee for US BANKS escrow agent services from the normal of \$1,500 to \$600 per account.

13. After reviewing the escrow contract, on October 5th, BRIAN KABBES communicated to Sam Lipari that the language of paragraph 10 “Security Interests” should be changed so that a security interest for US BANK could be created in the \$5,000 portion of the escrow that became Medical Supply’s property the moment a candidate submitted their certification funds into escrow. Medical Supply altered its escrow contract to conform to BRIAN KABBES’ suggestion and on or about October 7th emailed the changes to BRIAN KABBES. BRIAN KABBES and US Bank were identified as the escrow agent in the escrow agreement and BRIAN KABBES’ address was included in the body of the agreement.

14. On October 8th, US BANK’s Kansas City manager told Sam Lipari that there would be no problems with the escrow accounts and that BRIAN KABBES had told her that they were a “slam dunk.” **C22 para 49, C26 para 59** They arranged for Sam Lipari to meet with Doug Lewis, the

commercial loan officer for a line of credit based on the portion of the escrow accounts Medical Supply was guaranteed.

15. On October 9th, BRIAN KABBES called to request an additional change in the escrow contract. He supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US BANK TRUST DEPARTMENT. Medical Supply agreed to the additional change and modified the investment instructions exactly as BRIAN KABBES instructed. Medical Supply was told there were no more changes to be included so the certification and escrow agreements were sent out so candidates would have a chance to review the material before their November 1st deadline, which required their funds to be in the US BANK escrow accounts.

16. On October 10th, Sam Lipari delivered the Medical Supply business plan and associate program with all contracts and supporting documents to Douglas Lewis, at the US BANK, Independence, Missouri to make application for a line of credit utilizing escrow accounts as collateral. The business plan and associate program booklets each had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained in them. A letter of

introduction also stated the contents were protected with restricted disclosure and possession of the materials.

17. On October 15th, BRIAN KABBES called Sam Lipari and informed him that they had turned down the escrow accounts because of the USA Patriot Act. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for MEDICAL SUPPLY Sam Lipari was shocked and stunned and handed away the phone, where BRIAN KABBES repeated again The Patriot Act as the reason the accounts were denied. Medical Supply researched the act and discovered it did not apply to Medical Supply, **A3 para 5** already an established customer of US Bancorp for personal and corporate banking services; or the independent representatives, for each of whom Medical Supply has a fourteen page background and financial history. Medical Supply contacted all levels of US Bancorp management **A3 para 5** explaining the reliance Medical Supply had on US Bancorp fulfilling its agreement to provide escrow accounts, the inability to replace these services on such a short notice and the staggering damages Medical Supply would suffer. **A4 para 6** US Bancorp's highest corporate officers still maintained the refusal to provide the escrow accounts based on the USA PATRIOT Act. Each of these conversations was recorded and excerpts from the transcripts

appear in Medical Supply's pleadings. US Bank's Kansas City manager was told by BRIAN KABBES that;" no more time would be spent," by US Bancorp on Medical Supply's escrow accounts, the bank would not change its decision. She relayed this conversation on a taped answering machine which was also transcribed for the pleadings.

18. Sam Lipari had asked US Bancorp officers after the refusal if a conflict of interest **A5 para 6** with US Bancorp's affiliated healthcare technology and supplier companies had caused the interruption in the pattern and activity of providing the escrow accounts. He explained the negotiations, the alterations and final approval process they had gone through with BRIAN KABBES. Sam Lipari also explained that much of US Bancorp's investments were in Medical Supply's relevant market and the interruption in US Bancorp's performance did not happen until US Bank's Independence office had obtained Medical Supply's business plan, revealing Medical Supply's potential to provide efficiency and reduce healthcare supply prices. US Bancorp's PRIVATE CLIENT trust officers denied a conflict of interest by strangely stating they had not given out Medical Supply's business plan, a question that had not been asked. It was especially alarming since the St. Louis PRIVATE CLIENT GROUP **A19 para 21** had not been given the plan and could not have obtained it from US BANK in

Independence under the nondisclosure instructions he had given Doug Lewis and which were stated on the documents. This caused Sam Lipari to fear his trade secret information might become compromised. In 1995, two small Group Purchasing Organizations exploited a confidential relationship with Sam Lipari to misappropriate an innovative services pricing business model utilizing trade secret information. **C32 para 73** Mr. Lipari was unable to protect his trade secrets or obtain compensation. As Group Purchasing Organizations merged; Mr. Lipari's innovation became the model used by most of the 1.3 trillion dollar healthcare industry.

19. On November 6th, Sam Lipari obtained the documents he had entrusted with Doug Lewis at US BANK in Independence. Upon returning to Medical Supply's office Sam Lipari inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents. There are tractor marks from a copy or fax machine on the back of all the pages. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied. There were no marks on the back of these documents. **C32 para 73** The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices,

market strategies, revenue model, service structure, formula, algorithms, and financials including 5 year details, 5 year condensed, and break even analysis. Sam Lipari is fearful this information will fall into the wrong hands further blocking or eliminating entry to market.**C32 para 74**

20. Medical Supply approached the law firm Shook, Hardy, & Bacon to provide escrow agency services at US BANK to try to mitigate the injury caused by US Bancorp's interruption and refusal to deal. The firm declined because of concerns over the USA PATRIOT Act issue raised by US Bancorp.**A19 para 59** Medical Supply approached other candidates to provide escrow agency services but they also declined. Medical Supply found one other national bank in its region with the capability of providing the unique financing instrument it had created with US Bancorp but not in time for the November 1st funds Medical Supply depended on. Medical Supply also investigated US Bancorp's conduct in trying to control the capitalization of healthcare technology firms and suppliers and realized there were strong reasons to fear US Bancorp would continue to misuse the USA PATRIOT Act and make a "Suspicious Activity Report" against Medical Supply that would destroy the company's chances of ever obtaining the high level banking services it would need to provide the nation's hospitals with lower prices and competitive markets for medical devices and supplies.

21. US BANCORP NA, **A8 para 19** in combination with its wholly owned subsidiaries US BANCORP PIPER JAFFRAY, PRIVATE CLIENT GROUP and US BANK, along with their affiliate UNKNOWN HEALTHCARE SUPPLIER (herein, collectively; "US Bancorp") is the dominant venture fund and investment banking underwriter for capitalizing healthcare technology and healthcare supplier firms through seed capital, venture capital, bonds, initial public offerings of healthcare technology and healthcare supplier firms' securities and the marketing of healthcare technology and healthcare supplier firms' stock issues. **C9,10 para 24-29** US Bancorp devotes 70% of its venture funds to healthcare technology and supplier companies. US Bancorp is the largest venture fund investor of pre public offering healthcare technology and supplier companies.

US Bancorp on its healthcare venture fund web site states that it closely supervises the management of the healthcare companies it invests in. The healthcare venture fund also states it places US Bancorp officers on the boards of these healthcare technology and supplier companies when US Bancorp decides it is needed. US Bancorp leverages its monopoly power in the capitalization of healthcare technology and supplier companies through the acquisition and exercise of monopoly power in investment analysis for stimulating market interest and demand (increasing prices) for healthcare

technology and healthcare supplier firms' securities including private placements, bonds, and stocks. US Bancorp uses this monopoly power to increase demand and price for equities including venture funds and securities in healthcare technology and healthcare supplier firms it controls or has ownership interest in.

22. US Bancorp determined that twenty three billion dollars could be saved in the cost of healthcare supplies with the development of electronic marketplaces to efficiently handle the eighty three billion dollar hospital supply procurement market. **C11 para 27** US Bancorp used this information to acquire interests in fledgling healthcare electronic marketplaces. In partnership with other underwriters, US Bancorp aggressively promoted these companies and profited from the increase in securities prices obtained.

C11 para 28

23. At the same time, US Bancorp developed strong affiliations with the dominant healthcare supply distribution channels called Group Purchasing Organizations or "GPO's." The GPO's are the beneficiaries of the distribution system's inefficiencies. US Bancorp convinced the two dominant GPO's; the publicly traded company Novation and the privately held company Premier that together control over one half of the national healthcare supply market, to acquire the fledgling electronic market places to

prevent eliminating the inefficiency that was the source of the GPO's profit.

The electronic marketplace technology that had the potential to remove inefficiencies from healthcare supply procurement was diverted to create mere web page store fronts for supplies sold through the same old inefficient but profitable GPO distribution channel.

24. US Bancorp assisted in underwriting their securities and debt to accomplish the mergers, acquiring ownership interests in the new conglomerates and exchanging directors. US Bancorp then used its influence over the dominant GPO's including the director it placed on the board of Premier to negotiate anticompetitive sole source contracts with healthcare technology and supplier firms US Bancorp provided venture funding and public underwriting for. US Bancorp then used its monopoly power **A10 para 25** in healthcare technology stock analysis to provide coverage in the media, advertising the marketplace advantages of the companies that had secured these exclusive and anticompetitive contracts. US Bancorp then profited from manipulating the publicly traded prices of the securities because it retained significant equity in the healthcare technology companies it provided venture funding and underwriting for. These anticompetitive contracts and the kickbacks of equity and revenue to Premier, Novation, and their corporate officers along with the high healthcare supply prices they

caused became the subject of a New York Times investigative series and United States Senate, Federal Trade Commission and General Accounting Office investigations in 2002.

SUMMARY OF THE ARGUMENT

25. Medical Supply argues that it provided facts from which the only reasonable conclusion could be that it (1) will suffer irreparable harm unless the injunction issues; (3) the threatened injury to Medical Supply outweighs any harm the proposed injunctions may cause US Bancorp; (4) the injunctions would not be contrary to the public interest; and (2) there is a substantial likelihood Medical Supply ultimately will prevail on the merits of its *prima facie* antitrust and misappropriation claims. Medical Supply asserts that the court did not shift the burden of controverting the facts and allegations to US Bancorp once a *prima facie* antitrust case had been made. Furthermore, the sole defense of US Bancorp required it to bear the burden of proving the refusal to deal increased marketplace efficiency. When US Bancorp provided no affidavits or other showing of fact and made no assertions of material facts and developed no controverting legal arguments, the trial court committed an error of law. In addition to the error of not shifting the burdens to US Bancorp, Medical Supply asserts that the preliminary injunctive relief sought related to antitrust and trade secret

misappropriation is prescribed by statute and the court was in error by not adjusting its equity conclusion of law away from extraordinary relief to appropriate relief for a movant clearly entitled.

ARGUMENT

I. Whether the trial court erred in its conclusions of law in denying preliminary injunctive relief prescribed by the Clayton antitrust Act and the Kansas Trade Secret Misappropriation Act without findings of fact or an evidentiary hearing and where neither facts nor claims were controverted by the opposing party.

STANDARD OF REVIEW

26. The district court's grant of a preliminary injunction is reviewed under an abuse of discretion standard. See *Elam Constr., Inc. v. RTD*, 129 F.3d 1343, 1346 (10th Cir. 1997), cert. denied, 118 S. Ct. 1363 (1998) (citing *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir. 1995)). See also *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991) ("We will not set aside a preliminary injunction unless the district court abuses its discretion, commits an error of law, or is clearly erroneous in its preliminary factual findings" (citations omitted)). The appellate court has long held that "[a]n abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Chemical Weapons*

Working Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485, 1489 (10th Cir. 1997) (quotation omitted).

27. Medical Supply has shown through facts and allegations in its pleadings **H29 para 19,19.1** that it risks irreparable harm from both the imminent threat US Bancorp **A17 para 50, A19 para 50** will use malicious USA PATRIOT Act reporting to destroy **A5 para 7,8** Medical Supply's ability to compete with US Bancorp's healthcare technology and supplier companies, and that US Bancorp is likely to continue copying and transmitting Medical Supply's confidential trade secret information to US Bancorp's healthcare distribution affiliates to counter or destroy Medical Supply's ability to enter their markets and provide lower prices. **B2 para 4**

28. Like the 1995 misappropriation, the value of an innovation that revolutionizes an entire industry cannot be measured and no remedy at law is capable of providing appropriate redress for the economic value of the lost opportunity. Medical Supply's business plan is very conservative and does not project beyond acquiring 10% of the healthcare supply market, yet that amount is beyond the reasonable expectation of a damage award.

29. Finally, Medical Supply's pleadings consistently expressed the harm to hospitals **C5 para 10** and the public **A14 para 37, A15 para 14** in

decreased access to healthcare services and devices, leading to needless suffering and loss of life.

30. Under 15 U.S.C. § 2 Monopolization, Medical Supply must plead: "(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." See *TV Communications*, 964 F.2d at 1025 (quotations and citations omitted). Medical Supply sufficiently pleads its monopolization claim. Medical Supply alleges that the US Bancorp obtained monopoly power. Monopoly power requires proof of both power to control prices and power to exclude competition. See *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d at 967; *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc.*, 783 F.2d 159, 163-64 (10th Cir. 1986). Medical Supply's allegation that US Bancorp's denial of escrow services successfully prevented Medical Supply from entering the market **A13 para 35** with a healthcare electronic marketplace illustrates US Bancorp's ability to exclude competition against US Bancorp's healthcare combine. **A14 para 36** Additionally, because US Bancorp is the dominant provider of capitalization services to healthcare technology companies and suppliers, US Bancorp and its subsidiaries have the power to control prices in the equities and venture

fund markets; and US Bancorp and its healthcare technology companies and suppliers have the power to create sole source and exclusionary contracts with healthcare distributors, controlling prices of healthcare supplies. Thus, Medical Supply alleges that US Bancorp possess the components of monopoly power. **A 13 para 34** Finally, Medical Supply alleges that US Bancorp willfully obtained that power as a consequence of their unlawful denial of escrow accounts Medical Supply relied upon for capitalization and other wrongful conduct rather than a superior product, business acumen, or historic accident. As a result, Medical Supply has adequately pled its monopolization claim and has a substantial likelihood to prevail on the merits.

31. Under a claim for discrimination in furnishing services prohibited by the Clayton Antitrust Act (15 U.S.C. §13 (e)), Medical Supply must show US Bancorp contributed 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. Medical Supply has alleged that US Bancorp has provided the healthcare technology companies Neoforma, Inc. and Eclipsis Corp. with capitalization services. Medical Supply has shown US Bancorp has provided capitalization services to healthcare supplier companies Omnicell, Inc. and

Aspect Medical Systems, Inc. Medical Supply has alleged that the US Bancorp discriminated **A14 para 36** in favor of providing services to these companies because US Bancorp profited from the sale of their equities bonds or shares in venture funds used in their capitalization. Medical Supply has shown US Bancorp discriminated against Medical Supply because Medical Supply had a workable plan to capitalize its entry into commerce without using the underwriting services of US Bancorp. Medical Supply has shown US Bancorp was found guilty of anticompetitive acts in threatening to withhold critical investor analyst coverage of another healthcare supplier company; Antigenics, Inc. when it sought to use capitalization underwriting of US Bancorp's "would-be" competitor. This is further proof of US Bancorp's discriminatory intent in withholding escrow accounts from Medical Supply. Under 15 U.S.C. §16, such a judgment if made on the basis of antitrust laws, would go a great distance in establishing Medical Supply's basis for a claim. Section 16 states such a judgment "shall be *prima facie* evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties." In this instance, the judgment was on the basis of securities

regulation, but the conduct is actionable under Sherman Act § 2 for attempting monopolization.

32. Medical Supply also showed that US Bancorp used a “sham” official reason to discriminate against Medical Supply for denial of escrow accounts. The sham use of official or administrative government power to obstruct a competitor from entering the market place is not immunized under the doctrine from *Eastern R.R. Pres. Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961), but instead conduct fulfilling a substantial part of an antitrust complaint. See *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 512 (1972). **H22 para 10.4** Thus, Medical Supply has successfully pleaded a violation of 15 U.S.C. § 13 (e) Discrimination in Services and has a substantial likelihood to prevail upon the merits.

33. The “sham” use of official or government power in utilizing the USA Patriot Act as the reason to deny Medical Supply escrow accounts was shown to US Bancorp management and highest corporate officers to be an erroneous understanding of the act’s implementation. Medical Supply and its independent representative candidates were not subject to the increased “know your customer” requirements. Therefore, a defense based on an “efficiency” rationale even in the narrowest interpretation of *Aspen Skiing Co. v. Highlands Skiing Corp.*, 472 U.S. 585 (1985) in favor of US Bancorp

fails because there were no valid increases in cost to justify discriminating against Medical Supply in providing banking services. This is another reason Medical Supply is likely to prevail in an antitrust claim against US Bancorp.

34. The showing of facts indicate US Bancorp through its employees and subsidiaries misappropriated Medical Supply's business plan and associate program when US BANK disassembled the documents, copied them and faxed them to PRIVATE CLIENT GROUP in St. Louis, Missouri. The showing made and presentation of physical evidence indicating US Bancorp's disassembly, copying and faxing of the trade secrets was a disclosure or use without express or implied consent by Medical Supply and in fact against the express consent and written notice of Medical Supply. US Bancorp's Independence office of US BANK acquired Medical Supply's business trade secrets under circumstances giving rise to a duty to maintain their secrecy and limit their use as stated in the nondisclosure notices and the instructions of Sam Lipari to Doug Lewis. US Bancorp breached its duty to maintain Medical Supply's trade secrets and Medical Supply is likely to prevail in court.

35. The showing of facts and evidence indicates Medical Supply and the public will suffer irreparable harm unless the injunction is issued. Medical Supply will be forced to close its offices and will not be able to pay its

obligations to people who have agreed to provide services to Medical Supply. Medical Supply has shown that it does not have the funds on hand to meet its December obligations. Medical Supply has shown that it is in danger of negative reporting under the USA PATRIOT Act and without an injunction's protection, Medical Supply will not be able to attempt to set up escrow accounts at another national bank where a negative report from the US Bancorp would destroy Medical Supply as a viable competitor to the US Bancorp's healthcare supply combine. Without Medical Supply receiving injunctive relief and having the chance of obtaining capitalization at a competing bank, there will be no competitor entering US Bancorp's healthcare supply marketplace and lowering cost to hospitals. The showing of facts indicate over 2000 hospitals are jeopardized by Medical Supply's inability to go to a competing national bank as long as the US Bancorp threatens it with sham USA PATRIOT Act enforcement or malicious reporting.

36. There can be no adverse affect to US Bancorp's legitimate business interests if they are temporarily barred from making suspicious activity reports, which endanger Medical Supply. Since Medical Supply will not be an escrow account customer of US Bancorp during the duration of this

injunctive relief, there can be no legitimate basis for making a suspicious activity report against Medical Supply.

37. The threatened injury of sham or malicious USA PATRIOT Act Suspicious Activity Reports filed against Medical Supply by US Bancorp outweighs the harm that the preliminary injunctive relief may cause the US Bancorp.

38. The threatened injury of having proprietary business trade secrets misappropriated by US Bancorp and their healthcare companies which may use the information to develop an effective strategy to keep Medical Supply from competing to lower healthcare supply prices has the potential of destroying Medical Supply's value proposition and preventing it from earning any revenue or return on its investment.

39. The injunctive relief, if ordered, will not adversely affect the public interest. Medical Supply has made a showing of facts that US Bancorp's USA PATRIOT Act reporting is a "sham" use of the act's "know your customer requirement" which has not become law and is indefinitely postponed. There can be no adverse affect to the public interest if US Bancorp is temporarily enjoined from making suspicious activity reports against Medical Supply, especially in light of Medical Supply's allegations and supporting evidence in "Plaintiff's Amended Complaint," that US

Bancorp's personnel had not received the training as required by the act and that US BANK does not have a designated compliance officer in its Corporate Trust department as required by the act.

40. Injunctive relief for trade secret misappropriation, if issued, will not adversely affect the public interest. Medical Supply has shown in the statement of facts that US Bancorp has misappropriated business trade secrets Medical Supply planned to use to make healthcare supply purchases more efficient resulting in lower prices and greater access to healthcare, promoting the public interest. Medical Supply has shown in "Plaintiff's Amended Complaint" that US Bancorp opposes this public interest and has withdrawn banking services to prevent Medical Supply from accomplishing this goal, which would increase competition and lower prices for companies the US Bancorp owns or has a sizeable interest in.

41. For the above stated reasons there is no justification for a bond requirement to be imposed on Medical Supply for the proposed injunctive relief from USA PATRIOT Act reporting and trade secret misappropriation. The enjoinder of the US Bancorp will not add any costs damages or liabilities if it turns out that US Bancorp was improperly enjoined. US Bancorp has no legitimate interest in the conduct to be enjoined.

42. Mandatory injunctive relief is not prohibited and Medical Supply believes when the burdens related to antitrust claims are properly shifted, Medical Supply has a strong likelihood of success in its action. Medical Supply also believes it has met the burden of showing substantial irreparable harm, the balancing and public interest tests. In *SCFC* the appellate court stated that "in cases where the requested preliminary injunction alters the status quo . . . the movant will ordinarily find it difficult to meet its heavy burden of showing that the four factors, on balance, weigh heavily and compellingly in its favor, without showing a substantial likelihood of success on the merits." *SCFC*, 936 F.2d at 1101 n.11.

43. The court ruled that the relief was barred because it was "all the relief sought." "[T]he terms 'all the relief to which the movant would be entitled' or 'all the relief sought' have . . . been the source of confusion because, read literally, they appear to describe any injunction where the final relief for the plaintiff would simply be a continuation of the preliminary relief." *Tom Doherty Assoc., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). There is no reason, however, to disfavor a preliminary injunction simply because "the plaintiff would get no additional relief if he prevailed at the trial on the merits." *Id.* (internal quotation marks omitted). The only reason to disfavor a preliminary injunction that grants substantially all the relief

sought is if it would "render a trial on the merits largely or completely meaningless." *Id.* at 35.

44. Any preliminary injunctive relief granted Medical Supply would be undone if Medical Supply did not ultimately prevail on the merits at trial, therefore the relief sought did not, as US Bancorp contends, afford Medical Supply substantially all the relief it might recover. This interim relief, quite simply, was not "complete." *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988).

45. The court's reluctance to grant the extraordinary relief of equity, even in an extreme example where no facts or claim theories are controverted neutralizes the important public policy of the US Congress and the Kansas legislature when they crafted relief in antitrust and misappropriation cases that could prevent further harm before a final resolution on the merits. 15 U.S.C. § 26 states: "Any person, firm, corporation, or association *shall be entitled to sue for and have injunctive relief*,..." (emphasis added). Both statutes recognized the likelihood the prohibited conducts would lead to irreparable harm and provided injunctive relief as the primary mechanism for redress.

II. Whether the trial court erred in reaching negative findings on the merits of preliminary injunctive relief.

46. While in the context of a preliminary injunction hearing the court may consider sworn proof including affidavits, including those based upon

information and belief or hearsay (though it may affect the weight given), depositions, transcripts of prior hearings and live testimony, see James W. Moore, Moore's Federal Practice § 65.23 (1999),

47. The trial court determined that Medical Supply had failed to meet its burden of proof, ruling a negative finding. A negative finding will not be reversed on appeal absent arbitrary action, a total disregard of uncontroverted evidence, or an extrinsic consideration such as bias, passion, or prejudice. See *Thomason v. Stout*, 267 Kan. 234,238,978 P.2d 918 (1999).

48. The record indicates that in the pleadings and oral arguments, the only substantial competent evidence offered to the court was provided by Medical Supply in support of its claims and to justify its entitlement to preliminary injunctive relief. The appellate court's power to reverse fact finding begins and ends with determining whether there is substantial evidence that, if believed, supports the facts found. "Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." *State v. Jacques*, 270 Kan. 173,183-84,14 P.3d 409 (2000); *Dalmasso v. Dalmasso*, 269 Kan. 752, 758,9 P.3d 551 (2000). There was no evidence on offer to contradict Medical Supply's entitlement to relief. Medical Supply believes the court has totally disregarded its uncontroverted evidence.

49. In conclusion, Medical Supply Chain, Inc. asks the court to grant Emergency preliminary injunctive relief that it determines is appropriate to maintain the status quo and reasonable attorney's fees. The December 12 hearing sought non-mandatory relief from USA PATRIOT Act reporting and trade secret misappropriation that would have helped maintain the status quo. Medical Supply Chain, Inc. asks that at a minimum this relief be granted. Alternatively Medical Supply asks the court to remand back the decisions denying preliminary injunctive relief to the trial court for findings of fact and an evidentiary hearing.

STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing PLAINTIFF/APPELLANT'S OPENING BRIEF was furnished by U.S. Mail or delivered to the following on this the 24th day of December, 2002.

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United States Court of Appeals

For the Tenth Circuit

Docket No. 02-3443 (10th Cir.)

Case No.: 02-2539-CM

Medical Supply Chain, Inc.

v.

US Bancorp, NA; US Bank; Private Client Group, Corporate Trust, Institutional
Trust And Custody, And Mutual Fund Services, LLC.;
US Bancorp Piper Jaffray; Jerry A. Grundhofer;
Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes;
and Unknown Healthcare Supplier

Interlocutory Appeal from
the United States District Court
for the District of Kansas

REPLY BRIEF OF THE APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Counsel does not request oral argument.

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i EXTENSION OF TIME FOR APPELLEE BRIEF

The Appellees (hereafter US Bancorp) filed a motion for extension of time in which to file their answer brief, one day beyond the date the it was due and seven days beyond the deadline for a motion for extension of time under 10th Cir. R. 27.4(F). Medical Supply has diligently pursued this appeal and expedited every procedural requirement against the clock in order to obtain relief from impending actions by US Bancorp that threaten Medical Supply's capacity to pursue its claims, even its very existence. It is with great indignation that Medical Supply received the reason given by US Bancorp stating that they believed in error Medical Supply had missed one deadline regarding the binding of appendices already timely filed. Implicit in US Bancorp's motion is that the Appellees had the expectation that this court would cause Medical Supply to forfeit this appeal as a consequence. It is incredulous that US Bancorp would wait till the day after the deadline to check to see if their victim had been vanquished and finding their mistake, use it as an excuse to miss two serious deadlines. For US Bancorp to demonstrate in using this sole reason in its motion for extension of time that it has the expectation that this forum will not treat US Bancorp and Medical Supply equally under the law is a monument to prejudice Medical Supply has suffered to date.

I. ANSWER TO APPELLEE'S ASSERTION ON RULES

Medical Supply certified that the hearing transcripts were not required. The minutes from each hearing are an accurate record of the Hon. Judge Murgia's decisions. Medical Supply determined that the defense counsel made no contribution to the dialogue on issues being appealed. US Bancorp does not reference specific statements of their counsel or the court in their appellee arguments. The transcripts added to the record confirm that US Bancorp's counsel was unfamiliar with the motions and pleadings that were the subject of the two hearings. US Bancorp's counsel stated repeatedly and erroneously the issues were health insurance and pricing and appeared at all times to be very far afield from the subject matter of the case.

II. ANSWER TO ASSERTION COURT SHOULD BE AFFIRMED

US Bancorp asserts that the hearings on November 18 and December 12, 2002 were evidentiary hearings. Under Rule 52(a), a district court must "find the facts specially and state separately its conclusions of law . . . in granting or refusing interlocutory injunctions." Fed. R. Civ. P. 52(a). The Rule seeks "to (1) engender care on the part of trial judges in ascertaining the facts; and (2) make possible meaningful appellate review." *Wolfe v. New Mexico Dept. of Human Services*, 69 F.3d 1081, 1087 (10th Cir. 1995). "Findings of fact by a trial court should be sufficient to indicate the factual basis for the court's general conclusion as to ultimate facts, . . . should indicate the legal standards against which the evidence

was measured [,a]nd . . . should be broad enough to cover all material issues."

Otero v. Mesa County Valley Sch. Dist. No. 51, 568 F.2d 1312, 1316 (10th Cir. 1977).

The minutes and the absence of a written order do not indicate anything other than the evidence Medical Supply proffered in motions and in both hearings was not accepted or evaluated because the court determined the evidence was insufficient as a matter of law to meet the burden the court believed was required for preliminary injunctive relief. This court has not ruled evidentiary hearings are required or mandatory for consideration of preliminary injunctive relief. *Reynolds and Reynolds Co. V. Eaves*, No. 98-6026 (10th Cir. 1998) dismissing *Battle v. Fields*, 59 F.3d 178, 1995 WL 378436 (10th Cir. 1995) (unpublished opinion)

A. UNNECESSARY TO PROVE IRREPARABLE HARM

Plaintiffs are accorded the presumption of irreparable harm when statutes are being enforced. In *US v. Diapulse*, 457 F.2d 28 the court stated "...the function of a court in deciding whether to issue an injunction authorized by a statute of the United States to enforce and implement Congressional policy is a different one from that of the court when weighing claims of two private litigants."

While the court in *Diapulse* was concerned with enforcement of an FDA statute, the following applies equally to Sherman and Clayton Act statutes prescribing relief in equity to enforce Congressional policy:" The district courts are

given jurisdiction to restrain violations of the statute (21 U.S.C. Sec. 332(a)); the legislative goals are the framework within which the court operates in deciding whether to grant injunctive relief.” *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944). “No specific or immediate showing of the precise way in which violation of the law will result in public harm is required.” *Shafer v. United States*, 229 F.2d 124 (4th Cir.), cert. denied, 351 U.S. 931, 76 S.Ct. 788, 100 L.Ed. 1460 (1956); *Walling v. Brooklyn Braid Co.*, 152 F.2d 938 (2d Cir. 1945); *United States v. Ingersoll-Rand Co.*, 218 F.Supp. 530 (W.D.Pa.), aff’d 320 F.2d 509 (3d Cir. 1963).” *Diapulse*, 457 F.2d at 29

The appellees have submitted to antitrust relief and are not subject to the “balancing of equities.” US Bancorp, like the local government units in *City and County of San Francisco*, 310 U.S. 31-32 has received a grant from the government in the form of a charter as a bank holding company national association that requires US Bancorp to be under the jurisdiction of Congressional policy, specifically including antitrust injunctive relief. (Aple. App., pg.15; Aplt. App., Part C at 8) The Bank Holding Act under 12 USC §§1849, 1850 subjects US Bancorp to antitrust litigation. 12 USC §1849 (f) defines “antitrust laws.” For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act), the Act of October 15, 1914 (*the Clayton Act*), and any other Acts in parimateria.” [Emphasis added]

Regarding injunctive relief against USA Patriot Act reporting in circumstances as Medical Supply points out where the act does not apply and US Bancorp does not have jurisdiction to report or disclose Medical Supply's financial information or misappropriated trade secret market data, planning, algorithms, pricing and projections to others; 12 USC § 3418 Right To Financial Privacy states:"...injunctive relief *shall* be available to require that the procedures of this chapter are complied with...." [Emphasis Added]

The 10th Circuit has recognized that it is unnecessary for Medical Supply to prove irreparable harm in seeking an antitrust-based preliminary injunction or a preliminary injunction based on a Kansas statute providing relief from trade secret misappropriation. *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d at 260 (C.A.10 (Kan.), 1981) states:" Moreover, it is not necessary that the Railroads show that they will suffer irreparable harm if the injunction is denied. When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown." The court in *Atchison, T. & S. F. Ry. Co.* cited *State of Tennessee v. Louisville and Nashville R.R. Co.*, 478 F.Supp. 199, 210 (M.D.Tenn.1979), stating:

"Since Congress has expressly authorized federal courts to grant injunctive relief in furtherance of the express purposes of Section 306, it is not required that irreparable harm or inadequacy of legal remedies first be shown. *United*

States v. City and County of San Francisco, 310 U.S. 16, 30, 60 S.Ct. 749, 757, 84 L.Ed. 1050 (1940).”

The court in both lower hearings and in the 10th Circuit hearing on Medical Supply’s motion for emergency pre-hearing relief erroneously used traditional equity grounds to deny Medical Supply preliminary injunctive relief. *Atchison, T. & S. F. Ry. Co.* shows that this was an abuse of discretion: “As we stated in *Shadid v. Fleming*, supra, 160 F.2d at 753: ‘Where an injunction is authorized by statute it is unnecessary for plaintiff to plead and prove the existence of the usual equitable grounds, irreparable injury and absence of an adequate remedy at law. It is enough if the requirements of the statute are satisfied. . . .’ We agree that under *United States v. Brown*, 331 F.2d 362 (10th Cir. 1964), the district court’s decision to deny the preliminary injunction may only be overturned if the court abused its discretion in reaching that decision. We hold that in applying traditional equitable criteria to determine whether to grant or deny an injunction authorized by statute that the court abused its discretion. (citations omitted) “*Atchison, T. & S. F. Ry. Co* 640 F.2d at 261-262

By the time of the second hearing and certainly at the point Medical Supply sought emergency pre-hearing relief, Medical Supply was experiencing some of the irreparable harm it described was imminent in its motions “ . . . insolvency is irreparable harm - *Miami Interstate Realty v. Paynter*, 807 F2d 871, (10th Cir 1986). Medical Supply had consistently argued that consumers would be hurt and

identified a group of 2000 hospitals needing the services Medical Supply was bringing to market in order to reduce costs and stay in operation. Their patient constituencies would suffer physical harm and death from the loss of access to healthcare services if Medical Supply is unable to enter the relevant market and introduce competition in hospital supplies. Similar group harm has been recognized as irreparable when the health and welfare of a population is threatened: "Numerous cases have held that reductions in AFDC benefits, even reductions of a relatively small magnitude, impose irreparable harm on recipient families." *Beno v. Shalala*, 30 F.3d 1057, 1063-64 n. 10 (9th Cir.1994)

There is a strong public policy impetus to have the Congressional private enforcement intent in antitrust statutes function to correct a problem of insufficient competition in hospital supplies that was the subject of Senate hearings in April of 2002 and will be again in June of this year. After filing this appeal, General Electric's union labor force held a nationwide strike over rising healthcare costs. The effort to focus public attention on the crisis cost one worker her life.

It is in error to be dismissive of factual evidence, knowledge, trade publication reference and management expertise exhibited in pleadings and affidavits attested to by Samuel Lipari the president of Medical Supply Chain, Inc. This is not the "business speculation" of *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096 (C.A.10 (Utah), 1991) cited by US Bancorp its appellee brief where a

producer alleges consumers may be harmed. Medical Supply has shown consumers are being harmed in price and their physical being, and the trade secret data and showing of evidence, proves tremendous nationwide need for its services and products.

In *Allis-Chalmers Mfg. Co. v. White Consol. Industries, Inc.*, 414 F.2d 506 (C.A.3 (Del.), 1969), an antitrust merger case, an appellate court stated it was duty bound to consider issues not covered in the trial court's oral hearing when a national market was at stake. *Allis-Chalmers* 414 F.2d 518 Several are the issues of this case. The court rejected the lower court's summary determination that Allis did not stand close enough to the edge of the metal rolling mill market to exert a competitive influence on the small number of other actors in an oligarchic industry. The court found that management assertions about a planned entry to market, when uncontraverted, warranted further inquiry, citing *United States v. Wilson Sporting Goods Co.*, 288 F.Supp. 543, 549 (N.D.Ill.1968). See *Allis-Chalmers* 414 F.2d 515.

Coincidentally, this same court recognized the common definition of business trade secret and the similar harm Medical Supply seeks to protect against in its effort to obtain preliminary injunctive relief from misappropriation of trade secrets: "In addition, serious harm to Allis might result if White nominees were to become members of Allis' Board of Directors, thus gaining knowledge of Allis' business or

trade secrets, future plans, or other significant information, which would be 'irreversible' [irreparable] in the event of ultimate divestiture.” *Crane Co. v. Briggs Manufacturing Co.*, 280 F.2d 747, 750 (6th Cir. 1960).” Emphasis added *Allis-Chalmers* 414 F.2d 517. US Bancorp makes a spurious argument that the product of Medical Supply Chain, Inc.’s research and its trade secret planning and data in the fall of 2002 for the electronic marketplace was disclosed by the founder in 1995 because he made other unrelated innovations having to do with distributor pricing models that went on to be adopted by the entire hospital supply industry. See Aple. Br. pg. 25

B. APPELLEE USES WRONG STATUTE AND STANDARDS

While it is axiomatic that the antitrust laws "were enacted for the protection of competition not competitors,” *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), Medical Supply’s case is not one in which it is alleged that a competitor fell prey to competition; it is one in which it is alleged that competition fell prey to US Bancorp NA, its subsidiaries and their affiliate healthcare suppliers and distributors who are shown with extensive evidence to be inexorably intertwined in a relevant market of healthcare supplies and a related relevant market of equity financing where absences of competition resulting in high prices and harm to patients has been recognized in the New York Times, the US Senate, and by the FTC . “[W]e must bear in mind that the purpose of the antitrust laws is

the promotion of consumer welfare.... [W]e consider [defendant's] refusal to deal in light of its effect on consumers, not on competitors." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir.1986), cert. denied, 486 U.S. 1005, 108 S.Ct. 1728, 100 L.Ed.2d 192 (1988)

Medical Supply claimed US Bancorp denied escrow account services, a critical facility in violation of the Clayton Act against discrimination in price, services, or facilities; 15 U.S.C. § 13 of the Clayton Antitrust Act. . (Aplt. App., Part C at 43). Congressional policy provides for the enforcement of The Clayton Act against financial institutions including US Bancorp NA for discrimination in services and denial of a critical facility under the Bank Holding Company Act, specifically in 12 USC §1849 (f).

US Bancorp confuses the exclusion of some non-commodities from coverage under 15 U.S.C. § 13b of the Clayton Antitrust Act in cases dealing with price discrimination with Medical Supply's claims of non price predation involving denial of services and access to a critical facility. (Aple. Br.20) US Bancorp cites *Metro Communications Co. v. Ameritech Mobile Communications*, 984 F.2d 739, 745 (6th Cir. 1993); *Rankin County Cablevision v. Pearl River Valley Water Supply District*, 692 F.Supp. 691, 692 (S.D. Miss. 1988). These cases deal with the difficulty of resolving the price component of 15 U.S.C. § 13b where there are not discrete units.

Throughout this action, there has been a tragic misunderstanding on the part of counsel for US Bancorp. In every written motion, pleading and oral argument where the implication of 15 USC § 13 (b) and (e) on US Bancorp's conduct is explained by Medical Supply, counsel for US Bancorp (and it is presumed the trial court) are mistaking it for *15 USC § 13b*; a different statute entirely. While in the same Chapter as The Clayton Act § 13 (b) and (e) relevant to this case, *15 USC § 13b* is actually a different enactment and is a statute concerning transactions. *15 USC § 13b* has the jurisdictional requirement of a sale of a commodity; services are not covered; just as US Bancorp is always claiming.

In contrast, Medical Supply has asserted that US Bancorp NA *et al* have violated 15 USC Sec. 13. – “Discrimination in price, *services*, or facilities,” specifically subsection “(e) Furnishing *services or facilities* for processing, handling, etc.” [Emphasis Added]. This court has recognized the application of the Clayton Act to hospital private financing services in *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir. 1990), and refusals to deal in Ernest H. Schopler, Refusals to Deal as Violations of the Federal Antitrust Laws, 41 A.L.R. Fed. 175, 224-25 (1979) See *Full Draw Prod. v. Easton Sports Inc.*, 182 F.3d 753 (10th Cir., 1999)

Medical Supply has provided affidavits and attested pleadings stating that it was denied services and facilities required by Medical Supply to create a financial

device to capitalize its entry into market. US Bancorp has admitted these services and facilities were denied. Medical Supply's pleadings allege US Bancorp provided escrow accounts to other customers and documented specific customers in the relevant healthcare technology company capitalization market that is the subject of this case who received specialized financial services from US Bancorp NA. This documentation was in the form of admissible evidence under F.R.E. Rules 802(1), (2), (17), (18), (22); 804(b)(3); 901(b)(6); 902(5),(6). See (Aplt. App., Parts A, B, C at 1-65, 71-72, E, F, H, Aplt. Motion, Aplt Mot. Attachment)

Case law requires a burden shift under a Sherman § 1 violation if Medical Supply does not succeed in making a prima facie case of a recognized *per se* violation. Medical Supply must show the denial of escrow accounts unreasonably restrained trade either *per se* or under the rule of reason. See *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d at 542 (2d Cir. 1993). Medical Supply has asserted throughout this litigation that US Bancorp NA, US Bank, Piper Jaffray and an Unknown Healthcare supplier acted in concert as a group to boycott Medical Supply and deny them access to the hospital supply market, a related relevant market to the healthcare technology company capitalization market also identified. The Supreme Court has declared group boycotts illegal, *per se*. US Bancorp has never denied, challenged, contradicted or otherwise contravened Medical Supply's assertion that there is another entity-the

Unknown Healthcare supplier. Furthermore, Medical Supply's pleadings and motions reference by name many non-subsidiary affiliates of US Bancorp NA that are healthcare suppliers. As a final measure, Medical Supply even pointed out how without counting the Unknown Healthcare Supplier, the analysis of *Copperweld* does not apply to US Bancorp's subsidiaries; they are independent actors.

Under the rule of reason analysis, Medical Supply is first required to show the denial of escrow accounts had "an actual adverse effect on competition as a whole in the relevant market." *Id.* at 543; accord *Tops Mkts., Inc., v. Quality Mkts., Inc.*, 142 F.3d at 96. (2d Cir. 1998) The fact that the defendant's actions prevent a plaintiff from competing in a market is not enough, standing alone, to satisfy this initial burden of proof. See *Tops Mkts.*, 142 F.3d at 96. Medical Supply showed that the denial of escrow accounts based on a claimed USA Patriot Act "know your customer" cost, destroyed a unique financing instrument and prevented Medical Supply from carrying through its planned entry to the hospital supply market. A market Medical Supply had provided evidence suffered from high prices resulting from a lack of competition. (Aplt. App., Parts C at 9-11) Furthermore, Medical Supply repeatedly showed it could not go to another bank under the threat (verified by appellee affidavit Aple 10th Cir. Mot Attachment "D") of a malicious USA Patriot Act report.

If Medical Supply surmounts its first hurdle, the burden shifts to US Bancorp to establish the *procompetitive* value of its escrow account denial. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997). US Bancorp never stated its denial in procompetitive terms, merely efficiency terms. In the trial court, US BANCORP did not offer evidence in the form of an affidavit or party attested pleading related to its justification for refusal to deal. In response to the appellate emergency motion, US Bancorp provided an affidavit from Brian Kabbes (Aple 10th Cir. Mot Attachment “C”) that avoids the pretextual USA Patriot Act reason from the telephone conversations excerpted in trial court and fully included in transcripts attached to the Medical Supply’s appellate motion, US Bancorp and Brian Kabbes use an efficiency justification, not a procompetitive justification for US Bancorp’s conduct. Medical Supply has shown evidence that the reason was an invalid application of the USA Patriot Act and therefore pretextual.

Even though mere efficiency without a procompetitive justification fails on its face, Medical Supply addressed this defense in its original complaint and in subsequent pleadings and motions. The “know your customer” provision of the USA Patriot Act was suspended before it ever took effect. Also, the USA Patriot Act “know your customer” provision never applied to existing customers like Medical Supply and accounts of the size and type Medical Supply sought. There was never an added cost causing US Bancorp to break its enforceable oral promise

to provide escrow accounts to Medical Supply and in which Medical Supply made repeated performances to benefit US Bancorp in reliance of. The burden never shifted back to Medical Supply to show the same procompetitive effect could be achieved through alternative means that are less restrictive of competition. *Id.* In other words, Medical Supply can recover because it has ultimately shown that US Bancorps' actions had a "competition-reducing" effect, harming consumers. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990).

US Bancorp never submitted facts or otherwise contradicted Medical Supply's specific and supported allegations of US Bancorp's monopoly power. Monopoly power requires proof of both power to control prices and power to exclude competition. See *Reazin*, 899 F.2d at 967; *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos., Inc.*, 783 F.2d 159, 163-64 (10th Cir. 1986). The second amended complaint's (Aplt. App. Part C 34-42) allegation that appellee/defendants' boycott successfully prevented Medical Supply from entering the market illustrates defendants' ability to exclude competition against Medical Supply's electronic marketplace, keeping intact the existing US Bancorp/GPO distributor oligarchy that controls hospital supplies. US Bancorp and its affiliate companies have the power to control prices in the hospital supply market. This is monopoly power possessed and willfully obtained and preserved through unlawful boycott and other wrongful conduct. *Full Draw Prod* 182 F.3d 756-8

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I caused a true and correct copy of the foregoing to be deposited in the U.S. mail, postage prepaid, on this 28th day of March, 2003 addressed to:

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UNITED STATES COURT OF APPEALS

FILED

FOR THE TENTH CIRCUIT

**United States Court of Appeals
Tenth Circuit**

NOV 8 2004

PATRICK FISHER

Clerk

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 03-3342
(D.C. No. 02-CV-2539-CM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **McCONNELL**, **HOLLOWAY**, and **PORFILIO**, Circuit Judges.

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

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

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

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

¹ Appellant's brief mentions its Clayton Act and Hobbs Act claims, but appellant fails to include any argument as to how the district court erred in dismissing those claims. *See* Aplt. Br. at 7-8, 19. Any issue with respect to those claims is therefore waived. *Ambus v. Granite Bd. of Educ.*, 975 F.2d 1555 (10th Cir. 1992).

in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts.â Aplt. App. Vol. II at 402. Plaintiff then proceeded to file this appeal that is not supported by the law or the facts. Accordingly, we ORDER the plaintiff and plaintiff's counsel to SHOW CAUSE in writing within twenty days of the date of this order why they, jointly or severally, should not be sanctioned for this frivolous appeal pursuant to Fed. R. App. P. 38. *See Braley v. Campbell*, 832 F.2d 1504, 1510-11 (10th Cir. 1987) (discussing court's ability to impose sanctions against clients and their attorneys under Fed. R. App. P. 38).

Entered for the Court

John C. Porfilio
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

ANSWER TO SHOW CAUSE ON SANCTIONS

At the close of the US Senate Judiciary Committee's Antitrust Subcommittee's hearing entitled “Hospital Group Purchasing: How to Maintain Innovation and Cost Savings” on Tuesday, September 14, 2004, the subcommittee's chair suggested that the 1.8 trillion dollar market's anti-competitive behavior might be better corrected with private antitrust litigation than with new legislation. The plaintiff-appellant Medical Supply Chain, Inc. believes the Sherman Act prohibits the admitted conduct of the defendants in keeping Medical Supply Chain, Inc. from competing with the defendants’ openly publicized combination to restrain trade in hospital

supplies which included the threat of malicious USA PATRIOT Act reporting and the repudiation of the defendants' contract to provide Medical Supply Chain, Inc. escrow accounts required for capitalizing its market entry.

Plaintiff and plaintiff's counsel continue to recognize and assert that the district court erred by: 1) dismissing plaintiff's antitrust claims by imposing a heightened pleading standard, and 2) finding no private right of action under the USA Patriot Act.

Plaintiff filed this appeal that is supported by the law and the facts. Plaintiff incorporates by reference plaintiff's appellate opening and reply briefs along with the supporting record contained in the appendices for docket # 03-3342 and docket # 02-3443 including the evidentiary attachments of both parties in support of their motions for pre-hearing relief.

The defendant U.S. Bank was in contract with Medical Supply Chain, Inc. to provide escrow accounts. U.S. Bank broke the contract, Medical Supply Chain, Inc.'s complaint (written shortly after to obtain emergency injunctive relief and avoid the resulting irreparable harm¹) alleged the

¹ The defendant US Bancorp Piper Jaffray's adverse admission of economic research reveals that a web based electronic marketplace for hospital supplies like Medical Supply Chain, Inc. would eliminate 83 billion dollars in inefficiency. Plaintiff's Amended Complaint ¶27.

breaking of the contract was a result of exclusive dealing agreements between the defendants which included Unknown Healthcare Supplier. “[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action.” *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004).

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

The plaintiff’s complaint in the alternative alleged the actions of the defendant US Bancorp companies as a single firm in breaking the contract violated Sherman 2:

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

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

Finally, the plaintiff and plaintiff's counsel decline to accept Hon.
Judge John C. Porfilio's revisionist pronouncement about the lack of a
private right of action in the USA PATRIOT Act.

Public Law 107–56 “Uniting and Strengthening America by
Providing Appropriate Tools Required to Intercept and Obstruct Terrorism
(USA PATRIOT ACT) Act of 2001” contains at least two private rights of
action²; SEC. 223. CIVIL LIABILITY FOR CERTAIN UNAUTHORIZED
DISCLOSURES and the plaintiff's often averred malicious reporting to
which there is a private right in SEC. 355 which states “(3) MALICIOUS
INTENT.—Notwithstanding any other provision of this subsection,
voluntary disclosure made by an insured depository institution, and any
director, officer, employee, or agent of such institution under this subsection
concerning potentially unlawful activity that is *made with malicious intent*,

² Additional private rights of action are communicated in sections that
immunize “good faith” disclosure of information from third parties. The
qualifying of immunity to third parties' causes of action for civil liability are
expressions of Congressional intent for private rights of action; *i.e.* § 215 of
USA Patriot amends FISA § 501(e) (as amended): “A person who, in good
faith, produces tangible things under an order pursuant to this section shall
not be liable to any other person for such production.”

shall not be shielded from liability from the person identified in the disclosure.” [emphasis added].

Plaintiff’s counsel calls this court’s attention to the fact that irreparable harm has been suffered by the plaintiff and the nation’s hospitals, including loss of human lives while respectful requests for relief have been met with the trial court’s dismissal, this court’s denial of pre-hearing relief ³ and the present decision.

The plaintiff’s counsel has responded with timely well researched pleadings based upon a thorough investigation of the facts and applicable law. Medical Supply Chain, Inc. will continue to seek a hearing from a court that will do the same.

Respectfully Submitted

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³ The trial court based its dismissal in part upon this court’s denial of pre hearing relief in #02-3443, a decision the plaintiff’s memorandums of 6/26/03 and 7/10/03 showed surprisingly contradicted Tenth Circuit controlling authority.

Certificate of Service

I certify I have served two copies of this pleading upon opposing counsel listed below via U.S. Mail on November 10th, 2004.

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United States Court of Appeals

For the Tenth Circuit

Docket No. 03-3342 (10th Cir.)

Case No.: 02-2539-CM (Kans. Dist. Ct.)

Medical Supply Chain, Inc.

v.

US Bancorp, NA; US Bank; Private Client Group, Corporate Trust,
Institutional Trust And Custody, And Mutual Fund Services, LLC.;

US Bancorp Piper Jaffray; Jerry A. Grundhofer;
Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes;
and Unknown Healthcare Supplier

Appeal from the United States District Court
for the District of Kansas
Hon. Judge Carlos Murguia

MOTION FOR EN BANC REHEARING

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APPELLANT

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11/8/04 [1754705] Terminated on the Merits after Submission Without Oral Hearing; Affirmed. Appellant's motion to amend complaint on jurisdictional grounds is denied.; Written, Signed, Unpublished. McConnell; Holloway; Porfilio, authoring [03-3342] Parties served by mail on 11/8/04. (kf)	
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MOTION FOR REHEARING EN BANC

Medical Supply, seeks reconsideration of this court's affirmation of the Kansas District Court ruling, adopting it through incorporation by reference and without independent judicial inquiry. The appellate panel's opinion overlooks fundamental misstatements of law and misapprehends Medical Supply brief argument that it pled the required two or more actors in combination or conspiracy and that the opinion is in clear error, the USA PATRIOT Act expressly provides for numerous private causes of action and regardless, the court misapprehends Medical Supply's argument that it can enjoin the US Bancorp defendants from making a malicious suspicious activity report as a Sherman 2 violation of false petition not excepted by the *Noer* Doctrine¹ even if no private right existed. These important questions of law conflict with other Circuit Courts of Appeal and the U. S, Supreme Court.

Medical Supply Chain, Inc. (Medical Supply) brought the present action to seek injunctive relief to prevent the defendants from breaching their contract to provide escrow accounts Medical Supply required to capitalize its entry in the hospital supply market. Medical Supply has been unsuccessful in obtaining timely preliminary relief at the trial court level and in interlocutory appeal and has suffered the injuries this action has sought to prevent including the \$350,000.00 the escrow accounts were required for along with the theft of intellectual property.

¹ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141, 81 S.Ct. 523, 531, 5 L.Ed.2d 464

Evidence also now exists the defendants have filed a malicious suspicious activity report against Medical Supply. Medical Supply's injuries are no longer speculative and can now be proved with certainty. Medical Supply will bring claims in a federal district court (either Kansas or the Western District of Missouri) for monetary damages on the transaction that prompted the present injunctive relief attempt and the present decision deprives the parties of any issue preclusion.

Findings of the Appellate Panel

The appellate panel's entire determination on the merits of the issues raised by the plaintiff upon appeal is contained solely within the following fifty words excerpted from the panel's November 8th, 2004 Order and Judgment:

“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.” See Attachment 1 pg. 19

In adopting the Memorandum and Order of the trial court without additions or changes, the appellate panel gave no indication of independent judicial review² and has ruled in conflict with Tenth Circuit published opinions and the U.S.

Supreme Court on each of the Sherman Antitrust Act claims of the plaintiff and in

² “Judicial opinions are the core workproduct of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic.” *Bright v. Westmoreland County*, No. 03-4320 at pg.4 (Fed. 3rd Cir. 8/24/2004) (Fed. 3rd Cir., 2004)

conflict with the U.S. Supreme Court on the issue whether Congress may expressly grant private rights of action through enactment of the USA PATRIOT Act. The panel upholds the dismissal of Medical Supply's Sherman 1 and Sherman 2 claims because the plaintiff failed to allege two or more independent actors (see trial court's Memorandum and Order, pg.5) when the complaint clearly has an independent actor defendant-the Unknown Healthcare Supplier and unnamed co-conspirators identified. The court also dismissed the complaint for having alleged no agreement to exclude Medical Supply or to raise prices (see *id*, pg.6) when clearly the complaint alleges many agreements to exclude Medical Supply and to increase prices in the relevant markets of healthcare capitalization and Hospital supplies. Finally, neither the trial court or the appellate panel ever read the USA PATRIOT Act or Medical Supply's pleadings explaining it before their now infamous ruling on this hot issue of law, became de facto published on official court internet sites, shaming all of us who practice in this circuit.

The Erroneous Affirmation of a Hyperpleading Standard

The appellate panel's decision raises an important question of law by creating conflict with a trilogy of recent Supreme Court decisions reflecting the Court's renewed determination to ensure that district judges properly defer to the pleading party in deciding Rule 12(b)(6) motions to dismiss. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). In seeking to protect a bank or its representation from the inconvenience of answering an antitrust victim, the

appellate panel has made an embarrassing ruling with little indication it performed any of its own analysis. The decision also reverts back to prohibited barriers against antitrust actions where all the evidence is in the hands of the defendants:

“In the aftermath of *Leatherman*, antitrust heightened pleading has certainly been curtailed. Finding the *Leatherman* rationale applicable to antitrust, many lower courts have re-embraced notice pleading and Rule 8 as the appropriate pleading standard in antitrust cases. The Seventh Circuit is illustrative. Soon after *Leatherman*, the court made clear that the “nascent movement” to add judge made exceptions to notice pleading was now precluded. Consequently, antitrust plaintiffs were not required to plead with particularity. Moreover, the court denounced pre-*Leatherman* cases applying heightened pleading as no longer authoritative.” [footnotes omitted] Fairman, Christopher M., The Myth Of Notice Pleading *Arizona Law Review* pgs. 1018-19, Vol. 45:987 (2003).

Mistaken Points of Law Affirmed By Appellate Panel

Each of the trial court’s Sherman Act and USA PATRIOT Act decisions were made on fundamental errors in established law. Medical Supply’s pleadings and brief have gone unread in the mistaken belief that some critical element was under pled and therefore cannot be recognized. Especially tragic is the reputation of the Circuit lost in the statement there is no private right of action under the USA PATRIOT Act when the pleadings were there to inform the court. See Attachment 5 pgs. 42-46 contradicting the trial court’s admonishment.

Two or More Actors Medical Supply’s complaint satisfied the two or more independent actors requirement for a Sherman 1 prohibited combination. To prove a § 1 violation, a plaintiff must demonstrate: (1) a combination or some form of concerted action between at least two legally distinct economic entities that (2) unreasonably restrains trade. See *Tops Mkts.*, 142 F.3d at 95; *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir.

1993).

Neither the trial court nor the court of appeals addressed the issues of the separate defendant Unknown Healthcare Supplier or the unnamed coconspirators identified in the complaint that independently met the requirements for two or more actors. Instead of reviewing their own neglect, both the trial court and appellate panel repeatedly admonished Medical Supply's counsel and threatened him with sanctions. See Attachment 1 pg. 19

The Unknown Healthcare Supplier Separate Defendant. A legally separate entity-Unknown Healthcare Supplier was named in the caption, in the description of parties, the statement of facts and in the antitrust claims of Medical Supply's amended complaint. See Attachment 3 pg. 29. The plaintiff is still within the four year statute of limitations for antitrust claims. The trial court denied preliminary injunctive relief including an order sought by the plaintiff to obtain information about the named defendants and granted the dismissal just before the plaintiff appeared for the scheduled pretrial conference over the parties' proposed discovery plan.

The Tenth Circuit recognizes complaints against unknown defendants, i.e. *Gaylor v. Does*, 105 F.3d 572 (C.A.10 (Colo.), 1997). More specifically, the Tenth Circuit condemns dismissal when the identity of an unknown defendant can be obtained through discovery:

“Dismissal against unknown defendants is proper "only when it appears that the true identity of the defendant cannot be learned through discovery

or the court's intervention." *Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir.1985).”

Krueger v. Doe, 162 F.3d 1173 (C.A.10 (Okla.), 1993).

The Tenth Circuit On Unnamed Defendants in Antitrust The trial court and now the appellate panel have ignored Medical Supply’s arguments based on substantial authority that it need not name every conspirator as a defendant. Both courts ignored Healthcare Group Purchasing Organizations or “GPOs” including Premier all of which are distributors of hospital supplies competitors of Medical Supply, described as coconspirators in the combine. Attachment 3 pg. 26,28,29,33. Also ignored are the direct competitors of Medical Supply as a hospital supply electronic market place Commerce One and Medibuy averred to be in agreement to increase healthcare capitalization prices (shares) with the named defendants and exclusive dealing agreements with the GPOs. See Attachment 3 pg. 28.

In adopting the trial court’s ruling, the appellate panel contradicts clear Tenth Circuit authority on this precise issue. In *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, per se Sherman 1 liability was held for concerted refusal to deal or group boycott charges against Progressive and unnamed defendants, just as Medical Supply claimed against the US Bancorp defendants and Unknown Healthcare Supplier and other companies not identified or named as defendants:

“A further complaint on behalf of Olsen was that Progressive conspired **with certain unnamed co-conspirators, for example, George Best, CBS Musical Instruments (CBS) and Bobbie Herger (owner and operator of Herger's Music Store in Provo, Utah), in violation of Section 1 of the Act.** Olsen asserts that Progressive conspired with Best to cause Olsen to lose franchises, to destroy his credit and business reputation, to take over

his business location and terminate his corporate charter, to fix prices, and to cause manufacturers to boycott his business.”

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983). As the case was developed, the trial court found, like Medical Supply has alleged, that the refusal to deal or boycott was for the purpose of keeping the plaintiff from selling goods cheaper than the defendants and their unnamed coconspirators:

“The trial court found that Progressive had conspired with CBS and Bobbie Herger to boycott Olsen, whereby he would not be able to obtain CBS products. This boycott was an element of the price fixing conspiracy also allegedly engaged in by Progressive and Herger. The trial court said, "it was necessary to boycott Olsen in order that the high prices set by Progressive and Herger could be maintained and not be undercut by Olsen."

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 at 438 (C.A.10 (Utah), 1983). And like Medical Supply has averred in its complaint against the US Bancorp defendants and Unknown Healthcare Supplier, no pro competitive justification could exist:

“In this case there is evidence that there was a boycott which was "clearly exclusionary or coercive in nature." *Gould v. Control Laser Corp.*, 462 F.Supp. 685, 691 (M.D.Fla.1978), *aff'd*, 650 F.2d 617 (1981). Thus, the case differs from those in which "courts have circumvented the rigidity of the per se rule by reasoning that the need for its application 'depends not upon a finding that * * * [a restraint] constitutes a "boycott" but upon an analysis of its purpose and competitive impact.' " Note, The Facial Unreasonableness Theory: Filling the Void Between Per Se and Rule of Reason, 55 St. John's L.Rev. 729, 750 n. 155 (1981) (quoting Gould, *supra*, at 691). Pro-competitive impacts or motives within the trial court's findings are difficult to see. For instance, Herger boycotted Olsen because "she had an independent prejudice against giving competitive dealers large discounts." In addition, Progressive harbored a "predatory intent toward competing dealers."

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 at 438-9 (C.A.10 (Utah), 1983). There is a conflict among district courts in the Tenth Circuit if the trial court ruling in Medical Supply's case is allowed to stand with the appellate panel's unpublished opinion:

“Section 1 of the Sherman Act, by its language, does not prohibit solely unilateral conduct, regardless of its anti-competitive effects. *City of Chanute*, 955 F.2d at 650. Beacon's complaint, however, clearly alleges a conspiracy to restrain trade or commerce between two actors: Birtcher and Valleylab. Beacon specifically points to the licensing agreement entered into by Birtcher and Valleylab which restricts Valleylab's ability to purchase handpieces from outside sources. **The fact that Beacon pursues only one of the contracting parties does not limit its ability to obtain relief.** Accordingly, I conclude that claims 1-4, 7, 8-11, and 14 should not be dismissed for failure to allege a conspiracy to restrain trade or commerce between two or more actors.” [emphasis added]

Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350 at 1363 (Colo., 1996)

The Misapprehension of the Plaintiff's Named Defendants The complaint names US Bancorp NA, US Bank and Piper Jaffray as being in a combination with the Unknown Healthcare Supplier and describes in detail the separate acts of each in a common agreement to prevent Medical Supply from entering the market for hospital supplies. The named defendants are horizontal to each other and at the same market level where Medical Supply was creating its own financial investment program through the escrow accounts and while that was not an essential requirement for per se Sherman 1 liability, the lesser standard that concerted activity, even at another market level than the distribution of hospital supplies had been met:

“To establish that a group boycott is per se illegal in this Circuit, “there must be an agreement among conspirators whose market positions are horizontal to each other.” *Westman Com'n Co. v. Hobart Intern., Inc.*, 796 F.2d 1216, 1224 n. 1 (10th Cir.1986). **“While the competitors need not be at the same market level as the plaintiff, there must be concerted activity between two or more competitors at same market level.”** *Key Financial*, 828 F.2d at 641.” [emphasis added]

Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350 at 1363 (Colo., 1996).

Copperweld Does Not Exclude Parent Liability. Judge Nottingham in the District of Colorado’s ruling in *Nobody in Part. Presents v. Clear Channel Communs.*, 311 F.Supp.2d 1048 (D. Colo., 2004) ruled consistently with Medical Supply’s brief arguments regarding the potential of US Bancorp to be liable for the acts of its subsidiaries US Bank and US Bancorp Piper Jaffray and their officers in combination or conspiracy with Unknown Healthcare Supplier:

“[T]he Supreme Court has suggested that direct liability may exist for parent corporations under the Sherman Act. *Copperweld*, 467 U.S. at 777, 104 S.Ct. at 2744-2745 (stating in dicta that “[a]ny anticompetitive activities of corporations and their wholly-owned subsidiaries meriting antitrust remedies may be policed adequately without resort to the intra-enterprise conspiracy doctrine.... The enterprise is fully subject to § 2 of the Sherman Act”). **Additionally, lower courts have recognized that parent corporations can be held directly liable for independently participating in the antitrust violations of their subsidiaries.** *Reading Int’l, Inc. v. Oaktree Capital Mgmt., LLC*, 2003 WL 22928728 (S.D.N.Y. Dec. 10, 2003) (slip copy); *Carl Hize & Sons, Inc. v. Browning-Ferris Indus., Inc.*, 590 F.Supp. 1201, 1202 (D.Colo.1984).” [emphasis added]

Nobody in Part. Presents v. Clear Channel Communs., 311 F.Supp.2d 1048 at 1069-70 (D. Colo., 2004). The Tenth Circuit is now in conflict over this point with *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No.

02-9222 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004) where Sherman 1 and 2 conspiracy claims against defendants with mutual ownership were challenged: “there was no “unity of purpose or a common design” between ACIC/Brantford and Barr. *Copperweld*, 467 U.S. at 771, 104 S.Ct. 2731” *Geneva Pharmaceuticals Tech. v. Barr Laboratories*, 201 F.Supp.2d 236 at 275 (S.D.N.Y., 2002) and the Second Circuit reinstated the Sherman 1 and 2 claims.

Agreement The defendant U.S. Bank was in contract with Medical Supply Chain, Inc. to provide escrow accounts. U.S. Bank broke the contract, Medical Supply Chain, Inc.’s complaint (written shortly after to obtain emergency injunctive relief and avoid the resulting irreparable harm³) alleged the breaking of the contract was a result of exclusive dealing agreements between the defendants which included Unknown Healthcare Supplier. See Amd. Cmplt ¶¶81,82,86.(Attachment 3 pg. 27,28,29, 31) “[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action.” *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004). Medical Supply’s Amended Complaint pled agreements to raise prices in the relevant market of healthcare capitalization. See Amd. Cmplt. ¶81, Amd. Cmplt. pg. 34-5, Amd. Cmplt. pg. 10-12,.

In *Covad Communications*, the breaking of the agreement between the

³ The defendant US Bancorp Piper Jaffray’s adverse admission of economic research reveals that a web based electronic marketplace for hospital supplies like Medical Supply Chain, Inc. would eliminate 83 billion dollars in inefficiency. Plaintiff’s Amended Complaint ¶27.

plaintiff and the monopolist alone become adequate to state a claim. “[A]llegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws.” *Covad Communications Co. v. Bellsouth Corp.*, at ¶63 2002 C11 260 (USCA11, 2002), reversed on other grounds. The US Supreme Court recently stated this point of law, which the panel’s decision now surprisingly conflicts with:

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

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

Private Causes of Action Under USA PATRIOT Act Public Law 107–56

“Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001” contains at least two private rights of action ⁴; SEC. 223. CIVIL LIABILITY FOR CERTAIN UNAUTHORIZED DISCLOSURES and the plaintiff’s often averred malicious reporting to which there is a private right in SEC. 355 which states “(3)

⁴ Additional private rights of action are communicated in sections that immunize “good faith” disclosure of information from third parties. The qualifying of immunity to third parties’ causes of action for civil liability are expressions of Congressional intent for private rights of action; *i.e.* § 215 of USA Patriot amends FISA § 501(e) (as amended): “A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production.”

MALICIOUS INTENT.—Notwithstanding any other provision of this subsection, voluntary disclosure made by an insured depository institution, and any director, officer, employee, or agent of such institution under this subsection concerning potentially unlawful activity that is *made with malicious intent, shall not be shielded from liability from the person identified in the disclosure.*” [emphasis added].

In paragraphs 115-132 (Attachment 4 pgs. 35-41) of the Amended Complaint, Medical Supply alleges that the defendants threat of “bad faith” USA PATRIOT Act’ suspicious activity reporting is being used to prevent Medical Supply from entering the market for hospital supplies. It is beyond refute that the defendants used the USA PATRIOT Act as a pretext to break their contract with Medical Supply to provide escrow accounts. The act did not even go into effect over bank trust accounts. See Attachment 4 pgs. 35-41.

The Likely Reason For the Court’s Disregard

A judicial antagonism uncommunicated in the record, where neither district court preliminary relief trial decision was given a written decision and the appellate panel has declined to state its reasoning, exists against Medical Supply for continuing to seek injunctive relief. The likely erroneous basis of the antagonism of the trial court now, repeated by the hearing panel is that a new competitor like Medical Supply, prevented from entering the market by US Bancorp in an agreement with the defendant Unknown Healthcare Supplier has no injury and therefore no remedy of law.

Like the trial court in case *World of Sleep*'s conclusion that World of Sleep's lost profits from potential sales to the licensee stores were too speculative because "there is no history at all of any profit or loss on these dealings during the years involved in this case *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 at 1478 (C.A.10 (Colo.), 1985). This error contradicts established Tenth Circuit and US Supreme Court law:

“If proof of a profit and loss history were required, no plaintiff could ever recover for losses resulting from his inability to enter a market. However, such recoveries are clearly available under section 4 of the Clayton Act. See, e.g., *Zenith*, 395 U.S. at 129, 89 S.Ct. at 1579. (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969))”

World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 at 1478 (C.A.10).

Medical Supply was the Victim of a Conspiracy To Inflate Prices Through Hospital Group Purchasing Organizations (GPOs) Allied With the Defendants

The appellate panel's decision upholding the trial court and attacking the appeal for being frivolous and sanctionable was shared with the members of the U.S. Senate Judiciary Committee. It was a discussion between a chief expert witness and the Antitrust Sub Committee's counsel that led to seeking this rehearing. The conflict of the trial court with US Supreme Court authority (and the controlling cases of this circuit) on the requirements of initial pleadings raise extremely important questions of law. Medical Supply's brief identified these errors. The fact that this appellate decision was released shortly after the third committee hearing on the GPO monopoly conduct and its costs to our nation

certainly means that this decision left unchanged will become part of the coming judicial appointment policy debates in addition to the continuing search for a solution to the GPO monopoly, which will now unfortunately discredit antitrust enforcement in favor of increased regulation. If a rehearing is granted, addressing the above cited mistaken points of law, debate on this important national policy issue will be aided.

A Rehearing is required for Any Preclusion on the Issues Raised

Now that Medical Supply has experienced its damages and suffered additional overt acts by the defendant conspiracy, Medical Supply will bring its claims for monetary damages to a federal district court, likely the Western District of Missouri if no remand issues, “...if future damages are unascertainable, a cause of action for such damages does not accrue until they occur. *Zenith*, 401 U.S. at 339, 91 S.Ct. at 806.” *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at FN4 (C.A.10 (Kan.), 1989). See also *Barnosky Oils Inc., v. Union Oil Co.*, 665 F.2d 74, 82 (6th Cir. 1981). US Bank was still attempting to perform the financing part of the contract after Medical Supply filed its injunctive relief. If “the initial refusal is not final, each time the victim seeks to deal with the violator and is rejected, a new cause of action accrues. See *Pace Indus.*, 813 F.2d at 237-39; *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714-15 (11th Cir.1984).” *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at 933-4 (C.A.10 (Kan.), 1989).

Medical Supply now has evidence the malicious suspicious activity report, a sham petition⁵ was filed. “Some courts have held that, where a plaintiff alleges that a lawsuit was brought in bad faith (a sham petition) to suppress competition, the operative overt act for purposes of the antitrust limitations statute is the filing of the sham lawsuit. See, e.g., *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274-75 (5th Cir. 1991); *Korody-Colyer Corp. v. General Motors Corp.*,”*In re Relafen Antitrust Litigation* at pg. 6 (Mass., 2003).

The amended pleading for now ripe monetary damages in Kansas District Court or a new filed action in some other federal district court would suffer no issue preclusion on Sherman 1 or 2 claims. *Oltremari v. Kansas Social & Rehabilitative Service*, 871 F.Supp. 1331 (Kan., 1994). The failure of either the trial court or the appellate panel to address the use of the USA PATRIOT Act suspicious activity reporting as a sham petition completes the lack of preclusive effect of this panel decision.

Conclusion

Whereas for the above stated reasons, Medical Supply respectfully requests a rehearing en banc is granted, or in the alternative that the matter is remanded back to the trial court overruling the dismissal allowing amending for damages .

⁵ The "sham" exception to the *Noerr* doctrine “This exception encompasses situations in which persons use the governmental process itself—as opposed to the *outcome* of that process—as an anticompetitive weapon.” *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512, 92 S.Ct. 609, 612, 30 L.Ed.2d 642

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United States Court of Appeals
For the Tenth Circuit

Docket No. 03-3342 (10th Cir.)

Case No.: 02-2539-CM (Kans. Dist. Ct.)

Medical Supply Chain, Inc.

v.

US Bancorp, NA; US Bank; Private Client Group, Corporate Trust,
Institutional Trust And Custody, And Mutual Fund Services, LLC.;
US Bancorp Piper Jaffray; Jerry A. Grundhofer;
Andrew Cesere; Susan Paine; Lars Anderson; Brian Kabbes;
and Unknown Healthcare Supplier

Appeal from the United States District Court
for the District of Kansas
Hon. Judge Carlos Murguia

**MOTION FOR EN BANC REHEARING OF
PANEL SUA SPONTE SANCTIONS***

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* Jurisdictional authority for en banc review of hearing panel's sanctions on pg.s 1-2.

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MOTION FOR EN BANC REHEARING OF SANCTION ORDER

The appellant makes this request for en banc rehearing of the appellate panel's *sua sponte* order of double attorney's fees (**Pg. 17**) against appellant's counsel for abuse of discretion. The appellate panel's sanction order "relying on a materially incorrect view of the relevant law" is contrary to the standard in *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) and therefore an abuse of discretion.

The hearing panel made material errors in relevant antitrust law and conceded that it erroneously upheld the trial court's ruling that there is no private right of action under USA PATRIOT Act Pub. L. No. 107-56, 115 Stat. 272 (2001). The decision also contradicts controlling case law of this circuit regarding the prohibition of dismissal when there is a discoverable unknown defendant (*Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993) and plurality of actors through expressly identified but unnamed coconspirators (*Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983) as described *infra*. The en banc "appellate court would be justified in concluding that, in making such errors, the district court [here, the hearing panel] abused its discretion." *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402. "If the appeal is not frivolous under this standard, Rule 38 does not require the appellee to pay the appellant's attorney's fees." *Id* at 407.

The Tenth Circuit's local rules do not exclude the award of sanctions from en banc rehearing under Rule 35.7. The appellant unfortunately is prohibited from

seeking a denial of an earlier en banc petition (**Pg. 26**) for being late (even though it was filed within 14 days of receiving the panel judgment) under local rule 35.1 (C). However the panel's order of sanctions impacts the appellant counsel's liberty interests in representing clients and in protected speech on the violation of antitrust statutes and on his client's right to redress and therefore necessitates review. As a *sua sponte* order by an appellate hearing panel, the only opportunity for the appellant to appeal the basis for the sanction determination is through an en banc rehearing. The US Supreme Court in Rule 10 states certiorari will rarely be given for "...the misapplication of a properly stated rule of law." Conversely, the trial court charged with determining the considerable amount of attorney's fees to be levied against Medical Supply's counsel would not have the authority to reverse the superior appellate panel. Medical Supply's appeal was neither destined for an obvious result in law nor wholly without merit. "An appeal is frivolous when the result is obvious, or the appellant's arguments of error are wholly without merit." *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987)." The en banc panel is the reviewing court necessitated by *Braley*: "Following *Braley* to impose sanctions, a court must make specific findings sufficient to...(3) **identify for the reviewing court** the reason for the sanction." *Sally Beauty Company, Inc. v. Beautyco, Inc.*, No. 03-6055 (Fed. 10th Cir. 6/21/2004) (Fed. 10th Cir., 2004). [emphasis added]

Medical Supply's counsel is being harshly sanctioned for appealing denial of relief based on a complaint for an urgent Temporary Restraining Order filed

10/22/02 and amended 11/02/02 because the defendants were repudiating a contract (misusing the USA PATRIOT Act shown to be a false pretext) on 10/15/02 to provide escrow accounts required for the deposit of \$350,000.00 raised from manufacturer rep candidates by Medical Supply. The denial of the TRO caused all funds to be lost on 12/1/02, including the company's last resources used to recruit the candidates and all funds invested in preparation of training. No funds have ever been available for legal representation.

Medical Supply's cause is controversial because it's an action is to seek an injunction against breaking a contract to provide escrow accounts in furtherance of a boycott of US Bancorp and Piper Jaffray's coconspirator identified in the complaint as Novation, a healthcare Group Purchasing Organization ("GPO") competitor of Medical Supply's in the hospital supply market identified in the complaint with its captive e-commerce marketplace Neoforma, Inc. competing with Medical Supply on the web. **Pg.s 44-56** The Clerk of the Court, Patrick Fisher shared with counsel this court's nonpleading based misinformation and resulting prejudice against Medical Supply's cause in a July 1, 2004 conversation.

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The appellant panel is unaware that these defendants can be found to monopolize a market they do not directly compete in and therefore conclusorily rejected the appellant's Sherman 1 and 2 claims in ¶¶6,7,8 of the sanction order in clear error (**Pg. 23**), despite this well established point of antitrust law:

“However, in *Aquatherm* the plaintiffs did not name (or even identify) the alleged co-conspirators who participated in the relevant market. In this case, SBS alleges a conspiracy between HBC, a clear market participant, and CC. **Nothing in our case law suggests that a conspiracy must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy.** Cf. *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir. 2001) (“[W]e conclude that there can be sufficient evidence of a combination or conspiracy when one conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive.”). In its brief, CC correctly points out that Spectators involved a group boycott with multiple conspirators, thereby giving the non-participant defendant the power to injure the plaintiff.” [emphasis added]

Spanish Broadcasting System of Florida, Inc. v. Clear Channel

Communications, Inc., No. 03-14588 (Fed. 11th Cir. 6/30/2004) (Fed. 11th Cir., 2004) . The amended complaint (**Pg. 47**) at ¶82 averred the US Bancorp Piper Jaffray defendants’ control over the day to day operations of companies in Medical Supply’s market, even to the point of placing corporate officers on the GPO board of directors.

The hospital supply market is recognized to be anticompetitive See The Exclusion of Competition For Hospital Sales Through Group Purchasing Organizations June 25, 2002 by Harvard Law Professor Einer Elhauge and The US General Accounting Office report Pilot Study Suggests Large Buying Groups Do Not Always Offer Hospitals Lower Prices April 30, 2002 cited in the Amended Complaint.

On 4/30/02 Elizabeth A. Weatherman, Managing Director Warburg Pincus, LLC and Vice Chair of the Medical Group of the National Venture Capital

Association testified before the Senate that “...**companies subject to, or potentially subject to, anti-competitive practices by GPOs will not be funded by venture capital**. As a result, many of these companies and their innovations will die, even if they offer a dramatic improvement over an existing solution.”

[emphasis added] She was called back on 7/17/03 because of the Judiciary’s Antitrust Subcommittee concerns that GPO monopoly power and unethical conduct is still starving their healthcare technology competitors of capitalization.

The complaint pleads the fact that US Bancorp Piper Jaffray was fined for acts of extortion against a healthcare technology company attempting to capitalize itself with another investment bank (§80, Amd. Cmplt. pg. 34 (**Pg. 47**)) in the upstream relevant market of healthcare capitalization The article cited why the National Association of Securities Dealers fined Piper Jaffray but the conduct is also a Sherman 2 monopolization violation:

“The NASD investigation found a Piper managing director, Scott Beardsley, threatened to discontinue coverage of Antigenics Inc., a biotech firm, if it did not select Piper as a lead underwriter for a planned secondary stock offering. As part of a settlement with the NASD, Piper was censured and fined \$250,000 and Beardsley was censured and fined \$50,000.”

Both Medical Supply appeals were described to the third Senate Judiciary hearing on the GPO problem because of the important public policy being defeated by antitrust violations against e-commerce suppliers:

“[A] bank tied to an investment house that has seventy percent of its holdings in health care suppliers refused to provide the company with simple escrow services through a blatant misapplication of the USA Patriot Act. Most recently an international conglomerate that is a founder of GHX

was willing to take a \$15 million dollar loss on a real estate deal just to keep this company out of the market.”

Testimony of Lynn James Everard, Hospital Group Purchasing: Has the Market Become More Open to Competition?, United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Business and Consumer Rights July 16, 2003. The committee’s counsel made the recommendation that Medical Supply seek the en banc rehearing denied by the panel.

On 7/15/02 The NY Times reported the investigation of antitrust conduct of US Bancorp and Piper Jaffray’s coconspirator Novation:

“Premier and Novation are also being investigated by the Federal Trade Commission and the General Accounting Office, the investigative arm of Congress. The F.T.C. wants to know if the groups, which last year negotiated contracts worth more than \$30 billion, are wielding too much control in the market for hospital supplies. The G.A.O. has already issued a preliminary report that questions whether the groups actually save hospitals money.”

By 8/21/04 The NY Times reported that the Justice Department had opened a broad criminal investigation of the medical-supply industry revealing that Novation is being subjected to a criminal inquiry:

“Novation's primary business is to pool the purchasing volume of about 2,200 hospitals, as well as thousands of nursing homes, clinics and physicians' practices, and to use their collective power to negotiate contracts with suppliers at a discount. In many cases, the contracts offer special rebates to hospitals that meet certain purchasing targets. Although Novation is not well known outside the industry, **it wields formidable power because it can open, or impede, access to a vast institutional market for health products.**” [emphasis added]

The Counsel for Medical Supply responded to the panel's show cause order for sanctions with an answer incorporating by reference the case record and stating a complete defense: that the Sherman 1 and 2 claims along with the assertion a private right of action exists under the USA PATRIOT Act were erroneously rejected by the trial court and the appellate panel. The panel's memorandum and order exhibited unfamiliarity with the appellant's brief and the record on appeal, (Medical Supply's brief and pleadings were there to inform the court, see **Pg.s 59, 64-70** explaining Sherman 2 aspect of USA PATIOT Act and contradicting the trial court's admonishment). Medical Supply's counsel formulated a response to the panel that would decisively show Medical Supply had correctly stated a Sherman 1 claim, answering the single element Judge Murgia had faulted. The answer showed how the breach of a contract to provide escrow accounts as a result of an anticompetitive agreement with a market competitor stated on its own a Sherman 1 and 2 claim and finally listing two of the many, many express private rights of action in the USA PATRIOT Act. All in a deliberative attempt to adapt to the limited attention span a busy hearing panel could devote to a cause it had dismissed as entirely frivolous. The appeal brief gave these same arguments in great depth.

The panel is mistaken at ¶3 of its order (**Pg. 2**) about Judge Murgia's memorandum dismissing Medical Supply's Sherman 1 claims. Of the three elements, the trial court found only the absence of plurality of actors or agreement, the first element: "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.” The court in the same paragraph quotes the amended complaint in one passage that surprisingly stands alone as a complete Sherman 1 Group Boycott synonymous with Concerted Refusal to Deal claim sufficiently pled under FRCP 8(a):

“...that *defendants* [**the named defendants**] use “*anticompetitive sole source contracts* [**the agreements to restrain trade**] between their client health care suppliers and health care GPOs [sic] [**the independent co-conspirators identified in other paragraphs as Neoforma and Novation and the group purchasing organizations Premier and Novation**] the defendants have developed” in order to inflate the value of equity shares [**to raise prices of capitalization instruments**] 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.” [emphasis added]

Trial court memorandum and order (**Pg.s 74-5**). This same quote states Sherman 2 claims for Monopoly, Concerted Refusal to Deal, Single Firm Refusal to Deal and even the heightened standard for Sherman 2 Attempted Monopolization less the two relevant markets pled in the amended complaint at and the geographic nature of the market ¶36 (nationwide market), ¶ 43 “This plan *would put representatives in the field nationwide* ...[to] assist in the adoption of MSCI’s supply chain empowerment program.”[emphasis added]. Medical Supply’s Amended Complaint pled agreements to raise prices in the relevant market of healthcare capitalization. See Amd. Cmplt. ¶81, Amd. Cmplt. pg. 34-5,

(**Exb. 3**)Amd. Cmplt. pg. 10-12, However, Judge Murgia stated “plaintiff has not pled the existence of *a pricing agreement, or agreement of any kind, among the defendants* in restraint of trade.” [emphasis added]

Both courts ignored the GPO’s including Premier and Novation both of which are distributors of hospital supplies and competitors of Medical Supply, described as coconspirators in the combine (Amd Cmplt pg. 26,28,29,33) and **Pg.s 44-56** . Also ignored are the direct competitors of Medical Supply as a hospital supply electronic market place Commerce One and Medibuy averred to be in agreement to increase healthcare capitalization prices (shares) with the named defendants and exclusive dealing agreements with the GPOs. *Id.* The panel is in error sanctioning Medical Supply’s counsel because these coconspirators are not named as defendants yet, before any discovery that would identify which is the unknown healthcare provider:

The fact that Beacon pursues only one of the contracting parties does not limit its ability to obtain relief. Accordingly, I conclude that claims 1-4, 7, 8-11, and 14 should not be dismissed for failure to allege a conspiracy to restrain trade or commerce between two or more actors.” [emphasis added]

Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350 at 1363 (Colo., 1996). The trial court and the hearing panel are mistaken about a lack of reasonableness in counsel’s brief argument that US Bancorp NA can be liable under Sherman 1 and 2 for a conspiracy including its subsidiaries and an independent defendant or unnamed but identified coconspirators:

“...[P]arent corporations can be held directly liable for independently participating in the antitrust violations of their subsidiaries. *Reading Int'l, Inc. v. Oaktree Capital Mgmt., LLC*, 2003 WL 22928728 (S.D.N.Y. Dec. 10, 2003) (slip copy); *Carl Hize & Sons, Inc. v. Browning-Ferris Indus., Inc.*, 590 F.Supp. 1201, 1202 (D.Colo.1984).” [emphasis added]

Nobody in Part. Presents v. Clear Channel Communs., 311 F.Supp.2d 1048 at 1069-70 (D. Colo., 2004). See also *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No. 02-9222 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004) upholding “there was no "unity of purpose or a common design" between ACIC/Brantford and Barr. *Copperweld*, 467 U.S. at 771, 104 S.Ct. 2731” *Geneva Pharmaceuticals Tech. v. Barr Laboratories*, 201 F.Supp.2d 236 at 275 (S.D.N.Y., 2002) and the Second Circuit reinstated the Sherman 1 and 2 claims.

The trial court and the hearing panel are mistaken about the significance of US Bancorp and Piper Jaffray in concert with a hospital supplier collaboratively refusing to deal or in other words conducting a group boycott against Medical Supply’s use of escrow accounts to accept capitalization from its representative candidates.

“To establish that a group boycott is per se illegal in this Circuit, "there must be an agreement among conspirators whose market positions are horizontal to each other." *Westman Com'n Co. v. Hobart Intern., Inc.*, 796 F.2d 1216, 1224 n. 1 (10th Cir.1986). **"While the competitors need not be at the same market level as the plaintiff, there must be concerted activity between two or more competitors at same market level."** *Key Financial*, 828 F.2d at 641.” [emphasis added]

Beal Corp. Liquidating Trust v. Valleylab, Inc., 927 F.Supp. 1350 at 1363 (Colo., 1996). The amended complaint pleads concerted refusal to deal or group

boycott between actors horizontal to each other in both relevant markets, healthcare company capitalization and hospital supplies.

The panel abuses its discretion in attacking Medical Supply's counsel with the most severe sanctions for reasoning that Judge Murgia has employed a heightened standard of pleading in dismissing Sherman Act claims. Judge Murgia did not grant any reasonable inference or view the amended complaint's factual allegations "in the light most favorable to the nonmoving party." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). Medical Supply's brief reflected a very reasonable interpretation that the trial judge believed these simply stated elements were insufficient. In fact, Judge Murgia stated that Medical Supply's Sherman 2 claims needed to be dismissed because *particular words* were not used:

“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.”

Trial order at **Pg.s 78-9**, indicating a mistaken belief that formalistic pleading still applied to antitrust. It is beyond refute that the trial court denied preliminary injunctive relief twice and based its dismissal in part upon this court's denial of pre hearing relief in #02-3443 all on an incorrect heightened pleading standard for a violation of statute, mistakenly requiring a showing of irreparable harm to obtain the statute's expressly provided injunctive relief. A decision the plaintiff's memorandums of 6/26/03 and 7/10/03 showed contradicted controlling

authority. Subsequent Tenth Circuit decisions adopted the rule observed by Medical Supply that a showing irreparable harm is not required for a statute violation. See *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft* (10th Cir., 2003) and en banc rehearing.

Leatherman v. Tarrant County, 507 U.S. 163 (1993), bars the district court from applying a heightened pleading standard in antitrust cases. *MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 976 (7th Cir. 1995) see also *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.*, 2002 C05 351 (USCA5, 2002): “judicial attempts to apply a heightened pleading standard in antitrust cases had been "scotched" by the Supreme Court's decision...[in *Leatherman*]...and that after *Leatherman*, an antitrust plaintiff need not include "the particulars of his claim" to survive a motion to dismiss. 33 F.3d at 782.”

The hearing panel committed plain error in determining the plaintiff should be sanctioned for asserting an unknown healthcare supplier defendant was one way the complaint established a plurality of co-conspirators. Plain error is "obvious" or "clear under current law." *United States v. Olano*, 507 U.S. 725, 734 (1993). The Tenth Circuit recognizes complaints against unknown defendants, i.e. *Gaylor v. Does*, 105 F.3d 572 (C.A.10 (Colo.), 1997). “Dismissal against unknown defendants is proper "only when it appears that the true identity of the defendant cannot be learned through discovery or the court's intervention." *Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir.1985).” *Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993).

In *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, per se Sherman 1 liability was held for concerted refusal to deal or group boycott charges against Progressive and unnamed defendants, just as Medical Supply claimed against the US Bancorp defendants, Unknown Healthcare Supplier and other companies identified but not named as defendants:

“A further complaint on behalf of Olsen was that Progressive conspired **with certain unnamed co-conspirators, for example, George Best, CBS Musical Instruments (CBS) and Bobbie Herger (owner and operator of Herger's Music Store in Provo, Utah), in violation of Section 1 of the Act.** Olsen asserts that Progressive conspired with Best to cause Olsen to lose franchises, to destroy his credit and business reputation, to take over his business location and terminate his corporate charter, to fix prices, and to cause manufacturers to boycott his business.”

Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983).

The U.S. Bancorp defendants were in contract with Medical Supply to provide escrow accounts for a \$6000.00 fee. U.S. Bank broke the contract, Medical Supply Chain, Inc.’s complaint (written shortly after to obtain emergency injunctive relief and avoid the resulting irreparable harm) alleged the breaking of the contract was a result of exclusive dealing agreements between the defendants which included Unknown Healthcare Supplier and the unnamed but identified coconspirators. See Amd. Cmplt ¶¶81,82,86.(**Pg. s 46-50**) “[T]he exclusive dealing arrangement itself satisfies the § 1 requirement of coordinated action.” *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, No. 02-9222 at pg. 45 (Fed. 2nd Cir. 10/18/2004) (Fed. 2nd Cir., 2004).

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

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

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

Now that Medical Supply has experienced all the injury it sought to avoid, it is required to bring its claims for monetary damages to a federal district court, likely the Western District of Missouri, a notice pleading district: “...if future damages are unascertainable, a cause of action for such damages does not accrue until they occur. *Zenith*, 401 U.S. at 339, 91 S.Ct. at 806.” *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at FN4 (C.A.10 (Kan.), 1989). See also *Barnosky Oils Inc., v. Union Oil Co.*, 665 F.2d 74, 82 (6th Cir. 1981). US Bank was still attempting to perform the financing part of the contract after Medical Supply filed for its injunctive relief. If “the initial refusal is not final, each time the victim

seeks to deal with the violator and is rejected, a new cause of action accrues. See *Pace Indus.*, 813 F.2d at 237-39; *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714-15 (11th Cir.1984).” *Kaw Valley Elec. Co-op. Co., Inc. v. Kansas Elec. Power Co-op., Inc.*, 872 F.2d 931 at 933-4 (C.A.10 (Kan.), 1989).

Medical Supply also now has evidence the malicious suspicious activity report as a sham petition was filed to further the agreement to suppress competition. See, e.g., *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1274-75 (5th Cir. 1991); *Korody-Colyer Corp. v. General Motors Corp*; *In re Relafen Antitrust Litigation* at pg. 6 (Mass., 2003). The amended pleading for now ripe monetary damages in Kansas District Court or a new filed action in some other federal district court would suffer no issue preclusion on Sherman 1 or 2 claims. *Oltremari v. Kansas Social & Rehabilitative Service*, 871 F.Supp. 1331 (Kan., 1994). The failure of either the trial court or the appellate panel to address the meritorious appeal that the defendant’s use of the USA PATRIOT Act was a sham petition is a Sherman 2 (**Pg.s 59, 64-70** (Amd Cmplt. ¶¶ 115-118 on **Pg.s 89-90**). A violation not excepted by *Eastern RR v. Noerr.*, 365 U.S. 127, 141, 81 S.Ct. 523, 531, 5 L.Ed.2d 464 or maliciously under the USA PATRIOT Act private right of action (Amd Cmplt. ¶¶ 115-118 on **Pg.s 89-90**) completes the lack of preclusive effect of this panel decision. If left standing, the panel’s order sanctioning Medical Supply’s counsel would be impaired with no means to repay the sanctioned funds or prosecute the action. Neither Medical Supply’s counsel, president or any stakeholder have received any income since losing the TRO and their \$350,000.00 on 12/01/ 2002.

I certify the above motion is 15 pages of double spaced 13 point type.

Respectfully submitted,

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Certificate of Service

I certify I have served two copies of this pleading upon opposing counsel
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Bret D. Landrith
Kansas Supreme Court ID # 20380

In the Supreme Court of the United States

BRET D. LANDRITH, ATTORNEY-PETITIONER

v.

US BANCORP NA.
US BANK
The PIPER JAFFRAY COMPANIES
JERRY GRUNDHOFFER
ANDREW CESERE
SUSAN PAINE
BRIAN KABBES
UNKNOWN HEALTHCARE SUPPLIER

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR BRET D. LANDRITH IN SUPPORT

Bret D. Landrith, Esq.
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QUESTION PRESENTED

Whether an argument the USA-PATRIOT Act, Pub. L. 107-56 express language in § 355 granting a private right of action for malicious suspicious activity reports and Congress' *in pari materia* express and implied good faith qualifications in §§ 314(b) and 351 deny immunity for intentional misuse of the act (over which circuits are in conflict) is *sua sponte* sanctionable without review?

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LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit. The attorney petitioner here is Bret D. Landrith and the appellant below was Medical Supply Chain, Inc.

The respondents here and appellees below are US Bancorp, NA.

US Bank, US Bancorp Piper Jaffray, Jerry A. Grundhofer, Andrew Cesere

Susan Paine, Lars Anderson, Brian Kabbes, Unknown Healthcare Supplier

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OPINIONS BELOW

The Court of Appeals opinion sought to be appealed is *Medical Supply Chain Inc. v. US Bancorp N.A. et al*, Case No. 03-3342 (10 C.A. 2004). The District Court opinion is *Medical Supply Chain, Inc. v. U S Bancorp, NA*, 2003 WL 21479192, (D. Kan. 2003). The appellate sanction order, memorandum and order and trial court order are attachments 1-3.

JURISDICTION

The Court of Appeals denied en banc rehearing of its judgment on February 10, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

USA PATRIOT Act, Pub. L. No. 107-56 §§ 314, 351 and 355
Annunzio-Wylie Anti-Money-Laundering Act 31 U.S.C. Section 5318(g)(3)

STATEMENT OF THE CASE

This is a petition for review of *sua sponte* sanctions against the petitioner based on an appeal of the dismissal of Medical Supply Chain, Inc.'s (Medical Supply) federal Sherman Antitrust Act §§1 and 2 claims against the defendants on a Fed.R.Civ.P. 12 (b)(6) motion, prior to the commencement of discovery. The petitioner argued that the threat of a USA PATRIOT Act suspicious activity report should be enjoined as a form of

Sherman §2 prohibited monopolization where the bank and investment bank participated in agreements to restrain trade in the market for hospital supplies with Medical Supply's competitors Novation and Neoforma.

A. Factual Background

The action arose when US Bank, a subsidiary of US Bancorp NA broke an agreement to provide escrow accounts Medical Supply sought to use to capitalize its entry into the national market for hospital supplies.

The national market for hospital supplies has been the subject of three successive US Senate Judiciary Antitrust Subcommittee hearings on April 30, 2002, July 16, 2003 and September 14, 2004 regarding the lack of competition and the unavailability of venture capital due to the control of the two dominant hospital supplier group purchasing organizations Novation, LLC and Premier.

Medical Supply Chain, Inc. had previously sought investment banking services from Piper Jaffray, then a subsidiary of US Bancorp NA with 70% of its venture funds concentrated in investments in hospital supplier companies. Piper Jaffray refused to return Medical Supplies calls, prompting Medical Supply with the advice of consultants to create its own capitalization program utilizing escrowed funds and fees from its prospective marketing representatives like the excluded mountain in *Aspen Skiing*.¹

US Bank's trust department evaluated Medical Supply's business plan and the first ten candidates. US Bank, already Medical Supply's business account provider agreed to provide the escrow accounts and requested changes to the escrow contract and altering the placement of the funds of a company owned by US Bancorp NA. Medical

¹ *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)

Supply made the changes and the defendant Brian Kabbes, Vice President of the US Bank Trust office approved the changes via email and orally, knowing that Medical Supply was awaiting his approval before sending them to the candidates.

Brian Kabbes then called Medical Supply to break what Medical Supply argues is a written contract under the ESIGN Act 15 U.S.C. §§ 7001 *et seq.* stating the bank's reason for doing so was the USA PATRIOT Act "know your customer" provisions. In recorded conversations and letters up the chain of command of US Bancorp NA, Medical Supply confirmed it was USA PATRIOT Act "know your customer" provisions that were used as the business justification for the refusal to deal. Medical Supply informed the bank defendants that this justification was a pretext, that this provision did not apply to domestic trust accounts and had not yet been established by US Treasury regulation. Medical Supply also established in the recorded conversations that US Bancorp Piper Jaffray was continuing to provide escrow accounts to other new customers and that the defendants were doing business with other hospital suppliers.

B. Proceedings Below

Medical Supply brought suit for injunctive and declaratory relief to prevent the loss of \$300,000.00 it would forfeit without the promised escrow accounts, and seeking prospective relief to prevent US Bank from filing a malicious suspicious activity report under the USA PATRIOT Act to restrain competition in the nationwide hospital supply market. The complaint alleged the US Bancorp defendants refused to deal with Medical Supply because of its participation in the hospital supply market in conspiracy, combination and agreement with a defendant Unknown Healthcare Supplier along with

Novation, LLC and Neoforma, Inc. Both of which were identified as coconspirators but not named as defendants.

The trial court ruled that Medical Supply was not entitled to relief because there was no private right of action under the USA PATRIOT Act and Medical Supply failed to allege a conspiracy between two legally independent entities.

Medical Supply timely sought reconsideration pointing out the Unknown Hospital Supplier defendant and the identified coconspirators Novation, LLC and Neoforma, Inc. alleged to have been in publicized exclusionary agreements with the US Bancorp Piper Jaffray defendants. Medical Supply also pointed out the express language of the USA PATRIOT Act providing for a private right of action. However the trial judge denied reconsideration.

The petitioner as sole counsel for Medical Supply appealed on these same grounds to the Tenth Circuit Court of Appeals. The Appellate Court without finding of law or fact upheld the trial court, stating again that there was no private right of action created by the USA- PATRIOT Act and ordered the petitioner to show cause why he should not be sanctioned.

The petitioner made a timely response showing at law the sufficiency of Medical Supply's antitrust claims including the complaint's allegations of identified coconspirators that were legally separate entities from US Bancorp Piper Jaffray defendants and the express language of the USA PATRIOT Act creating several private rights of action.

The Tenth Circuit panel responded by *sua sponte* sanctioning the petitioner with attorney's fees and double costs, the most severe sanction available to it. The appellate

panel refused to reconsider its opinion and the sitting judges of the circuit en banc denied the petitioner review of the *sua sponte* sanction.

REASONS FOR GRANTING THE WRIT

The petitioner raises the following reasons that this court should grant review:

I. A Conflict Between Two Circuits And A Circuit and State Supreme Court Exists

A split in Circuits and the Arkansas Supreme Court exists over whether a good faith requirement exists for safe harbor immunity from civil liability. Cases recognizing liability in the absence of good faith are *Lopez v. First Union Nat. Bank of Florida*, 129 F.3d 1186 (C.A.11 (Fla.), 1997) and *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003). Cases opposing bad faith liability are *Stoutt v. Banco Popular De Puerto Rico*, 2003 C01 48 (USCA1, 2003) *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544-45 (2d Cir. 1999).

The USA PATRIOT Act provides for voluntary sharing of information among financial institutions under a safe harbor from liability. To encourage the free-flow of data, Congress created in Section 314(b) a broad safe harbor from any civil liability to any person pursuant to any law, regulation, contract or other legally enforceable agreement, provided that a financial institution complies with four basic procedures set forth in the regulations: Banks must annually file a specified form of notice of intent to share information with the Financial Crimes Enforcement Network, or Fincen; share such information only with other institutions or associations of institutions that have filed such a notice; maintain procedures to adequately protect the security and confidentiality of the information; and use it only for detecting, identifying, and reporting on activities that May involve terrorism or money laundering, and determining whether to establish or

maintain an account or to engage in a transaction. Medical Supply's complaint alleged in detail that US Bank was not complying with the requirement of maintaining procedures to prevent abuse and the loss of Medical Supply's confidential business information.

Though the language creating the safe harbor is broad and the required procedures are fairly simple, it is still unresolved how "safe" the safe harbor is. Courts should impose a good-faith standard with respect to the sharing of information, but doing so subjects a bank to potential liability. Insight into the appropriate judicial action comes from the pre USA PATRIOT Act interpretations of the earlier version of the safe harbor protecting an institution that files a suspicious-activity report to an agency in accordance with the Annunzio-Wylie Anti-Money-Laundering Act of 1992. Banks must file a SAR when a known or a suspected violation of law or a suspicious transaction related to money laundering has occurred according to certain statutory thresholds and may voluntarily file one for other suspicious activities not captured by those thresholds. The law provides that a bank filing an SAR is not liable to any person for the disclosures or for failing to notify the person involved in the transaction of them. One line of cases interpreting the Annunzio-Wylie safe harbor had provided that a bank must have a good-faith suspicion of a violation before it discloses information related to the suspected money laundering or other potential crime. In *Lopez v. First Union Nat'l Bank* and *Coronado v. BankAtlantic Bancorp., Inc.*, both at 129 F.3d 1186, 1195 (11th Cir. 1997), a court held that the safe harbor was not intended to provide blanket immunity for disclosures. In the related action *Coronado v. BankAtlantic Bancorp, Inc.*, the court held that it did not apply because the bank, which had notified law enforcement of suspicious activity and granted

federal agents access to about 1,100 accounts, had not shown that it had determined in good-faith that there was a connection between the activity and the disclosures.

Bank of Eureka Springs v. Evans, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003) most closely resembles the circumstances of the present case. In *Bank of Eureka Springs*, the court found the bank had filed a suspicious activity report in an attempt to have its client criminally prosecuted without cause so that it might take his property. The court found the bad faith conduct deprived the bank of immunity for the SAR. Medical Supply alleges that US Bank sought to file a malicious suspicious activity report to restrain competition in the market for hospital supplies where US Bancorp NA and Piper Jaffray were actively participating in agreements to exclude internet marketplaces like Medical Supply from undercutting Novation, LLC and Neoforma, Inc.'s maintenance of artificially inflated hospital supply prices.

Other courts, however, have expressly declined to impose the good-faith standard and reasoned that the plain language of the safe harbor provision of Annunzio-Wylie described an unqualified privilege with no mention of good faith or similar requirement. The courts in both *Lee v. Bankers Trust Company*, and most recently in *Stoutt v. Banco Popular de Puerto Rico*, concluded that the provision does not limit protection to disclosures based on a good-faith belief that a violation has occurred. The split in judicial opinion over whether the Annunzio-Wylie safe harbor includes an implicit requirement that a bank making a disclosure must first make its own good-faith determination raises general concern about the scope of these safe harbors. Like the Annunzio-Wylie safe harbor, the USA PATRIOT Act's safe harbor and the regulations implementing it contain no explicit qualifications as to the scope of the liability on the basis of good-faith

determinations. In contrast, other parts of the USA PATRIOT Act specifically include standards limiting the applicable safe harbor, such as in Section 355 which provides that with respect to an employment reference, an institution shall not be shielded from liability if a disclosure is made with "malicious intent." On the basis of the express provision for civil liability under Section 355 of the USA PATRIOT Act the petitioner believed his client had a cause of action for antitrust injunctive relief to prevent the filing of a suspicious activity report. Moreover, in section 314(a) of the act, Congress included specific standards with respect to information shared among financial institutions, regulators and law enforcement, and described the information subject to such disclosures as "reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities." The Patriot Act's safe-harbor section does not contain any similar modifiers of reasonable suspicions or credible evidence, though the final portion of section 314(b) does except from the safe harbor violations of the section generally. This court should resolve whether courts apply a good-faith standard in application of the safe harbor. Until clear parameters are established, banks are likely not to voluntarily participate in information sharing and are required to make careful determinations about what is shared.

II. IMPORTANT CONGRESSIONAL PUBLIC POLICY IS DEFEATED BY USA PATRIOT ACT BAD FAITH IMMUNITY

Medical Supply's complaint sought to enjoin conduct that costs health insurers and the government healthcare finance programs Medicare and Medicaid over twenty billion dollars a year in hospital supply distribution inefficiency. This loss is based on the complaint's citation of the defendant investment bank Piper Jaffray's study revealing the savings an internet marketplace like Medical Supply would realize.

The trial court and Court of Appeals believed that the USA PATRIOT Act immunity could not be overcome, even for prospective injunctive relief and that no provision of the USA PATRIOT Act provided for private civil liability. This court has long contradicted this view:

“It is settled law that '(i)mmunity from the antitrust laws is not lightly implied.' *People of State of California v. Federal Power Comm'n*, 369 U.S. 482, 485, 82 S.Ct. 901, 903—904, 8 L.Ed.2d 54. *United States v. Borden Co.*, 308 U.S. 188, 198 S.Ct. 182, 188—189, 84 L.Ed. 181; *United States v. Southern Pac. Co.*, 259 U.S. 214, 239—240, 42 S.Ct. 496, 501—502, 66 L.Ed. 907. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here.”

United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

Medical Supply's cause is controversial because it's an action seeking an injunction against the filing of a USA PATRIOT Act suspicious activity report in furtherance of a boycott US Bancorp and Piper Jaffray participated in with coconspirators identified in the complaint as Novation, a healthcare Group Purchasing Organization (“GPO”) competitor of Medical Supply's in the hospital supply market identified in the complaint with its captive e-commerce marketplace Neoforma, Inc. competing with Medical Supply on the web. The court using the wrong standard believed US Bank, US Bancorp NA and Piper Jaffray could not violate antitrust laws in Medical Supply's market since they did not sell hospital supplies:

“However, in *Aquatherm* the plaintiffs did not name (or even identify) the alleged co-conspirators who participated in the relevant market. In this case, SBS alleges a conspiracy between HBC, a clear market participant, and CC. Nothing in our case law suggests that a conspiracy must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy. Cf. *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir. 2001) (“[W]e conclude that there can be sufficient evidence of a combination or conspiracy when one

conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive."). In its brief, CC correctly points out that Spectators involved a group boycott with multiple conspirators, thereby giving the non-participant defendant the power to injure the plaintiff." [emphasis added]

Spanish Broadcasting System of Florida, Inc. v. Clear Channel

Communications, Inc., No. 03-14588 (Fed. 11th Cir. 6/30/2004) (Fed. 11th Cir., 2004).

III. THE USA PATRIOT ACT'S MISUNDERSTOOD GRANT OF IMMUNITY PREJUDICES THE RIGHTS OF LITIGANTS

The appellate panel's sanction order "relying on a materially incorrect view of the relevant law" based on the mistake first that no private rights of action were created by the USA PATRIOT Act and secondly that a reasonable challenge to the trial court's ruling on coconspirators could not be raised. The appellate panel's order of sanctions was contrary to the standard in *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) and therefore an abuse of discretion. The decision also contradicts controlling case law of the Tenth circuit regarding the prohibition of dismissal when there is a discoverable unknown defendant (*Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993) and plurality of actors through expressly identified but unnamed coconspirators (*Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983) as described infra. The en banc "appellate court would be justified in concluding that, in making such errors, the district court [here, the hearing panel] abused its discretion." *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402. "If the appeal is not frivolous under this standard, Rule 38 does not require the appellee to pay the appellant's attorney's fees." *I.d* at 407.

The basis for the Tenth Circuit's incongruous rulings in reaction to a challenge to the USA PATRIOT Act is likely the national emergency the USA PATRIOT Act legislation sought to address. The Tenth Circuit had recently recognized the limitation of immunity at common law where one who reports suspected criminal conduct already has a privilege, but a privilege often taken to require both a reasonable basis for the report and good faith in *Murphree v. U.S. Bank of Utah, N.A.*, 293 F.3d 1220, 1222-23 (10th Cir. 2002).

CONCLUSION

Whereas for the above stated reasons, the petitioner Bret D. Landrith respectfully requests that the court grant certiorari over this matter or in the alternative to remand the action back to district court for discovery and further development.

Respectfully submitted,

S/ Bret D. Landrith

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No. 05-5503

Title: Bret D. Landrith, Petitioner
v.
US Bancorp, NA, et al.

Docketed: July 27, 2005
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (03-3342)
Decision Date: December 30, 2004
Rehearing Denied: February 10, 2005

~~Date~~ ~~~~~Proceedings and Orders~~~~~

May 11 2005 Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed.
(Response due August 26, 2005)
Aug 4 2005 Waiver of right of respondents US Bancorp, et al. to respond filed.
Sep 8 2005 DISTRIBUTED for Conference of September 26, 2005.
Oct 3 2005 Petition DENIED. The Chief Justice took no part in the consideration or decision of this petition.

~~Name~~~~~Address~~~~~Phone~~~

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Party name: Bret D. Landrith

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Party name: US Bancorp, et al.

CLOSED

**U.S. District Court
District of Kansas (Kansas City)
CIVIL DOCKET FOR CASE #: 2:03-cv-02324-CM-JPO**

Medical Supply Chain, Inc. v. General Electric Company et al

Assigned to: District Judge Carlos Murguia

Referred to: Magistrate Judge James P. O'Hara

Case in other court: 10CCA, 04-03075

10CCA, 04-03102

10CCA, 04-03075

10CCA, 04-03102

Cause: 15:15 Antitrust Litigation

Date Filed: 06/18/2003

Date Terminated: 01/29/2004

Jury Demand: Plaintiff

Nature of Suit: 410 Anti-Trust

Jurisdiction: Federal Question

Plaintiff

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Ryan Z. Watts
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*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

John K. Power
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ATTORNEY TO BE NOTICED

Defendant

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John K. Power
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ATTORNEY TO BE NOTICED

Defendant

Jeffrey Immelt

represented by **John K. Power**
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/18/2003	1	COMPLAINT with trial location of Kansas City , filed by Medical Supply Chain, Inc..(mm) (Entered: 06/18/2003)
06/18/2003		FILING FEE PAID: in the amount of \$ 150, receipt number 099270 (mm) (Entered: 06/18/2003)
08/13/2003	2	NOTICE of Appearance by John K. Power on behalf of all defendants (Power, John) (Entered: 08/13/2003)
08/13/2003	3	MOTION for attorney Jonathan Ian Gleklen to appear pro hac vice by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company (Attachments: # 1 Affidavit Jonathan Ian Gleklen)(Power, John) (Entered: 08/13/2003)
08/13/2003	4	MOTION for attorney Ryan Zane Watts to appear pro hac vice by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company (Attachments: # 1 Affidavit Ryan Zane Watts)(Power, John) (Entered: 08/13/2003)
08/13/2003		PRO HAC VICE FEE PAID: on 08/13/03 for attorneys Ryan Zane Watts and Jonathan Gleklen, regarding 3 MOTION for attorney Jonathan Ian Gleklen to appear pro hac vice, and 4 MOTION for attorney Ryan Zane Watts to appear pro hac vice, in the amount of \$25.00 (each)--\$50.00 total. Receipt Number: 099958. (THIS IS A TEXT ONLY ENTRY-NO DOCUMENT IS ASSOCIATED WITH THIS TRANSACTION) (mg) (Entered: 08/13/2003)
08/13/2003	5	ORDER granting 3 , 4 motions for leave to appear pro hac vice. Jonathan I. Gleklen and Ryan Z. Watts are granted leave to appear pro hac vice on behalf of defendants General Electric Company, GE Transportation Systems Global Signaling LLC, and General Electric Capital Business Asset Funding Corporation. Ordered by Magistrate Judge James P. O'Hara on 08/13/03. (Order by docket-text entry only. No separate order will be issued.) (mg) (Entered: 08/13/2003)
08/15/2003	6	AMENDED COMPLAINT <i>including Defendant Jeffrey Immelt</i> against all defendants, filed by Medical Supply Chain, Inc.. (Attachments: # 1 Amended Complaint# 2 Exhibit Medical Supply Executive Summary# 3 Exhibit Novation-Neoforma Marketplace Contract# 4 Affidavit Everard Affidavit of Market Dominance)(Landrith, Bret) (Entered: 08/15/2003)
08/19/2003	7	NOTICE of Appearance by John K. Power on behalf of Jeffrey Immelt (Power, John) (Entered: 08/19/2003)
08/21/2003	8	MOTION to Dismiss <i>Amended Complaint</i> by Defendants GE Transportation

		Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt (Power, John) (Entered: 08/21/2003)
08/21/2003	9	MEMORANDUM IN SUPPORT of 8 MOTION to Dismiss <i>Amended Complaint</i> by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt (Attachments: # 1 Exhibit 1-A, Plaintiff's Amended Complaint, Medical Supply Chain, Inc. v. US Bancorp NA, pp. 1-35# 2 Exhibit 1-B, Plaintiff's Amended Complaint, Medical Supply Chain, Inc. v. US Bancorp NA, pp. 36-71)(Power, John) (Entered: 08/21/2003)
09/09/2003	10	MOTION for Extension of Time as to 8 MOTION to Dismiss <i>Amended Complaint</i> , 9 Memorandum in Support of Motion, and <i>defendants' motion for sanction (not docketed)</i> by Plaintiff Medical Supply Chain, Inc. (Landrith, Bret) (Entered: 09/09/2003)
09/15/2003	11	MEMORANDUM in Opposition by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt re 10 MOTION for Extension of Time as to 8 MOTION to Dismiss <i>Amended Complaint</i> , 9 Memorandum in Support of Motion, and <i>defendants' motion for sanction (not docketed)</i> (Power, John) (Entered: 09/15/2003)
09/19/2003	12	ORDER SETTING SCHEDULING CONFERENCE: Scheduling Conference set for 10/31/2003 at 1:30 PM before Magistrate Judge James P. O'Hara. Parties' planning meeting report due by 10/21/2003. Signed by Magistrate Judge James P. O'Hara on 9/19/03. (kg) (Entered: 09/19/2003)
09/23/2003	13	MOTION for Sanctions <i>Rule 11</i> by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt (Power, John) (Entered: 09/23/2003)
09/23/2003	14	MEMORANDUM IN SUPPORT of 13 MOTION for Sanctions <i>Rule 11</i> by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt (Attachments: # 1 Exhibit 1# 2 Exhibit 2)(Power, John) (Entered: 09/23/2003)
09/30/2003	15	MOTION to Stay <i>Discovery Pending Resolution of Defendants' Motion to Dismiss</i> by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt (Power, John) (Entered: 09/30/2003)
09/30/2003	16	MEMORANDUM IN SUPPORT of 15 MOTION to Stay <i>Discovery Pending Resolution of Defendants' Motion to Dismiss</i> by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt (Power, John) (Entered: 09/30/2003)

10/01/2003	17	MEMORANDUM in Opposition by Plaintiff Medical Supply Chain, Inc. re 13 MOTION for Sanctions <i>Rule 11</i> , 8 MOTION to Dismiss <i>Amended Complaint</i> (Landrith, Bret) (Entered: 10/01/2003)
10/01/2003	18	MEMORANDUM IN SUPPORT of 13 MOTION for Sanctions <i>Rule 11</i> , 8 MOTION to Dismiss <i>Amended Complaint</i> by Plaintiff Medical Supply Chain, Inc. (Attachments: # 1 Exhibit # 2 Exhibit # 3 Exhibit # 4 Exhibit # 5 Exhibit # 6 Exhibit # 7 Exhibit # 8 Exhibit)(Landrith, Bret) (Entered: 10/01/2003)
10/10/2003	19	RESPONSE by Plaintiff Medical Supply Chain, Inc. re 15 MOTION to Stay <i>Discovery Pending Resolution of Defendants' Motion to Dismiss</i> (Landrith, Bret) (Entered: 10/10/2003)
10/14/2003	20	REPLY to Response to Motion by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt re: 13 MOTION for Sanctions <i>Rule 11</i> (Power, John) (Entered: 10/14/2003)
10/14/2003	21	REPLY to Response to Motion by Defendants GE Transportation Systems Global Signaling LLC, General Electric Capital Business Asset Funding Corporation, General Electric Company, Jeffrey Immelt re: 8 MOTION to Dismiss <i>Amended Complaint</i> (Power, John) (Entered: 10/14/2003)
10/24/2003	22	ORDER granting 15 motion to stay; October 31, 2003-scheduling conference cancelled. Signed by Judge James P. O'Hara on 10/24/03. (mt) (Entered: 10/24/2003)
01/29/2004	23	ORDER granting 8 Motion to Dismiss, granting 10 Motion for Extension of Time to File Response, denying 13 Motion for Sanctions. Signed by Judge Carlos Murguia on 1/29/2004. (jc) (Entered: 01/29/2004)
02/13/2004	24	JUDGMENT pursuant to the Memorandum and Order filed 1/29/04, plaintiff to take nothing and the action is dismissed on the merits. Defendant to recover of plaintiff their costs of action. Signed by deputy clerk on 2/13/04. (ck) (Entered: 02/13/2004)
02/13/2004	25	NOTICE OF APPEAL by Plaintiff Medical Supply Chain, Inc.. (Landrith, Bret) (Entered: 02/13/2004)
02/20/2004	26	PRELIMINARY RECORD ON APPEAL transmitted to 10CCA Volume(s) One re 25 Notice of Appeal - Final Judgment (Attachments: # 1 Letter to 10cca# 2 APPEAL# 3 Docket Sheet# 4 Appeal Receipt# 5 Letter from 10CCA to Counsel of Record# 6 Transcript Order form)(trs) (Entered: 02/20/2004)
02/27/2004	27	NOTICE OF APPEAL in regard to 23 Order ruling on Motion to Dismiss, Motion for Extension of Time to File Response/Reply and Motion for Sanctions by Defendant General Electric Company. (Power, John) Text modified on 3/1/2004 (ck). (Entered: 02/27/2004)
03/03/2004		APPEAL FEE PAID in the amount of \$255 Receipt No. 102439 re Notice of

		Appeal - Final Judgment ²⁷ filed by General Electric Company; (THIS IS A TEXT ONLY ENTRY-NO DOCUMENT IS ASSOCIATED WITH THIS TRANSACTION) (trs) (Entered: 03/03/2004)
03/05/2004	²⁸	RECEIPT FROM 10CCA of the Preliminary Record on Appeal 10CCA regarding ²⁵ Notice of Appeal - Final Judgment. Appeal Number: 04-3075. (mg) (Entered: 03/05/2004)
03/05/2004	²⁹	APPEAL DOCKETED in 10CCA on 02/25/04 and assigned Appeal Number: 04-3075, regarding ²⁵ Notice of Appeal - Final Judgment, filed by Medical Supply Chain, Inc.. (mg) (Entered: 03/05/2004)
03/05/2004	³⁰	Letter to 10CCA stating filing fee paid re ²⁷ Notice of Appeal - Final Judgment; (trs) (Modified 3/15/04 to clarify text no appeal number issued (trs)). (Entered: 03/05/2004)
03/15/2004	³¹	PRELIMINARY RECORD ON APPEAL transmitted to 10CCA re ²⁷ Notice of Appeal - Final Judgment; (Attachments: # ¹ 10CCA Letter 03-2324# ² Receipt to 10CCA# ³ Docket Sheet# ⁴ 10CCAletter# ⁵ Transcript Order Form)(trs) (Entered: 03/15/2004)
03/16/2004	³²	MOTION to Supplement <i>Trial Court Record</i> by Plaintiff Medical Supply Chain, Inc. (Attachments: # ¹ Supplement Letter to Chief Judge Lungstrum)(Landrith, Bret) (Entered: 03/16/2004)
03/19/2004	³⁴	TRANSCRIPT ORDER FORM stating no transcript required; filed by Medical Supply Chain, Inc.; re ²⁵ Notice of Appeal - Final Judgment filed by Medical Supply Chain, Inc. (Appeal No. 04-3075) (trs) (Entered: 03/23/2004)
03/22/2004	³³	RECEIPT FROM 10CCA of Preliminary Record on Appeal 10CCA re ²⁷ Notice of Appeal - Final Judgment (ck) (Modified on 3/24/2004 to correct the filed date. (mg)) (Entered: 03/23/2004)
03/22/2004		APPEAL FEE PAID in the amount of \$255 Receipt No. 102664 ; re Notice of Appeal - Final Judgment ²⁵ filed by Medical Supply Chain, Inc. (Appeal No. 04-3075) (THIS IS A TEXT ONLY ENTRY-NO DOCUMENT IS ASSOCIATED WITH THIS TRANSACTION) (trs) (Entered: 03/23/2004)
03/22/2004	³⁵	Letter to 10CCA stating Filing Fee Paid 3/22/04 re ²⁵ Notice of Appeal - Final Judgment (Appeal No. 04-3075) (trs) (Entered: 03/23/2004)
03/22/2004	³⁶	APPEAL DOCKETED in 10CCA on 3/18/04 and assigned Appeal No. 04-3102; re ²⁷ Notice of Appeal - Final Judgment filed by General Electric Company. (trs) (Entered: 03/23/2004)
03/31/2004	³⁷	TRANSCRIPT ORDER FORM : No Transcript Necessary re ²⁷ Notice of Appeal - Final Judgment filed by General Electric Company (Appeal No. 04-3102) (trs) (Entered: 04/02/2004)
04/13/2004	³⁸	Letter to 10CCA stating Transcript is not necessary re ²⁷ Notice of Appeal - Final Judgment (Appeal No. 04-3102) (trs) (Entered: 04/13/2004)

04/13/2004	39	Letter to 10CCA stating Transcript is not necessary for this appeal re 25 Notice of Appeal - Final Judgment (Appeal No. 04-3075) (trs) (Entered: 04/13/2004)
04/13/2004	40	ORDER granting 32 Motion to Make Addition to the Record Upon Appeal . Signed by Judge Carlos Murguia on 4/14/04. (ck) (Entered: 04/14/2004)
08/09/2005	41	MOTION to Consolidate Cases by Plaintiff Medical Supply Chain, Inc.(Landrith, Bret) (Entered: 08/09/2005)
08/09/2005	42	EXHIBIT(S) IN SUPPORT of 41 MOTION to Consolidate Cases by Plaintiff Medical Supply Chain, Inc. <i>Complaint identifying GE defendants as coconspirators</i> (Landrith, Bret) (Entered: 08/09/2005)
08/19/2005	43	APPEAL MANDATE from 10CCA Affirming decision of the District Court's dismissal of Medical Supply Chain's federal claim on the merits and dismissal of Medical Supply Chain's state claims without prejudice as to Notice of Appeal - Final Judgment 25 filed by Medical Supply Chain, Inc.; Reversing the District Court's order denying defendant's motion for sanctions and Remanding to District Court for a determination of the proper sanctions to be assessed as to Notice of Appeal - Final Judgment 27 filed by General Electric Company (Attachments: # 1 Letter transmitting Mandate)(kao) (Entered: 08/19/2005)
08/29/2005	44	MOTION to Amend/Correct <i>Defendants' Consolidation Letter</i> by Plaintiff Medical Supply Chain, Inc. (Attachments: # 1 Exhibit Exb 1# 2 Exhibit Exb 2)(Landrith, Bret) (Entered: 08/29/2005)
08/31/2005	45	ORDER finding as moot 41 Motion to Consolidate Cases, finding as moot 44 Motion to Amend/Correct. Case closed on 2/13/2004. The only remaining issue is the 10th Circuit's remand regarding defendant's motion for sanctions. Signed by Judge Carlos Murguia on 8/31/2005.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (js) (Entered: 08/31/2005)
08/31/2005	46	MOTION to Clarify <i>Consolidation Order</i> by Plaintiff Medical Supply Chain, Inc. (Attachments: # 1 Exhibit Exb 1# 2 Exhibit Exb 2)(Landrith, Bret) (Entered: 08/31/2005)
09/14/2005	47	ORDER finding as moot 46 Motion to Clarify . In accordance with the court's previous text entry order, plaintiff's motion is moot. Signed by Judge Carlos Murguia on 9/24/1005.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (js) (Entered: 09/14/2005)
01/09/2007	48	ORDER. Defendant Immelt shall submit, within ten (10) days of this Order, a statement indicating whether he still intends to pursue sanctions in this case, and, if appropriate, affidavits providing the court with information on reasonable attorney fees and costs incurred. Signed by Judge Carlos Murguia on 1/9/2007.(js) (Entered: 01/09/2007)
01/22/2007	49	ORDER re 48 ., Signed by Judge Carlos Murguia on 1/22/07.(yh,) (Entered: 01/22/2007)

PACER Service Center			
Transaction Receipt			
02/13/2007 13:04:17			
PACER Login:	dh0916	Client Code:	
Description:	Docket Report	Search Criteria:	2:03-cv-02324-CM-JPO
Billable Pages:	5	Cost:	0.40

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

CASE NO.: 2:03-cv-2324

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff,

vs.

GENERAL ELECTRIC COMPANY
GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING CORPORATION
GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, L.L.C.

Defendants.

PLAINTIFF'S AMENDED COMPLAINT

Comes now the plaintiff Medical Supply Chain, Inc., represented by its attorney Bret D. Landrith, Esq. and makes the following amended complaint against General Electric Company and its subsidiaries GE Transportation Systems Global Signaling, L.L.C. and General Electric Capital Business Asset Funding Corporation and adds the defendant Jeffrey R. Immelt. The plaintiff Medical Supply Chain, Inc. 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.

1. 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. The purpose of this cartel is to prevent new entrants to the hospital supply e-commerce market and to maintain uncompetitive higher prices on hospital supply commodities. The cartel maintains control over its members pricing, volume, distribution and customer data to enforce the allocation of customers and to exclude nonmember competitors. The cartel requires tying contracts so suppliers and customers are required to join and are forced to do business through the cartel's e-commerce marketplace. When GE's Medical divisions discovered GE Corporate had made a contract with Medical Supply Chain, Inc., they got Jeffrey R. Immelt's office to order that it not be performed to harm a competitor entering their markets. 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.

Jurisdiction and Venue

2. This court has jurisdiction of this action on a federal question, where there is diversity of citizenship and an amount in excess of \$75,000.00.

Parties

Plaintiff:

3. MEDICAL SUPPLY CHAIN, INC., (herein "Medical Supply"), is a Missouri Corporation located at 1300 NW Jefferson Court, Blue Springs, MO 64015. Medical Supply's corporate banking accounts are in Topeka, KS and its counsel is in Pittsburg, KS. The Company provides web-based services (online enterprise software) that dramatically reduce cost when managing healthcare supply chain activities including purchasing transactions made between hospitals and thousands of competing manufacturers on line in Medical Supply's electronic marketplace. These services

manage strategic data and provide direct support to buyers and sellers that make up the healthcare supply chain. By simply replacing the existing maze of supply chain inefficiencies with Medical Supply's services, supply chain cost can be reduced by more than 20%. The Company offers its web-based enterprise as a neutral, pure play driven utility. The Company maintains its autonomy by empowering its customers (buyers/sellers) with enterprise services that efficiently manage their entire supply chain. The tools offered as an enterprise service support extremely efficient and transparent management of procurement, fulfillment, inventory, logistics and settlement activities. In this manner, Medical Supply Chain, Inc. as an e-commerce vendor, replaces a store or distributor as a more efficient and intelligent distributor of hospital supplies. Suppliers offer their products and services through Medical Supply Chain, Inc. and hospitals purchase their supplies through Medical Supply Chain, Inc.

4. Medical Supply's technology is superior allowing for greater market efficiency and transparency than GE's electronic marketplace called GHX, L.L.C. Medical Supply's founder spent 10 years developing it and for the last three years, Medical Supply has been incorporated, completing the research and development for commercialization. Medical Supply's first entry into the hospital supply market was halted in October 2002 by members of GE's cartel directly affiliated with the other electronic marketplace, Neoforma. GE appeared to be acting independently of Neoforma, when it accepted Medical Supply's proposal for a lease buy out and financing, but similarly repudiated a contract for essential facilities, preventing entry into the hospital supply market at great sacrifice when Medical Supply was not in a position to find an alternative. (Neoforma's financial partner, US Bancorp Piper Jaffray, has attested to a threat of filing a Suspicious

Activity Report or “SAR,” against Medical Supply under the USA PATRIOT Act, which would destroy Medical Supply’s ability to process hospital and supplier purchasing transactions. In an affidavit by Piper Jaffray Vice President and Chief Counsel submitted in *Medical Supply vs. US Bancorp et al* No. 02-3443 (10th Cir.), Piper Jaffray argues to file a “SAR” at any time it sees fit. Medical Supply is seeking to be protected from Piper Jaffray’s extortion and any malicious use of the USA PATRIOT Act. The October 2002 and June 2003, distinct antitrust injuries to Medical Supply prevented it from beginning its operations each time and realizing the expectations of its investors and stakeholders. Defendants:

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

market. As part of that strategy, Immelt spent \$50,000,000.00 in 1999 on web site, database and internet communications technologies.

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

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

8. Mr. Immelt knew that the illegitimate increased cost of hospital supplies due to the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause and is causing Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel's supplies.

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

citizens leading to injury and death.

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

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

line.

12. Mr. Immelt's violations of 15 U.S.C. § 1, injuring healthcare supply consumers; including hospitals and patients, in addition to competitors like Medical Supply Chain, Inc. is egregious conduct equivalent to felony. Antitrust Procedures and Penalties Act, Pub.L.No. 93-528, § 3, 88 Stat. 1706, 1708.

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

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

15. GENERAL ELECTRIC COMPANY, (herein “GE”), registered agent address for Kansas, The Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. GE was a dominant medical device manufacturer and medical equipment and electrical equipment supplier to North American hospitals. GE ceased to be a manufacturer and became a distributor of parts, assemblies, products, systems and credit services to hospitals. GE established monopolies in many product lines for hospitals but feared other distributors would bypass GE and buy the same parts, assemblies, products, systems from foreign sources and sell them to North American hospitals at lower prices in competition with GE. To prevent this, GE made alliances with the dominant distributors for hospitals called GPO’s because they were intended to be group-purchasing cooperatives (organizations). GE and the other dominant manufacturers gave the management of these GPO’s kickbacks to prevent direct competition in distribution, preserve their loyalty and to protect the inflated prices. However, GE saw that the captive customers of these GPO’s were growing dissatisfied at the inefficiency and the failure to achieve group purchasing discounts. To protect against other market entrants, GE formed Global Health Exchange L.L.C. as an electronic market place promising online distribution at lower prices to hospitals. GE owns shares of stock in the privately held company and provided the initial capitalization. As an alliance of a handful of dominant manufacturers (now distributors) the actual goal was to preempt the fledgling e-commerce companies from entering the electronic distribution of hospital supplies. GE found the technology of GHX, Inc. was inadequate to outperform new entrants and aligned itself with Neoforma, Inc., the electronic marketplace co-opted by the dominant GPO’s in an alliance to exchange data among suppliers to reinforce cost structures as inflated as those of the

GPO's. GHX, L.L.C. at the direction and approval of GE has retaliated against suppliers who endanger the marketplace with competitive prices. GHX, L.L.C. at the direction and approval of GE has excluded competitors including Retractable Technologies, Inc. and Maximo for failing to give kick backs to the cartel. Death and injury resulted from the failure of hospitals to obtain these medical devices held out by GHX. GHX, L.L.C. at the direction and approval of GE has excluded Medical Supply Chain, Inc. from entering the market by not allowing Medical Supply to offer GE Capital Healthcare credit to its potential customers in April of 2002, by refusing to offer US Bancorp Piper Jaffray services to Medical Supply in June 2002 and by repudiating essential escrow contracts required by Medical Supply to capitalize its entry into market in October 2002. (US Bancorp has interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX L.L.C.; Novation and Premier. US Bancorp helped Novation acquire control of Neoforma and partner it with GHX, L.L.C. creating a monopoly of over 80% of healthcare e-commerce market). GE repudiated a 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. The healthcare market is worth 1.3 trillion dollars. GE acted on the tremendous windfall to preserve its monopoly. George Fricke is GE's property manager.

16. While GE is a diverse conglomerate, in 1993, the majority of its income was derived from the capitalization and finance of unrelated companies and individuals that are customers of its financial services divisions.

17. GENERAL ELECTRIC CAPITAL BUSINESS ASSET FUNDING

CORPORATION, (herein "GE Capital") registered agent address for Kansas, The

Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. GE Capital is a subsidiary of GE performing GE's commercial lending operations. GE in accepting Medical Supply's proposal, committed GE Capital to provide a 5.4% interest rate mortgage for \$6.4 million dollars on the building at 1600 NE Coronado, in Blue Springs, MO. GE Capital had its loan officer Doug McKay from their Overland Park, KS office contact Mr. Lipari of Medical Supply.

18. GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING, L.L.C. (herein "GE Transportation") registered agent address for Kansas, The Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. GE Transportation acquired the building and its transferable lease when it bought the railroad signal company Harmon Industries, Inc. and dismissed its employees. GE Transportation sought to escape the \$5.4 million dollar liability of the remaining 7-year lease because of the \$50,000 to \$60,000 dollar a month lease and insurance on the building that had not been occupied for over 8 months with no sub lease offers. Previously the building had been under utilized while GE dismissed Harmon's staff. The high monthly cost was making the subsidiary fail to meet GE's economic performance requirements and hurting the conglomerate's bottom line and share price.

Statement of Facts

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

portion of the building. The leasing agent declined his offer indicating the existing lessee would not accept anything less than sub-leasing the entire building.

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

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

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

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

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

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

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

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

May 15th 2003-George Frickie

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

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

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

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

28. On or about May 20th, 2003, Medical Supply was given a walk through of the

property to inventory the buildings furniture and fixtures and discuss building maintenance and operational procedures. Tom Davis, the property manager for GE Transportation in Blue Springs and John Phillips, the GE Transportation building maintenance engineer provided a three-hour walk through in addition to the building maintenance and operational procedures. John Philips also provided the construction blue prints of the building and allowed Mr. Lipari to make copies. Mr. Lipari returned the blue prints after copies were made. They both stated they were being dismissed from employment with GE since they would no longer be needed.

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

30. On or about June 2nd, 2003 Mr. Lipari called McKay to see how they were doing on closing and McKay indicated that the person he needed to speak with was at corporate and that he needed to speak with him before moving forward. As the June 15, 2003 closing date approached, medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent George Frickie and email stating that

a delay in closing would not effect the lease buyout of \$350,000. Medical Supply's counsel later again called Mr. Frickie when he receive no response and Mr. Frickie became extremely angry and hung up the phone. Medical Supply then proceeded to speak with GE's counsel Kate O'Leary to determine if the contract had been repudiated. Supporting statutes and the antitrust basis and damages implications were explained to Ms O'Leary. Medical Supply gave GE a deadline of June 10th to clarify whether there had been a repudiation. Mrs. O'Leary later faxed a letter on the 10th requesting that Medical Supply not speak to anyone at GE and that any correspondence relating to this matter be directly to her. Medical Supply then emailed a letter stating that if no earnest money were deposited to indicate the contract was not being repudiated, Medical Supply would file on June 16th for antitrust and breach of contract.

Claims

31. The plaintiff makes the following claims with short and plain statements showing Medical Supply is entitled to relief, having made a short and plain statement of the grounds upon which the court's jurisdiction depends, above and prior to concluding with a demand for the judgment sought against the defendants. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* (91-1657), 508 U.S. 223 (1993).

“...after *Leatherman*, an antitrust plaintiff need not include ‘the particulars of his claim’ to survive a motion to dismiss. 33 F.3d at 782.

It is instead sufficient for the plaintiff to include in its complaint only "a short and plain statement of the claim" showing an entitlement to relief. (emphasis added).” *Apani Southwest, Inc., Plaintiff-Appellant, v. Coca-Cola Enterprises, Inc.*, No. 01-11026 (5th Circuit, August 12, 2002).

32. The court has interpreted this requirement to mean that "factual pleading is required only insofar as it is necessary to place a defendant on notice as to the type of claim

alleged and the grounds upon which it rests, thereby enabling a defendant to prepare a responsive pleading." *Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d at 1388 (10th Cir. 1980). The defendants are hereby given notice of the facts within the totality of this pleading and the claims as follows:

I. Sherman Antitrust Claims Under 15 U.S.C. § 1

33. Count 1, Concerted Refusal to Deal: The Defendants refused to deal with Medical Supply in violation of the Sherman Act in concert with other healthcare suppliers as part of an open and notorious conspiracy incorporated as Global Health Exchange, L.L.C., (See Attachment 3, affidavit of Lynn Everard) and nakedly restrained trade by preventing the entry of Medical Supply Chain, Inc. as an electronic marketplace competing with the defendants' cartel in the relevant market for North America of providing hospital supplies through e-commerce. The purpose of the defendants' creation of a cartel or trust among their competitors was to keep prices of hospital supplies high without competition and to allocate customers, suppliers and distribution channels among the cartel members by contracts in a per se violation of 15 U.S.C. § 1. See *U.S. v. Suntar Roofing, Inc.*, 897 F.2d 469 (C.A.10 (Kan.), 1990). The defendants' refusal to deal in concert with other suppliers and electronic marketplaces (the members of GHX, Inc.) is a per se restraint of trade violating 15 U.S.C. § 1 under *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

34. Count 2, Refusal to Deal in Furtherance of a Monopoly: The Defendants have through their repudiation of their agreement to buy out their lease and provide financing, furthered their monopoly cartel of hospital supplies through e-commerce in North America. Concerted refusal to deal in furtherance of a monopoly or as attempted

monopolization is a per se restraint of trade in violation of 15 U.S.C. § 1 under *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375, 47 S.Ct. 400, 71 L.Ed. 684 (1927).

35. Count 3, Refusal To Deal/Denial of Unique Financial Instrument: The Defendants accepted a proposal in a signed writing, committing to provide novel or custom financing utilizing the equity in a commercial building the Defendants knew was in excess of ten million dollars as a security for an unusual (100%) mortgage loan of 6.4 million dollars to Medical Supply which had no revenue at an unusually low interest rate (5.4%) for an unusually longer period (20 years), with the unusual provision that there would be a moratorium on mortgage payments for the first year. This unique and custom financing provided Medical Supply a capital asset with 3.6 million in equity, coupled with a \$350,000 dollar lease buy out payment from the defendants, was to be used for the purpose of capitalizing Medical Supply's entry into the hospital supply market. The defendants accepted this proposal in a telephone call and in a signed writing, having evaluated Medical Supply's forward financials and business summary and determining that the mortgage could be repaid by Medical Supply's entry into the hospital supply e-commerce market. This unique and custom financing could not be replicated at any bank or in the injured venture fund markets. The value of an e-commerce company is the intellectual property contained in its business model, software, industry and customer relationships. While this is infinitely more valuable than machine tools or the 19th century physical capital, it is difficult or impossible to obtain conventional financing. Medical Supply did not have the means or time to register securities offerings and sell public bonds as GE does to raise money for its operations, financing suppliers, customers

and to capitalize its subsidiaries and affiliates, including GHX, Inc. and Neoforma. The financing GE committed to with Medical Supply was a unique and custom credit facility under *United States Steel Corporation v. Fortner Enterprises, Inc.*, 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977). The defendants' repudiation of the financing cut off access to a facility necessary to enable Medical Supply to capitalize its entry into the North American hospital supply e-commerce market dominated by the defendants' cartel GHX, Inc. which has over 80% of the market and is a per se naked restraint of trade violating 15 U.S.C. § 1 under *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, ante, at 294.

36. Count 4, Conspiracy in Restraint of Trade: "[A]greements whose nature and necessary effect are so plainly anticompetitive . . . no elaborate study of the industry is needed to establish their illegality-they are 'illegal per se.'" *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978). Medical Supply charges that: (1) the defendants contracted, combined, conspired forming an open and notorious cartel with other suppliers and electronic market places to operate in the hospital supply market with joint exchange of data and information among companies that were previously competitors so that less efficient cartel members including Premier, Inc. and Novation, Inc. could maintain their inflated price structure and anticompetitive distribution contracts; (2) that the combination or conspiracy produced adverse, anti-competitive effects by preventing the efficiency of competitive electronic commerce in the relevant North American hospital supply market resulting in excess charges of 20 to 40% , reducing the bottom line profit and loss statements of U.S. hospitals by an average of 5% and forcing over 2000 North

American hospitals to operate at an unsustainable loss, endangering the nation's access to healthcare, increasing the cost of care and health insurance and forcing the closing and merging of treatment centers, resulting in needless suffering and death; (3) the object of the defendants' conduct, refusing to deal or boycotting Medical Supply pursuant to their involvement in a cartel with other suppliers and electronic marketplaces in contract and conspiracy is illegal; and (4) the plaintiff Medical Supply was injured as a proximate result of that conspiracy. Medical Supply has been harmed in antitrust injury from the concerted behavior of the cartel members, included repeated denial of essential facilities and a course of dealing proving illegal intentional cooperative behavior by its competitors in open contact with each other. See *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946) ("The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in any exchange of words.") The defendants have committed a per se antitrust conspiracy in restraint of trade violating 15 U.S.C. § 1 under *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564, 572 (3d Cir.1986).

II. Sherman Antitrust Claims Under 15 U.S.C. § 2

37. Count 5, Restraint of Trade Through Monopoly: The defendants possess monopoly power, having over 80% market share in the relevant market of hospital supplies delivered through e-commerce in North America which they use to set prices by exchanging data and information among their members so that inefficient existing distributor market members including the GPO's Premier and Novation can preserve their inflated cost structures (the cartel has prevented the annual \$23 billion dollar savings identified by US Bancorp Piper Jaffray's 2001 study by maintaining prices

regardless of internal efficiencies) and by preventing the entry of competitors to the relevant market. The defendants willfully acquired and maintained that power by forming the cartel GHX, Inc. to buy an inferior electronic marketplace and exchanging ownership interests with suppliers and distributors that previously were competitors. The defendants further acted to maintain that monopoly by repudiating Medical Supply's financing and lease buy out agreement with full knowledge that Medical Supply had been previously prevented from entering the hospital supply e-commerce market by other cartel members of GHX, Inc. The defendants have restrained trade through a monopoly in violation of 15 U.S.C. § 2 under *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).

38. Count 6 Restraint of Trade Through Attempted Monopolization: The defendants' combinations, contracts, conspiracy with other former competitor companies in the open incorporation of the GHX, Inc. cartel are intentional acquisition of enhanced monopoly power to keep prices inflated and competitors excluded (as a manufacturer and supplier GE created several subsidiaries that have products with monopoly power in niches as a result of their initial superiority, business acumen and by historical accident, GE leveraged these hospital product monopolies to form GHX, Inc.) The defendants repudiated their agreement with Medical Supply, knowing the financing was required to enter the hospital supply market. These actions show: 1) the defendants have a specific intent to monopolize the North American hospital supply e-commerce market; 2) the defendants have a dangerous probability of success where they already possess monopolies in the hospital supply market and now have 80% of the hospital supply e-commerce market by adding Neoforma (the remaining existing electronic marketplace) to

their GHX, Inc. cartel and 3) the defendants repudiated their agreement with Medical Supply to provide financing and lease buy out funds once they realized that Medical Supply was a competitive threat to their cartel and hospital supply monopolies. The defendants restrained trade through attempted monopolization in violation of 15 U.S.C. § 2 under TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d at 1025.

39. Count 7 Single firm Refusal to Deal: The defendants have monopoly power in the relevant North American hospital supply e-commerce market through their subsidiaries. Under Copperweld, a company and its subsidiaries are treated as a single firm. The defendants as a single firm repudiated the agreement to provide market entry capitalization for Medical Supply through financing and a lease buy out at the sacrifice of over \$15 million dollars of profit for the defendant entities, removing a \$5.4 million dollar liability from GE Transportation's balance sheet and adding substantial interest income of \$3.4 million dollars and a lending portfolio book asset of \$10million dollars to GE Business Capital. The defendants chose to repudiate their agreement even knowing the resulting present suit for business plan expectation damages trebled, an additional billion dollar liability that arising through fraudulent misrepresentation of GE's intent to honor its contract will require SEC reporting disclosure under Section 302(a)(3) Sarbanes-Oxley Act of 2002. The refusal to accept the immediate benefits of release from GE Transportation's 7-year \$5.4 million dollar liability at a mere \$350,000.00 and to repudiate an agreement to provide a profitable loan at an interest rate twice that of GE's credit cost in a first mortgage for slightly more than half of the 1998 value of the commercial building GE intimately knew having maintained and at possibly less than

half of the replacement cost or market value with the subsequent development of an adjacent golf course and a Marriott Court Yard Hotel with extensive conferencing centers owned by the City of Blue Springs, causing circumstances where there was no cost to GE resulting from risk on the loan or in the broader business sense; GE would not suffer from losses due to an absence of economic efficiency performing under the loan agreement. Thus the evidence supports an inference that like Ski Co. in *Aspen Skiing*, the defendants were not motivated business lending efficiency concerns and that GE was willing to sacrifice short-run benefits and business goodwill in exchange for a perceived long-run impact on the fledgling rival to its e-commerce cartel. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 472 U.S. at pg. 611-612. The defendants are liable under 15 U.S.C. § 2 for a refusal to deal where they had monopoly power in the relevant market the refusal excluded Medical Supply from and the refusal to deal sacrificed profit available from exercising that monopoly power in order to exclude competition and thereby to create additional market power. GE sought to enlarge its monopoly by "attempting to exclude rivals on some basis other than efficiency." *Id.*, 472 U.S. 585, 605 (1985).

40. Count 8, Refusal to Deal "Change of Pattern": The defendants are a large conglomerate operating thousands of facilities around the world engaged in design, manufacture, sales, distribution and servicing of millions of discrete or distinct products. The defendants were pioneers in electronic signaling for business communications purposes including buy and sell orders for distribution of property having conducted distance transactions for over 150 years. Later the defendants were among the first business entities to transmit electronically facsimiles of paper documents including contracts. Now, over 93% (the average for an American corporation) of the defendants'

contracts are transmitted electronically. There is not a process performed or service provided anywhere in the world by GE or any of its subsidiaries that is not dependent on the enforceability of electronically transmitted offers and acceptances between parties geographically removed from each other. From outsourced subcomponents to real estate mortgages, bonds and shares of GE stock, the defendants have at any given second, billions of dollars of electronic contract transactions relying solely on the security of commercial law in the many countless jurisdictions GE operates and the expertise of their legions of corporate counsel. On June 15th, 2003, GE interrupted that pattern of distribution of property arising in a competitive market and existing for over a century, by denying the validity of an electronic contract with clear terms, an exchange of promises comprising a verified offer and acceptance, committing GE, bearing the digital signature of its authorized agent, under the federal E-Sign Act of the United States. GE's home nation, knowingly harming Medical Supply and preventing its entry into the hospital supply market dominated by GE's GHX, Inc. cartel for no valid business reason and no pro-competitive business justification in violation of 15 U.S.C. § 2 under Aspen Skiing at 605, 105 S.Ct. at 2858.

41. Count 9, Refusal to Deal Denial of Essential Facility: GE controls an essential facility for the capitalization of business entities, both its own subsidiaries and affiliate companies and for hire through its business capital and venture funding divisions. GE facilities to obtain capital through the sale of securities in the form of stocks and bonds has taken over a hundred years to develop. It would take more than a year to develop securities registrations in all fifty states and substantial capital to obtain the accountancy and legal review to make a public offering of stocks or bonds, far more capital to be listed

on the NYSE or to create a market among investors trusting enough to demand GE securities in very large supplies for low rates of return. It would be far more reasonable and practical to overcome Aspen's development red tape hurdles and bulldoze four more mountains for new slopes. The mortgage and lease buy out was a unique financial instrument no other lender could have provided due to the absence of the financial stake in being released from the lease, banks are prohibited from making 100% mortgages by the F.D.I.C. Only GE had the economic power in the Wall Street financial markets to obtain the low cost bond money required to provide the low interest rate for twenty years under the terms of the loan. The agreement's uniqueness made it an essential facility, Fortner I 394 U.S. at 505, 89 S.Ct. 1252. In Alaska Airlines, the court defined the essential facilities doctrine, generally, as: imposing "liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain to compete with the first." Alaska Airlines, 948 F.2d at 542. The capitalization of Medical Supply's entry into the hospital supply e-commerce market could not be reasonably and practically duplicated once repudiated by GE. The financing and lease buy out was an essential facility under Anaheim v. Southern California Edison Co., 955 F.2d 1373, 1380 (9th Cir.1992). GE's repudiation of the financing and lease buy out essential facility harmed the competitive process in the absence of a legitimate business justification. Kodak, 504 U.S. at 483 n. 32, 112 S.Ct. at 2090 n. 32 (citing Aspen Skiing, 472 U.S. at 602, 105 S.Ct. at 2857).

III. Clayton Antitrust Claims Under 15 U.S.C. § 13

42. Count 10, Discrimination in Services or Facilities: The defendants have dominant market power in the hospital supply market and provide a significant (80%) of the

commerce in the hospital supply e-commerce market. GE provided the initial capitalization of the GHX, L.L.C. cartel at its formation in 2000 in exchange for an ownership interest in the fledgling electronic marketplace. GHX, L.L.C initially valued itself at \$100 million dollars, but lacked the web based multiparty communications technology of Medical Supply, limiting GHX, L.L.C's potential to create efficiency through supplier competition inherent in Medical Supply's business model. GE and G.H.X., L.L.C. joined with Neoforma, the remaining electronic exchange to create a common e-commerce exchange at the exclusion of Medical Supply. GE provides credit to Neoforma and has electronic contracts for property transactions on GE products sold through Neoforma and GHX, L.L.C. GE repudiated its agreement to provide facilities to Medical Supply when it realized Medical Supply would compete with GE's e-commerce cartel. The Court held that neither 'cost-justification' nor an absence of competitive injury may constitute 'justification' of a prima facie § 2(e) violation. *FTC v. Simplicity Pattern Co., Inc.* 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959).

IV. Breach of Contract

43. Count 11, Breach of a Written Contract: George Fricke, property manager for The General Electric Company who Medical Supply had been told by Fricke and his agents, was the authority for the building at 1600 NE Coronado Dr. telephoned Medical Supply Chain's Missouri headquarters and placed a message on its answering machine stating he had been instructed by "business leaders" to accept Medical Supply's proposal and he was calling to do so. Then, George Fricke sent a written acceptance via e-mail with his initials added a signature at the end of the email message. No terms were disputed and the acceptance confirmed The General Electric Company would make its subsidiary GE

Transportation L.L.C. pay \$350,000 for the buy out of the lease and its GE Capital subsidiary provide the \$6.4 million dollar mortgage and closing at 5.4% for twenty years with a first year moratorium on payments. In diversity actions, the Court applies the substantive law, including choice of law rules, that Kansas state courts would apply. See *Moore v. Subaru of Am.*, 891 F.2d 1445, 1448 (10th Cir. 1989). Kansas courts apply the doctrine of *lex loci contractus*, which requires that the Court interpret the contract according to the law of the state in which the parties performed the last act necessary to form the contract. See *Missouri Pac. R.R. Co. v. Kansas Gas and Elec. Co.*, 862 F.2d 796, 798 n.1 (10th Cir. 1988) (citing *Simms v. Metropolitan Life Ins. Co.*, 9 Kan. App. 2d 640, 642-43, 685 P.2d 321 (1984)). George Fricke's signed written acceptance referenced the proposal he had received from Medical Supply earlier that day. The set of documents then became an bilateral contract completed with the last act exchanging mutual promises (*D.L. Peoples Group, Inc. v. Hawley*, — So.2d — (2002 WL 63351, Ct. App., Fla., 2002) enforceable for the sale of the lease interest and the benefit of the bargain obtained by Medical Supply under its clear and complete terms meeting the writing requirements of a real estate purchase contract in Missouri and the writing and definiteness requirement of a credit agreement under Missouri statute RMS 432.045.2 . The formation of an enforceable contract in a set of documents created in correspondence is well settled See *Estate of Younge v. Huysmans*, 127 N.H. 461, 465-66, 506 A.2d 282, 284-85 (1965). Since state law requires a writing, the e-mail acceptance and signature of George Fricke is valid and enforceable under 15 USC §7001, the federal Electronic Signatures in Global and National Commerce Act, widely known as "E-SIGN." Section 101(a) of E-SIGN states that "(1) a signature, contract, or other record relating to such transaction may not

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

44. Medical Supply performed as required, introducing itself to the City of Blue Springs Economic Development, and committed to purchase the building from its owner in reliance on the contract with GE Transportation made open partial performance of the contract by opening the building for a three hour briefing on the operation and maintenance of the building's complex systems. This briefing was made by GE Transportation's Blue Springs property manager and the building's maintenance engineer, both of whom told Medical Supply's CEO Mr. Lipari that they had been terminated and will be leaving employment with GE Transportation the following month because they were no longer needed. GE Capital partially performed as required and made an appointment with Mr. Lipari in its Overland Park, Kansas office where Mr. Lipari took the building's blueprints furnished him by GE Transportation, the building's physical description and photo furnished by George Fricke of GE corporate and Medical Supply's corporate records for the loan. The GE Capital loan officer Douglas McKay discussed the terms and questioned Mr. Lipari in detail about the USBank lawsuit. Mr. Lipari explained why under the threat by US Bank of a malicious USA PATRIOT Act suspicious activity report, Medical Supply could not risk going to a bank until the lawsuit was settled. Mr. McKay agreed the USA PATRIOT Act had no valid relationship to Medical Supply's involvement with US Bank and stated he would obtain the additional requirements GE Capital required from George Fricke and GE Transportation. Mr.

McKay indicated it could take longer to close but he would check into it.

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

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

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

48. Count 12, Fraudulent Misrepresentation: The defendants have gained the opportunity to destroy Medical Supply and prevent it from entering the hospital supply

market by communicating by telephone and in a written signed communication that they have accepted the plaintiff's offer and in overt actions demonstrating that they are in a binding agreement, including partial performance when in fact they had no intention of being bound by the agreement once they discovered Medical Supply as an electronic marketplace would compete with their GHX, L.L.C. and go against their agreement with Neoforma to exclude competitors. Missouri case law supports a claim against the defendant on this conduct. See *City of Warrensburg, Mo. v. RCA Corp.*, 571 F.Supp. 743 (W.D.Mo.1983), which distinguished negligent misrepresentation from a misrepresentation to perform an agreement 'If the agreement is not enforceable as a contract, as when it is without consideration, the recipient still has, as his only remedy, the action in deceit under the rule stated in § 525 [Liability for Fraudulent Misrepresentation].' " 571 F.Supp. at 753. The RCA court went on to state:"Unlike § 530, § 552 does not, by its terms, apply to misrepresentation of intention to perform an agreement. Nor do the illustrations to § 552 apply to other than typical cases of misrepresentation of factual, commercial information. [Kansas also recognizes this basis for a claim against GE] The Comments to § 530 specifically state that where there is no viable action on the [265 Kan. 665] contract, the exclusive remedy for misrepresentation of intention to perform an agreement lies in the action for deceit...". 571 F.Supp. at 753. . *Bittel V.Farm Credit Services Of Central Kansas*, P.C.A. 962 P.2d 491 at pg. 501, 265 Kan. 651, (1998)

49. Count 13, Breach of Duty of Care and Fair Dealing: The defendants have harmed Medical Supply by breaching a contract to buy out the lease and provide financing because the defendants discovered they have a conflict of interest in the electronic

marketplace for hospital supplies. The defendants then acted to destroy the value of the bargain negotiated and obtained by Medical Supply. The defendants fraudulently represented to the plaintiff and the owner of 1600 NE Coronado that the plaintiff and GE were not in contract. Kansas courts imply a duty of good faith and fair dealing in every contract. Parties shall not "intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Bonanza, Inc. v. McLean*, 242 Kan. 209, 222, 747 P.2d 792 (1987). In dealing with good faith arguments against lenders by borrowers, we have stated the test of good faith is subjective and requires only honesty in fact. *Karner v. Willis*, 238 Kan. 246, 249, 710 P.2d 21 (1985).

50. The traditional rule is that the lender-borrower relationship creates no special duty. *Denison State Bank v. Madeira*, 230 Kan. at 695, 640 P.2d 1235. However the defendants have acted in fraud out of a conflict of interest, the exception to this rule. See Rossi, *Lender Liability in Kansas: A Paradigm of Competing Tort and Contract Theories*, 29 *Washburn L.J.* 495, 503-05 (1990) (comprehensive review of Kansas lender liability cases).

51. Count 14, Bad Faith: The defendants have refused to cooperate in determining if the contract sought to be enforced had been repudiated. The corporate counsel for each of the defendant entities have received the antitrust implications of their GE's conduct and the antitrust harm that will be inflicted upon Medical Supply by the denial of the essential facility of financing that is the bargain obtained by Medical Supply in the contract. GE's counsel answered the plaintiff's *Nelson v. Miller* notice by denying without justification

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

Relief

52. Preliminary Injunctive Relief: Medical Supply Chain, Inc. seeks preliminary injunctive relief under antitrust law to protect the nation's healthcare consumers from the defendants' control over pricing through exclusion of the plaintiff's more efficient electronic market place, while this matter is being litigated. The plaintiffs will file a separate motion for preliminary injunction and evidentiary hearing, supported by a memorandum, documentary evidence and affidavits. The preliminary injunction relief will not be the ultimate relief sought in adjudication on the merits of this case, however will include initially preventing the defendants from leasing 1600 N.E. Coronado, pendente lite attorney fees and two offices and a reception area, to facilitate Medical Supply's prosecution of this complaint and to allow it to prevent further damage by the

defendants to the nation's consumers and Medical Supply's business associates and stakeholders. Medical supply is eligible for preliminary injunctive relief for the following reasons: (a) Medical Supply is likely to prevail on some or all of its antitrust claims. The facts are undisputed and by statute, there are no defenses to most claims, which are per se violations. (b) The defendants have no legitimate interest in maintaining their prevention of Medical Supply's entry into the hospital supply market, which could outweigh the continuing injury to Medical Supply if no action in pretrial equitable relief is made. (c) The public has been harmed by the exclusion of Medical Supply and by the cartel's previous exclusion of manufacturers where death and needless pain and suffering resulted, a current crisis in decreasing access to healthcare services at hospitals exists nationwide due to rising costs. There would only be a benefit to the public by allowing Medical Supply to enter the hospital supply market, prior to the trial on the merits of this action. (d) Medical Supply in seeking injunctive relief provided for under the Clayton Antitrust Act is not required to show irreparable harm under controlling law for this jurisdiction. See *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d at 260 (C.A.10 (Kan.), 1981) stating: "Moreover, it is not necessary that the Railroads show that they will suffer irreparable harm if the injunction is denied. When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown."

53. Permanent Injunctive Relief: Medical Supply will seek to protect healthcare consumers by obtaining permanent injunctive relief including divestiture of GE's ownership and control in healthcare supply distributors including GHX, L.L.C. Medical

Supply also seeks GE's renouncement of anticompetitive agreements with other distributors and manufacturers in the healthcare supply market.

54. Damages: Medical Supply Chain, Inc. seeks damages in excess of \$75,000.00 for its antitrust injury and breach of contract. The monetary relief sought is the contract expectation damages as determined by the business plan summary and forward financials in possession of GE at the time the proposal was accepted and the contract was formed. Medical Supply seeks the lost profits that can be determined with reasonable certainty that it would have made for the next four years of operations, had it been allowed to enter the market. In addition to this amount, Medical Supply seeks the equity it would have gained from the purchase of the building, and the cash payment for the remainder of the lease.

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

Demand For Trial By Jury

Comes now plaintiff and makes demand for a trial before 12 jurors on all such issues so determinable.

The Seventh Amendment (right to jury trial) does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

When Congress provides for enforcement of statutory rights in an ordinary civil

action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be made available if the action involves rights and remedies of the sort typically enforced in an action at law. *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974), at 194-195, 94 S.Ct. at 1008.

Designation Of Place Of Trial

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

Prayer

WHEREFORE, plaintiff prays for declaratory and injunctive relief as indicated; costs, including all appropriate attorney's fees, expert fees and expenses allowed; and for such other and further relief as the Court may deem appropriate in law and equity.

Respectfully submitted,

-----S-----

Bret D. Landrith, ESQ.
Kansas Supreme Court # 20380
Attorney for Medical Supply Chain, Inc.
605 W. Kansas
Pittsburg, KS 66762
1.620.231.7636

AFFIDAVIT OF FACTS

I attest to the facts in the above complaint seeking injunctive relief and verify that they are true based on my information and belief.

-----S-----

Samuel K. Lipari
CEO
Medical Supply Chain, Inc.

CERTIFICATE OF SERVICE

I certify that on August 15th, 2003, emailed this document to the defense counsel :

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-----S-----

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MARKETPLACE@NOVATION

MASTER SUPPLIER AGREEMENT

This Marketplace@Novation Master Supplier Agreement ("**Agreement**") is entered into effective _____ ("**Effective Date**") among _____, a _____ corporation having its principal place of business at _____ ("**Supplier**"), Novation, LLC, a Delaware limited liability company having its principal place of business at 125 East John Carpenter Freeway, Irving, Texas 75062 ("**Novation**"), and Neoforma, Inc., a Delaware corporation having its principal place of business at 3061 Zanker Road, San Jose, CA 95134 ("**Neoforma**").

Novation is a contracting agent that develops and delivers supply chain management agreements, programs and services on behalf of VHA Inc. ("**VHA**"), University HealthSystem Consortium ("**UHC**") and their patrons.

Neoforma provides e-commerce services for the healthcare industry and, on behalf of Novation, operates an e-commerce marketplace for the benefit of the members of VHA and UHC and the associated healthcare organizations of Healthcare Purchasing Partners International, LLC ("**HPPI**") ("**Marketplace@Novation**").

Supplier wishes to participate in Marketplace@Novation and utilize certain Marketplace@Novation services by entering into this Agreement with Novation and Neoforma.

Novation, Neoforma and Supplier therefore agree as follows:

1. **DEFINITIONS**

1.1 "**Affiliate**" means a person or entity controlled by or under common control with another person or entity.

1.2 "**Content**" means any text, graphics, logos, button icons, images, audio clips, video clips, HTML code, java programs and other material displayed at [Marketplace@Novation](#), but excluding Supply Chain Data.

1.3 "**Contract Portfolio**" means a catalog of Products for which Novation has contracted with Supplier for the benefit of the members of VHA and UHC and the associated healthcare organizations of HPPI. For purposes of clarification, a Product is purchased through a Contract Portfolio if the Product is included in the contract between Novation and Supplier and is sold to a VHA or UHC member, regardless of whether such sale is pursuant to a separate contract between Supplier and the member and except when the Member notifies Novation that the Product has been purchased pursuant to the terms of another GPO's contract.

1.4 "**EDI Standards**" means the standard format for Electronic Data Interchange (EDI) generally accepted and used in North America, as may change from time to time.

1.5 "**Information**" means (i) any and all information and data collected, developed, and/or stored by Neoforma relating to Members, (ii) any and all information and data relating to use of or transactions at Marketplace@Novation by Members and (iii) any and all Member Transaction Information collected, developed, and/or stored by Neoforma.

1.6 "**Marketplace@Novation**" means the e-commerce marketplaces created specifically for and accessible only to the members of VHA and UHC and the associated healthcare organizations of HPPI.

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Inserted: Neoforma

MSC Attachment 2

1.7 "Member Transaction Information" means information delivered or received between Supplier and a Member through Marketplace@Novation or Supply Chain Data delivered to Marketplace@Novation.

1.8 "Members" means at any date those members of VHA and UHC and the associated healthcare organizations of HPPI entitled to use the Marketplace@Novation pursuant to a Marketplace@Novation participation agreement with Neoforma.

1.9 "NeoFormat" means the format in which Product Data is to be sent to Neoforma.

1.10 "Non-Contract Products" means any Product offered by Supplier other than through a Contract Portfolio. For purposes of clarification, a Product may be offered by Supplier both as a Non-Contract Product and through one or more Contract Portfolios, but will be considered a Non-Contract Product when the Member notifies Novation that the Product has been purchased pursuant to the terms of another group purchasing organization's contract.

1.11 "Products" means all equipment, products, supplies and services, information and content provided by Supplier and available for purchase, rental or lease by Members at Marketplace@Novation or through the Services.

1.12 "Product Data" means information describing the manufacturer and distributor product numbers, features, functions and pricing of Supplier's Products, including images, specifications, shipping weight, shipping dimensions, associated products, maintenance and warranty information, equivalent products and other information, to be offered at Marketplace@Novation or through the Services.

1.13 "Services" means those services provided by Neoforma which are listed and described in Schedule A and mutually agreed to be provided to Supplier by Neoforma and Supplier, attached hereto and incorporated herein by this reference. Supplier must comply with the requirements and obligations of this Agreement and its Schedules to use the Services.

1.14 "Supply Chain Data" means the following data for any purchase made by a Member from Supplier through any means: Supplier identification, buyer identification, buyer account number, GPO (e.g., Novation) contract identifier, invoice number, invoice date, purchase order number, Supplier product number, product description, manufacturer, manufacturer part number, quantity, unit of measure, unit price, taxes, freight, price adjustments, and total cost, in electronic form in accordance with EDI Standards or such other standards as mutually agreed to by the parties.

2. SERVICES

2.1 Subject to the terms and conditions of this Agreement and the applicable Schedules, Neoforma shall use commercially reasonable efforts to make available to Supplier the Services within sixty (60) days of the Effective Date. Supplier shall use commercially reasonable efforts to cooperate with Neoforma's provision of the Services, including but not limited to the designation of the following person as its primary integration contact:

Name: _____
Title: _____
Telephone: _____
Email: _____

3. OWNERSHIP AND LICENSE

3.1 Neoforma. Neoforma owns and will continue to own the compilation or "look and feel" of all Content as it appears on Marketplace@Novation ("**Content Compilation**"), subject to Section 3.4.

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MSA v8 1.29.03.DOC

Inserted: Neoforma

Any reproduction, transmission or display of the Content Compilation by Supplier or any third party is strictly prohibited.

3.2 For the term of this Agreement, Neoforma grants Supplier permission to access and use the Services and Marketplace@Novation in accordance with the terms of this Agreement.

3.3 Supplier. For the term of this Agreement, Supplier grants a non-exclusive license to Neoforma to use, copy, modify, display, perform and create derivative works of Supplier's Product Data solely for the purpose of digitizing, categorizing and formatting such information for placement at Marketplace@Novation, in accordance with the terms of this Agreement and the Schedules attached hereto.

3.4 Each party owns and shall retain all right, title to and interest in its names, logos, trademarks, service marks, trade dress, copyrights and proprietary technology, including, without limitation, those names, logos, trademarks, service marks, trade dress, copyrights and proprietary technology currently used or which may be developed and/or used by it in the future ("Marks"). Neoforma is authorized to use Supplier's Marks as necessary to provide the Services under this Agreement. To the extent that Neoforma modifies Product Data or other Content provided by Supplier pursuant to this Agreement and the applicable Schedules, Supplier hereby acknowledges that Neoforma will be the copyright owner of the derivative works that it creates pursuant to and subject to the license granted in Section 3.3 (whether in graphical, narrative or any other form), and subject in all respects to Supplier ownership of the underlying information and to the copyright of third parties.

4. **SUPPLIER DATA**

4.1 Supplier is solely responsible for all Product Data and any other Content it supplies to Neoforma for inclusion at Marketplace@Novation, including maintenance of such Product Data and Content. Neoforma will not be responsible for the accuracy or legality of information provided by Supplier for publication at Marketplace@Novation or through the Services, and Neoforma may at any time at its sole discretion, remove such information from Marketplace@Novation, and/or exercising its rights under Section 15.2, Termination, if Neoforma reasonably believes that the information may cause liability for it. Product Data must not (a) infringe any third party rights, including, but not limited to intellectual property, publicity or privacy, (b) be defamatory, trade libelous, threatening or harassing nor (c) be obscene, indecent or contain pornography.

4.2 Supplier may make its Product Data available to Neoforma for listing at Marketplace@Novation provided that Supplier provides the Product Data for all Products in the manner and format set forth in the NeoFormat specifications provided by Neoforma to Supplier (a current copy of which has been provided to Supplier). Neoforma may digitize, categorize and format the Product Data and post such Product Data at Marketplace@Novation in accordance with Neoforma's standard practices for digitization, categorization and formatting of Product Data.

4.3 The Product Data provided by Supplier shall include the manufacturer and distributor Product numbers, manufacturer, extended units of measure, Product descriptions and the specific terms and conditions of Supplier's sale of Products to Members, subject to the terms and conditions of any contract between Supplier and a Member or Novation with respect to any Product ("**Supplier Terms and Conditions**"). Neoforma does not set, approve, control or endorse the Supplier Terms and Conditions.

4.4 If at any time during the term of this Agreement and any renewals or extensions thereof, direct sales of Supplier's Products, either through Marketplace@Novation or through other means, exceed ___% of Supplier's total sales of Products (i.e., directly by Supplier and indirectly through distributors), Supplier shall, upon request from Neoforma and within ninety (90) days of such request, provide Neoforma with its Supply Chain Data on a daily basis or at least as often as provided to Members (in electronic form or otherwise) but in no event less than on a monthly basis. Neoforma may use Supply Chain Data only in accordance with the Marketplace@Novation Data Confidentiality and

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Privacy Statement (“**Privacy Policy**”), a current copy of which shall be provided to Supplier upon request and posted at <http://novation.neoforma.com>.

4.5 Supplier shall update Product Data from time to time and at least quarterly in accordance with Neoforma’s then current policies and procedures for accessing and updating Product Data. Supplier shall update Product Data, including pricing information, hospital-specific pricing information for Non-Contract Products, Product identifications, Product numbers, extended units of measure, names and descriptions, and the Supplier Terms and Conditions, as required to ensure that at all times such Product Data is accurate, including removal of any discontinued or recalled Products.

4.6 Neoforma will not be responsible for the fulfillment of or payments for orders for Products. Supplier acknowledges that a Member makes an offer for a Product through Marketplace@Novation when it places an order for such Product. Supplier shall respond to an order for a Product directed to it by a Member through Marketplace@Novation within one (1) business day of placement of such order by either accepting or rejecting such order. Supplier shall have the right, in its sole discretion, to accept or reject any order. Supplier acknowledges that all orders made by Members for Products and accepted by Supplier will be accepted based on prices (if listed) and Product Data (including any posted terms and conditions relating to purchase of such Products) as they appear at Marketplace@Novation at the time of such order. Notwithstanding the foregoing, nothing in this Section 4.6 will affect the Supplier’s rights and obligations vis-a-vis the party placing the order.

4.7 Neoforma will not be responsible for ensuring that a sale to a Member is authorized and in compliance with laws and that a Member has complied with any licensing or other governmental requirements or for fulfillment, billing or collections to Members. If Supplier sells Products directly through Marketplace@Novation, (i) Supplier shall provide credential and licensure verification, fulfillment, billing and collections to Members who have purchased from Marketplace@Novation; (ii) Supplier shall have the final authority to refuse to ship Products when it believes, in its sole discretion, that the party placing the order does not have the necessary license or other government required permission or authority to receive the Product ordered or that such sale is otherwise not to an authorized Member or not in compliance with applicable laws; (iii) Supplier shall communicate to any such party the reasons for a refusal to ship an ordered Product; and (iv) Supplier shall be responsible for all customer support after the point when an order is made by a Member and transmitted from Neoforma to Supplier. Notwithstanding the foregoing, nothing in this Section 4.7 will affect the Supplier’s rights and obligations vis-a-vis the party placing the order.

4.8 Neoforma may use Information to facilitate transactions conducted through Marketplace@Novation, to allow access to and fulfill contractual obligations to Novation and Members, to conduct its business as outlined in the Privacy Policy, and to create and sell aggregated reports on Marketplace@Novation activities, provided that such reports do not contain data that has been combined or compiled in such a way that an individual, either by name or by other designation, can be identified.

5. **SYSTEM INTEGRITY**

5.1 Supplier and Neoforma shall use then current industry standard state of the art anti-virus software and procedures to prevent any software routine or any other device including but not limited to any viruses, Trojan horses, worms, time bombs, or cancelbots, from interfering or attempting to interfere with the proper working of Marketplace@Novation.

6. **FEES**

6.1 Contingent upon Neoforma providing Supplier the Services, Supplier shall pay the fees and other amounts detailed in Schedule A attached hereto (“**Fees**”) upon receipt of an invoice provided by Neoforma to Supplier in accordance with Schedule A hereto. Payments not received within thirty (30) days of the date of the invoice shall bear interest at the lesser of twelve percent (12%) per annum or the maximum rate allowed under applicable law. The Fees are non-cancelable and non-refundable. All

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Fees are payable in U.S. dollars and shall be sent to Neoforma, shall be in return for the provision of the Services by Neoforma and shall satisfy any and all of Supplier's payment obligations to Neoforma.

7. TAXES

7.1 As between Neoforma and Supplier, Supplier bears sole responsibility for payment and/or collection from Members of all local, state, national or foreign taxes (including without limitation, sales, use, value added and other taxes which may apply), license, fees, export/import fees and any other similar obligations relating to any sale of a Product listed at Marketplace@Novation. In no event will Neoforma bear any such responsibility.

8. RIGHTS TO AUDIT AND INSPECTION INFORMATION

8.1 Novation may provide Neoforma with such information provided by Supplier to Novation pursuant to any Novation Supplier Agreement between Supplier and Novation, as is necessary for Neoforma to confirm Supplier's compliance with this Agreement.

9. PRIVACY

9.1 Supplier will have the ability to access that portion of Marketplace@Novation which displays its Products, using a user ID and password and otherwise in accordance with Neoforma's then current policies and procedures for accessing and updating Product Data. Such user IDs and passwords shall be maintained as confidential and shall not be distributed or disclosed to third parties. Supplier shall, through an authorized officer of Supplier, notify Neoforma of the need to change or discontinue the user ID or password. Supplier shall discontinue any user IDs and passwords that are no longer active.

10. CONFIDENTIALITY

10.1 Except as expressly set forth in the Privacy Policy, Novation, Neoforma and Supplier shall regard and preserve as confidential all information related to the business of each other disclosed pursuant to this Agreement. This confidentiality obligation does not apply to (a) information that is publicly known prior to the disclosure or becomes publicly known through no wrongful act of the receiving party; (b) information that was in lawful possession of the receiving party prior to disclosure and was not received as a result of any breach of confidentiality; (c) information that was independently developed by the receiving party outside the scope of this Agreement; (d) information which the receiving party is required to disclose pursuant to a court order or regulatory agency request; or (e) the existence, but not the terms or conditions, of this Agreement. In the event of a request for disclosure pursuant to subsection (d), immediate notice of such request shall be provided by the party receiving the request to the party whose information is subject to the request to provide an opportunity to oppose such request for disclosure. Notwithstanding the foregoing and except as otherwise limited, Neoforma shall be entitled to share (1) with Novation any and all Information and (2) Information, except pricing Information, regarding the sale of Products distributed but not manufactured by Supplier to Members with the manufacturer of such Product if such manufacturer is a party to a Marketplace@Novation Master Supplier Agreement with Neoforma.

11. REPRESENTATIONS AND WARRANTIES

11.1 Neoforma represents and warrants that (i) it has full power and authority to enter into this Agreement and the applicable Schedules, (ii) it has all rights, titles, licenses, permissions and approvals necessary to perform its obligations under this Agreement and the applicable Schedules and to grant to Supplier all licenses and rights granted hereunder, and that such licenses do not and will not infringe or otherwise violate any copyright, trade secret, trademark, patent or other proprietary right of any third party, (iii) that it has and will maintain the capability to provide the Services and to create and host Marketplace@Novation during the term of this Agreement and all applicable Schedules, and (iv) it has

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complied and shall continue to comply with all applicable legislation, laws, statutes, ordinances, rules and regulations regarding Marketplace@Novation and the Services.

11.2 Supplier represents and warrants that (i) it has full power and authority to enter into this Agreement and the applicable Schedules, (ii) it has full power and authority to sell the Products to be sold by it at Marketplace@Novation and will not offer for sale counterfeit or stolen items, (iii) it is the sole owner or is a valid licensee of all Content provided by or on behalf of Supplier for inclusion at Marketplace@Novation and has secured all necessary licenses, consents and authorizations with respect to use of such Content and all elements thereof to the full extent contemplated herein, (iv) no part of any Content provided by or on behalf of Supplier for inclusion at Marketplace@Novation violates or infringes upon the patent rights, copyrights, trade secrets, trademarks or other proprietary rights of any person or entity or constitutes defamation, invasion of privacy or the violation of the rights of any person or entity, and (v) it has complied and shall continue to comply with all applicable legislation, laws, statutes, ordinances, rules and regulations regarding the Products and their sale or transfer, and its actions in relation to Marketplace@Novation and the Services.

11.3 EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED HEREIN, NEOFORMA SUPPLIES MARKETPLACE@NOVATION AND THE SERVICES "AS IS" AND WITHOUT ANY WARRANTY OR CONDITION, EXPRESS OR IMPLIED. NEOFORMA SPECIFICALLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE OR TRADE PRACTICE. NEOFORMA ALSO DOES NOT GUARANTEE CONTINUOUS, UNINTERRUPTED ACCESS TO MARKETPLACE@NOVATION AND THE SERVICES, AND OPERATION OF THE MARKETPLACE@NOVATION MAY BE INTERFERED WITH BY NUMEROUS FACTORS OUTSIDE OF NEOFORMA'S CONTROL. USE OF MARKETPLACE@NOVATION AND SALE OF PRODUCTS TO MEMBERS IS AT SUPPLIER'S RISK. BY USING THE SERVICES AND MARKETPLACE@NOVATION, SUPPLIER REPRESENTS AND WARRANTS THAT IT CAN FORM LEGALLY BINDING CONTRACTS UNDER APPLICABLE LAW. FURTHERMORE, SUPPLIER REPRESENTS AND WARRANTS THAT THE INDIVIDUAL EXECUTING THIS AGREEMENT HAS AUTHORITY TO BIND SUPPLIER AS SELLER AND THAT BY DOING SO IS NOT BREACHING OR IN CONFLICT WITH ANOTHER AGREEMENT OR OBLIGATION.

12. INDEMNIFICATION

12.1 Subject to Section 12.3, Neoforma shall defend and/or handle at its own expense any third party claims or actions, arising from (i) any actual or alleged infringement of a copyright, trade secret, trademark, patent or other proprietary right of a third party arising out of Supplier's use of Marketplace@Novation and the Services as permitted under this Agreement and the applicable Schedules, and (ii) any breach by Neoforma of any of its representations or obligations set forth in this Agreement and the applicable Schedules, and shall indemnify and hold harmless Supplier and its respective officers and directors from and against any loss, liability, cost or expense (including reasonable attorney's fees) resulting from any such claim or action, and its settlement or compromise.

12.2 Subject to Section 12.3, Supplier shall defend, and/or handle at its own expense, any third-party claims or actions, arising from (i) any breach by Supplier of any of its representations or obligations set forth in this Agreement and the applicable Schedules (ii) any misrepresentation or omission in any Content provided by or on behalf of Supplier in connection with the Services or at Marketplace@Novation, (iii) any claims brought by a third party, having a basis in contract or tort, in law or in equity, relating to any Products listed or sold by Supplier through Marketplace@Novation or otherwise relating to Supplier's use of Marketplace@Novation or the Services, , and shall indemnify and hold harmless Neoforma, its Affiliates, and their respective officers and directors from and against any loss, liability, cost or expense (including reasonable attorneys' fees) resulting from any such claim or action, and its settlement or compromise. As to any product liability claim Supplier additionally shall fully indemnify Neoforma and shall cause Neoforma to be listed as an additional insured on any product liability insurance policy of Supplier.

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12.3 The party seeking indemnification under subsection 12.1 or 12.2, as the case may be ("Indemnified Party"), shall give prompt written notice to the other party ("Indemnifying Party"). In addition, the Indemnified Party shall allow the Indemnifying Party solely to direct the defense and settlement of any such claim, with counsel of the Indemnifying Party's choosing, and shall provide the Indemnifying Party, at the Indemnifying Party's expense, with information and assistance that is reasonably necessary for the defense and settlement of the claim. The Indemnified Party reserves the right to retain counsel, at the Indemnified Party's sole expense, to participate in the defense of any such claim. The Indemnifying Party shall not settle any such claim or alleged claim without first obtaining the Indemnified Party's prior written consent, which consent shall not be unreasonably withheld, if the terms of such settlement would adversely affect the Indemnified Party's rights under this Agreement and the applicable Schedules.

12.4 The remedy provided under this Section 12 will be the Supplier's sole and exclusive remedies in relation to claims and actions alleging intellectual property infringement.

13. **LIMITATION OF LIABILITY**

13.1 WITH THE EXCEPTION OF NEOFORMA'S OBLIGATIONS UNDER SECTION 12.1 IN NO EVENT WILL NEOFORMA BE LIABLE TO SUPPLIER FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES ARISING OUT OF THIS AGREEMENT OR THE SCHEDULES ATTACHED HERETO OR THEIR TERMINATION, WHETHER LIABILITY IS ASSERTED IN CONTRACT OR IN TORT, (INCLUDING NEGLIGENCE) AND IRRESPECTIVE OF WHETHER NEOFORMA HAS BEEN ADVISED OF THE POSSIBILITY OF ANY SUCH LOSS OR DAMAGE. IN NO EVENT WILL NEOFORMA'S TOTAL LIABILITY TO SUPPLIER OR TO ANY THIRD PARTIES UNDER THIS AGREEMENT AND THE APPLICABLE SCHEDULES ATTACHED HERETO EXCEED THE AMOUNT OF FEES SUPPLIER PAYS TO NEOFORMA IN THE 12 MONTHS PRIOR TO THE ACTION GIVING RISE TO THE LIABILITY.

13.2 NEOFORMA DOES NOT AND CANNOT CONTROL THE FLOW OF DATA TO OR FROM MARKETPLACE@NOVATION AND OTHER PORTIONS OF THE INTERNET. ACTIONS OR INACTIONS OF THIRD PARTIES MAY RESULT IN SITUATIONS IN WHICH SUPPLIER'S CONNECTION TO THE INTERNET, AND/OR ACCESS TO MARKETPLACE@NOVATION MAY BE IMPAIRED, DISRUPTED OR DAMAGED. NEOFORMA CANNOT GUARANTEE THAT SUCH EVENTS WILL NOT OCCUR, AND ACCORDINGLY DISCLAIMS ANY AND ALL LIABILITY RESULTING FROM OR RELATED TO SUCH EVENTS.

14. **NO AGENCY; DISCLAIMER**

14.1 Supplier and Neoforma are independent contractors, and no agency, partnership, broker-dealer, distributor, joint venture, employee-employer or franchiser-franchisee relationship is intended or created by this Agreement and the applicable Schedules. Neoforma provides a forum for buyers and Supplier to conduct transactions and is not involved in the actual transaction between buyers and Supplier. Neoforma does not have any responsibility whatsoever with regard to the actual fulfillment of any orders made by buyers, including but not limited to the shipment of the Products ordered or purchased at Marketplace@Novation. Neoforma has no control over the price, contract terms, quality, safety, conformance or legality of the Products listed at Marketplace@Novation, the truth or accuracy of the listings, or other information at Marketplace@Novation including but not limited to Supply Chain Data, or the ability of Supplier to sell items or the ability of buyers to buy items. Neoforma has no control over whether the offer or sale of Products by Supplier or the purchase of Products by a buyer is in compliance with applicable laws or whether Supplier or any buyer has any required license or other government permission or authority for any such offer, sale or purchase. Neoforma cannot and does not control whether or not buyers will complete the purchase of items they have ordered, and is not responsible for payment or collection of orders placed by Member buyers at Marketplace@Novation. NEOFORMA MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED AS TO THE QUALITY OR CREDITWORTHINESS OF ANY BUYER.

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15. TERM AND TERMINATION

15.1 Term. The term of this Agreement will commence on the Effective Date and shall continue for a period of three (3) years. This Agreement will automatically renew for additional one-year terms unless written notice of termination is provided by the terminating party to the non-terminating party not less than ten (10) days prior to the expiration of the then-effective term. Unless otherwise indicated in the applicable Schedule, the term of each Schedule hereto shall be the same as the term of this Agreement.

15.2 Termination. Any party hereto shall have the right to terminate this Agreement or any Schedule attached hereto in the event of a material breach of the terms hereof or thereof by another party which is not cured within thirty (30) calendar days following receipt of written notice specifying the breach.

15.3 Termination by Neoforma. If Neoforma receives excessive complaints from Members about Supplier's compliance with the Supplier Terms and Conditions or the service provided by Supplier relating to Products, Neoforma may provide Supplier with notice of its receipt of such complaints and the opportunity to respond to and cure the source of such complaints. If Supplier has not satisfactorily responded to or cured the source of such complaints within thirty (30) calendar days following receipt of such notice, Neoforma, at its sole discretion, may terminate this Agreement or any Schedule attached hereto.

15.4 Schedules. Upon termination of this Agreement for any reason, all Schedules entered into pursuant to this Agreement shall also terminate.

16. GENERAL PROVISIONS

16.1 No Waiver. The failure of a party to this Agreement to require or enforce strict performance by the other party of any provision of this Agreement or any Schedule hereto or to exercise any right under this Agreement or any Schedule hereto shall not be construed as a waiver or relinquishment to any extent of such party's right to assert or rely upon any such provision or right in that or any other instance.

16.2 Entire Agreement. This Agreement and any applicable Schedule hereto represents the entire agreement, and supersedes any and all prior agreements or understandings of the parties written or oral with respect to the subject matter hereof. This Agreement and the Schedules hereto may only be modified, or any rights under it waived, by a written document executed by the duly authorized representative of both parties. In the event of any conflicts or inconsistencies between the terms of this Agreement and any Schedules, the terms of the applicable Schedule will control.

16.3 Applicable Law; Jurisdiction. This Agreement and the Schedules hereto shall be interpreted, construed and enforced in all respects in accordance with the laws of the State of California without reference to conflict of law principles. All actions brought by a party to this Agreement arising under or related to this Agreement or any Schedules hereto shall be subject to the jurisdiction and venue of the state and federal courts located in Santa Clara County, California.

16.4 No Diversion. With respect to a buyer who seeks to purchase a Product through the Marketplace@Novation, as evidenced by the buyer's selection of an item for purchase or quotation at the Marketplace@Novation, Supplier shall not take any action to divert the purchase of that Product through means other than the Marketplace@Novation.

16.5 Non-Exclusivity. Supplier and Neoforma agree that this Agreement and the Schedules hereto are non-exclusive and that each party is free to contract and deal with competitors of the other.

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16.6 Assignment. This Agreement and the Schedules hereto shall not be assigned by a party to this Agreement without the prior written consent of the other parties, except that no such consent will be required in connection with an acquisition, merger, reorganization or sale of all, or substantially all the assets of a party to this Agreement. Neoforma may assign the Agreement and the Schedules hereto to an Affiliate of Neoforma. The parties further agree that an Affiliate of Neoforma may provide services under this Agreement. Subject to the foregoing, this Agreement will bind and inure to the benefit of the parties' successors in title and permitted assigns. Any attempt to assign this Agreement other than as permitted above will be void.

16.7 Schedules. The Schedules applicable to this Agreement are attached hereto, refer explicitly to this Agreement, and are dated and signed by both parties.

16.8 Notices. Any notice required or permitted by this Agreement shall be in writing and shall be deemed given if sent by prepaid registered or certified United States mail, return receipt requested (if available), overnight mail with a nationally recognized overnight mail courier, or sent by facsimile or similar communication, and confirmed by such mail, postage prepaid, addressed to the other party at the address shown below or at such other address for which such party gives notice hereunder. Notices will be deemed given three (3) business days after deposit in the U.S. Mail, one (1) business day after deposit with an overnight mail courier, or when confirmation of receipt is obtained if sent by facsimile or similar communication, as applicable.

If to Supplier:

Facsimile: _____

Attention: _____

With a copy to:

Facsimile: _____

Attention: _____

If to Novation:

Novation, LLC
125 East John Carpenter Freeway
Irving, Texas 75062
Facsimile: (972) 581-5778
Attention: General Counsel

If to Neoforma:

Neoforma, Inc.
3061 Zanker Road
San Jose, CA 95134
Facsimile: (408) 468-4045
Attention: General Counsel

16.9 Force Majeure. No party to this Agreement shall be considered in default in the performance of any obligation hereunder to the extent that the performance of such obligation is

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prevented or delayed by fire, flood, explosion, strike, war, insurrection, embargo, government requirement, civil or military authority, act of God, failure of the Internet or any other event, occurrence or condition which is not caused, in whole or in part, by that party, and which is beyond the reasonable control of that party. The parties shall take all reasonable action to minimize the effects of any such event, occurrence or condition.

16.10 Survival. The following sections will survive termination or expiration of this Agreement: 3.1, 6.1, 7.1, 8.1, 10.1, 11, 12, 13, 14.1 and 16.

16.11 Execution in Counterparts, Facsimiles. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. This Agreement shall become binding when any one or more counterparts hereof, individually or taken together, bear the signature of the parties to this Agreement. Novation may execute this Agreement by and on behalf of Neoforma, as Neoforma's agent. In such case Novation will not be responsible or liable for the obligations of Neoforma or Supplier under this Agreement. For the purposes hereof, a facsimile copy of this Agreement, including the signature pages hereto, shall be deemed an original.

16.12 Novation Participation in this Agreement. Novation shall be a party to this Agreement solely for the purposes of Sections 4.4, 8.1, 10.1, 15.2 and 16.1 through 16.12.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

NEOFORMA, INC.,
a Delaware corporation

Executed by Novation on behalf of Neoforma as
Neoforma's agent

By: _____

Title: _____

Date: _____

NOVATION, LLC,
a Delaware limited liability company

By: _____

Title: _____

Date: _____

SUPPLIER,
a _____ corporation

By: _____

Title: _____

Date: _____

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MSC Attachment 2

SCHEDULE A – SERVICES AND FEES

Neoforma shall provide Supplier and Supplier shall pay Neoforma for the following Services elected by Supplier:

Supplier elects the following Fee model:

Initial one	Fee Model
	Service Fee Model
	A la Carte Model

Service Fee Model:

1. **Contract Sales.** For the purposes of this Schedule A, "**Contract Sales**" shall be determined as set forth in the Novation Supplier Agreement between Novation and Supplier.

2. **Product Mix.** Supplier represents and warrants to Neoforma that Contract Sales represent ____ % of Supplier's total sales of products to the VHA and UHC members and the associated healthcare organizations of HPPI, whether under the pricing and other terms of the Novation Supplier Agreement or under the terms of any other purchasing or pricing arrangements that may exist between the such members and Supplier ("**Product Mix**"). Supplier and Neoforma shall update to the Product Mix every six months. Any breach of the foregoing representation and warranty or misstatement concerning the Product Mix in an update shall require Supplier to pay Neoforma the difference between Fees for Services collected and Fees which would have been assessed using the actual Product Mix, plus late charges as specified in Section 6.1 of the Agreement and costs of recovering Fees.

3. Digitization, Categorization, Formatting and Integration Fees.

(a) Supplier shall pay Neoforma, on a monthly basis, for the integration of Supplier to Marketplace@Novation one-tenth of one percent (.10%) of its monthly Contract Sales.

(b) Supplier shall pay Neoforma for digitization, categorization, formatting and posting of Product Data to Marketplace@Novation a one-time fee of one-tenth of one percent (.10%) of its Contract Sales for the first month in which Fees under Section 4 below are accessed. If a Product is offered at Marketplace@Novation as a Non-Contract Product in addition to through the Novation Contract Portfolio, Supplier shall pay only once for the digitization, categorization, formatting and posting of such Product.

4. Service Fees.

Supplier shall pay the following Fee for the Services:

Initial One	Manufacturer	2003	2004	2005
	Over 90% of Product Sales are through Novation Contract Portfolio	.25 of Monthly Contract Sales	.35 of Monthly Contract Sales	.35 of monthly contract sales
	75% to 90% of Product Sales are through Novation Contract Portfolio	.375% of monthly Contract Sales	.50% of monthly Contract Sales	.50% of monthly Contract Sales
	50% to 74% of Product Sales are through Novation Contract Portfolio	.45% of monthly Contract Sales	.675% of monthly Contract Sales	.675% of monthly Contract Sales
	25% to 49% of Product Sales are through Novation Contract Portfolio	.55% of monthly	.75% of monthly Contract Sales	.75% of monthly

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		Contract Sales		Contract Sales
	Under 25% of Product Sales are through Novation Contract Portfolio	.75% of monthly Contract Sales	1% of monthly Contract Sales	1% of monthly Contract Sales

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A la Carte Fee Model:

1. Neoforma Order Management Solution

The Neoforma Order Management Solution ("OMS") shall provide connectivity with Members, Web-based order discrepancy management, reporting, online collaboration, and tools for managing user and organizational access privileges. The OMS fee shall have two components: (i) access to the Web-based functionality and reports and (ii) connectivity, priced as set forth below:

Solution Modules	# Users	Annual Fee	Initial All that Apply
• Order Discrepancy Management • Order Transaction Reporting • Online Collaboration	3 or fewer users (minimum fee)	\$66,000	
	4 – 8 Users	\$158,000	
	9 or more (\$17,600/user)	<enter calculated fee>	
• Connectivity	Manual to Electronic Conversion	\$1500 per Member for establishing connectivity between Member and Supplier	
	2 Transaction Set**	\$0.16/Line Item	
	3 Transaction Set**	\$0.22/Line Item	
	4 Transaction Set**	\$0.26 Line Item	

** A transaction set shall mean an EDI document (850, 855, 856, 832, 810, etc.).

A two-transaction set connection shall mean an EDI 850 and EDI 855. The line item fee for a two-transaction set connection shall be based set on the number of line items in the EDI 850. For example, if an EDI 850 has 7 line items, the line item fee would be \$1.12 (7 x \$0.16 = \$1.12), regardless of how many line items may be included on the EDI 855. If an EDI 850 is not sent (e.g. a telephone or FAX order), then the line item fee shall be based on the line item count of the confirming EDI 855.

A three-transaction set connection shall mean an EDI 850, EDI 855 and may include one of the following: EDI 810, EDI 832 or EDI 856. As with the two-transaction set connection, the line item fee shall be based on the number of line items in the EDI 850. For example, if an EDI 850 has 7 line items, the line item fee would be (7 x \$0.22 = \$1.54, the 3 transaction set rate), regardless of how many line items may be included on the EDI 855 or other EDI documents. If an EDI 850 is not sent (e.g. a telephone or FAX order), then the line item fee shall be based on the line item count of the confirming EDI 855 or 856.

A four-transaction set connection shall mean an EDI 850, EDI 855 and may include two of the following: EDI 810, EDI 832 or EDI 856. The line item fee shall be calculated in the same manner as a two- or three-transaction set connections, but at the four transaction set rate.

2. Neoforma Contract Management Solution

The Neoforma Contract Management Solution ("CMS") shall provide the ability to publish Product Data and Contract Portfolio information to Members in product catalog and contract viewing modules, contract reporting, online collaboration, and tools for managing user and organizational access privileges. The CMS fee shall be based on line items of Product Data included in the product catalog, priced as set forth below.

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Solution Modules	Criteria	Annual Fee	Total number of items and initial
Product Catalog Product Data shall include the information required to complete a transaction, including but not limited to: Product name, Product description, manufacturer number, UOM, price, serial number (content equivalent to CIS/CID description) Supplier may include the following additional Content: Hyperlinks, MSDS, images, broader product descriptions and other rich content	Contract Portfolio Product Data	\$3.00/SKU/Month	Fee Paid by Novation
	Non-Contract Product Data	\$3.00/SKU/month	
Contract Viewing Any Novation Supplier Agreement between Supplier and Novation shall be displayed to VHA and UHC members through the Contract Viewing module within the Neoforma Contract Management Solution available at CMS	Novation Contract	\$0	

SCHEDULE B – INTEGRATED SOLUTION PARTICIPATION

1. Integrated Solution Participation

1.1 By executing this Schedule B, Supplier elects to participate in Marketplace@Novation and access the Services through the alliance established between the Global Healthcare Exchange, LLC (“**GHX**”) and Neoforma to integrate and connect GHX’s electronic trading exchange with the Marketplace@Novation (“**Integrated Solution**”).

1.2 Supplier shall be eligible to participate in Marketplace@Novation and access the Services through the Integrated Solution only if Supplier executes a User Agreement with GHX (“**GHX User Agreement**”).

2. Resolution of Inconsistencies. The terms of the GHX User Agreement shall control with respect to any inconsistency between the terms of the GHX User Agreement and Sections 4.3, 4.5 and 4.6 of this Agreement.

3. Cooperation. Supplier shall use commercially reasonable efforts to cooperate with GHX and Neoforma so that some or all of the Services may be provided to Supplier through the Integrated Solution within sixty (60) days of the Effective Date of this Agreement.

4. Waiver of digitization, categorization, formatting and integration fees. By executing this Schedule B, the digitization, categorization, formatting and integration fees set forth in Section 4 of Schedule A is hereby waived, subject to Section 5 below for Product Data provided to Neoforma by GHX.

5. Termination of Integrated Solution. If the agreement between GHX and Neoforma to provide the Integrated Solution to Supplier terminates while this Agreement is in effect, (i) this Schedule B shall terminate, (ii) Supplier shall continue to participate in Marketplace@Novation under the remaining terms of this Agreement, (iii) Supplier shall pay the digitization, categorization, formatting and integration fees set forth in Section 3(a) and (b) of Schedule A, and (iv) Supplier and Neoforma shall use commercially reasonable efforts to make available to Supplier some or all of the Services within sixty (60) days of the date of such termination.

ACCEPTED BY:

SUPPLIER

ACCEPTED BY:

NEOFORMA, INC.

Executed by Novation on behalf of Neoforma
as Neoforma’s agent

Authorized Signature

Authorized Signature

Printed Name and Title

Printed Name and Title

MSC Attachment 2

1

Deleted: Neoforma Pharmco Form
MSA v8 1.29.03.DOC

Inserted: Neoforma

Date

Date

MSC Attachment 2

2

Deleted: Neorforma Pharmco Form
MSA v8 1.29.03.DOC

Inserted: Neorforma

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

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

ORDER

Pending before the court are Defendants' Motion for Attorney's Fees (Doc. 85) and Defendants' Accounting of Attorneys' Fees and Costs (Doc. 100).

I. Background

On March 9, 2005, plaintiff Medical Supply Chain, Inc. (“Medical Supply”) filed the above-captioned case in the United States District Court for the Western District of Missouri, case number 05-2010-CV-W-ODS. Plaintiff brought suit against Neoforma, Inc.; Robert J. Zollars; Volunteer Hospital Association, Inc. (“VHA”); Curt Nonomaque; University Healthsystem Consortium; Robert J. Baker; US Bancorp NA; U.S. Bank National Association; Jerry A. Grundhofer; Andrew Cesare;¹ Piper Jaffray Companies; Andrew S. Duff; Shughart Thomson & Kilroy, P.C.;² and Novation, LLC. Plaintiff’s 115 page complaint alleges sixteen counts including claims for price restraint under the Sherman Act, restraint of trade and monopolization under both federal and Missouri law, conspiracy,

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

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

tortious interference with contract or business expectancy, breach of contract, breach of fiduciary duty, fraud, prima facie tort, and claims under RICO and the USA PATRIOT Act.

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

II. Standard

The court follows a two-step process to determine an award of reasonable attorney fees and costs. The initial estimate is calculated by multiplying the number of hours reasonably expended by a reasonable hourly fee, resulting in the "lodestar" amount. *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The court may then adjust upward or downward from the lodestar as necessary. *Blum*, 465 U.S. at 888.

The party moving for attorney fees "bears the burden of . . . documenting the appropriate hours expended and the hourly rate." *Case v. Unified Sch. Dist. No. 233, Johnson County, Kan.*, 157 F.3d 1243, 1249 (10th Cir. 1998). To satisfy its burden, therefore, the party must submit "meticulous, contemporaneous time records that reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks." *Id.* at 1250

(citing *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983)). “The prevailing party must make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.” *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998). The court will reduce the hours claimed if the attorneys’ records are inadequate or fail to precisely document the time necessary to complete specific tasks. *Hensley*, 461 U.S. at 433-34; *Case*, 157 F.3d at 1250.

III. Analysis

A. **Defendants US Bancorp NA; U.S. Bank National Association; Jerry A. Grundhofer; Andrew Cesare; Piper Jaffray Companies; and Andrew S. Duff’s Motion for Attorney Fees (Doc. 85)**

Defendants US Bancorp NA, U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cesare, Piper Jaffray Companies, and Andrew S. Duff request \$59,856.41 in attorney fees, which they assert represent the work done and expenses incurred in responding to plaintiff’s March 9, 2005 complaint and obtaining dismissal of this case. In support of this request, the law firm of Shughart Thomson & Kilroy in Kansas City, Missouri submitted to the court numerous bills for legal services rendered. The bills were divided between two sets of clients: (1) US Bancorp NA, U.S. Bank National Association, Jerry A. Grundhofer, and Andrew Cesare; and (2) Piper Jaffray Companies and Andrew S. Duff. Plaintiff does not oppose the reasonableness of these fees.

The court’s examination of the two sets of bills revealed numerous errors and inconsistencies. First, each set of clients was billed for what appears to be identical work. For example, the first entry for each bill states that Mark Olthoff devoted .3 hours to “analysis of new complaint,” for which each client was billed \$85.50 (\$285 an hour multiplied by .3 hours). Neither the bills themselves nor Mr. Olthoff’s declaration address this issue. Second, although Mr. Olthoff’s declaration, which was signed under penalty of perjury, lists the hourly rates for each attorney who worked on the case, the hourly rates actually billed to the clients are inflated for all but one attorney by as much as seventeen

percent. The court reiterates that defendants bear the burden of accurately demonstrating, through meticulous records, the hours expended and the hourly rates charged for each attorney. *Case*, 157 F.3d at 1249-50.

For the above-mentioned reasons, the court finds that these defendants have not met their burden. As such, the court denies defendants' motion for attorney fees without prejudice with leave to re-file within five (5) days of this Order. Failure to sufficiently address each of the above-mentioned issues will result in the court denying defendants' motion.

B. Defendants Novation, LLC; VHA Inc.; University Healthsystem Consortium; Robert Baker; and Curt Nonomaque's Accounting of Attorneys' Fees and Costs (Doc. 100)

Defendants Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker, and Curt Nonomaque seek a total of \$54,889.55 in attorney fees and costs. The law firm of Vison & Elkins, LLP in Dallas, Texas requests \$50,711³ in attorney fees, and the law firm of Husch & Eppenberger, LLC in Kansas City, Missouri requests \$4,178.55 in attorney fees and costs. Plaintiff does not oppose the reasonableness of these fees.

The court finds that these defendants have met their burden of submitting "meticulous, contemporaneous time records." *Id.* at 1250. Furthermore, the court finds that the hours claimed, the hourly rate of each attorney, and the documentation of time is reasonable. As such, the court hereby awards these defendants \$54,889.55 in attorney fees and costs.

IT IS THEREFORE ORDERED that Defendants US Bancorp NA, U.S. Bank National Association, Jerry A. Grundhofer, Andrew Cesare, Piper Jaffray Companies, and Andrew S. Duff's

³ By the court's calculation, the amount Vison & Elkins billed to defendants totals \$57,270.39. This discrepancy was not discussed in the affidavit of Kathleen Bone Spangler, Of Counsel attorney for Vison & Elkins. Since the amount requested is considerably lower than the amount billed, the court will use the amount requested.

Motion for Attorney Fees (Doc. 85) is denied without prejudice. Defendants shall have five (5) days from this Order to re-file their motion for attorney fees.

IT IS FURTHER ORDERED that Defendants Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker, and Curt Nonomaque's request for attorney fees is granted as set forth above. Defendants are hereby awarded \$54,889.55 in attorney fees and costs from plaintiff, to be divided as follows: \$50,711 to the law firm of Vison & Elkins, LLP in Dallas, Texas and \$4,178.55 to the law firm of Husch & Eppenberger, LLC in Kansas City, Missouri.

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

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

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General Docket

United States Court of Appeals for the 10th Circuit

Current cases:

	Lead	Member	Start	End
Cross-appeal:	04- 3075	04- 3102	3/18/04	

Docket as of August 17, 2005 8:03 pm

Page 1

Proceedings include all events.

04-3075 Medical Supply Chain v. General Electric Co., et al

MEDICAL SUPPLY CHAIN, INC.
Plaintiff - Appellant

Bret D. Landrith
[COR LD NTC ret]
2961 SW Central Park, Apt. G33
Topeka, KS 66611
785/267-4084

v.

GENERAL ELECTRIC COMPANY
Defendant - Appellee

John K. Power
[COR NTC ret]
Husch & Eppenberger
1200 Main Street
Suite 1700
Kansas City, MO 64105
816/421-4800

Jonathan I. Gleklen
FAX 202/942-5999
202/942-5454
[COR NTC ret]
Ryan Z. Watts
FAX 202/942-5999
202/942-6609
[COR NTC ret]
Arnold & Porter
555 12th Street N.W.
Washington, DC 20004
202/942-5112

GENERAL ELECTRIC CAPITAL
BUSINESS ASSET FUNDING

John K. Power
(See above)

CORPORATION

[COR NTC ret]

Defendant - Appellee

Jonathan I. Gleklen
(See above)

[COR NTC ret]
Ryan Z. Watts
(See above)

[COR NTC ret]

GE TRANSPORTATION SYSTEMS
GLOBAL SIGNALING, LLC

John K. Power
(See above)

Defendant - Appellee

[COR NTC ret]

Jonathan I. Gleklen
(See above)

[COR NTC ret]
Ryan Z. Watts
(See above)

[COR NTC ret]

JEFFREY IMMELT
Defendant - Appellee

John K. Power
(See above)

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Proceedings include all events.

04-3075 Medical Supply Chain v. General Electric Co., et al

[COR NTC ret]

Jonathan I. Gleklen
(See above)

[COR NTC ret]
Ryan Z. Watts
(See above)

[COR NTC ret]

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Proceedings include all events.

04-3075 Medical Supply Chain v. General Electric Co., et al

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.

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Page 4

Proceedings include all events.

04-3075 Medical Supply Chain v. General Electric Co., et al

2/25/04 [1688865] Civil case docketed. Preliminary record filed.
DATE RECEIVED: 2/24/04. Fee due 3/10/04 for Medical Supply
Chain. Transcript order form due 3/10/04 for Medical Supply
Chain pursuant to R.42.1. Docketing statement due 3/10/04
for Medical Supply Chain. Notice of appearance due 3/10/04
for Medical Supply Chain, General Electric Co., General
Electric Capital, GE Transportation, and Jeffrey Immelt. (mt)

[04-3075]

3/10/04 [1692581] Notice of appearance filed by John K. Power as
attorney for General Electric Co., General Electric, GE
Transportation and Jeffrey Immelt. CERT. OF INTERESTED
PARTIES (y/n): n. (kf) [04-3075]

3/10/04 [1692582] Notice of appearance filed by Ryan Z. Watts and
Jonathan I. Gleklen as attorneys for General Electric Co.,
General Electric, GE Transportation and Jeffrey Immelt.
CERT. OF INTERESTED PARTIES (y/n): n. (kf) [04-3075]

3/12/04 [1693507] Docketing statement filed by Medical Supply
Chain. Original and 4 copies. c/s: y. (mt) [04-3075]

3/12/04 [1693508] Notice of appearance filed by Bret D. Landrith
as attorney for Medical Supply Chain. CERT. OF INTERESTED
PARTIES (y/n): n. (mt) [04-3075]

3/12/04 [1693509] Notice received from Appellant Medical Supply
Chain that a transcript is not necessary for this appeal.
Notice due that record is complete 3/22/04 for Ralph L.
DeLoach. (mt) [04-3075]

3/26/04 [1696678] Fee paid. Date paid in District Court on
3/22/04. (kf) [04-3075]

3/31/04 [1697673] Case referred for mediation conferencing. (kjs)

[04-3075 04-3102]

4/15/04 [1701305] Filed notice record is complete 4/12/04. (kjs)
[04-3075]

4/15/04 [1701311] Cross-appeal schedule set. First brief on cross appeal and appendix due 5/25/04 for Medical Supply Chain in 04-3075 and 04-3102 (kjs) [04-3075 04-3102]

5/3/04 [1705663] Case mediation conferencing terminated. (kjs)
[04-3075 04-3102]

5/27/04 [1712356] Deficient first brief on cross-appeal filed by Medical Supply Chain in 04-3075, 04-3102. (two briefs filed, cover is yellow) Corrected first brief on cross-appeal 6/7/04 for Medical Supply Chain in 04-3075, and 04-3102. (sl) [04-3075 04-3102]

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Proceedings include all events.

04-3075 Medical Supply Chain v. General Electric Co., et al

6/1/04 [1713502] First brief on cross-appeal filed by Medical Supply Chain in 4-3075, and 04-3102. Original and 7 copies. c/s: y Served on 5/27/04. Oral Argument? n, Appendix filed. Original and 1 appendix copy. Appendix Pages: 509. (2 volumes) 2nd cross-appeal brief due 6/29/04 for Jeffrey Immelt, et al., in 04-3075, 04-3102. (sl) [04-3075 04-3102]

6/17/04 [1717407] Motion to strike first brief on cross-appeal filed by General Electric Co., et al., in 04-3075, and 04-3102. Original and 3 copies. c/s: y (kjs)
[04-3075 04-3102]

6/21/04 [1718103] Order filed by PF granting as provided herein appellees/cross-appellants' motion to strike [1717407-1] the first brief on cross-appeal. The appellant/cross-appellee shall serve all parties to this appeal copies of the entire corrected first brief on cross-appeal, including service on this court, within 10 calendar days of the date of this order. The second brief of cross-appeal shall be served and filed within 30 days of the date of service of the corrected first brief on cross-appeal. Correct first brief due 7/1/04 for Medical Supply Chain in 04-3075 and 04-3102. Parties served by mail. (kjs) [04-3075 04-3102]

6/28/04 [1719984] Appellant's motion filed by Appellant Medical Supply Chain in 04-3075 and 04-3102 to file brief instantner of nonconforming yellow appellant brief 04-3075 received by

the court on 5/27/04. Original and 3 copies. c/s: y. (kf)

[04-3075 04-3102]

6/29/04 [1721006] Appellant's motion to file brief instanter of nonconforming yellow appellant brief 04-3075 submitted to court. (kf) [04-3075 04-3102]

7/6/04 [1721995] Certificate of service filed by Bret D. Landrith in 04-3075 04-3102 stating that two copies of the first brief on cross-appeal were served on 7/1/04. (kf)

[04-3075 04-3102]

7/7/04 [1721942] Order filed by Judges Murphy and O'Brien denying Appellant's motion to file instanter. Appellant shall serve copies of the corrected brief and provide the clerk with proof of service of the corrected brief in 04-3075 and 04-3102. Parties served by mail. (kf) [04-3075 04-3102]

8/4/04 [1729998] Second brief on cross-appeal filed by General Electric Co., General Electric, GE Transportation and Jeffrey Immelt in 04-3075, 04-3102. Original and 7 copies. Served on 8/3/04. Oral Argument? n. Third brief on cross-appeal due 9/7/04 for Medical Supply Chain. (sl)

[04-3075 04-3102]

Docket as of August 17, 2005 8:03 pm

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Proceedings include all events.

04-3075 Medical Supply Chain v. General Electric Co., et al

8/19/04 [1734261] Third brief on cross-appeal filed by Medical Supply Chain in 04-3075 and 04-3102. Original and 7 copies. Served on 8/18/04. Fourth brief on cross-appeal due 9/7/04 for General Electric Co., et al. (mt) [04-3075 04-3102]

8/19/04 [1734262] Motion to submit the case on the briefs filed by Medical Supply Chain. Original and 3 copies. c/s: y. (mt)

[04-3075 04-3102]

9/2/04 [1737320] Order filed by PF referring appellant's motion to submit case on the briefs [1734262-1] REFERRED TO PANEL ON THE MERITS in 04-3075, 04-3102. Parties served by mail. (mt) [04-3075 04-3102]

2/4/05 [1778752] Case submitted to panel on the briefs pursuant to Rule 34 for Conference Calendar. (as) [04-3075 04-3102]

7/26/05 [1829624] Terminated on the Merits after Submission Without Oral Hearing; Affirmed (in part) and Reversed (in

part); Written, Signed, Unpublished. Lucero, authoring
judge; Porfilio; Baldock. [04-3075, 04-3102] Parties served
by mail on 7/26/05. (kf) [04-3075 04-3102]

8/17/05 [1837188] Mandate issued. (kjs) [04-3075 04-3102]

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PACER Service Center			
Transaction Receipt			
02/13/2007 12:10:34			
PACER Login:	dh0916	Client Code:	
Description:	dkt report	Case Number:	04-3075
Billable Pages:	7	Cost:	0.56

United States Court of Appeals

For the Tenth Circuit

Docket No. 04-3075 and 04-3102 (10th Cir.)

Case No.: 03-2324

Medical Supply Chain, Inc.

v.

The General Electric Company, General Electric Capital Business Asset
Funding Corporation, GE Transportation Systems Global Signaling, L.L.C.,
and Jeffrey R. Immelt

Appeal from
the United States District Court
for the District of Kansas

APPELLANT BRIEF

Law Offices of Bret D. Landrith, Esq.
12820 SW Hwy 4
Topeka, KS
1-785-876-2233
1-785-256-6508
Attorney for Medical Supply Chain, Inc.

Bret D. Landrith, Esq.
Kansas Sup. Ct. Id. # 20380
On the brief

APPELLANT

No Oral Argument Requested.

ARGUMENT

I. Whether the trial court erred in dismissing Medical Supply's Antitrust Claims.

ARGUMENT I, STANDARD OF REVIEW

Chemical Weapons Working Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485, 1490 (10th Cir. 1997).

Yoder v. Honeywell, Inc. 104 F.3d 1215,1224 (10th Cir.)

Yoder, 104 F.3d at 1224

Full Draw Prod. v. Easton Sports Inc., 182 F.3d 745 at 750 (10th Cir., 1999).

SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996).

Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A., 711 F.2d 989, at 994(11th Cir. 1983)

St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am., 795 F.2d 948, 953 (11th Cir. 1986)

Covad Communications Co. v. Bellsouth Corp., at ¶21 2002 C11 260 (USCA11, 2002).

George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 (2d Cir. 1977).

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993).

Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, at 782 (7th Cir.1994).

George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998).

Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976).

Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511 at 1518 (C.A.10 (Colo.), 1995).

Statutes

FED .R. CIV. P. Rule 12(b)(6)

FED .R. CIV. P. 8(a)(2)

Other Authorities

Charles Alan Wright, Law of Federal Courts Sec. 68, at 475-76 (5th ed. 1994)

PRIOR OR RELATED APPEALS

This is the first of two appeals resulting from the trial court's Memorandum and Order of Dismissal dated 1/29/04 and Judgment dated 2/13/04. Medical Supply entered its Notice of Appeal on 2/13/04 Case No. 04-3075 and GE entered its Notice of Appeal on 2/27/04, Case No. 04-3102.

STATEMENT OF APPELLATE JURISDICTION

“The district court had original jurisdiction over the antitrust claims pursuant to 28 U.S.C. § 1337, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291.” [footnote omitted] *Full Draw Prod. v. Easton Sports Inc.*, 182 F.3d 745 at 749 (10th Cir., 1999).

The trial court issued its Memorandum and Order of Dismissal dated 1/29/04 and Judgment dated 2/13/04. Medical Supply entered its Notice of Appeal on 2/13/04 and GE entered its Notice of Appeal on 2/27/04.

STATEMENT OF ISSUES PRESENTED

Whether Medical Supply's Amended Complaint Alleged GE Defendants' Participation in Group Boycott to Bar Entry Into the Market of Hospital Supplies in E-Commerce? and Whether Medical Supply's Amended Complaint Alleged GE Defendants' Monopolization of Hospital Supplies in E-Commerce?

STANDARD OF REVIEW

The appellate court upholds a dismissal under Fed. R. Civ. P. 12(b)(6) only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him to relief," *Full Draw Prod. v. Easton Sports Inc.*, 182 F.3d 745 at 750 (10th Cir., 1999).

STATEMENT OF THE CASE

This is an action against General Electric, its CEO Jeffrey Immelt and two of its subsidiaries for group boycott and other antitrust prohibited actions in the creation and enforcement of a hospital supply cartel called G.H.X., LLC revealed through General Electric's breach of a business relationship established with Medical Supply. Once Jeffrey Immelt

discovered Medical Supply was the last independent electronic marketplace and targeted by the cartel, he caused the breach of an agreement to purchase a lease in antitrust prohibited conduct. “[A]llegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws.”¹

The General Electric defendants’ common ownership did not shield them from liability for acting in concert with the independent G.H.X., LLC. After *Copperweld*, Sherman § 1 liability still exists when the “original anticompetitive purpose of a combination is evident from the affiliated corporations’ subsequent conduct” and “Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination," which was created in a " 'deliberate, calculated' " manner.”²

STATEMENT OF FACTS

The following facts were alleged by the appellant Medical Supply as plaintiff in its amended complaint. The facts are restated here in substantially the same form as in the complaint but with the additional of subject headings in bold and the addition of material facts alleged in the

¹ *Covad Communications Co. v. Bellsouth Corp.*, 2002 C11 260 at ¶¶ 62 and 63 (USCA11, 2002)

² Chief Justice Burger, Majority Opinion, *Copperweld v. Independence Tube*, 104 S.Ct. 2731, 81 L.Ed.2d 628 at 761-762 (1984)

attachments to the amended complaint of a contract³ requiring participation in G.H.X., LLC and Neoforma and an affidavit containing the two full press releases judicially noticeable as being the official statements of publicly traded companies and identified as such.

MEDICAL SUPPLY CHAIN, INC., (herein “Medical Supply”), is an e-commerce vendor, replaces a store or distributor as a more efficient and intelligent distributor of hospital supplies. Suppliers offer their products and services through Medical Supply Chain, Inc. and hospitals purchase their supplies through Medical Supply Chain, Inc. **V I pg. 52 §3**

Medical Supply’s technology is superior allowing for greater market efficiency and transparency than GE’s electronic marketplace called GHX, L.L.C. Medical Supply’s founder spent 10 years developing it and for the last three years, Medical Supply has been incorporated, completing the research and development for commercialization. Medical Supply’s first entry into the hospital supply market was halted in October 2002 by members of GE’s cartel directly affiliated with the other electronic marketplace, Neoforma. GE appeared to be acting independently of Neoforma, when it accepted Medical Supply’s proposal for a lease buy out

³ In *Vigano v. Wylain, Inc.*, an unexecuted contract attachment to the complaint sufficiently gave notice under FRCP 8 and “...correctly placed before the jury the question of the existence *vel non* of a contract..”: *Vigano v. Wylain, Inc.*, 633 F.2d 522 (C.A.8 (Mo.), 1980)

and financing, but similarly repudiated a contract for essential facilities, preventing entry into the hospital supply market at great sacrifice when Medical Supply was not in a position to find an alternative. (Neoforma's financial partner, US Bancorp Piper Jaffray, has attested to a threat of filing a Suspicious Activity Report or "SAR," against Medical Supply under the USA PATRIOT Act, which would destroy Medical Supply's ability to process hospital and supplier purchasing transactions. In an affidavit by Piper Jaffray Vice President and Chief Counsel submitted in *Medical Supply vs. US Bancorp et al* No. 02-3443 (10th Cir.), Piper Jaffray argues to file a "SAR" at any time it sees fit. Medical Supply is seeking to be protected from Piper Jaffray's extortion and any malicious use of the USA PATRIOT Act. The October 2002 and June 2003, distinct antitrust injuries to Medical Supply prevented it from beginning its operations each time and realizing the expectations of its investors and stakeholders. **V I pg. 53 §4**

Jeffrey R. Immelt, Chief Executive Officer, General Electric Company (herein "GE"). Mr. Immelt has been a long time employee of the many divisions and entities of General Electric Company. In 1997 Mr. Immelt was made president of GE Medical, the subsidiary corporation owned and controlled by GE responsible for selling products to the healthcare industry. In or about 1998 GE directed Immelt to identify the

form of internet business model that would be a threat to GE Medical's profit margin. Mr. Immelt directed a study that determined that an internet marketplace which was independent of manufacturers and existing healthcare group purchasing organizations would threaten GE by causing prices to be much lower and by freeing hospitals, clinics and doctors from having to purchase products only from channels controlled by GE. These customers would then have access to competing products. Mr. Immelt found GE Medical's healthcare industry customers were rapidly adopting the Internet for purchasing decision making. GE made Immelt and his managers wargame out strategies to prevent an internet based competitor with a more efficient business model from entering the hospital supply market. **V I pg. 54 §5**

As part of that strategy, Immelt spent \$50,000,000.00 in 1999 on web site, database and internet communications technologies. **V I pg. 54 §5**

**Jeffrey Immelt And GE's Creation Of A Combination
With Its Competitors To Boycott Medical Supply**

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. The purpose of this cartel is to prevent new entrants to the hospital supply ecommerce market and to maintain uncompetitive higher prices on hospital supply commodities. The

cartel maintains control over its members pricing, volume, distribution and customer data to enforce the allocation of customers and to exclude nonmember competitors. The cartel requires tying contracts so suppliers and customers are required to join and are forced to do business through the cartel's e-commerce marketplace. When GE's Medical divisions discovered GE Corporate had made a contract with Medical Supply Chain, Inc., they got Jeffrey R. Immelt's office to order that it not be performed to harm a competitor entering their markets. 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. **V I pg. 51 §1**

The second part of the strategy Immelt developed and implemented under the direction of GE was to organize GE Medical's competitors and combine with them to create a preemptive internet marketplace where prices could be protected from competitive pressure caused by new market entrants and market shares could be preserved by the assignment of territories and the allotment of product markets. Immelt presided over the formation of this cartel and the engineering of the conspiracy to rig prices and markets through exchange of price, volume and other product data in a per se restraint of trade. See *United States v. Andreas*, 216 F.3d 645 (7th Cir., 2000). **V I pg. 55 §6**

Jeffrey Immelt and GE's Registration and Incorporation of the Combination or Agreement to Restrain Trade as G.H.X., LLC

Mr. Immelt signed and oversaw the preparation of documents incorporating the conspiracy as Global Health Exchange, LLC in 2000. Mr. Immelt oversaw GE's capitalization of the cartel, and caused the articles of incorporation and the operating agreement to secure GE's control of the entity, including the placement of an interlocking board of directors with the other founders of the trust and made the explicit requirement an officer of GE is on the board of directors. **V I pg. 55 §7**

Press Released Statements Regarding G.H.X., LLC From The Contents of the Attached Affidavit of Lynn Everard

Affidavit Part A Press Release of General Electric and its competitors: "Johnson & Johnson, GE Medical Systems, Baxter International Inc., Abbott Laboratories and Medtronic, Inc. announced today that they are creating a global healthcare exchange that will be an independent Internet-based company. This new privately-held trading exchange will help healthcare providers make quicker, more efficient purchasing decisions by simplifying business processes and providing a single source for customers' healthcare purchases." And "This exchange is a big part of the solution--access to state-of-the-art supply chain management and clinical content without the capital expense." "Healthcare requires the speed of the Internet and the

staying power of trusted, experienced industry leaders. This venture combines both, and is the perfect extension to our long-standing customer relationships. We all have a stake in the future of healthcare," said Jeff Immelt, president and CEO, GE Medical Systems. "The exchange is being established with equity investments by the founding companies" "The exchange will be supported by the combined resources of GE Global Exchange Services, and the strategic alliance between Ariba (NASDAQ: ARBA), IBM (NYSE: IBM), and i2 (NASDAQ: ITWO). Johnson & Johnson (NYSE: JNJ), GE Medical Systems (NYSE: GE), Baxter International Inc. (NYSE: BAX), Abbott Laboratories (NYSE: ABT) and Medtronic, Inc. (NYSE: MDT) are equal shareholders in the privately-held company." Major Medical Products and Services Companies Establish Global Healthcare Exchange 3/29/2000 NEW YORK, Mar 29, 2000 (BUSINESS WIRE) **V.I pg. 108-110**

Affidavit Part B Press Release of the publicly traded company, Neoforma, Inc. "Under the terms of the three-year agreement, Neoforma's current and future marketplaces will interface with GHX's supplier connectivity portal and AllSource™ catalog, the industry's most up-to-date and accurate electronic catalog. GHX will license portions of Neoforma's innovative NeoConnect™ solution suite, which supports the rapid

integration of trading partners for supply chain collaboration. Neoforma and GHX will market this integrated solution to existing and prospective customers. The two organizations also intend to jointly develop, market and sell technology and supply chain solutions” “To participate in the integrated solution, hospitals and suppliers will have agreements with both GHX and Neoforma.” Global Healthcare Exchange and Neoforma Sign Definitive Agreement to Provide First Comprehensive, Integrated Supply Chain Solution for Healthcare Alliance will accelerate benefits and adoption of e-commerce for marketplace participants Denver, Colo. and San Jose, Calif. - August 29, 2001 **V.I pg. 111-112**

The Qui Tam Averment That Jeffrey Immelt and GE’s Purpose in Restraining Trade With G.H.X.,LLC Was to Defraud Medicare in Illegally Inflated Claims

Mr. Immelt knew that the illegitimate increased cost of hospital supplies due to the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause and is causing Medicare to be defrauded out of billions of dollars over paid in artificially inflated claims for devices and procedures utilizing the cartel’s supplies. **V I pg. 55 §8**

Mr. Immelt knew the decreased access to healthcare resulting from the operation of the conspiracy, cartel or trust he had created and incorporated as GHX, LLC. would cause employers and health insurers to

reduce coverage and benefits to the nation's citizens leading to injury and death. **V I pg. 55 §9**

Mr. Immelt became CEO of The General Electric Company in September 2001. Under Immelt's leadership, GE's Global Exchange's inefficient and technologically inferior internet marketplace for its appliances was sold off. Immelt, however continued GE's support and participation in GHX, LLC. Immelt's purpose was to prevent other healthcare internet marketplaces from providing competition in hospital supplies. Immelt also expanded the membership to include non-manufacturer members, including the Group Purchasing Organizations that distributed most of the nation's hospital supplies. Immelt caused GHX, LLC. to be even more protective against internet competitors by requiring members to force their customers and suppliers to make anticompetitive contracts with other member companies. **V I pg. 56 §10**

Jeffrey Immelt's Scheme To Maintain the Monopoly In E-Commerce By Requiring All Customers to Be Members of Both Neoforma and G.H.X., LLC Customer In A Tying Agreement

Immelt allied GHX, LLC with the other internet marketplace, Neoforma, Inc. to control 80% of the existing hospital supply e-commerce market. Immelt made GHX, LLC. require customers to join both the former competing internet marketplace, Neoforma and GHX, LLC.'s internet

marketplaces. **See Attachment 2**, Marketplace @Novation, Master Supplier Agreement, Schedule B. In this way, GE could allocate customers and suppliers among the members of GHX, LLC and obtain real time price and volume data to enforce the cartel's goal of illegitimately higher hospital supply prices. **V I pg. 56 §10**

Contents of Attachment 2 Contract Requiring Neoforma Customers to Enroll in G.H.X., LLC

Excerpt from Marketplace@Novation Contract

“SCHEDULE B – INTEGRATED SOLUTION PARTICIPATION

1. Integrated Solution Participation

1.1 By executing this Schedule B, Supplier elects to participate in Marketplace@Novation and access the Services through the alliance established between the Global Healthcare Exchange, LLC (“GHX”) and Neoforma to integrate and connect GHX’s electronic trading exchange with the Marketplace@Novation (“Integrated Solution”).

1.2 Supplier shall be eligible to participate in Marketplace@Novation and access the Services through the Integrated Solution only if Supplier executes a User Agreement with GHX (“GHX User Agreement”).

2. Resolution of Inconsistencies. The terms of the GHX User Agreement shall control with respect to any inconsistency between the terms of the GHX User Agreement and Sections 4.3, 4.5 and 4.6 of this Agreement.

3. Cooperation. Supplier shall use commercially reasonable efforts to cooperate with GHX and Neoforma so that some or all of the Services may be provided to Supplier through the Integrated Solution within sixty (60) days of the Effective Date of this Agreement.” **V I pg. 105**

Mr. Immelt knew the gravamen of his actions when the trade unions of GE held a two day, nationwide strike on January 14 th, 2003 to call

attention to the high cost of healthcare and the rapid price increases for American working families. This effort to call public attention to the crisis cost the life of a GE worker. Kjeston Michelle Rodgers, a member of IUE-CWA Local 83761, was hit by a police car and killed while on the picket line. **V I pg. 56 §11**

Mr. Immelt's violations of 15 U.S.C. § 1, injuring healthcare supply consumers; including hospitals and patients, in addition to competitors like Medical Supply Chain, Inc. is egregious conduct equivalent to felony. Antitrust Procedures and Penalties Act, Pub.L.No. 93-528, § 3, 88 Stat. 1706, 1708. **V I pg. 57 §12**

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

prevent Medical Supply from introducing competition and efficiency into that market. **V I pg. 57 §13**

Jeffrey Immelt and GE's Intentional Obstruction of Justice Through Intimidation

When Medical Supply Chain, Inc. prepared to seek redress in court for its injury, Mr. Immelt through his agents caused Medical Supply Chain, Inc., a victim of GE's deliberate actions to be threatened and intimidated in conduct equivalent to the felony of 18 U.S.C. § 1503 Obstruction of Justice with the intent of preventing Medical Supply Chain, Inc. and its counsel from bringing these charges and to cause them to be withdrawn. By deliberately refusing to cite any authority, case law or statute that Medical Supply's claims were invalid or frivolous, Mr. Immelt through his agents attempted to make GE's victims believe that they would be sanctioned and fined not on the basis of law but on GE's power over the legal system. **V I pg. 57 §14**

GENERAL ELECTRIC COMPANY, (herein "GE"), registered agent address for Kansas, The Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. **GE was a dominant medical device manufacturer and medical equipment and electrical equipment supplier to North American hospitals. GE ceased to be a manufacturer and became a distributor of parts, assemblies, products, systems and**

credit services to hospitals. GE established monopolies in many product lines for hospitals but feared other distributors would bypass GE and buy the same parts, assemblies, products, systems from foreign sources and sell them to North American hospitals at lower prices in competition with GE. To prevent this, GE made alliances with the dominant distributors for hospitals called GPO's because they were intended to be group-purchasing cooperatives (organizations). GE and the other dominant manufacturers gave the management of these GPO's kickbacks to prevent direct competition in distribution, preserve their loyalty and to protect the inflated prices. However, GE saw that the captive customers of these GPO's were growing dissatisfied at the inefficiency and the failure to achieve group purchasing discounts. To protect against other market entrants, GE formed Global Health Exchange L.L.C. as an electronic market place promising online distribution at lower prices to hospitals. GE owns shares of stock in the privately held company and provided the initial capitalization. As an alliance of a handful of dominant manufacturers (now distributors) the actual goal was to preempt the fledgling e-commerce companies from entering the electronic distribution of hospital supplies. GE found the technology of GHX, Inc. was inadequate to outperform new entrants and aligned itself with Neoforma, Inc., the electronic marketplace co-opted by

the dominant GPO's in an alliance to exchange data among suppliers to reinforce cost structures as inflated as those of the GPO's. GHX, L.L.C. at the direction and approval of GE has retaliated against suppliers who endanger the marketplace with competitive prices. GHX, L.L.C. at the direction and approval of GE has excluded competitors including Retractable Technologies, Inc. and Maximo for failing to give kick backs to the cartel. Death and injury resulted from the failure of hospitals to obtain these medical devices held out by GHX. GHX, L.L.C. at the direction and approval of GE has excluded Medical Supply Chain, Inc. from entering the market by not allowing Medical Supply to offer GE Capital Healthcare credit to its potential customers in April of 2002, by refusing to offer US Bancorp Piper Jaffray services to Medical Supply in June 2002 and by repudiating essential escrow contracts required by Medical Supply to capitalize its entry into market in October 2002. (US Bancorp has interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX L.L.C.; Novation and Premier. US Bancorp helped Novation acquire control of Neoforma and partner it with GHX, L.L.C. creating a monopoly of over 80% of healthcare e-commerce market). GE repudiated a 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. The healthcare market is worth 1.3 trillion dollars. GE acted on the tremendous windfall to preserve its monopoly. George Fricke is GE's property manager. **V I pg. 58 §15**

While GE is a diverse conglomerate, in 1993, the majority of its income was derived from the capitalization and finance of unrelated companies and individuals that are customers of its financial services divisions. **V I pg. 59 §16**

GENERAL ELECTRIC CAPITAL BUSINESS ASSET

FUNDING CORPORATION, (herein "GE Capital") registered agent address for Kansas, The Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. GE Capital is a subsidiary of GE performing GE's commercial lending operations. GE in accepting Medical Supply's proposal, committed GE Capital to provide a 5.4% interest rate mortgage for \$6.4 million dollars on the building at 1600 NE Coronado, in Blue Springs, MO. GE Capital had its loan officer Doug McKay from their Overland Park, KS office contact Mr. Lipari of Medical Supply. **V I pg. 59 §17**

GE TRANSPORTATION SYSTEMS GLOBAL SIGNALING,

L.L.C. (herein "GE Transportation") registered agent address for Kansas, The Corporation Company, Inc., 515 S Kansas Ave., Topeka, Ks 66603. GE Transportation acquired the building and its transferable lease when it

bought the railroad signal company Harmon Industries, Inc. and dismissed its employees. GE Transportation sought to escape the \$5.4 million dollar liability of the remaining 7-year lease because of the \$50,000 to \$60,000 dollar a month lease and insurance on the building that had not been occupied for over 8 months with no sub lease offers. Previously the building had been under utilized while GE dismissed Harmon's staff. The high monthly cost was making the subsidiary fail to meet GE's economic performance requirements and hurting the conglomerate's bottom line and share price. **V I pg. 60 §18**

Business Relationship Allegations

On or about June 1st, 2002, Mr. Lipari, CEO of Medical Supply Chain, Inc. contacted the leasing agent Cohen & Esrey Property Management regarding a building located at 1600 N.E. Coronado Drive in Blue Springs, MO. The leasing agent indicated the building was already leased but that the lessee could and would like to sub-lease the building. The building was not occupied so Mr. Lipari made a verbal offer to sub-lease a portion of the building. The leasing agent declined his offer indicating the existing lessee would not accept anything less than sub-leasing the entire building. **V I pg. 60 §19**

On or about April 1st, 2003 Mr. Lipari contacted the new leasing agent (B.A. Karbank & Company) in the event the new agent had different instructions regarding a sub-lease of the property located at 1600 N.E. Coronado Drive in Blue Springs, MO. The new leasing agent told him that GE was the lessee seeking to sub-lease the building due to their vacating the building after GE Transportation bought out Harmon Industries. The building was still not occupied so again Mr. Lipari made a verbal offer to lease a portion of the building. The leasing agent declined his offer indicating GE Corporate Properties would not accept anything less than leasing the entire building. **V I pg. 61 §20**

On or about April 7th Mr. Lipari contacted GE and spoke with the GE property manager, George Frickie regarding Medical Supply's interest in sub-leasing the building. George Frickie indicated again that GE would not be interested in sub-leasing a portion of the building but rather would be interested in leasing the entire building. Mr. Lipari requested the name of the owners and Mr. Frickie gave him the name and number of Barry Price with Cherokee Properties L.L.C. Mr. Lipari contacted Mr. Price, he was referred to Scott Asner who also had a substantial interest in the building. While speaking with Mr. Asner he provided Mr. Lipari the background and current details on the building lease with GE, terms and a price to purchase

the building. The lease was transferable and GE was still obligated for 7-years out of a 10-year lease. Mr. Asner agreed to sell Medical Supply the building for the remaining balance of the GE 7-year lease (\$5.4 million) and provided Mr. Lipari with a letter of intent to sell the building to Medical Supply. **V I pg. 61 §21**

On or about April 15th, Mr. Lipari contacted Mr. Frickie with GE Commercial Properties and indicated that he had an interest in purchasing the building. Mr. Lipari ask Mr. Frickie if GE had an interest in buying out the remainder of their lease so that Medical Supply could occupy the building following the purchase. Mr. Frickie offered GE's lease payments for the remainder of 2003 (\$350,000) as a buy out offer. **V I pg. 62 §22**

On or about May 1st, 2003 Mr. Lipari tentatively contacted several local Banks, knowing that US Bank had threatened his company with a malicious USA PATRIOT Act report to keep Medical Supply from entering the hospital supply market where US bank was affiliated with Neoforma, an existing electronic marketplace for healthcare supplies. Mr. Lipari knew Medical Supply could not get a loan because of the threat and extortion, but knew he needed input from bankers familiar with the commercial real estate market in Blue Springs. Mr. Lipari felt Medical Supply could form a holding company to obtain the property without US Bank realizing he could

enter the hospital supply market. Mr. Lipari spoke with Allen Lefko President of Grain Valley Bank, Pat Campbell branch manager of Gold's Bank and Randy Castle Senior Vice-President of Jacomo Bank. Each of the banks indicated a willingness to provide the mortgage because they felt the property was worth far more than the price offered by Cherokee Properties L.L.C., but the mortgage was too large for the regulatory size of their bank and they each suggested a national bank as an alternative. Due to US Bank's extortion and racketeering, including the pretext and very real threat of a malicious USA PATRIOT Act suspicious activity report (SAR) against Medical Supply since Mr. Lipari had tried to enter the hospital supply market in October of 2002, Mr. Lipari knew he was unable to solicit a national bank for the real estate loan. **V I pg. 62 §23**

On or about May 7th, Medical Supply contracted a financial consultant (Joan Mark) for advice on how to put a mortgage together to buy the building which has a 7-year revenue stream from GE in the amount of \$5.4 million, the identical amount offered to purchase the building and for which Medical Supply had a letter of intent from the owner Cherokee Properties L.L.C. Mrs. Mark suggested Mr. Lipari propose a mortgage arrangement directly to George Frickie with GE Corporate. Mrs. Mark explained how a purchase of the \$10 Million dollar property for \$5.4 Million

was a great deal for any mortgage lender. Mrs. Mark also explained if GE provided a \$5.4 million dollar mortgage on a \$10 million dollar property and eliminated a \$5.4 million dollar lease obligation that GE would directly benefit from a \$15 million dollar swing to their balance sheet. **V I pg. 63**

§24

Allegation of Contract Under The E-Sign Act, 15 U.S.C. 7001

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

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 (V I pg. 63 §25)

Contents of Attachment 1 in the Offer Accepted By General Electric

“The Legal Action

Medical Supply Chain, Inc. planned to enter the market December 1st 2002 but was temporarily stopped in October by a consortium in the hospital supply marketplace that had determined Medical Supply Chain Inc.'s business model would cost them over 23 billion dollars annually in lost profit. In fact, Medical Supply Chain, Inc. was the only remaining web based electronic marketplace they had not acquired. The consortium's attempt to stop Medical Supply Chain, Inc. violated antitrust laws and the defendants are being prosecuted in Medical Supply Chain, Inc. v. US Bancorp, et al for the business plan expectation damages, the injury to hospitals and other business associates along with attorney's fees. To date, after 6 months of legal action, the defendants have admitted their conduct and have failed to provide a defense at law and no counterclaims have been made against Medical Supply Chain, Inc. Medical Supply has invested over 260,000 dollars and the damages sought are in excess of 1.7 Billion

dollars and are trebled under antitrust laws. Medical Supply Chain, Inc. plans to discover evidence on other hospital supply distributors to prevent future obstructions and enjoys favorable publicity with the nation's leading hospital groups and medical device manufacturers who see Medical Supply Chain, Inc. as a positive and reputable reformer the hospital supply marketplace badly needs.” **V I pg. 88**

The Executive Summary furnished to General Electric included Medical Supply's market description:

“A HUGE MARKET POTENTIAL exists in the healthcare market because it represents over \$200 billion in annual transactional supply-chain activity including medical & non-medical products. Industry experts expect this to increase to \$360 billion annually by the year 2009. Many of the existing 6,000 Health systems (hospitals) are spending in excess of 20% on needless and inflationary process costs. Management has identified several health systems out of 6,000 currently utilizing similar strategies and initiatives as those developed by the company. These health systems have documented over 20% in total supply-chain cost reduction.” **V I pg. 89**

And financial projections from which the “business leaders” (*infra*) of General Electric evaluated the resources of Medical Supply and from which they made the decision to accept Medical Supply's offer:

“60 MONTH FORWARD REVENUES

TERM	ANNUAL	CUMULATIVE
Year 1	\$2,901,600	\$2,901,600
Year 2	\$27,366,576	\$30,268,176
Year 3	\$74,798,940	\$105,067,116
Year 4	\$140,683,980	\$245,751,096
Year 5	\$223,728,060	\$469,479,156” V I pg. 90

Acceptance of Contract Allegations

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

May 15th 2003-George Frickie "Bret, George Frickie, ah.... I know I sent you an email saying that my counsel way out ah...and I followed up with another email but I spoke to the business leaders and we will accept that transaction ah... let's start the paper work ah... if you want to do some drafting of lease termination or if you would like us to do that, give me a holler 203-4314452." (V I pg. 64 §26)

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

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

Bret, I would like to confirm our telephone conversation in that GE will accept your proposal to terminate the existing Lease. Robert Payne GE Counsel will start working on the document. He is out of the office until Monday the 19th. GCF (V I pg. 64 §27)

Manifestation, Mutual Performances And Reliance Allegations

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

property manager for GE Transportation in Blue Springs and John Phillips, the GE Transportation building maintenance engineer provided a three-hour walk through in addition to the building maintenance and operational procedures. John Philips also provided the construction blue prints of the building and allowed Mr. Lipari to make copies. Mr. Lipari returned the blueprints after copies were made. They both stated they were being dismissed from employment with GE since they would no longer be needed.

V I pg. 64 §28

On May 22nd, 2003 Mr. Lipari spoke to Doug McKay with GE Capital who had called earlier that week with regard to the mortgage outlined in Medical Supply's proposal. Mr. McKay asked that Mr. Lipari send the company information regarding the mortgage. Mr. Lipari indicated that he could meet him the following Tuesday because Medical Supply had a loan package for him that included its financials, the proposal that George Frickie and GE's business leaders accepted, the letter of intent from the owners and our Dunn & Bradstreet report showing Medical Supply's good credit and strong financial condition. Mr. Lipari gave the information to 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. **V I pg. 65 §29**

Interference With Business Relationship and Breach Allegations

On or about June 2nd, 2003 Mr. Lipari called McKay to see how they were doing on closing and McKay indicated that the person he needed to speak with was at corporate and that he needed to speak with him before moving forward. As the June 15, 2003 closing date approached, Medical Supply had not received any definitive closing date so Medical Supply's corporate counsel called and sent George Frickie an email stating that a delay in closing would not effect the lease buyout of \$350,000. Medical Supply's counsel later again called Mr. Frickie when he received no response and Mr. Frickie became extremely angry and hung up the phone. **V I pg. 65**

§30

The Refusal to Confirm or Deny Repudiation

Medical Supply then proceeded to speak with GE's counsel Kate O'Leary to determine if the contract had been repudiated. Supporting statutes and the antitrust basis and damages implications were explained to Ms O'Leary. Medical Supply gave GE a deadline of June 10th to clarify whether there had been a repudiation. Mrs. O'Leary later faxed a letter on the 10th requesting that Medical Supply not speak to anyone at GE and that any correspondence relating to this matter be directed to her. Medical Supply then emailed a letter stating that if no earnest money were deposited to

indicate the contract was not being repudiated, Medical Supply would file on June 16th for antitrust and breach of contract. **V I pg. 65 §30**

SUMMARY OF ARGUMENTS

Medical Supply asserts that the trial court failed to recognize the adequately plead Group Boycott conducted by the General Electric defendants in concert with G.H.X., LLC and Neoforma, horizontal competitors of Medical Supply. Secondly, Medical Supply asserts that the trial court failed to recognize the adequately plead claims of monopolization that subject a single firm to antitrust liability.

I. Whether Medical Supply's Amended Complaint Alleged GE Defendants' Participation in Group Boycott to Bar Entry Into the Market of Hospital Supplies in E-Commerce

The trial court dismissed Medical Supply's amended complaint out of clear factual error and an incorrect application of federal antitrust law. At page 5 of the Memorandum and Order, the court states:

“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.” **V2 pg. 491**

The court mistook the General Electric division that sold hospital supplies in E-Commerce called GE Global Exchange Services for the

similarly named Global Exchange Services, LLC the entity the court referred to as G.H.X. LLC (See *infra*) and the court misunderstood the allegations made by Medical Supply against the General Electric defendants as competitors in e-commerce hospital supplies for their concerted conduct with G.H.X., LLC as the appellant will more fully explain below:

- a. The complaint identified two Internet or Web based electronic marketplaces for healthcare supplies in E-Commerce that General Electric directly distributes hospital supplies through- G.H.X., LLC and its own GE Global Exchange Services**

The trial court made a clear error of fact in dismissing Medical Supply's action against the General Electric defendants because General Electric was not alleged to itself be a distributor of hospital supplies. The amended complaint averred General Electric distributed hospital supplies through GE Global Exchange Services during the time of the complained of conduct:

“As part of that strategy [to compete with other internet hospital supply distributors], Immelt spent \$50,000,000.00 in 1999 on web site, database and internet communications technologies.” **V I pg. 54 §5**

Even after Jeffrey Immelt went on to organize the separate company Global Health Exchange, LLC or G.H.X., LLC when shortened to its initials and which was named after Jack Welch's (GE's previous CEO) pioneering electronic marketplace GE Global Exchange Services which sold all of GE's

division's products, including GE Medical's, the General Electric electronic marketplace continued to exist and support G.H.X., LLC as stated in attachment 3 to the amended complaint:

“The exchange [G.H.X., LLC] will be supported by the combined resources of **GE Global Exchange Services**, and the strategic alliance between Ariba (NASDAQ: ARBA), IBM (NYSE: IBM), and i2 (NASDAQ: ITWO). Johnson & Johnson (NYSE: JNJ), GE Medical Systems (NYSE: GE), Baxter International Inc. (NYSE: BAX), Abbott Laboratories (NYSE: ABT) and Medtronic, Inc. (NYSE: MDT) are equal shareholders in the privately- held company.” (emphasis added) **V.I pg. 108-110**

The body of the amended complaint discusses Jeffrey Immelt's steps over time to get rid of the General Electric marketplace GE Global Exchange, but without discovery or even an answer to the complaint, it is not clear when he succeeded in jettisoning it, or if GE continues to own and control part of it, or if GE retained the electronic marketplace for hospital supplies (that portion that “supports” G.H.X., LLC):

“Under Immelt's leadership, **GE's Global Exchange's** inefficient and technologically inferior internet marketplace for its appliances was sold off. Immelt, however continued GE's support and participation in GHX, LLC. Immelt's purpose was to prevent other healthcare internet marketplaces from providing competition in hospital supplies.” (emphasis added) **V I pg. 56 §10**

b. The Amended Complaint's Averment of Defendants' Creation of and Participation in an Agreement With Horizontal Competitors to Restrain Trade in Hospital Supplies, Including Those Delivered Through E-Commerce

Medical Supply's Amended Complaint alleged that the appellees General Electric Company and Jeffrey Immelt were manufacturer/distributors of hospital supplies, that they had created an electronic marketplace for distribution of the supplies in E-Commerce, sold hospital supplies through E-Commerce as a single firm, created an agreement with their manufacturer/distributor competitors and the electronic marketplace Neoforma to distribute hospital supplies through E-Commerce and monopolize the hospital supply market and exclude competitor web based distributors the group boycott had targeted, specifically Medical Supply. The agreement was alleged to be overt and announced in press releases and articles by the General Electric appellees. The Amended Complaint alleges the General Electric defendant/appellees even registering and incorporating the agreement, naming the trust G.H.X., LLC and dividing shares among each of the manufacturer/distributors.

Medical Supply argued in trial court that the defendant/appellee's agreement and actions against Medical Supply in combination with G.H.X., LLC and Neoforma was a restraint of trade prohibited under §§ 1 and 2 of The Sherman Act.

In *Copperweld Corp. v. Independence Tube Corp.*; 467 U.S. 752 (1984), Chief Justice Burger stated that a single enterprise or combination

for an illegal purpose is different from the overturned “intraenterprise conspiracy doctrine” and that Sherman § 1 liability still exists when the “original anticompetitive purpose of a combination is evident from the affiliated corporations’ subsequent conduct.” The footnotes to Chief Justice Burger’s lead opinion in *Copperweld*, 467 U.S. 752 indicate that the original evil sought to be prohibited by Senator Sherman, the “trust” or combination of otherwise competing firms is still vibrant law:

“4. Under the arrangements condemned in *Northern Securities Co. v. United States*, 193 U.S. 197, 354 (1904) (plurality opinion),

‘all the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose.’

In *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power. Although the Court in the latter case suggested that the contracts between affiliated companies, and not merely the original combination, could be viewed as the conspiracy, *id.* at 184, **the Court left no doubt that “the combination, in and of itself,” was a restraint of trade and a monopolization, *id.* at 187.”** [emphasis added]

Copperweld Corp. v. Independence Tube Corp.; 467 U.S. 752 at FN 4 (1984).

Medical Supply's amended complaint alleges the creation of the agreement as G.H.X., LLC "the combination, in and of itself" *id.* that allocated its shares to its member manufacturer/distributor competitors:

"We all have a stake in the future of healthcare," said Jeff Immelt, president and CEO, GE Medical Systems. "The exchange is being established with equity investments by the founding companies"

Johnson & Johnson (NYSE: JNJ), GE Medical Systems (NYSE: GE), Baxter International Inc. (NYSE: BAX), Abbott Laboratories (NYSE: ABT) and Medtronic, Inc. (NYSE: MDT) are equal shareholders in the privately-held company." **V.I pg. 108-110**

and the tying contracts or agreements between the affiliated companies (*supra*):

"To participate in the integrated solution, hospitals and suppliers will have agreements with both GHX and Neoforma." **V.I pg. 111-112**

in the averment that GE and Immelt acted against Medical Supply as part of their group boycott agreement with G.H.X. LLC and in the attached unexecuted example contract from Novation (The monopolist GPO) requiring customers of Neoforma to enroll in the competitor electronic marketplace G.H.X., LCC.

General Electric's Instrumentality G.H.X., LLC

Medical Supply adequately alleges that G.H.X. LLC as created by the General Electric defendants and their hospital supply manufacturer/distributor competitors was an instrumentality created to

illegally restrain trade. As an alleged instrumentality the court should disregard the nature of G.H.X. LLC as a limited liability corporation. Kansas law would apply the alter ego doctrine, finding liability for the General Electric defendants:

“... [T]he doctrine of *alter ego* fastens liability on the individual who uses a corporation merely as an instrumentality to conduct his own personal business, such liability arising from fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation. Under it the court merely disregards corporate entity and holds the individual responsible for his acts knowingly and intentionally done in the name of the corporation.”

Kilpatrick Bros., Inc. v. Poynter, 205 Kan. 787, 797, 473 P.2d 33 (1970).

The Tenth Circuit has indicated it would similarly utilize the alter ego to address the General Electric defendants’ misuse of G.H.X., LLC:

“The Third Circuit has stated that the equitable tool of piercing the corporate veil on the basis of the alter ego theory is appropriately utilized ‘when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime.’ *Publicker Industries v. Roman Ceramics*, 603 F.2d 1065, 1069 (3rd Cir. 1979); quoting *Zubik v. Zubik*, 384 F.2d 267, 272 (3rd Cir. 1967), *cert. denied* 390 U.S. 988, 88 S.Ct. 1183, 19 L.Ed.2d 1291 (1968). In *Trustees of The Colorado Cement Masons Apprentice Trust Fund, et al. v. Burton Levy, et al.*, Nos. 78-1057 and 78-1058, *unpublished* (10th Cir., Aug. 17, 1979) the Tenth Circuit held that ‘in order to establish as a matter of law that the corporate veil should be pierced and that an individual should be held liable for actions that were carried out in the name of the corporation, *it must appear that the corporation was being misused in some manner*. For example, that its funds were being

diverted or a fraud, constructive or express, was being carried out. Slip op. at 7 (emphasis added).”

Schmid v. Roehm GmbH, 544 F.Supp. 272 at 275-276 (Kan., 1982)

Under Missouri law, the particular misuse of G.H.X., LLC by the General Electric defendants to monopolize an industry against antitrust public policy would result in summary determination of intentional fraud, a factor in determining whether to disregard the separate corporate existence of G.H.X. LLC as a barrier to the liability of the General Electric defendants:

“Historically, Missouri, where the subject building is located, has treated combination in restraint of trade as equivalent to conspiracy, or more precisely, a fraudulent conspiracy: ‘The Missouri anti-trust act (Rev. Stat. of 1899, §§ 8968, 8971) provides that any person or corporation which shall form a combination in restraint of trade shall be deemed guilty of a conspiracy to defraud,...’ *Standard Oil Company of Indiana v. State of Missouri No 47 Republic Oil Company v. State of Missouri No 48*, 224 U.S. 270, at 272, 32 S.Ct. 406, 56 L.Ed. 760 (1912).”

“Plaintiff’s Answer Memorandum To Defendants’ Motion For Dismissal And Answer To Defendants Motion For Sanction” pg. 24 (**V I pg. 313**). The Missouri legislature’s summary “*shall be deemed guilty of a conspiracy to defraud*” is an appropriate treatment of *per se* Sherman § 1 Group Boycott prohibited conduct where the organizer or architect of the agreement, Jeffrey Immelt has eliminated any possibility of doubt about the existence of the agreement or combination to restrain trade’s existence by

registering the agreement or combination as a limited liability corporation and then directing General Electric to act against General Electric Transportation's (and GE's) own declared legitimate business interests to breach an agreement discovered by General Electric to be necessary for Medical Supply to enter the market for hospital supplies.

Persuasive contemporary authority indicates that General Electric cannot escape federal antitrust liability for what it does in concert with or through G.H.X. LLC. on the basis that G.H.X. LLC as an electronic marketplace or "Business to Business" (B2B) exchange is a separate corporation:

"However, while industry coalition B2Bs may consider themselves as independent of their corporate parents, antitrust enforcers are not likely to view coalition B2Bs as individual actors. Rather, the agencies are more likely to view such B2Bs much in the same way as group purchasing or other joint ventures among competitors. As such, a coalition B2B's refusal to deal with certain competitors may be viewed as a group boycott or concerted refusal to deal - conduct that is traditionally prohibited under the Sherman Act... See *Fashion Originators' Guild of Am. v. Federal Trade Comm'n*, 312 U.S. 457, 467-68 (1941); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)."

Martin Dajani ⁴ *Beyond Covisint - Antitrust Scrutiny of B2B Exchanges.*

⁴ F. Martin Dajani, a member of the District of Columbia and Missouri Bars, is an attorney in the Washington, D.C. office of Piper Marbury Rudnick & Wolfe LLP, where he practices in the Antitrust and Trade Regulation Group. Prior to joining PMRW, Mr.

The pre *Copperweld* case *LEEWARD PETROLEUM. Ltd V. MENE GRANDE OIL CO*, 415 F.Supp. 158 concerned a parent company that became involved in contract negotiations of its subsidiary. Because the allegations created the possibility the corporate veil might be pierced by corporate fraud the court declined the motion to dismiss:

“Gulf by its actions during the negotiations became a principal on the contract between Meneg and Leeward, and might therefore be liable on the contract itself. *See generally, Fluor Corp. v. United States ex rel. Mosher Steel Co.*, 405 F.2d 823 (9th Cir. 1969). In addition, if Leeward shows that Meneg fraudulently claimed an act of state on Gulf's orders, a showing of corporate fraud sufficient to pierce the corporate veil might be made out. At this stage of the proceedings, the issue is not the likelihood of plaintiff's prevailing, but whether plaintiff may be allowed to present evidence. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974). Judged by this standard, the motion to dismiss Count 2 must be denied.”

Leeward Petroleum. Ltd V. Mene Grande Oil Co, 415 F.Supp. 158 at 162-3 (D. Delaware 1976)

c. The Amended Complaint Adequately Alleged Medical Supply was the Defendants’ Perceived Competitor in the Relevant Market of Hospital Supplies Through E-Commerce

Dajani was an attorney with the Federal Trade Commission Bureau of Competition, where he was the lead attorney in the FTC's investigation of Covisint. Mr. Dajani is a graduate of the University of Missouri-Columbia and a former Missouri Assistant Attorney General.

The complaint alleges that General Electric ordered Jeffrey Immelt when he managed GE Medical to identify a Web based electronic marketplace like Medical Supply as a competitor to GE and made him create a war plan to obstruct Medical Supply's entry into market:

“Mr. Immelt directed a study that determined that an internet marketplace which was independent of manufacturers and existing healthcare group purchasing organizations would threaten GE by causing prices to be much lower and by freeing hospitals, clinics and doctors from having to purchase products only from channels controlled by GE. These customers would then have access to competing products. Mr. Immelt found GE Medical's healthcare industry customers were rapidly adopting the Internet for purchasing decision making. GE made Immelt and his managers wargame out strategies to prevent an internet based competitor with a more efficient business model from entering the hospital supply market.” **V I pg. 54 §5**

The Tenth Circuit has treated perceived competitors as horizontal competitors under the Sherman Act:

“Blue Cross challenges Wesley's standing on the ground that it "was not in the relevant market selected by the court, health care financing, either as a consumer or as a competitor." Brief of Appellants at 33. While it is true that Wesley was not itself a direct participant in the provision of health care financing, it was, by virtue of its affiliation with HCA and HCP, a perceived competitor of Blue Cross. Indeed, as the district court stated, "that is the precise reason [Blue Cross] undertook the conduct at issue in this case." *Reazin II*, 663 F.Supp. at 1426 n. 17. In any event, as the Supreme Court has specifically held, an antitrust plaintiff need not necessarily be a competitor or consumer. See *McCready*, 457 U.S. at 472, 102 S.Ct. at 2544. Where the plaintiff's injury is "inextricably intertwined" or "so integral an aspect of the conspiracy alleged" plaintiff has established an antitrust injury. *Id.* at 484, 479, 102 S.Ct. at 2551, 2548. Here, Wesley's claimed injuries were an "integral aspect" of the conspiracy to restrain trade in

the health care financing market. Indeed, Wesley was the direct victim of Blue Cross' actions. See *Associated Gen. Contractors*, 459 U.S. at 529-30 n. 19, 103 S.Ct. at 904 n. 19. There was also evidence that Blue Cross specifically intended to harm Wesley.”

Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 962-3(C.A.10 (Kan.), 1990) as quoted in Plaintiff’s Answer Memorandum To Defendants’ Motion For Dismissal And Answer To Defendants’ Motion For Sanction pg. 16-17. **V 2 pg. 305-306**

The trial court was in error in its belief only a competitor could bring a Sherman 1 complaint:

“Plaintiffs correctly contend the conspiratorial conduct in this case, between BCBSK and St. Francis and St. Joseph Hospitals, contains elements of both vertical and horizontal impacts because the Saints are direct competitors of Wesley Medical Center. Secondly, the purpose of this agreement was not to design and implement an efficient distribution system for BCBSK's own insurance products, but to sanction a perceived competitor and deter competition in the health care financing market. Third and finally, refusals to deal by other Blue Cross and Blue Shield systems across the company have not only been held a violation of § 1, but under certain circumstances have been held per se violations, as discussed in *Reazin I*, 635 F.Supp. at 1322-27 (citing *Glen Eden Hospital v. Blue Cross & Blue Shield of Michigan*, 740 F.2d 423 (6th Cir.1984), and *St. Bernard Gen. Hospital v. Hospital Service Assn.*, 712 F.2d 978 (5th Cir.1983), *cert. denied* 466 U.S. 970, 104 S.Ct. 2342, 80 L.Ed.2d 816 (1984)).”

Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 663 F.Supp. 1360 at

Page 1411 (Kan., 1987).

d. The Amended Complaint Adequately Alleged General Electric As A Hospital Supplier Boycotted Medical Supply

According to General Electric's Agreement With G.H.X. LLC , Making GE a Horizontal Competitor

The amended complaint alleges that General Electric and Jeffrey Immelt formed the cartel G.H.X., LLC to sell GE's hospital supplies in E-commerce. In this role, General Electric is a supplier and G.H.X., LLC is a customer of General Electric (like Medical Supply would be, if permitted to enter the market) and General Electric is alleged to have boycotted Medical Supply in conformance with its contract with G.H.X., LLC :

“The defendants willfully acquired and maintained that power by forming the cartel GHX, Inc. to buy an inferior electronic marketplace and exchanging ownership interests with suppliers and distributors that previously were competitors. The defendants further acted to maintain that monopoly by repudiating Medical Supply's financing and lease buy out agreement with full knowledge that Medical Supply had been previously prevented from entering the hospital supply e-commerce market by other cartel members of GHX, Inc.” **Vol I pg. 70 § 37**

GE appeared to be acting independently of Neoforma, when it accepted Medical Supply's proposal for a lease buy out and financing, but similarly repudiated a contract for essential facilities, preventing entry into the hospital supply market at great sacrifice when Medical Supply was not in a position to find an alternative.” **V I pg. 53 §4**

“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. The purpose of this cartel is to prevent new entrants to the hospital supply ecommerce market and to maintain uncompetitive higher prices on hospital supply commodities. The cartel maintains control over its members pricing, volume, distribution and customer data to enforce the allocation of customers and to exclude nonmember competitors. The cartel

requires tying contracts so suppliers and customers are required to join and are forced to do business through the cartel's e-commerce marketplace. When GE's Medical divisions discovered GE Corporate had made a contract with Medical Supply Chain, Inc., they got Jeffrey R. Immelt's office to order that it not be performed to harm a competitor entering their markets. 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." **VI pg. 51 §1**

The Tenth Circuit has recognized that when a supplier like General Electric acts against a customer at the direction of another customer, the restraint becomes horizontal:

"...if the action of a ...supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier." [Emphasis supplied].

Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 at 388 (C.A.10 (Okla.), 1985).

The trial court's characterization of General Electric's actions as that of a supplier privileged to select its distributors in non *per se* vertical restraint is in error. Medical Supply had no distribution agreement with General Electric and the business relationship established and later breached was not one to sell General Electric's medical products. General Electric's ultimate actions were to eliminate every e-commerce alternative to G.H.X., LLC with the exception of Neoforma, to which it subsumed into the G.H.X. LLC cartel.

Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982) recognized that in certain circumstances, the elimination of an intermediary effectively destroys competition. In such cases, the distributor's knowledge (like Medical Supply's XML or web based supply chain integration) or authority (as a neutral marketplace) makes it an integral part of the competitive structure and its injury is heavily intertwined with the core injury perpetrated by antitrust violators. To deny standing to the intermediary is to sanction the diminution of competition where it matters the most.

The Court in *McCready* acknowledged that if an end-user is not the best protector of choice and price in the relevant market, competition may be effectively preserved by another kind of plaintiff. As the Court observed in *SAS*, "The most obvious reason for conferring standing on a second-best plaintiff is that, in some general category of cases, there may be no first best with the incentive or ability to sue." *SAS of Puerto Rico*, 48 F.3d at 45, citing *Associated General*, 459 U.S. at 542, 103 S.Ct. 897.

McCready-like standing applies when the flash point of competition lies outside of the customer or consumer. *McCready*, as well as the other vertical distributor exceptions, affirm that the intermediary must either be a damaged participant in the very market in which competition is diminished (that is, it must share characteristics of parties injured by horizontal conspiracies) or stand in the shoes of endusers who cannot or will not sue. See *Serpa Corp. v. McWane, Inc.*, 14 F.Supp.2d 147 at 151-152 (D. Mass. 1998)

Medical Supply is alleged to be attempting to enter the E-commerce hospital supply marketplace the General Electric defendants wish to restrain competition in and also to be the effective plaintiff for 2000 hospitals that are losing money as a result of the General Electric defendants' actions.

e. The Amended Complaint Adequately Alleged Medical Supply Was Obstructed From Entry into the Relevant Market of Hospital Supplies Through E-Commerce by the Intentional Acts of the Defendants

The amended complaint alleges intentional conduct of the General Electric defendants in nakedly restraining trade. The formation of G.H.X., LLC was the open creation of a cartel with the existing manufacturer/distributors of the hospital supply market:

“The purpose of the defendants’ creation of a cartel or trust among their competitors was to keep prices of hospital supplies high without

competition and to allocate customers, suppliers and distribution channels among the cartel members by contracts in a *per se* violation of 15 U.S.C. § 1.” **Vol I pg. 67 § 33**

The amended complaint alleges the violence of breaching a contract to provide inputs known by the defendants to be essential to Medical Supply’s entry into the market of hospital supplies distributed through e-commerce. This hostile acts toward Medical Supply were committed after Medical Supply informed the defendants of the antitrust laws prohibiting the conduct and the monetary damages the conduct would cause Medical Supply. The trial court’s belief that because the contract did not concern the hospital supply commodities to be delivered in E-commerce that there was no violation of Sherman §§ 1 and 2 or 15 U.S.C. § 13(e) is in error. The General Electric defendants’ refusal to deal in a “collateral transaction” is the *sine qua non* of concerted refusal to deal or boycott:

“Conduct constitutes a "boycott" where, in order to coerce a target into certain terms on one transaction, parties refuse to engage in other, unrelated or collateral transactions with the target. [*Hartford Fire Ins. v. California*, 509 U.S. 764 at 802-03, 113 S.Ct. 2891 at 2912, 125 L.Ed.2d 612 (1993)]...Specifically, it is ‘the refusal to deal beyond the targeted transaction that gives great coercive force to a commercial boycott: unrelated transactions are used as leverage to achieve the terms desired.’ *Id.*; *Uniforce*, 87 F.3d at 1298 (establishing that a ‘boycott’ is the ‘refusal to deal in a collateral transaction as a means to coerce terms respecting a primary transaction’)”

Slagle v. ITT Hartford, 102 F.3d 494 at 498 to 499 (C.A.11 (Fla.), 1996).

The amended complaint alleged that the General Electric defendants had sought to accomplish their antitrust injury of Medical Supply by breaching their agreement to purchase the remainder of their lease from Medical Supply. The failure to perform under the lease contract was not exempt from *per se* Sherman § 1 liability:

“We also approve the district court's ruling that the concerted scheme to withhold a lease from IBI was a *per se* violation of section 1. "Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA*, 468 U.S. at 103-04, 104 S.Ct. at 2962 (footnote omitted). Thus, a court's task is to distinguish between "naked" restraints of trade and those restraints that may have a salutary effect on competition or productivity. *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir.1985). The district court found that there were no redeeming virtues to the agreement not to provide IBI with a stadium lease and, significantly, defendants have not challenged this finding or in any way suggested that such virtues existed.”

Fishman v. Estate of Wirtz, 807 F.2d 520 at 541 (C.A.7 (Ill.), 1986)

The amended complaint is replete with averments of the General Electric defendants' motive and intent to commit antitrust injury against Medical Supply, however there is no need to allege the elements of conspiracy, including intent where combination has been alleged:

“...plaintiff alleges that defendants entered into combinations and contracts in restraint of trade. There is no need to show a common purpose in order to prove the absence of independent action because the relevant merger or contract amply demonstrates that there was no independence of action. Additionally, there is no need to demonstrate

a unity of purpose to establish a conspiracy because conspiracy is not alleged.”

Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81 at 92 (S.D.N.Y. 1995).

f. The Amended Complaint Adequately Pled Breach of Contract for the Purpose of Antitrust Injury

The trial court failed to recognize the antitrust relevancy of Medical Supply’s averments that the General Electric defendants breached the agreements to buy the lease from Medical Supply and the agreement to provide a mortgage for the purpose of inflicting antitrust injury on Medical Supply and to keep Medical Supply from entering the market for hospital supplies through e-commerce.

“We note that *Stein v. Pac. Bell Tel. Co.*, 173 F. Supp. 2d 975, 983 (N.D. Cal. 2001), the district court held that plaintiff had stated a valid antitrust claim on refusal-to-deal facts similar to those in the present case. In *Stein*, according to the plaintiff, Pacific Bell "entered into these optional and voluntary [1996 Act] agreements and then breached them or proceeded to engage in bad faith conduct in carrying them out, without any business justification and with the intent to destroy its competitors . . . so as to unlawfully maintain its monopoly." *Id.* Citing *Aspen*, the plaintiff claimed that such conduct violated Section 2 of the Sherman Act because Pacific Bell was "attempting to exclude rivals on some basis other than efficiency," thus making its conduct "predatory." *Id.* The Stein court held that even accepting *Goldwasser* in its entirety, the plaintiff had stated a valid claim. *Id.* at 983-84 ("*Goldwasser* did not consider whether violations of the 1996 Act, if done in a 'predatory' manner as defined in *Aspen Skiing*, can make up an independent basis for liability under the Sherman Act. The plaintiffs in *Goldwasser* did not allege, as Stein

alleges here, that the defendant breached interconnection agreements in bad faith and engaged in other exclusionary practices.").

In essence, BellSouth asks this Court to conclude that it is impossible to find a refusal to deal where the defendant has formed an agreement with the plaintiff, in this case an agreement pursuant to the strictures of the 1996 Act. For the reasons stated above, we conclude that allegations that allege a failure to perform under an agreement that amount to a refusal to deal are sufficient to state a claim under the antitrust laws.”

Covad Communications Co. v. Bellsouth Corp., 2002 C11 260 at ¶¶ 62 and 63 (USCA11, 2002). The trial court should not have dismissed the complaint when breach of an agreement for the purpose of causing antitrust injury had been adequately alleged.

II. Whether Medical Supply’s Amended Complaint Alleged GE Defendants’ Monopolization of Hospital Supplies in E-Commerce.

The trial court did not address the appellant Medical Supply’s Sherman 2 antitrust claims of monopolization through Concerted Refusal to Deal, Refusal to Deal in Furtherance of a Monopoly, Refusal To Deal/Denial of Unique Financial Instrument, Conspiracy in Restraint of Trade, Restraint of Trade Through Monopoly, Restraint of Trade Through Attempted Monopolization, Single firm Refusal to Deal, Refusal to Deal “Change of Pattern”, Refusal to Deal Denial of A Facility Under 15 U.S.C. § 13(e).

The court asserted fundamental defects existed barring Medical Supply's antitrust claims. First, the failure to allege the defendants or their affiliate companies possess market power:

“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 ecommerce in North America.’” **V2 pg. 493**

and the belief of the court that the alleged conduct of the General Electric defendants in no way prevented Medical Supply from entering the market for hospital supplies in e-commerce:

“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 ecommerce. *Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1 st Cir. 1996) (“To determine whether a party has or could acquire monopoly power in a market, ‘courts have found it necessary to consider the relevant market and the defendant’s ability to lessen or destroy competition in that market.’”) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)). Accordingly, even assuming as true the facts alleged in the Amended Complaint, the court concludes that defendants’ conduct was not unlawful under the federal antitrust laws.” **V 2 pg. 494**

The appellant Medical Supply asserts that the trial court was in clear error. The amended complaint alleged that the General Electric defendants entered a business relationship with Medical Supply, then used the knowledge gained from the relationship to intentionally destroy Medical Supply's plan to enter the market for hospital supplies through e-commerce

which the General Electric defendants were alleged to control 80% of. The violence against Medical Supply was taken with full knowledge of the Neoforma/Novation/ US Bancorp attempt to destroy Medical Supply and that Medical Supply was the last remaining independent E-Commerce distributor.

CONCLUSION

The repeated refusal of the trial court to permit the development of Medical Supply's actions against the US Bancorp and General Electric defendants was contrary to all case law and federal statute. No writing in any pleading was given consideration that might have jeopardized the swiftest possible transfer of the actions in total to the appellate court.

The lack of a single validation of Medical Supply's belief that redress was possible took a terrible human toll on its stakeholders and counsel. The possibility of reform in the industry was repeatedly set backwards as all eyes looked to each abrupt repudiation in these two actions. The trial court's written orders acknowledged the injury to consumers, including even death from the conduct alleged by Medical Supply. Inconceivably, it appeared that the Kansas District Court was unwilling to devote resources to such a serious issue.⁵ A theory has however developed that the Group Boycott

⁵ Letter to Chef Judge, Hon. John W. Lungstrum, Nov. 7th, 2003 **V2 pg. 506-7**

claims were clearly *per se* and judicially noticeable as not subject to reasonable denial to a degree unrealized by even Medical Supply's counsel. The need to further develop the case was unnecessary and delayed hearing before august antitrust tribunal available in the Tenth Circuit, which had the experience and diverse business practice knowledge required to pronounce Sherman § 1 prohibited antitrust conduct as *per se*.

This theory explains what can be seen as judicial economy in avoiding the resources expended without fruit in *In re Indepen. Serv. Organiz. Antitrust Litigation*, 964 F.Supp. 1454 (Kan., 1997) and allowing the determination or judgment to be made where if General Electric is found to have violated Sherman § 1, relief would be difficult to delay. The problem with the theory however is the disbelief that the Kansas District Court could have expected Medical Supply, the only plaintiff the cartel could not silence under existing contracts, could sustain its prosecution against such insurmountable odds. However Medical Supply has lived up to that expectation and with this appeal, places its claims before this court for resolution.

PRAYER FOR RELIEF

The appellant respectfully requests the court find for Medical Supply on the 15 U.S.C. §§1 and 2 Group Boycott/concerted refusal to deal claims

and grant injunctive relief, declaratory relief and treble monetary damages sought in the complaint along with interest, costs and *pendente lite* attorneys fees. Medical Supply also requests the court remand back the remaining federal claims, including the Medicare Qui Tam claim and state claims for discovery, amendment and further prosecution.

Respectfully Submitted,

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I, the undersigned, do hereby certify that I caused two true and correct copies of the foregoing and a complete appendix to be deposited in the US Mail on May 25th, 2004 and mailed to the following:

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Supreme Court # 20380

**United States Court of Appeals
For the Tenth Circuit**

Docket No. 04-3075 and 04-3102 (10th Cir.)*

Case No.: 03-2324

Medical Supply Chain, Inc.

v.

The General Electric Company, General Electric Capital Business Asset
Funding Corporation, GE Transportation Systems Global Signaling, L.L.C.,
and Jeffrey R. Immelt

Appeal from
the United States District Court
for the District of Kansas

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No Oral Argument Requested.

* Medical Supply does not respond to the cross appeal, case no. 04-3102

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Citizen Publishing 394 U.S. at 133.....
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Dagher v. Saudi Refining Inc., 369 F.3d 1108 at pg. fn 3 (Dissent).....
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Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (C.A.3 (Pa.), 1979)

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(C.A.10 (Okla.), 1985).....

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485 U.S. 717 at 725, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988).....

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956 F.2d 1399 (C.A.7 (Ill.), 1992).....

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956 F.2d 1399 at 1401 (C.A.7 (Ill.), 1992).....

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<i>Business Electronics Corporation v. Sharp Electronics Corporation</i> , 485 U.S. 717 at 734.....	10
<i>Continental Inc v. GTE Sylvania Incorporated</i> , 433 U.S. 36.....	10
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STATEMENT OF NONREPLY TO CROSS APPEAL

The Appellant Medical Supply Chain, Inc. has elected not to reply to the cross appeal, Docket No. 04-3102. The present answer brief in 04-3075 makes no reference to or comment on that portion of the appellees' brief for the cross appeal and addresses none of the issues of the cross appeal contained in part B of the Appellee's brief. Fed. R. App. P. Rule 28 (c) briefs states:

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. An appellee who has cross-appealed may file a brief in **reply to the appellant's response** to the issues presented by the cross-appeal.

Consequently, this is the last brief in both 04-3075 and 04-3102.

RESPONSE TO APPELLEES' ARGUMENT THAT THE DISTRICT COURT PROPERLY DISMISSED MSC'S ANTITRUST AMENDED COMPLAINT

A. GE's Argument that MSC Failed to State a Monopolization Claim Because it Did Not Allege That Defendants Compete in The Relevant Market.

The determination of the relevant market is a question of fact. The plaintiff's complaint identifies the market for hospital supplies narrowed by the qualification of "delivered through e-commerce in North America." The Appellees' brief states a factual dispute over whether Medical Supply's amended complaint alleges GE is a competitor in the market of hospital supplies delivered through e-commerce. See Appellee Br. pg. 12-13.

However, authority cited in the Appellee brief for another purpose reveals that Medical Supply's emphasis on the way electronic marketplaces add savings or efficiencies to the process of selling goods in e-commerce (See Aplt. Appendix V I pg. 52 §3, V I pg. 53 §4) and the GE appellees' attempts to have the court resolve this dispute in favor of the movant may all be wasted or at least premature:

"Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." *United States v. Bethlehem Steel Corp.*, 168 F.Supp. 576, 592 (S.D.N.Y.1958); *El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F.Supp. 626, 633 (S.D.N.Y.1982).

Westman Com'n Co. v. Hobart Intern., Inc., 796 F.2d 1216 (C.A.10 (Colo.), 1986). (Cited for another purpose by GE at Appellee Br. pg.s 18 and 20). The rule that the determination of relevant markets is a question of fact is further explained in *Telecor Communications, Inc. v. Southwestern Bell Telephone*, 2002 C10 1017:

"Although the product differences cited by the court below are all reasons that the jury might rely upon were it to find that the relevant market did not include cell phones, we cannot agree that such differences support summary judgment on this factual issue."

Telecor Communications, Inc. v. Southwestern Bell Telephone, 2002 C10 1017 at ¶ 41 (USCA10, 2002).

Medical Supply's amended complaint adequately alleged that GE continues to be a direct competitor to Medical Supply in distributing hospital

supplies in addition to sufficiently alleging GE competes in the narrower market of hospital supplies through e-commerce.

B. GE's Argument that MSC's Unreasonable Restraint Claim Fails Because MSC Did Not Allege That Defendants Had Market Power.

Medical Supply alleged the defendants have market power in both the markets for hospital supplies and the market for hospital supplies through e-commerce.

“GE was a dominant medical device manufacturer and medical equipment and electrical equipment supplier to North American hospitals. GE ceased to be a manufacturer and became **a distributor of parts, assemblies, products, systems and credit services to hospitals. GE established monopolies in many product lines for hospitals...**” Aplt Appendix V I pg. 58 §15

Medical Supply, contrary to the Appellee's brief, averred that GE created GHX, LLC in a strategic alliance with its competitors (Johnson & Johnson, Baxter International Inc., Abbott Laboratories, Medtronic, Inc.):

“The exchange is being established with equity investments by the founding companies” “The exchange will be supported by the combined resources of GE Global Exchange Services, and the strategic alliance between Ariba (NASDAQ: ARBA), IBM (NYSE: IBM), and i2 (NASDAQ: ITWO). Johnson & Johnson (NYSE: JNJ), GE Medical Systems (NYSE: GE), Baxter International Inc. (NYSE: BAX), Abbott Laboratories (NYSE: ABT) and Medtronic, Inc. (NYSE: MDT) are equal shareholders in the privately- held company.” **Major Medical Products and Services Companies Establish Global Healthcare Exchange** 3/29/2000 NEW YORK, Mar 29, 2000 (BUSINESS WIRE) Aplt Appendix V.I pg. 108-110 [emphasis added]

Medical Supply adequately alleged Market Power for the combination:

“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. The purpose of this cartel is to prevent new entrants to the hospital supply ecommerce market and to maintain uncompetitive higher prices on hospital supply commodities. The cartel maintains control over its members pricing, volume, distribution and customer data to enforce the allocation of customers and to exclude nonmember competitors. The cartel requires tying contracts so suppliers and customers are required to join and are forced to do business through the cartel’s e-commerce marketplace.”
Aplt. Appdx. V I pg. 51 §1

“Immelt presided over the formation of this cartel and the engineering of the conspiracy to rig prices and markets through exchange of price, volume and other product data in a per se restraint of trade. See *United States v. Andreas*, 216 F.3d 645 (7th Cir., 2000).” Aplt Appendix V I pg. 55 §6

1. GE’ Argument That MSC’s Attempt to Characterize The Amended Complaint As Attacking The Formation OF GHX Is Unavailing.

The GE appellees relegate to a footnote Medical Supply’s suggestion that *Dagher v. Saudi Refining Inc.* 369 F.3d 1108 (9th Cir. 2004) decided after the initial filing of the appellant brief, describes whether creating an limited liability company with competitors allows the parent company to escape Sherman liability. See Appellee Br. fn4, pg. 22. The complaint alleges that Jeffrey Immelt and General Electric formed GHX, LLC as a cartel with its competitors. The decision in *Dagher* describes the creation of a new organization by two formerly fierce competitors, Shell and Texaco to limit competition in the nationwide market for petroleum products:

“Shell approached Texaco in 1996 about several potential corporate combinations designed to enhance efficiency and reduce competition between the two companies with respect to the downstream refining and marketing of gasoline. In 1998, preliminary discussions yielded an agreement to form a nationwide alliance (hereinafter: “the alliance”) 2 consisting of two separate joint ventures. 3 One joint venture was named “Equilon Enterprises” (Equilon); it combined Shell’s and Texaco’s downstream operations in the western United States. The other venture, formed by Texaco, Shell, and SRI, was named “Motiva Enterprises” (Motiva); it combined the three companies’ downstream operations in the eastern United States.”

Dagher v. Saudi Refining Inc., 369 F.3d 1108 at pg. 6873-6874. The separate entities thereafter functioned as a single cartel controlling the distribution of its founder’s products like GHX, LLC distributes its members’ products:

“While the defendant corporations did not create a new legal entity called “The Alliance,” the record establishes beyond dispute that representatives of Texaco and Shell generally referred to the two joint ventures as part of a single project to combine the two companies’ nationwide refining and marketing operations. Moreover, the record confirms that the single project was often referred to as “an alliance,” and frequently called “The Alliance,” by representatives of Texaco, Shell, and SRI, and by Board Members from the two joint ventures, “Equilon Enterprises” (Equilon) and “Motiva Enterprises” (Motiva). When we refer to “the alliance,” we therefore refer to the combined national refining and marketing operation consisting of Equilon and Motiva — an enterprise which was created, developed, and maintained collectively by the individual defendant corporations.”

Dagher v. Saudi Refining Inc., 369 F.3d 1108 at fn 2 pg. 6873-6874. The *Dagher* court compared Equilon and Motiva’s alliance to that condemned in *Citizen Publishing*:

“In *Citizen Publishing*, the Supreme Court confronted a joint venture similar to the one between Equilon and Motiva. The defendants in that case were the two daily newspapers in Tucson, Arizona. They entered into a joint venture agreement, which “provided that each paper should retain its own news and editorial departments, as well as its corporate identity.” 394 U.S. at 133. The joint venture established a new company, Tucson Newspapers, Inc., “which was to manage all departments of their business except the news and editorial units. The production and distribution equipment of each paper was transferred to TNI.” Id. at 133-34. The purpose of the agreement, like the purpose of the Alliance, was “to end any business or commercial competition between the two papers.” Id. at 134. 9”

Dagher v. Saudi Refining Inc., 369 F.3d 1108 at pg. 6887. Similarly, Medical Supply’s amended complaint describes circumstances in which competition in healthcare products has been injured through the conduct and control of the LLC by the GE defendants in combination and agreement with their competitors:

“Mr. Immelt oversaw GE’s capitalization of the cartel, and caused the articles of incorporation and the operating agreement to secure GE’s control of the entity, including the placement of an interlocking board of directors with the other founders of the trust and made the explicit requirement an officer of GE is on the board of directors.” Aplt. Appendix V I pg. 55 §7

“Immelt also expanded the membership [of GHX, LLC] to include non-manufacturer members, including the Group Purchasing Organizations that distributed most of the nation’s hospital supplies. Immelt caused GHX, LLC. to be even more protective against internet competitors by requiring members to force their customers and suppliers to make anticompetitive contracts with other member companies.” Aplt. Appendix V I pg. 56 §10

“Immelt made GHX, LLC. require customers to join both the former competing internet marketplace, Neoforma and GHX, LLC.’s internet marketplaces. See Attachment 2, Marketplace @Novation, Master

Supplier Agreement, Schedule B. In this way, GE could allocate customers and suppliers among the members of GHX, LLC and obtain real time price and volume data to enforce the cartel's goal of illegitimately higher hospital supply prices." Aplt. Appendix V I pg. 56 §10

Unlike the Appellees' suggestion that whatever conduct alleged has to be vertical in nature, the *Dagher* court found it still to be *pro se*:

"The Supreme Court held that the confluence of these anticompetitive restraints, in the context of a joint venture between two formerly-vigorous competitors in the market area targeted by the venture, constituted a *per se* violation of the Sherman Act."

Dagher v. Saudi Refining Inc., 369 F.3d 1108 at pg. 6887.

Judge Fernandez dissented from the majority opinion reversing the summary judgment against Shell and Texaco because they no longer competed in the markets where Equilon and Motiva now produced and marketed oil products, a distinction inapplicable to GE. The *Dagher* court was aware that one defendant, Shell had the equivalent of an investor ownership interest in Equilon yet this (also a defense raised by GE see Appellee Br. pg. 13) was no defense to liability for the parent company's relationship to Equilon that was a *per se* violation of Sherman Antitrust laws:

"Shell, by the way, is a mere member of Equilon and is shielded from liability for the debts or obligations of Equilon, just as corporate shareholders are shielded. See Cal. Corp. Code § 17101."

Dagher v. Saudi Refining Inc., 369 F.3d 1108 at pg. fn 3 FERNANDEZ, Circuit Judge, Concurring and Dissenting.

2. The Inapplicability of the Manufacturer's Privilege To Choose Distributors

The GE appellees assert that *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (C.A.3 (Pa.), 1979) and *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (C.A.10 (Okla.), 1985) have been overruled by *Business Elecs.* Specifically, the Supreme Court recognized in *Bus. Elec.* the inapplicableness of *per se* treatment to intra brand competition in the context of manufacturer distributor relationships where interbrand¹ competition exists:

“Moreover, we observed that a rule of *per se* illegality for vertical nonprice restraints was not needed or effective to protect *intra* brand competition. First, so long as interbrand competition existed, that would provide a "significant check" on any attempt to exploit intrabrand market power.”

Business Electronics Corporation v. Sharp Electronics Corporation, 485 U.S. 717 at 725, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). The court followed its decision in *GTE Sylvania*, 433 U.S. 36 where *United States v. Arnold*,

¹ The *GTE* court described the terms interbrand and intrabrand in a definition footnote: “The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors wholesale or retail of the product of a particular manufacturer.” *GTE Sylvania Incorporated*, 433 U.S. 36 at fn19.

Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 was overruled:

“there has been no showing in this case, either generally or with respect to Sylvania's agreements, that vertical restrictions have or are likely to have a "pernicious effect on competition" or that they "lack . . . any redeeming virtue." *Ibid.* Accordingly, we conclude that the per se rule stated in *Schwinn* must be overruled. *In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co.* But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than as in *Schwinn* upon formalistic line drawing.” [footnotes omitted] [emphasis added]

Continental Inc v. GTE Sylvania Incorporated, 433 U.S. 36 at 58-59, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). The appellee brief also cited *A-Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F.2d 1399 (C.A.7 (Ill.), 1992). A-Abarth was a distributor suing a manufacturer where Medical Supply’s opening brief discussed the manufacturer’s privilege of choosing among distributors and did not claim as does Medical Supply the horizontal element that more than one direct competitor sought the exclusion:

“A-Abart does not contend, and there is no record evidence demonstrating that Emerson and Littman agreed with any other retailer to exclude A-Abart from the selling of the new ceiling fan line.”

A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399 at 1401 (C.A.7 (Ill.), 1992)

In contrast Medical Supply's complaint alleged that it was the last remaining potential electronic marketplace competitor to the cartel and that it was being prevented from entering the market through the cartel's concerted refusal to deal. The Amended Complaint's first sentence of its first numbered paragraph states "GE founded a cartel with its horizontal and vertical competitors..." Since potential *interbrand* competition had already been eliminated by the GE defendant/appellees, the conduct alleged is outside of that permitted under *Business Elec.* (and Medical Supply's complaint alleged the element of horizontal combination recognized in *Business Elecs.* as requiring the application of the *per se* rule from *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966) and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).) See *Business Electronics Corporation v. Sharp Electronics Corporation*, 485 U.S. 717 at 734.

Medical Supply's complaint also alleged the circumstances where *Continental Inc v. GTE Sylvania Incorporated*, 433 U.S. 36 still recognized vertical nonprice restraints subject to the *per se* rule. See *GTE Sylvania* at 58 quoted *Supra*. The court was referring to those described in *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Among the acts without redeeming or potentially competitive qualities enumerated in *Northern Pac. R. Co.* is group boycott alleged by Medical

Supply under both Sherman §§ 1 and 2. The Tenth Circuit has continued to find such pernicious acts fall under the *per se* rule instead of the rule of reason:

“Under ‘rule of reason’ analysis, the factfinder weighs all of the circumstances of a case to decide whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977).

However, since the passage of the Sherman Act, the courts have formulated and applied a *per se* rule of illegality for certain restrictive practices that are deemed to be manifestly anticompetitive. *Id.* at 50, 97 S.Ct. at 2557.”

U.S. v. Suntar Roofing, Inc., 897 F.2d 469 (C.A.10 (Kan.), 1990).

Medical Supply also argued that the manufacturer’s privilege to choose distributors did not apply because Medical Supply was in a nondistributor relationship with GE and was its customer for the inputs withheld by the refusal to deal.

3. The Unanswered *Qui Tam* Averment

GE’s appellee brief did not address the *Qui Tam* averment contained within the Amended Complaint’s statement of facts. See Aplt Appendix V I pg. 55 §8. Medical Supply and its principals are free as the original source to be the realtor in a *Qui Tam* against healthcare monopolists under seal in the Western District of Missouri Application under the exception to the public disclosure jurisdictional bar of 31 U.S.C. § 3730(e)(4) as stated by this court

in *Kennard v. Comstock Resources, Inc.*, No. 03-8012 (10th Cir. 4/5/2004)
(10th Cir., 2004).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Word count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 2803 words. I relied on my word processor to obtain the count and it is MS Word for Mac 2001. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

S/ Bret D. Landrith

Bret D. Landrith

CERTIFICATE OF SERVICE

I certify that on August 18, 2004 I have served two copies of this answer brief on each of the opposing law firms addressed to the counsel listed below:

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UNITED STATES COURT OF APPEALS

July 26, 2005

FOR THE TENTH CIRCUIT

PATRICK FISHER
Clerk

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff - Appellant,

v.

Nos. 04-3075 & 04-3102
(D.C. No. 03-CV-2324-CM)
(D. Kan.)

GENERAL ELECTRIC COMPANY;
GENERAL ELECTRIC CAPITAL
BUSINESS ASSET FUNDING
CORPORATION; GE
TRANSPORTATION SYSTEMS
GLOBAL SIGNALING, LLC;
JEFFREY IMMELT,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before **LUCERO, PORFILIO, and BALDOCK**, Circuit Judges.

* 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.

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 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." (I 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.

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.¹

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

¹ 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. (I 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.

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.

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 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. Elliott 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

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.

....

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 sternly than unilateral activity under § 2.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (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 through 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.²

1

Under the Sherman Act § 2, to state a claim for attempted monopolization, a 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

² 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.

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," (I 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.³ It is also inconsistent with MSC's contention that

³ 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.;

(continued...)

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.

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 building 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

³(...continued)

Guidant Corporation; Siemens Medical Solutions and Tyco International, Ltd." (I Appellant's App. at 112.)

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 (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.3 (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 (1990)

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 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 categorize 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.

Amended Complaint 3

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.⁴

B

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

⁴ 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.

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(h), 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 Fed. R. Civ. P. 11 and cautioned him to take greater care in the future in ensuring that claims he 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.

Defendants are correct that Rule 11 sanctions can be imposed even when some claims are not frivolous. Dodd Ins. 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.

Entered for the Court

Carlos F. Lucero
Circuit Judge

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

MEDICAL SUPPLY CHAIN, INC.,	)	
<i>Plaintiff,</i>	)	
v.	)	Case No. 05-2299-KHV
NOVATION, LLC	)	Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	)	Attorney Lien
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFFER	)	
ANDREW CESERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY	)	
WATKINS BOULWARE, P.C.	)	
<i>Defendants.</i>	)	

And

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

MOTION TO CONSOLIDATE UNDER RULE 42

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel Bret D. Landrith and makes the present motion to consolidate actions. The plaintiff respectfully requests the court grant the plaintiff leave to consolidate under Federal Rules of Civil Procedure 42 for the following reasons:

STATEMENT OF FACTS

1. The plaintiff has a concurrent action against the principal defendants' coconspirators in this case.
2. The action is in the US District Court for the Western District of Missouri and is captioned *Medical Supply Chain, Inc. v. Novation, et al.*, Case No. 05-0210-CV-W-ODS and now Kansas District Court Case No. 05-2299-KHV alleges additional and subsequent conduct targeted against Medical Supply

in an attempt to restrain trade in the market for hospital supplies, violating state and federal law by the defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. charged in the earlier action *Medical Supply Chain, Inc. v. General Electric et al.*, Case No. 03-2324-CM.

3. The federal and state claims in both cases rely on the same issues of law and share some of the same facts.

4. The earlier action *Medical Supply Chain, Inc. v. General Electric et al.*, Case No. 03-2324-CM has been remanded back to Kansas District Court.

Respectfully Submitted

S/Bret D. Landrith
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Certificate of Service

I certify that on August 9th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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Bret D. Landrith

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

MEDICAL SUPPLY CHAIN, INC.,	)	
<i>Plaintiff,</i>	)	
v.	)	Case No. 05-2299-KHV
NOVATION, LLC	)	Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	)	Attorney Lien
ROBERT J. ZOLLARS	)	
VOLUNTEER HOSPITAL ASSOCIATION	)	
CURT NONOMAQUE	)	
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)	
ROBERT J. BAKER	)	
US BANCORP, NA	)	
US BANK	)	
JERRY A. GRUNDHOFFER	)	
ANDREW CESERE	)	
THE PIPER JAFFRAY COMPANIES	)	
ANDREW S. DUFF	)	
SHUGHART THOMSON & KILROY	)	
WATKINS BOULWARE, P.C.	)	
<i>Defendants.</i>	)	

And

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

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

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

STATEMENT OF FACTS

1. The defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. sent a letter to the court misstating the law of our circuit in an effort to prejudice Medical Supply's right to consolidate its actions and further amend its claims.
2. The defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. did not object to consolidating the two actions.
3. As a letter instead of a motion with a memorandum of law, the court and Medical Supply are both hindered in addressing the defendants' assertions.
4. On Wednesday, August 24th, Jonathan L. Glecken lead counsel for the defendants Jeffrey R. Immelt, General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C. , threatened Medical Supply's counsel with the loss of his home if he did not withdraw Medical Supply's claims.
5. Jonathan L. Glecken was unaware that the defendants' cartel had already injured Medical Supply's counsel by causing him to lose his house as part of numerous informal sanctions in retaliation for representing Medical Supply in seeking redress from the cartel's repeated refusals to deal and other antitrust prohibited acts in the hospital supply market.
6. The Tenth Circuit decision awarding sanctions for Medical Supply's claims against defendants Jeffrey R. Immelt because the complaint did not allege Jeffrey R. Immelt personally knew General Electric Company, General Electric Capital Business Asset Funding Corporation, GE Transportation Systems Global Signaling, L.L.C.'s conduct according to plans instructions the complaint alleges Jeffrey R. Immelt personally ordered to prevent web based hospital supply distributors using Medical Supply Chain, Inc. is clearly in error factually and at law.
7. US law jurisdictions provide Medical Supply standing for seeking relief under Antitrust and RICO claims against defendants who were the *proximate* cause of Medical Supply's injuries. Hon. Judge Lucero knew and is responsible for knowing that the sanction order against Medical Supply is unlawful.

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

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

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

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

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

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

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

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

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

12. Medical Supply adequately pled that Jeffery Immelt's conduct was intentionally targeted at consumers in the market for hospital supplies and intentionally targeted at the specific consumer Medicare.

Paragraph 9 of the Amended Complaint, Exhibit 1 states:

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

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

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

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

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

15. Medical Supply adequately pled that Jeffery Immelt's conduct is a felony under federal law:

Paragraph 12 of the Amended Complaint, Exhibit 1 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Despite Medical Supply's action being remanded for sanctions, the GE defendants are still under jurisdiction of this court. The Medical Supply v Novation *et al* complaint which avers subsequent federal antitrust¹ and RICO and state law claims against the GE Defendants was served on their counsel when Medical Supply made its motion to consolidate the two actions.

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

THE UNLAWFULNESS OF THE GE DEFENDANTS' THREATENED SANCTIONS

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

The Jeffrey Immelt Sanction Is Overtly Unlawful

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

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

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

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

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

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

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

"In our view, in order for the concept of a conspiracy between a principal and an agent to apply in the antitrust context, the exception to the general rule should arise only where an agent acts to further his own economic interest in a marketplace actor which benefits from the alleged restraint, and causes his principal to take the anticompetitive actions about which the plaintiff complains. In this way, the exception captures agreements that bring together the economic power of actors which were previously pursuing divergent interests and goals, the type of activity that section 1 was intended to oversee. *Copperweld*, 467 U.S. at 752, 104 S.Ct. at 2731."

Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125 at 1136-1137 (C.A.3 (Pa.), 1995).

The Clear Error On Standing To Charge Jeffrey Immelt

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

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

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

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

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

Immelt is the architect of. The target area test merely requires that an antitrust plaintiff both "**prove that he is within that sector of the economy endangered by a breakdown of competitive conditions in a particular industry**" and that he is "**the target against which anticompetitive activity is directed.**"

National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 608 (11th Cir.1984), cert. denied sub nom., *Patterson v. Buena Vista Distribution Co.*, 474 U.S. 1013, 106 S.Ct. 544, 88 L.Ed.2d 473 (1985). **Basically, a plaintiff must show that it is a customer or competitor in the relevant antitrust market.** *Associated General Contractors*, 459 U.S. at 539, 103 S.Ct. at 909, *Florida Seed Co., Inc. v. Monsanto Co.*, 105 F.3d 1372 at 1374 (C.A.11 (Ala.), 1997).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted

S/Bret D. Landrith
Bret D. Landrith

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Certificate of Service

I certify that on August 29th, 2005 I have served the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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Attorneys for Defendants

S/Bret D. Landrith
Bret D. Landrith

June 13, 2003

By Facsimile and U.S. Mail

Bret D. Landrith, Esq.
Corporate Counsel
Medical Supply Chain, Inc.
Corporate Center
1300 NW Jefferson Court
Blue Springs, MO 64015

Dear Mr. Landrith:

This firm serves as counsel to the General Electric Company and GE Capital. I have discussed with Jason Hanson of GE Medical Systems and Kate O'Leary of GE the antitrust and contract claims that you say Medical Supply Chain will assert next week, and write to tell you that GE is confident that any such claims are both legally and factually meritless. If Medical Supply Chain nevertheless files claims against GE or GE Capital, they will not hesitate to seek recovery of their attorneys' fees and costs incurred in responding to your baseless allegations.

Any breach of contract claim would fail because there simply was no contract between Medical Supply Chain and either GE or GE Capital. No such contract could be alleged consistent with the requirements of Fed. R. Civ. P. 11.

With regard to Medical Supply Chain's purported antitrust claims, it is beyond dispute that nothing in the antitrust laws required GE Capital to lend \$300,000 to a company with no assets, no revenues, and no customers. Even if GE Capital lacked a legitimate business justification for its refusal to lend money to Medical Supply Chain – and it plainly did not – it has been clear since *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), that a firm without market power is free to “exercise [its] own independent discretion as to parties with whom [it] will deal.” There could of course be no plausible argument that GE Capital has market power in the market for providing financing.

Moreover, because Medical Supply Chain could – if it were creditworthy – obtain funding from a multitude of other sources, GE Capital's refusal to deal would not be unlawful even if GE Capital *were* a monopolist. *See generally McKenzie v. Mercy Hosp.*, 854 F.2d 365, 369 -70 (10th Cir. 1988) (holding that refusal to deal did not violate § 2 of the Sherman Act because plaintiff had alternatives to doing business with the defendant).

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Bret D. Landrith
June 13, 2003
Page 2

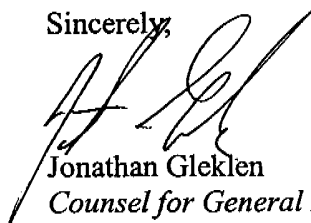
In the same vein, because GE lacks market power in the market for commercial real estate and because Medical Supply Chain could obtain office space from a multitude of other suppliers, GE's refusal to lease a building cannot violate the antitrust laws either.

Conspiracy claims under § 1 or § 2 of the Sherman Act would fair no better. GE and GE Capital are incapable of conspiring with each other as a matter of law, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and there was no agreement (and indeed no communications) between Global Healthcare Exchange and either GE or GE Capital regarding their dealings with Medical Supply Chain. Again, no such agreement or communication could be alleged consistent with the requirements of Fed. R. Civ. P. 11.

Moreover, because neither GE nor GE Capital competes with Global Healthcare Exchange, if there were an agreement – and there was not – it would be a vertical agreement subject to analysis under the rule of reason, not the *per se* rule. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Because GE Capital has a minuscule share of the market for providing financing and GE has a minuscule share in the market for leasing office space, any such agreement would be entirely lawful. *See e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 (1984) (share of at least 30% required to support a claim under the rule of reason); *see generally SCFC ILC, Inc. v. VISA U.S.A., Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) (proof of market power “is a critical first step, or ‘screen,’ or ‘filter,’ which is often dispositive of the case.”).

In summary, it is plain that reasonable inquiry by Medical Supply Chain would establish that there is neither a factual nor a legal basis for antitrust or breach of contract claims against GE or GE Capital. If, notwithstanding this lack of legal or factual basis, Medical Supply Chain pursues claims against GE or GE Capital, it does so at the risk of paying their attorneys' fees and costs in addition to its own.

Sincerely,



Jonathan Gleklen
Counsel for General Electric Company
and GE Capital

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

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

ORDER

The Tenth Circuit remanded this case, directing the court to determine the proper sanction to be assessed for plaintiff Medical Supply Chain, Inc.'s inclusion of one of the defendants, Jeffrey Immelt, as a defendant in his individual capacity. On January 9, 2007, the court ordered defendant Immelt to submit a statement indicating whether he still intends to pursue sanctions in this case, and, if appropriate, to submit affidavits providing the court with information on reasonable attorney fees and costs incurred. On January 19, 2007, Defendant Immelt responded that he does not wish to pursue sanctions in this case. The court therefore finds that defendant Immelt's previous request for sanctions is moot.

IT IS SO ORDERED.

Dated this 22nd day of January 2007, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

EAPADMIN

U.S. District Court
United States District Court for the Western District of Missouri (Kansas City)
CIVIL DOCKET FOR CASE #: 4:06-cv-01012-FJG

Lipari v. US Bancorp, NA et al
Assigned to: Chief District Judge Fernando J. Gaitan, Jr
Case in other court: Jackson County Circuit Court, Missouri,
0616-CV32307
Cause: 28:1332 Diversity-Other Contract

Date Filed: 12/13/2006
Jury Demand: Both
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff**Samuel K. Lipari**

represented by **Samuel K. Lipari**
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PRO SE

V.

Defendant**US Bancorp, NA**

represented by **Andrew M. DeMarea**
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Defendant

US Bank NA

represented by **Andrew M. DeMarea**
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Mark A. Olthoff
 (See above for address)
LEAD ATTORNEY
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Date Filed	#	Docket Text
12/13/2006	<u>1</u>	NOTICE OF REMOVAL by US Bancorp, NA, US Bank NA, US Bancorp, NA, US Bank NA from Circuit Court of Jackson County, Missouri, case number 0616-CV32307. (Filing fee \$ 350 receipt number 1408283) filed by Mark A. Olthoff on behalf of US Bancorp, NA, US Bank NA, US Bancorp, NA, US Bank NA. (Attachments: # <u>1</u> State Court Petition# <u>2</u> Civil Cover Sheet)(Olthoff, Mark) (Entered: 12/13/2006)
12/13/2006	<u>2</u>	NOTICE of filing by US Bancorp, NA, US Bank NA re <u>1</u> Notice of Removal, <i>to Plaintiff</i> (Olthoff, Mark) (Entered: 12/13/2006)
12/13/2006	<u>3</u>	DISCLOSURE OF CORPORATE INTERESTS filed by Mark A. Olthoff on behalf of Defendants US Bancorp, NA, US Bank NA.(Olthoff, Mark) (Entered: 12/13/2006)
12/14/2006	<u>4</u>	NOTICE of filing by US Bancorp, NA, US Bank NA <i>of Certificate of Filing of Notice of Removal in State Court and Proof of Service</i> (Olthoff, Mark) (Entered: 12/14/2006)
12/14/2006	<u>5</u>	Notice of EAP Administrative (Attachments: # <u>1</u> EAP General Order)(Baldwin, Joella) (Entered: 12/14/2006)
12/18/2006	<u>6</u>	MOTION to remand <i>and rely to Notice of Removal</i> filed by Samuel K. Lipari. Suggestions in opposition/response due by 1/2/2007 unless otherwise directed by the court. (Attachments: # <u>1</u> Exhibit 1# <u>2</u> Exhibit 2# <u>3</u> Exhibit 3# <u>4</u> Exhibit 4# <u>5</u> Exhibit 5)(Jones, Robin) Modified on 12/19/2006 to attach Letter to Clerk (Jones, Robin). (Entered: 12/18/2006)
12/21/2006	<u>7</u>	ANSWER to Complaint filed by Mark A. Olthoff on behalf of Defendants US Bancorp, NA, US Bank NA.(Olthoff, Mark) (Entered: 12/21/2006)
12/29/2006	<u>8</u>	SUGGESTIONS in opposition re <u>6</u> MOTION to remand filed by Mark A. Olthoff on behalf of Defendants US Bancorp, NA, US Bank NA. Reply suggestions due by 1/16/2007 unless otherwise directed by the court (Related document(s) <u>6</u>) (Olthoff, Mark) (Entered: 12/29/2006)
01/03/2007	<u>9</u>	ORDER - joint proposed discovery plan and scheduling order due by 2/9/2007.

		Counsel for defendants, after consultation with plaintiff, shall take the lead in preparing a proposed scheduling order for execution and filing with the court. Signed by Judge Fernando J. Gaitan Jr. on 1/3/07. (Enss, Rhonda) (Entered: 01/03/2007)
01/04/2007	10	MOTION for more definite statement filed by Samuel K. Lipari. Suggestions in opposition/response due by 1/19/2007 unless otherwise directed by the court. (Jones, Robin) (Entered: 01/05/2007)
01/04/2007	11	MOTION to vacate Case Management Order, Document 9 , filed by Samuel K. Lipari. Suggestions in opposition/response due by 1/19/2007 unless otherwise directed by the court. (Related document(s) 9) (Jones, Robin) (Entered: 01/05/2007)
01/04/2007	12	REPLY to answer on behalf of Plaintiff Samuel K. Lipari. (Attachments: # 1 Exhibit 1)(Related document(s) 7) (Jones, Robin) (Entered: 01/05/2007)
01/18/2007	13	SUGGESTIONS in opposition re 10 MOTION for more definite statement filed by Mark A. Olthoff on behalf of Defendants US Bancorp, NA, US Bank NA. Reply suggestions due by 2/5/2007 unless otherwise directed by the court (Related document(s) 10) (Olthoff, Mark) (Entered: 01/18/2007)
01/18/2007	14	SUGGESTIONS in opposition re 11 MOTION to vacate 9 Order, filed by Mark A. Olthoff on behalf of Defendants US Bancorp, NA, US Bank NA. Reply suggestions due by 2/5/2007 unless otherwise directed by the court (Related document(s) 11) (Olthoff, Mark) (Entered: 01/18/2007)
01/19/2007	15	MOTION for leave to file excess pages filed by Mark A. Olthoff on behalf of all defendants Suggestions in opposition/response due by 2/8/2007 unless otherwise directed by the court. (Olthoff, Mark) (Entered: 01/19/2007)
01/19/2007	16	MOTION to dismiss case <i>Or, In the Alternative, Motion to Transfer</i> filed by Mark A. Olthoff on behalf of all defendants Suggestions in opposition/response due by 2/8/2007 unless otherwise directed by the court. (Olthoff, Mark) (Entered: 01/19/2007)
01/19/2007	17	SUGGESTIONS in support re 16 MOTION to dismiss case <i>Or, In the Alternative, Motion to Transfer</i> filed by Mark A. Olthoff on behalf of Defendants US Bancorp, NA, US Bank NA. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E)(Related document(s) 16) (Olthoff, Mark) (Entered: 01/19/2007)
01/31/2007	18	MOTION to stay further proceedings pending appeal filed by Samuel K. Lipari. Suggestions in opposition/response due by 2/20/2007 unless otherwise directed by the court. (Attachments: # 1 Notice of Exhibit Attachment)(Carr, Lori) (Entered: 02/01/2007)
02/08/2007	19	SUGGESTIONS in opposition re 18 MOTION to stay <i>Defendants' Suggestions in Opposition to Plaintiff's Motion to Stay</i> filed by Mark A. Olthoff on behalf of Defendants US Bancorp, NA, US Bank NA. Reply suggestions due by

		2/26/2007 unless otherwise directed by the court (Related document(s) 18) (Olthoff, Mark) (Entered: 02/08/2007)
02/09/2007	20	REPORT of Rule 26(f) planning meeting. (Olthoff, Mark) (Entered: 02/09/2007)

PACER Service Center			
Transaction Receipt			
02/14/2007 09:35:50			
PACER Login:	dh0916	Client Code:	
Description:	Docket Report	Search Criteria:	4:06-cv-01012-FJG
Billable Pages:	2	Cost:	0.16

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

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

NOTICE OF REMOVAL OF CIVIL ACTION

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

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

I. INTRODUCTION

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

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

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

II. NOTICE OF REMOVAL IS TIMELY

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

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

III. DIVERSITY JURISDICTION EXISTS

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

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

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

IV. REMOVAL TO THIS DISTRICT IS PROPER

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

V. MISCELLANEOUS

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

10. All Defendants join in this Notice of Removal.

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

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

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

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

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

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

Dated: December 13, 2006

Respectfully submitted,

/s/ Mark A. Olthoff

MARK A. OLTHOFF MO #38572
SHUGHART THOMSON & KILROY, P.C.
Twelve Wyandotte Plaza
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Telephone: (816) 421-3355
Facsimile: (816) 374-0509

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

CERTIFICATE OF SERVICE

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

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

/s/ Mark A. Olthoff

Attorney for Defendants

Exhibit A

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

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

vs.

US BANCORP, NA
US BANK, NA
Defendants

0616-CV32307

)
) **Case No.**

)
) **Contract Breach**

)
) **Jury Requested**

**DIVISION
02**

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

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

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

PETITION

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

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

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

I. Jurisdiction

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

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

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

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

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

II. Venue

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

defendants that regularly do business in Jackson County, Missouri.

7. Venue is proper in this court.

III. Procedural History

8. Plaintiff, in the name of his Missouri corporation Medical Supply Chain, Inc. ("Medical Supply") brought an action to enjoin possible conduct by the defendants and to declare rights of parties under the subject contract of this claim in a federal action in the US District Court for Kansas in October 2002.

9. Medical Supply's first action for injunctive and declaratory relief in the U.S. District Court for the District of Kansas was captioned *Medical Supply Chain, Inc. v. US Bancorp, NA et al* KS. Dist. Case No.: 02-2539

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

11. The defendants' later conduct breaking the contract caused all funds to be lost on 12/1/02, including the

company's last resources used to recruit the candidates and all funds invested in preparation of training.

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

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

14. Medical Supply sought an interlocutory appeal on the denial of injunctive relief without a memorandum and order or findings of law and fact *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 02-3443.

15. Medical Supply also sought interim pre-hearing relief in the Tenth Circuit seeking to prevent the defendants from filing a malicious USA PATRIOT Act Suspicious Activity Report that would destroy the Medical Supply's ability to obtain escrow arrangements, higher level banking and international fund transfer services elsewhere to accomplish its capitalization and conduct hospital supply transactions. The pre-hearing relief opposed by the

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

16. Medical Supply appealed the dismissal of its injunctive and declaratory relief action *Medical Supply Chain, Inc. v. US Bancorp, NA et al* 10th Cir. Case No.: 03-3342.

17. The Tenth Circuit upheld the trial court's dismissal without findings of law or fact and made a show cause order why Medical Supply and its counsel should not be sanctioned for a frivolous appeal.

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

19. The Tenth Circuit found that Medical Supply had pled a conspiracy that included a separate legal entity, contradicting the trial court's ruling and the Tenth Circuit panel found that Medical Supply was correct in the existence of private rights of action under the USA PATRIOT Act.

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

21. Medical Supply sought *en banc* rehearing of its appeal, giving notice that the panel's ruling had no preclusive effect for the parties regarding the future action for monetary damages in the Western District of Missouri. Neither the court nor opposing counsel contradicted Medical Supply's ripeness analysis.

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

23. Medical Supply then brought its now ripe damages claims against US BANK and US BANCORP along with its existing pendant state law contract and trade secret misappropriation claims in the Western District of Missouri.

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

25. Kansas District Court Judge Kathryn H. Vratil then participated in an *ex parte* discussion on the day of the disbarment oral argument with personnel and justices of the Kansas Supreme Court, disparaging Medical Supply's counsel without his knowledge or opportunity to question Kansas District Court Judge Kathryn H. Vratil's testimony in

conduct designed to cause Medical Supply's counsel to be disbarred without due process.

26. Kansas District Court Judge Kathryn H. Vratil then removed herself from the case on October 20, 2005 minutes before the Kansas Supreme Court justices heard Medical Supply's counsel's oral argument. A transcript of the hearing which was resultantly delayed will give light to these unusual events.

27. The petitioner's case was then transferred to Kansas District Court Judge Carlos Murguia where he took no action for many months until immediately after Medical Supply's counsel was reciprocally disbarred by the Kansas District Court without disclosing to Medical Supply's counsel that Kansas District Court Judge Kathryn H. Vratil had participated in *ex parte* testimony over Medical Supply's counsel's "incompetence".

28. The Kansas District Court refused to postpone its decision on reciprocally disbarring Medical Supply's counsel until the Tenth Circuit ruled on the appeal of *Bolden v. City of Topeka* where Medical Supply's counsel representing James Bolden challenged Judge Kathryn H. Vratil's findings of law in that case and where Magistrate Judge James O'Hara, a managing partner in the defendants' law firm Shugart Thomson & Kilroy authored a case

management recommendation condemning Medical Supply's counsel for properly relying on controlling case law on alternative state law service of process.

29. The Kansas District court also interfered and obstructed providing records to the Tenth Circuit court for the appeal in *Bolden v. City of Topeka* during and after the state proceedings to disbar Medical Supply's attorney causing the Tenth Circuit to have to postpone the briefing schedule of James Bolden's appeal.

30. The Kansas District Court Judge Kathryn H. Vratil was ultimately overruled on two issues appealed by the petitioner and James Bolden's now disbarred counsel and the decision *Bolden v. City of Topeka*, 441 F.3d 1129.

(10thCir.2006) has been favorably cited by the Sixth Circuit.

31. No further court action occurred in the Medical Supply action until the petitioner's counsel had been disbarred, then Kansas District Court Judge Carlos Murguia began in earnest making rulings with the visible purpose of dismissing the action for the lack of counsel and completing the removal of representation participated in by the Kansas District court and to further its adversarial interest in the petitioner's proceeding.

32. The Kansas District Court Judge Carlos Murguia dismissed the federal claims in their entirety for failure to state a claim despite the fact that the complaint was identical in elements of pleading for its claims to the complaint filed in *Craftsman Limousine, Inc. vs. Ford Motor Company and American Custom Coachworks, et al*, 8th Cir. 03-1441 and 03-1554 and Judge Murguia expressly declined to exert jurisdiction over the state law based claims.

33. The Kansas District court retained jurisdiction over the federal action to sanction Medical Supply's former counsel and SAMUEL K. LIPARI for among other reasons, witnessing his counsel's disbarment but then because of a timely motion for reconsideration ruled Medical Supply Chain, Inc. would be sanctioned.

34. Medical Supply Chain, Inc. and SAMUEL K. LIPARI as successor in interest gave notice of appeal of the federal court decision on September 8, 2006 and SAMUEL K. LIPARI's federal law based claims over the injuries to his former corporation are currently before the Tenth Circuit Court of Appeals in *Medical Supply Chain, Inc. v. Novation, et al*, (formerly W.D. MO case no. 05-0210, then KS Dist. Court case no.:05-2299, now 10th Cir. case no. 06- 3331.

IV. PARTIES

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

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

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

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

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

V. INTRODUCTION

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

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

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

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

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

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

VI. STATEMENT OF FACTS

45. On or about 3/12/2002, following 3 years of R&D SAMUEL LIPARI, President and CEO of Medical Supply Chain, Inc.

(Medical Supply) began a process of selecting a corporate bank for the rollout of its healthcare supply chain empowerment program that produces significant benefits to healthcare and its patients.

46. SAMUEL LIPARI sought input from associates and advisors concerning selection of an appropriate national bank that would be capable of a full range of corporate banking services, including nation wide checking, escrow services, short and long term credit facilities, receivables financing and international clearing of transactions between thousands of health systems and their suppliers.

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

48. Piper Jaffray had targeted healthcare customers and participated as underwriter and funds manager for pre IPO healthcare manufacturers and service providers and US BANCORP NA acted as underwriter for corporate bonds of healthcare companies.

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

50. The account was opened in the name of Medical Supply Chain, Inc., using Medical Supply's federal tax I.D. number with a cashier's check in the name of Medical Supply's agent and drawn on Miner's State Bank of Frontenac Kansas for \$7,500.00.

51. On or about 4/25/02 SAMUEL LIPARI opened a personal account in his name at US BANK's neighborhood branch at 3640 S. Noland Road, Independence, MO.

52. Before opening the checking account, the US Bank employee reviewed SAMUEL LIPARI's account application and submitted SAMUEL LIPARI's personal data to Chex Systems, Inc. for a background check, evaluation and verification of eight years of his previous banking history at other banking institutions.

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

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

US BANK and US BANCORP's Knowledge of Medical Supply

55. On 6/5/02 SAMUEL LIPARI contacted Piper Jaffray's Minneapolis headquarters to speak to Heath Lukatch, managing director of the Piper Jaffray healthcare venture

fund about Medical Supply being considered as a venture capital candidate.

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

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

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

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

60. SAMUEL LIPARI also attempted to speak to a Piper Jaffray venture fund manger in their San Francisco office but again, his calls were not taken or returned.

61. On 7/9/02 SAMUEL LIPARI and Medical Supply were visited by a Merger and Acquisitions attorney for another San Francisco venture capital firm and after extensive discussions with her at Medical Supply's Blue Springs, MO headquarters on the need to quickly enter the healthcare supply chain market and take advantage of the opportunity created by the healthcare industry's sudden willingness to reject the existing Group Purchasing Organizations, and

after the New York Times had began uncovering corruption revelations in the market.

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

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

64. Medical Supply's management felt with the exception of Piper Jaffray, which concentrated its investments in healthcare, that much of the assets venture funds reported were in fact overvalued equities in telecom technology companies and that the collapse of WorldCom would further depress the venture capital markets.

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

66. SAMUEL LIPARI recounted the contacts made with Supply Solution, a Michigan based company focused on expanding integration in the healthcare industry, GoCoop/Avendra a Florida based company providing e-procurement/group purchasing in the hospitality industry and also wanted to integrate in the healthcare industry, both of which were seeking go to market partners in healthcare, Owen Healthcare the pharmaceutical distribution subsidiary acting for Cardinal and Cerner, a Kansas City healthcare

company with enterprise resource planning software that is based on an older operating system, called EDI that is inferior to Medical Supply's web based services and poorly suited for electronic commerce.

67. Cerner had bought out Mitch Cooper & Associates, a healthcare supply chain consulting company and seemed to be trying to acquire the capability to create an electronic healthcare marketplace.

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

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

70. SAMUEL LIPARI also recounted how start up healthcare electronic marketplace firms with technology similar to Medical Supply like Empacthealth and Medibuy had been bought up by GPOs for tens of millions of dollars, but that once they were no longer independent, their market potential was eliminated and the technology was used by GPO firms to deceive health systems into thinking their GPO partner was attempting to increase its economic efficiency when in fact they continued to restrict trade in support of monopolizing markets.

Medical Supply's Internal Capitalization Plan

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

72. Medical Supply settled on a plan that would utilize the value of its healthcare supply chain intellectual property and offer a comprehensive year long education and healthcare supply chain certification program to independent representatives.

73. This plan would put representatives in the field nationwide that possess the knowledge and skills to relate to all levels of management in healthcare systems and assist in the adoption of Medical Supply's supply chain empowerment program.

74. The independent representatives would pay for their certification and fund their own marketing and sales operations, consistent with distribution systems that rely on independent manufacturer's representatives.

75. Since Medical Supply's web services were new to the market, SAMUEL LIPARI decided that it would be critical for the certification fee to be held in escrow until the candidates had a chance to meet Medical Supply's certification team and have a chance to see if they would

succeed in mastering healthcare supply chain empowerment knowledge.

76. After a week long intensive seminar, the candidates would have the opportunity to decide whether or not to commit to the certification program and Medical Supply would have the opportunity to reject any candidates it felt would not succeed in the program.

77. Medical Supply developed a curriculum and contracted with the industry's foremost logistics and supply chain experts to provide instruction during the weeklong seminar and assist and advise candidates throughout the certification process.

78. Medical Supply made arrangements to include information and presenters from companies with expertise in financial analysis of healthcare purchasing, including strategic sourcing and human resource evaluations so that the representatives would be able to represent products and technology services outside of Medical Supply's capabilities that would complement Medical Supply's supply chain empowerment program in allowing a health system/hospital to break free of its GPO supplier.

79. Beginning 8/1/02 Medical Supply advertised nationwide to recruit experienced account executives and sales professionals and processed hundreds of applicants with

detailed evaluation of resumes, job history and financial disclosure applications.

80. For the first of what were to be quarterly classes, Medical Supply selected 15 candidates that had the potential to succeed as independent representatives for its services.

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

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

Defendants' Offer of US BANCORP Escrow Services

83. On or about 10/1/02 Medical Supply contacted Chris Walden of the Noland Road, Independence MO branch of US BANK for direction on escrow accounts and commercial banking services.

84. Medical Supply was referred to Becky Hainje a US BANCORP "Private Banker" and on or about 10/3/02 Becky Hainje contacted SAMUEL LIPARI and told him she would arrange to put him in contact with the persons in different departments of US BANK that could provide Medical Supply the services Medical Supply requested and needed.

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

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

87. SAMUEL LIPARI described Medical Supply's need for escrow accounts to Brian Kabbes and emailed him an escrow contract that Medical Supply counsel had prepared for its candidates.

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

Meeting of the Minds With US BANCORP

89. SAMUEL LIPARI negotiated with Brian Kabbes to reduce the escrow fee per account since all escrow accounts would be identical, and US BANK had refused to have the funds in a single account.

90. Brian Kabbes agreed to lower the fee for US Bank's escrow agent services from the normal of \$1,500 to \$600 per account and no hidden or additional transaction or disbursement fees.

91. After reviewing the escrow contract, on or about 10/5/02 Brian Kabbes communicated to SAMUEL LIPARI that the

language of paragraph 10 "Security Interests" should be changed so that a security interest for US BANK could be created in the \$5,000 portion of the escrow that became Medical Supply's property the moment a candidate submitted their certification funds into escrow.

Performance of Escrow Contract

92. Medical Supply altered its escrow contract to conform to Brian Kabbes' suggestion and on or about 10/7/02 emailed the changes to Brian Kabbes.

93. Brian Kabbes and US BANK were identified as the escrow agent in the escrow agreement and Brian Kabbes' address was included in the body of the agreement.

94. On or about 10/8/02 SAMUEL LIPARI spoke again to Becky Hainje about Medical Supply's need for a business line of credit based on the Medical Supply portion of the escrow assets.

Oral Confirmation of Escrow Contract

95. Becky Hainje said she had talked to Brian Kabbes and he had told her there would be no problems with the escrow accounts, that they were a "slam dunk."

96. Becky Hainje suggested SAMUEL LIPARI call Douglas Lewis and make an appointment to apply for the line of credit, which was based on the escrow account assets.

Defendants' Receipt of Value for Escrow Contract

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

98. Brian Kabbes supplied a specified US Treasury fund investment language for the funds while the funds were in the custody of US Bank Trust Department, without disclosing the treasury funds vehicle was also owned by US Bancorp which profited from steering US Bank's trust business into the treasury funds vehicle.

Written Memorialization of Escrow Service Agreement

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

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

101. Brian Kabbes said there would be no other changes, thereby acknowledging the completion of the memorializing of the written agreement and asked why Medical Supply was sending the candidates the escrow contract.

102. Medical Supply explained that the contracts were going out with the certification program agreement so candidates would have a chance to review the information before their

November 1st deadline, which required their funds to be in the US Bank escrow accounts.

103. Brian Kabbes acknowledged the explanation and agreed to look over the release document Medical Supply developed that candidates would execute following the week long evaluation seminar to be held the first week of December.

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

105. Medical Supply agreed to send him the reinstatement and tax clearance documents on Friday 10/11/02 and that Samuel Lipari was meeting with Douglas Lewis at the Noland Road Branch on the afternoon of Thursday 10/10/02 to set up the credit facility using the escrow accounts as security.

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

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

Defendants' Misappropriation Of Trade Secrets

108. On or about Thursday 10/10/02, Samuel Lipari delivered the Medical Supply business plan and associate program to

Douglas Lewis, at the US Bank, Noland road office to apply for the agreed upon commercial line of credit based on the portion of the escrow accounts Medical Supply would retain from its associate program.

109. The business plan and associate program booklets each had cover pages giving notice of restricted use and that Medical Supply protected the confidential business trade secret and intellectual property contained in them.

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

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

112. Douglas Lewis asked how many candidates Medical Supply had and SAMUEL LIPARI reached into his brief case and held up the ten folders of applicants who had committed to sending in their funds by November 1st and five others who were in the final stages.

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

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

Repudiation of Agreement to Provide Escrows

115. On or about Tuesday 10/15/02 Brian Kabbes called SAMUEL LIPARI and informed him that US Bank had turned down the escrow accounts because of the USA PATRIOT Act.

116. When asked to clarify, he said the know your customer requirements had changed and US Bank could not set up the escrow accounts for Medical Supply.

117. SAMUEL LIPARI was shocked and stunned and handed away the phone, where Brian Kabbes repeated again The Patriot Act as the reason the accounts were denied.

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

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

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

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

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

123. Becky Hainje said the reasons were the lack of a "relationship with the Bank... that the principals involved with the business were people unknown to the bank, but the main reason is the know your customer provisions of the "Patriot Act" that was enacted after 9/11, and which we could not really give all the correct answers on the source and flow of money.

US BANCORP Participation in the Repudiation

124. On or about 10/15/02 Medical Supply found Andrew Cesere was the head of US Bancorp trust department on the US Bank web site and at 4 p.m. called his secretary Barb in Minneapolis.

125. Andrew Cesere was unavailable so Medical Supply asked Barb to leave instructions for him to call SAMUEL LIPARI about Medical Supply's corporate escrow account rejection at 9 a.m. the following morning.

126. Barb asked for more details concerning the problem.

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

128. At 4:30 p.m. Barb called back and asked for additional information and the names of the people Medical Supply had dealt with so that Mr. Cesere could inquire about the problem.

129. At 9 a.m. the following morning on or about 10/16/02 Ed Higgins called, leaving a tape-recorded message on Medical Supply's answering system identifying him as the executive vice president of Midwest trusts for US BANK.

130. SAMUEL LIPARI, believing that the USA Patriot Act had probably been used to reject the escrow accounts because of his family sir name which is also the name of a small group of Islands in the Mediterranean Sea and which ends in "ari" like many Moslem sir names of people of Arabic descent, activated a tape recorder with a built in microphone and called Mr. Higgins back on the speaker phone.

131. Each subsequent call to US BANK in which Samuel Lipari participated was also recorded by him to document what he suspected was discrimination based on his national origin or ethnic descent. See Attachment 1 Transcript of Recordings.

132. Ed Higgins listened to SAMUEL LIPARI after stating he was an attorney and how long he had been working in trust banking, agreed with him that he saw no reason why the USA Patriot Act would apply to Medical Supply.

133. SAMUEL LIPARI explained that Medical Supply needed additional US Bank services including credit facilities, receivables financing and clearing and settlement services

for approximately \$90 million worth of transactions in the first year of operations.

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

135. Instead of Ed Higgins, Brian Kabbes called back with Lars Anderson who he identified as head of corporate trust new business development person and Susan Paine who he said he reported to, both on the line with him.

136. Medical Supply explained that at the time of his previous call, it was not realized that the escrow account contracts that US BANK had approved had already been sent out to the candidates in reliance on US BANK's agreement to host the escrow accounts.

137. Lars Anderson expressed some irritation that Medical Supply had contacted the head of the trust unit about the rejection of escrow accounts.

138. Lars Anderson said the bank had never been on board and it was not a done deal.

139. Brian Kabbes denied that there had been an agreement; he said he had twice told SAMUEL LIPARI.

140. Lars Anderson said that there had never been a signed off agreement to provide the service and that there had never been any bid for it.

Defendants' Knowledge of Breach

141. Medical Supply contradicted that and said the price for the service had been quoted by Brian Kabbes and after negotiating, a specific amount had been agreed upon.

142. SAMUEL LIPARI also told them Brian Kabbes provided and requested changes to the escrow and that Brian Kabbes had told Becky Hainje it was a "slam dunk."

Defendants' Knowledge of Irreparable Harm to Medical Supply

143. During the call Medical Supply attempted several times to work out any misunderstandings and set up at least the 10 accounts Medical Supply had relied on US Bank for and that US Bank had known about and that Medical Supply was now in danger of being irreparably harmed.

144. Medical Supply stated that the US Patriot Act did not apply and that Medical Supply was in actuality an established US BANK customer and that Medical Supply had been in a trust relationship with US BANK and the bank even had its business plan and information about its proprietary business model.

145. Brian Kabbes said that the trust department was a "stand-alone unit" and had its own criteria for accepting customers.

US BANK Refused to Reverse its Decision

146. Medical Supply pointed out that it had not received a true reason for denial of the accounts and that the reason given was a pretext at best.

147. Viewing US BANK's actions, Medical Supply stated they could only be explained by a conflict of interest due to US BANCORP's existing healthcare investments and involvement.

148. Medical Supply felt extremely disturbed by the apparent out come of this situation, there was not enough time to establish a new banking relationship with another nationally recognized Bank and Medical Supply would loose substantial momentum.

149. Medical Supply had spent several months building up to roll out it's supply chain empowerment program and felt to change a trust relationship in the middle will be devastating to it's entry to market.

150. Medical Supply researched over 300 resumes only to find 30 that appeared to be qualified.

Defendants' Fiduciary responsibility for trade secrets

151. On or about 10/17/02 SAMUEL LIPARI telephoned Douglas Lewis and told him what had happened.

152. Douglas said he had sent Brian Kabbes the good standing documentation but not the business plan and associate program.

153. SAMUEL LIPARI instructed him not to send the business plan and associate program materials to the corporate trust office of US Bank in St. Louis because of previous losses of intellectual property from unauthorized business plan dissemination.

154. SAMUEL LIPARI told Douglas Lewis that Medical Supply would be litigating over the escrow decision and planned to renew its application for a line of credit once it had the situation straightened out.

155. SAMUEL LIPARI suggested he might find another bank to provide the escrow accounts but Douglas Lewis said that would make the line of credit difficult. SAMUEL LIPARI further instructed Douglas Lewis to hold on to the materials and keep anyone else from having access to them.

156. Douglas Lewis agreed and stated he would keep the business plan materials safe.

157. On or about 10/18/02 Medical Supply drafted a letter and sent it to Jerry A. Grundhoffer, the President and Chief Executive Officer of US BANCORP NA with a copy being sent to Andrew Cesere, explaining the staggering damages US Bancorp would be liable for in imminent litigation due to the refusal to provide escrow accounts to Medical Supply.

158. Medical Supply suggested an alternative of fact finding depositions to take place in St. Louis, MO before

the end of the day Tuesday 10/22/02, believing US BANK to be misinformed about the USA Patriot Act and any reason for denying the escrow accounts.

159. US BANCORP Trust Department corporate counsel, Kristen Strong replied Friday 10/18/02 via fax and priority delivery with a letter denying US BANCORP NA was in contract with Medical Supply and that if any law suit is filed to address service for the trust department to her at her office.

160. Medical Supply called the trust department counsel Monday 10/21/02 to ask for service addresses of the other named entities and employees.

161. Kristen Strong said the same address would be good for all and then proceeded to ask what the causes of action were.

162. Medical Supply explained that it was chiefly an antitrust action based on the Sherman, Clayton and Hobbs Act and that causes of action under the USA Patriot Act were also a basis for the suit.

163. Kristen Strong was surprised Medical Supply was told the USA Patriot Act had been given as the reason for the denial of escrow account service but reiterated that there was no contract in her view and she saw no basis for the other causes of action.

164. Medical Supply stated that it would fax the complaint to her at the time the action was filed at the end of business Thursday 10/24/02, but they were still waiting for Mr. Jerry Grundhoffer to select the alternative of mutual fact finding to promote a resolution of the matter without litigation.

165. Kristen Strong stated that the depositions would not lead to any meaningful explanation, that Medical Supply had her letter explaining US BANK's reason for denying the escrow accounts and that the bank reserved the right to choose whom it served.

166. Medical Supply reminded her that US BANCORP had extensive investments in healthcare and that choosing not to provide a service to a competitor is actionable under antitrust law.

167. Kristen Strong warned Medical Supply not to contact anyone at US BANK and said If Medical Supply filed an action against US BANCORP NA, she would send a letter to the judge in advance of her answer to our complaint saying we had *ex parte* communications.

168. Medical Supply stated that it had not had any communications with US BANK employees since receiving her reply on Friday 10/18/02.

169. Medical Supply informed Strong it was an account holder at US BANK and would continue to have communications with US BANK regarding its other bank business.

170. Medical Supply contacted an attorney, familiar with the healthcare supply chain research and development done by SAMUEL LIPARI at the law firm of Shook, Hardy and Bacon and asked if his firm could act as escrow agent for accounts to be set up in US Bank.

171. The Shook, Hardy and Bacon attorney said the bank is better prepared to provide escrow services, fearing the liabilities and risks for an escrow agent where the USA PATRIOT Act had been invoked and declined to act as escrow agent.

172. On Thursday 10/24/02 Medical Supply filed for urgent injunctive relief against US BANCORP NA, its subsidiaries and named employees.

173. Medical Supply counsel contacted US BANK counsel Kristin Strong to clarify the clerk of the court's questioning of service and to attempt to schedule a hearing.

174. Ms. Strong said she would call the following morning Friday 10/25/02 to answer the question about service. She did not call and took the day off.

175. Medical Supply counsel called her on Monday morning 10/28/02 at which time she said the case had been transferred to outside counsel and gave the phone number to Medical Supply.

176. On or about 10/28/02 Medical Supply contacted US BANCORP's retained counsel and explained that there were questions about service and that Medical Supply was seeking to schedule a hearing that week for its requested relief to stop the harm it was suffering and to avoid a terminal outcome for the company.

177. US BANCORP's counsel said he had to travel and was unsure of his schedule but by the next day he might know of a time he could make a hearing.

178. Without hearing from the opposing counsel, Medical Supply became concerned and sent an email on or about 10/29/02 suggesting portions of the injunctive relief it seemed likely the two parties could agree on and explaining the harm it was suffering and what delaying the relief beyond critical dates would inflict on Medical Supply, its associates and customers.

The Defendants' Acceptance of Liability for Medical Supply's Business Plan Damages

179. The email explained the losses as follows: the damages of failing to receive the \$350,000 to \$450,000 it depended

on November 1st and the resulting effects of that delay on its projected financials including lost profit of \$51,795,005.00 lost increase in average valuation of \$155,385,015.00 Candidate lost revenue of \$15,499,788.00. 180. The email explained that these injuries would be far greater if a December 1st deadline is missed and if the company does not recover from US Bank's denial of the escrow accounts the total third year losses of the company would be as follows: lost profits \$51,795,005.00 loss of increased company avg. valuation of \$155,385,015.00 Candidate lost revenue of \$15,499,788.00 and Customer losses of \$697,486,200.00.

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

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

183. US BANCORP's counsel reiterated his belief Medical Supply needed to find another bank and that no liability existed.

184. Medical Supply's counsel explained that SAMUEL LIPARI will not risk a hundred million dollar company that requires high level banking services to future damage from a secret USA PATRIOT Act report that has misinformation in it and would create a black mark preventing them from ever being able to do any business.

185. US BANCORP's counsel said it would not agree to even just the relief sought in paragraph 66 of the first federal complaint.

186. Medical Supply asked US BANCORP's counsel if his firm would act as an escrow agent for accounts to be deposited in US BANK, since Shook, Hardy and Bacon had declined to do so.

187. US BANCORP's counsel refused to do so stating that US Bank did not owe any duty to Medical Supply.

Defendants' Intellectual Property Misappropriation

188. Realizing there was no immediate solution to this matter, and the fact that a previous business model pricing system developed by SAMUEL LIPARI in 1993-1995 was appropriated by HSCA, Medecon and Cardinal Healthcares' subsidiary Owen Healthcare through exploitation of a

confidential business relationship and then taken later by many other GPOs.

189. On or about 11/6/02 SAMUEL LIPARI visited US BANK, Noland road branch to retrieve the documents left by him following the meeting with Douglas Lewis on 10/10/02.

190. Douglas Lewis gave the documents back to SAMUEL LIPARI.

191. SAMUEL LIPARI specifically ask if the documents were copied or faxed and Douglas Lewis said he put all of the information in his analysis and Samuel Lipari left the bank.

192. Upon returning to Medical Supply's office SAMUEL LIPARI inspected the documents and found that the binders had been separated and copies or faxes had been made of the associate program and the business plan documents.

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

194. The documents relating to the escrow agreement associate program application, and certification contract were not faxed or copied.

195. There were no marks tractor marks on the back of these documents.

196. Medical Supply became fearful of where these documents were sent and who has reviewed them.

197. The documents that were copied or faxed contain all confidential details to the business, business model, management team, investors, industry experts, advisors, business practices, market strategies, revenue model, service structure, formula, algorithms and financials including 5 year details, 5 year condensed and break even analysis.

198. SAMUEL LIPARI became fearful this information would fall into the wrong hands further blocking or eliminating entry to market.

Defendants' Breach Injures Medical Supply

199. On or about 11/7/02 SAMUEL LIPARI received a complimentary D&B report dated 10/31/02 on Medical Supply.

200. The report indicated Medical Supply started in 2000 and has a clear credit history and a strong financial condition.

Medical Supply Seeks Federal Declaratory Relief

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

202. Medical Supply had a second preliminary injunction hearing at 12:00 p.m. on December 12, 2002.

203. Medical Supply again sought urgent preliminary injunctive relief, opposed by the defendants from trade secret misappropriation and urgent preliminary injunctive relief from USA PATRIOT Act reporting, but was denied.

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

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

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

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

The Third Attempt to Cover For Defendants' Breach

208. The defendants subjected MSCI to threatened and or actual USA PATRIOT Act Suspicious Activity Reporting (S.A.R.) with the knowledge that such reporting would harm or destroy MSCI's ability to capitalize its entry into the market for hospital supplies.

209. Never the less, on or about May 1st, 2003 Samuel Lipari again attempted to substitute or cover the

defendants breach, this time with a capitalization plan involving the purchase of an office building at 1600 N.E. Coronado Drive in Blue Springs.

210. On or about May 7th, 2003 MSCI's loan consultant Joan Mark explained if the General Electric Company provided a \$5.4 Million dollar mortgage on a \$10 Million dollar property and eliminated a \$5.4 Million dollar lease obligation that GE would directly benefit from a \$15 Million dollar swing to their balance sheet.

211. Samuel Lipari negotiated a contract to purchase 1600 N.E. Coronado Drive creating for MSCI \$350,000.00 in funds earned in the purchase bargain from selling the termination of the building's ten year \$5.4 million dollar lease with the building's tenant GE Transportation to its parent corporation, the General Electric Company (GE), which also agreed to provide MSCI a purchase mortgage as part of its contract with MSCI to release GE Transportation from the ten year lease.

212. When GE entered into the contract with MSCI, knowing of the S.A.R. threat by US BANK and US BANCORP related to GE by SAMUEL LIPARI.

213. GE on May 15th, 2003 agreed to buy the deeply discounted remainder of the lease and fund MSCI's mortgage to purchase the office building at 1600 N.E. Coronado Drive

after performing diligence over the executive summary of MSCI's business plan and affirming MSCI would be able to repay the mortgage based on MSCI's value proposition and the opportunity in the market for an independent hospital supply electronic marketplace on the internet.

214. Later, GE Medical and its former president Jeffrey R. Immelt, now CEO of GE learned that GE corporate had capitalized MSCI's entry into the hospital supply marketplace when GE's former CEO Jack Welch had specifically instructed Jeffrey R. Immelt to distribute GE Medical's equipment and supplies on the internet first in GE's electronic marketplace Global Exchange and then to form GHX, LLC as an electronic marketplace, both because Jack Welch feared an independent hospital supplier creating an electronic marketplace that would provide lower prices selling supplies from GE's competitors.

215. GHX, L.L.C. was capitalized by and remains under the control of GE and Jeffrey R. Immelt which retains a directorship on the board of the privately held company.

216. With GE and Jeffrey R. Immelt's approval GHX, L.L.C. had subsequently formed a joint venture with the remaining electronic marketplace for hospital supplies, Neoforma, Inc. part of a healthcare technology company capitalization syndicate with US BANCORP's Piper Jaffray and together in

an agreement, GHX, L.L.C. and Neoforma allocated market share of the nation's hospitals between each other.

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

218. MSCI sought to enforce its contract with GE and recover damages in federal court so tat MSCI would still be able to enter the market for hospital supplies and capitalizing its electronic marketplace.

219. SAMUEL LIPARI filed a *lis pendens* notice in the Jackson County Register of Deeds office based on his state law and antitrust claims in the US District Court.

US BANCORP and US BANK Work to Frustrate Recovery From GE

220. The defendants US BANCORP and US BANK along with Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray Companies and Andrew S. Duff coordinated their defense of Medical Supply's action for injunctive and declaratory relief with the GE defendants Jeffrey R. Immelt, GE, GHX, GE Healthcare, GE Capital and GE Transportation who inconceivably attached the Medical Supply complaint and order to their 12(b)6 motion to dismiss in Medical Supply's separate action against Jeffrey R. Immelt, GE, GHX, GE Capital and GE Transportation.

221. On January 29, 2004, March 4, 2004, April 2, 2004 US Bancorp's counsel, Nicholas A.J. Vlietstra and Piper Jaffray's counsel Reed coordinated their appeal (10th C.C.A. 03-3342) with the GE defense. The GE defendants included the action against the US BANCORP defendants and Unknown Healthcare Provider as a related appellate case in (10th C.C.A. 04-3075) and used the US BANCORP order as a basis for a cross appeal (10th C.C.A. 04-3102) challenging the failure of the trial court to grant sanctions against Medical Supply."

222. A cartel of hospital suppliers organized in an anticompetitive agreement as members of GE's GHX, LLC and including the University Hospital Consortium (UHC), Robert J. Baker, the Volunteer Hospital Association (VHA, Inc.), Novation LLC, Neoforma, Inc. and Robert J. Zollars renewed their conscious commitment to a common scheme designed to achieve an unlawful objective of keeping Medical Supply out of the market for hospital supplies by reviewing the case against US BANCORP and consulting with representatives for the defendants US BANCORP and US BANK along with Jerry A. Grundhoffer, Andrew Cesere, the Piper Jaffray Companies and Andrew S. Duff.

223. The cartel decided to rely on the continuing efforts to illegally influence the Kansas District Court and Tenth

Circuit Court of Appeals to uphold the trial court's erroneous ruling.

224. The cartel also renewed their efforts to have Medical Supply's sole counsel disbarred, knowing that an extensive search for counsel by Medical Supply had resulted in 100% of the contacted firms being conflicted out of opposing US BANCORP and actually effected a frenzy of disbarment attempts against Medical Supply's counsel in the period from December 14, 2004 to February 3rd, 2005, originating from US BANCORP and US BANK's agent Shughart Thomson and Kilroy's past and current share holders."

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

VII. CLAIMS

194. Plaintiff alleges the following claims against the defendants US BANK and US BANCORP upon information and belief that discovery will support findings against the defendants.

COUNT I **CAUSE OF ACTION FOR BREACH OF CONTRACT**

195. Plaintiff hereby re alleges the preceding averments of facts and incorporates them herein.

196. The Defendants breached their contract with Medical Supply (MSCI) which interests are now assigned to SAMUEL LIPARI to provide MSCI with a full range of business banking services, including corporate trust services and escrow agency to be performed lawfully and professionally with a "five star guarantee" of quality of service.

197. This contract was executed in writing by the Defendants and MSCI when their respective agents opened the Medical Supply Chain Corporate checking account.

198. The Defendants breached their contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates.

199. This contract was made while the plaintiff was influenced by representations over the phone at a distance of 300 miles between the defendant US BANK's St. Louis office and the plaintiff as chief executive officer of MSCI a customer of US BANK's Noland Road Independence office in the regular course of business.

200. No writing or other memorialization of this contract to provide a full range of banking services with a "Five Star Guarantee" was referred to or contemplated at any time

during its negotiation and formation by either the Defendants or MSCI.

201. The Defendant's Vice President Brian Kabbes and Samuel Lipari came into formation of a written contract for escrow account services when both had agreed upon some or all of the terms in exchanges of email including: the composition of the escrow form, the language limiting the liability of US BANK and the escrow agent, the language designating US BANK's compensation for its duties in any legal disputes arising between the parties, the directions for US BANK's investment of long term held funds, the directions for US BANK's investment of short term held funds, the selection of investment vehicles for both funds respectively, the name and address of BRIAN KABBES as escrow agent on the escrow form, the name and address of US BANK as escrow depository on the escrow form, the price term US BANK is charging for the agreed upon escrow service and the price term and payment schedule for maintaining the account.

202. The Defendants performed diligence to determine whether to accept the contract with MSCI to provide MSCI with corporate trust services, escrow agency and the service of hosting escrow accounts for MSCI and its candidates.

203. The Defendants required only one item to be rectified

for approval; a current good standing status from the Missouri Secretary of State, which MSCI provided, satisfying their sole open element.

204. The Defendants approved MSCI's escrow form for delivery along with MSCI's associate contract to MSCI's independent representative candidates for their examination and submission for review to their personal legal counsel. After entering into a contract with MSCI, the defendants breached the contract and did not provide the escrow accounts.

205. The Defendants breached the contract to provide escrow accounts to MSCI when the defendants discovered MSCI would reduce hospital supply prices nationwide with an internet based electronic marketplace.

206. MSCI attempted to cover or substitute as described in the statement of facts, seeking the services of Shook, Hardy & Bacon, then the defendants' own law firm to administer escrow accounts unsuccessfully.

207. MSCI then attempted to cover or substitute by obtaining the capitalization for entry to market through a real estate transaction with GE which breached its contract when it also discovered MSCI would reduce hospital supply prices nationwide with an internet based electronic marketplace.

COUNT II
CAUSE OF ACTION FOR FRAUD

208. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

209. The Defendant US BANCORP injured MSCI with a fraudulent misrepresentation material to their transaction of escrow agency and escrow account hosting through US BANK for MSCI and SAMUEL LIPARI.

210. Then Brian Kabbes speaking as a Vice President of US BANK falsely represented to MSCI that US BANK and the commercial trust department would not perform as escrow agent or host MSCI's escrow accounts because of the "know your customer provisions" diligence requirements of the USA PATRIOT Act had come into effect and made it impossible for the bank to perform this service for MSCI.

208. The defendants' officers Lars Anderson and Susan Paine made this fraudulent misrepresentation through the defendant Brian Kabbes by directing him to give this reason to MSCI's chief executive officer, SAMUEL LIPARI.

211. The defendant US BANCORP's officer Andrew Cesere directed the defendants' officers Lars Anderson, Susan Paine And Brian Kabbes not to retract this fraudulent misrepresentation when it had been questioned by MSCI and SAMUEL LIPARI and to maintain the misrepresentation in

their capacity as managing speaking officers for US BANCORP NA, US BANK.

212. The defendants' officers Andrew Cesere, Lars Anderson, Susan Paine and Brian Kabbes caused this fraudulent misrepresentation to be communicated to SAMUEL LIPARI with the intention to induce MSCI to refrain from enforcing US BANK's agreement to provide MSCI escrow agency services and escrow account hosting.

213. On 10-24-02 the defendants officer Brian Kabbes communicated to MSCI and SAMUEL LIPARI that US BANK's corporate trust division (US BANCORP) would not provide the escrow accounts because of the "know your customer" provision of the USA PATRIOT Act prevents them from providing the agreed upon escrow accounts.

214. Becky Hainje US Bancorp (Phone Message left on MSCI answering machine 10-24-02);

"Becky Hainje: Hi Sam this is Becky Hainje with US Bank I a... visited again with Brian Kabbes in the a... corporate trust area and a... ask him what would you need to provide in order to have the a... request for the escrow trust reviewed and he was very honest, he said a... really it does not look good, this is something that the bank would be willing to do and he doesn't want you to invest any more time in it with him, but he did give me a... the listing of the main reasons, the concerns that the bank had a... first of all was that of course this is an unknown start up business that a... did not have any prior existing relationship with the a... Bank a... that the principals involved with the business were people unknown to the bank as you mentioned they were National and he really had no idea, and but the

main reason is to know your customer "Patriot Act" that was enacted after 911, and which we really could not give all the correct answers a... on the course and the flow of money, so that's what the situation was a...I understand that your coming up with a unique way to finance and get a business off of the ground unfortunately this seems to be a day and an age where unique thinking outside of the box isn't a... is being, a...is very difficult to get anything going, and I apologize that I wasn't able to be of more service to you a...hopefully you will be able to get this going perhaps with Doug on financing, and I do wish you all the best, if you have any more concerns, please feel free to give me a call at 913-261-5725."

215. Brian Kabbes called back rather than Ed Higgins:

"Bret Landrith MSCI; "Yes Brian, this is Bret Landrith, returning your call.

Brian Kabbes US BANCORP; "Bret hey a...Lars Anderson wants to be on this call too, he is our new business development guy, do you mind if I get him on the line."

Bret Landrith MSCI; " No problem."

Lars Anderson US Bancorp; "Hey Bret, I got Lars Anderson, hey Bret."

Bret Landrith MSCI; "Nice to speak to you"

Lars Anderson US BANCORP; "Susan Pane is here also here in the office a..."

Brian Kabbes US BANCORP; "I report to Susan Pane and Lars is our new business development person, now you had called Andy Cesere yesterday."

Bret Landrith MSCI; "Yes I didn't realize when I last spoke to Brian that we had already sent out the escrow agreements that he approved, am of course."

Lars Anderson US Bancorp; "Who approved?"

Bret Landrith MSCI; "Brian Kabbes, he works there in your office, I think he is in front of you, a... of course it is sort of inherent in an escrow customer that somebody is seeking an escrow account because there is not a sufficient establishment of trust yet so between the parties and realizing that we are going to have to change the escrow account contracts with the, our ten best candidates that we've chosen who will produce the most revenue for our business in it's first year in market a... that became a substantial issue for us and I didn't realize that when I last spoke to Mr. Kabbes."

Lars Anderson US Bancorp; "Yeah, we were wondering how obviously calling Andy Cesere a..."

Bret Landrith MSCI; "well a..."

Lars Anderson US Bancorp; "as you were not happy with our decision not to move forward on the transaction to get a hold of management at the bank that runs our overall unit."

Bret Landrith MSCI; "a... Mr. Kabbes was very helpful, he suggested that we go to some local bank, you know some big bank hasn't bought up like you all and taken and run off the staff that knew anything, but a...he a... was also not clear on why we had sought a trust account at US Bank, because he didn't see why we didn't go to our own bank, of course you are our bank and have been since about April, the first corporate account we ever opened was with you all."

Lars Anderson US Bancorp; "Sure",

Brian Kabbes US BANCORP; "I said that when I said that I said your local bank, I didn't know it was with US Bank."

Bret Landrith MSCI; "Who has really accelerated there a level of customer service just recently in the former First Star Bank, you guys took over and occupied, and now they actually connect us with the people that can provide the services they say they have, and that is how come our local bank forwarded us to your Trust Department."

Lars Anderson US Bancorp; "Got yea...Well then no doubt nobody questions about whether you have an account or whether, you know we can't handle this type of transaction generally, the question centers around when did we commit to this transaction specifically and Brian and I have been talking and we don't know at any point where we specifically said we are on board a... we were trying to evaluate the transaction therefore looking at some of the specifics of the document and what our duties were."

Bret Landrith MSCI; "I don't think we need to go into minutia over that right now I think the chronology will come with the demand letter a...but we understood that you knew the purpose and why we kept contacting you in getting the second change approved, by the time you made the negative decision you also had our business plan and that's pretty serious."

Lars Anderson US Bancorp; "We have not divulged your Business Plan to any body, there is no confidentiality issue here."

Bret Landrith MSCI; "well a..."

Lars Anderson US Bancorp; "Where did we ever accept the transaction, we never provided you pricing, we never

provided you a bid and we certainly never signed off on the escrow agreement."

Bret Landrith MSCI; "we had pricing and its oral, and this is Missouri, and this is a business contract in your regular line of business and we relied and depended on your excerption that it was ok and we sent it our to our best people."

Brian Kabbes US BANCORP; "I'll tell you what Bret, you can talk with Sam, you can get him on the phone if you want, because when I went over numbers with Sam, I said by no means is this a done deal, I need to run it past some people, I told him that twice, so I discussed numbers with him, but I said to him twice, I we came to what would work for you."

Bret Landrith MSCI; "Sam is in the room now."

Sam Lipari MSCI; "Hi Brian, well Brian, I also had conversations with Becky Hainje, and Becky had indicated as well that your conversation with her according to the recording that I have of the conversation is that you guys, you or her or combination thereof, had no problem with this and it should be a slam-dunk, to quote her exactly."

Bret Landrith MSCI; "but, but before we go farther down this line, obviously you don't have your new business development guy in there so you can help document why it was good of you not to take on our new business and we are sort of flabbergasted that you got any reason not to take on our business and we are sorry we are with you, but we are with you for at least these ten people."

Brian Kabbes US BANCORP; "Excuse me"

Lars Anderson US Bancorp; "you do want, on what basis do you consider us to be with you guys, I mean in any cap... in this transaction."

Bret Landrith MSCI; "well we have our sole banking relationship with you and we have shared an incredible amount of trust with you and divulged our business practices model and everything to you and are are corporate financials, we knew that a large major competitor of ours is headquartered in St. Louis and we had no concept that there would be a conflict of interest issue, but a... a....
Lars Anderson US Bancorp; "We don't have a conflict of interest."

Bret Landrith MSCI; "this comes out of left field that you are accusing us of being Arab terrorist or something and not wanting to set up a basic account your bread and butter services of your department, I think you are taking on other customers this year sometime, if you are still going to have a trust office in St. Louis, and we are sort of

surprised you are not taking us on and we can't imagine a reason for it.

Lars Anderson US Bancorp; "Ok, well I think Brian's conveyed..."

Bret Landrith MSCI; "well those are pretty bad reasons and those end up with a demand letter, and yes there will be extensive chronology and we will explain trust obligations and fiduciary duties and where we think we were in contract and we think we will have an explanation that wins."

Lars Anderson US Bancorp; "well we are not the right people to talk to about that, we are just..."

Bret Landrith MSCI; "all right well, like I said earlier, I don't see any point in having a discussion about that, obviously you guys provide a service, you got your new business development guy there on this phone call, either you are talking to us about the services you are going to provide, or what we need to do to be your customer."

Lars Anderson US Bancorp; "so your, what your what are you stating at this point, that you are going to...."

Bret Landrith MSCI; "we got ten people that...."

Lars Anderson US Bancorp; "to force us to provide these services, or what, I don't understand now what you want."

Bret Landrith MSCI; "your, your characterizing that as a threat, there are no threats here, our business future depended on these ten people for the next six months or year revenue, you took them out you didn't even threaten us before you did it, so we will try and save what we can, but probably since you got your team there you ought to think about how to make us a customer at least for these ten so that we can remediate this damage."

Lars Anderson US Bancorp; "well we certainly never contracted with you or these ten people."

Bret Landrith MSCI; "well I think we go to a referee on that, first you get the demand letter, you get to respond to your version and then we go to a forum where they will make a ruling."

Sam Lipari MSCI; "and, and if I might add something here, this patriot act, that was identified as a reason for not extending the escrow services to us might you guys explain how that applies to a company that has been incorporated and in good standing for three years in the state of Missouri, in addition to the fact that we have a trail of where the funds come from, we also have signatures on both financial and criminal discovery of these individuals where anyone can run a background check or financial background on these individuals. I mean I am just really concerned

why this patriot act was brought into this when we don't have anything to do with that.

Lars Anderson US Bancorp; "we were not trying to relate the Patriot Act specifically to your status of business or your integrity it only..."

Sam Lipari MSCI; "well according to Ed Higgins, he didn't see how this, where this even came from."

Bret Landrith MSCI; "what other customers has this been an issue with for you and maybe you shouldn't be dealing with those types of customers?"

Lars Anderson US Bancorp; "The patriot act, when it was put in place, caused us to have a clear set of rules on how we take on business."

Sam Lipari MSCI; "well according to Ed Higgins, he doesn't think that the Patriot Act has anything remotely to do with Medical Supply Chain, and what we are trying to do here."

Bret Landrith MSCI; "but, since you mentioned it the other day, we started looking at who you got investments in, and you got some investments in some healthcare entities that are under the gun, they have either been indicated for anti-trust violations or illegal kick-back schemes and for us now looking at space alien excuse for not having our trust accounts hosted by you, we are starting to think conflict of interest explains it."

Lars Anderson US Bancorp; "yea, you know what...we are not sure...what's your..."

Bret Landrith MSCI; "yea, it is pretty serious and it goes beyond contract damages ok."

Lars Anderson US Bancorp; "we are not the right people to talk to if you..."

Bret Landrith MSCI; "I know you may not be the right people to talk about trust, that is why I was trying to get your Vice Chairman, still haven't gotten to him, hopefully we can get this resolved today."

Lars Anderson US Bancorp; "we have already spoken with him and explained the situation, if you want to talk about other things in the Bank and our policies, whatever, I mean."

Bret Landrith MSCI; "no, I think we are going to focus on the Trust Department on US Bank for sometime here, it is probably a three-year process, but we will get to know each other quite well."

Lars Anderson US Bancorp; "do you have any other questions today?"

Bret Landrith MSCI; "No, you called us."

Lars Anderson US Bancorp; "well we were just returning your call to Andy Ceccere".

Bret Landrith MSCI; "well I think he ought to personally talk to us cause we are still not getting a good explanation here."

Lars Anderson US Bancorp; "you are not looking for a good explanation you are looking to force us to do the transaction."

Bret Landrith MSCI; "no, you guys are the ones that don't even threaten you just kill, but we are still wondering how we can fix this."

Sam Lipari MSCI; "yea, we need, the problem here is that we have these a..., we basically have a..., out of 300 resumes we've pined it down to approximately 15 of which 10 we sent out the contract and the escrow and then you guys decide that you don't want to do the escrow over a Patriot Act that we don't have anything do with in the first place, now you claim that we do and be on, I...I still don't understand where you are coming from that standpoint, but that is ok, in the mean time we tried to explain the situation and in fact we spoke with Ed, now who is Ed Higgins,

Brian Kabbes US BANCORP; "He is ahead of personal trust in St. Louis."

Sam Lipari MSCI; "Ok, well when we spoke with Ed, Ed seemed to feel as though this doesn't have anything to do with the Patriot Act, and basically, that is what we are saying, but I will indicate to you this....Becky had already established the fact that Brian you and her had talked last week and you didn't see any problem with it and if you didn't see any problem with it, you also suggested we make a change on #10 of the escrow agreement, so that we could leverage the asset to create a line of credit here at the local level, a... and everything seemed to be going in order and then all of a sudden you guys come back and say well you are not going to do it and you guys want to basically climb behind the Patriot Act as a basis for your decision, but Patriot Act doesn't have anything to do with what we are doing.

Brian Kabbes US BANCORP; "first off, that was a minor, that was part of our reason that was a minor reason..."

Sam Lipari MSCI; "well, if, if I quote Becky correctly this morning on her conversation, it was the fact that you don't know who all is involved in the Company, you don't know where these, where the Executives are that are running this company, in other words, you didn't have background information on the company itself to set up the trust, that, why is that any of your business in the first places as it relates to setting up an escrow? That's my question, and again I think we are going to find out that we are

going to constantly come back to this issue where you have a conflict of interest and because of your knowing our business model and how we are arriving at generating revenue and so on and so forth that you basically kill our escrow, so by killing our escrow, especially in this particular situation on these ten that we have sent the information out to, you have essentially cut off at least \$300 and possibly \$450 thousand dollars."

Bret Landrith MSCI; "but they were our ten best you know, former principal of IBM, and people we hand picked from all over the country at the best change of getting our hundreds of millions of dollars or revenue we count on in the next couple of years."

Sam Lipari MSCI; "so all the conversations that we have documented since last week, have basically indicated that you had no problem in doing the escrow in the first place, in fact, Bryan you and I hammered out a Cost and Price and I would think..."

Brian Kabbes US BANCORP; "you are missing a very important part of that, twice I said to you I need to run this past something, and I stopped you and said it a second time."

Sam Lipari MSCI; "ok well then let me ask you this Brian, why won't you just set the escrow up? Why? We don't have anything to do with the...a..."

Brian Kabbes US BANCORP; "well"

Sam Lipari MSCI; "there is a conflict of interest Brian, and you know there is, and I don't know why you are hiding behind the Patriot Act because the Patriot Act doesn't have anything to do with us, and you know it doesn't, and I am upset about it, I have spent two weeks working with Becky and Doug and You and everybody else, we've got basically \$300 to \$450 thousand dollars in the pipeline here that has been basically cutoff cause we don't have an escrow for these people to deposit and we are going to have to go back to them to try and save them if we can, and if we can't all this is really kind of a mute issue, it is just a fact that you don't want to do business with us because you have a conflict of interest with other companies that are doing banking business with you and frankly, you are right, if we ever get our business model off the ground, we are going to put them out of business, in fact, we may not have to the Justice Department has already indicted them, the Federal Trade Commission is after them, and not Medicare and Medicaid is after these GPO's. In addition to that, I have a glass pipe line to the New York Times, so if we really want to bring everybody into this thing and really nail down what is going on we can. All we asked for was a

simple escrow so that we had a place to put our certification program candidates until they receive the weeks worth of training and we were able to identify whether or not they were going to be part of our organization or not. That is all we asked you people to do, instead, you guys have carried this thing farther, in other words, you want to know more information about the company, or you want to know about our background, or you want to know whose involved in this because there is a conflict of interest and that is the only reason you guys wouldn't provide these services. You would provide them for anyone else that walked in off of the street, but you have a conflict. So admit you have a conflict and let's move on. If you don't have a conflict, then set the escrow up."

Lars Anderson US Bancorp; "Sam, this is Lars, Brian and I have talked about this since he bounced the transaction off of me to find out if we should do the deal and I couldn't see good reason to do the deal, but we have never talked about any kind of conflict of interest. I don't even know where you are coming from that standpoint."

Brian Kabbes US BANCORP; "I don't have any idea what he is talking about."

Bret Landrith MSCI; "I understand you are not admitting it yet, but you have not come up with a plausible non-protectoral reason to not set up escrow accounts. We are going to be looking at..."

Brian Kabbes US BANCORP; "we have to know our customers I have to have complete information and to know our customers and to know who we are doing business with."

Bret Landrith MSCI; "I don't think a US Bank knows too much about US Bank, but in terms of, we filled out credit application you got business plan, you got all that information, and once you got all that information then we are surprised you are not accepting the account."

Lars Anderson US Bancorp; "we take on a trust business stand alone, and we have our own acceptance criteria and it's got nothing to do with what someone else got your financials or whatever...."

Bret Landrith MSCI; "like I said, I don't think US Bank is a coherent entity and I am really alarmed at some of the laissez-faire lack of control of practices that you have and I am sure we are going to see a lot of disturbing things, unless you are here are calling us to set up some trust accounts we will probably do our next communications in correspondence."

Lars Anderson US Bancorp; "Ok, well we are trying to explain to you today the reason why we are not taking on the account."

Sam Lipari MSCI; "and what is that reason exactly, because we have gone""

Transcript of tape recorded telephone conference.

216. MSCI and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation to not enforce US BANK's promise with the defendants' officer Brian Kabbes upon learning that US BANK was not going to provide the escrow services. MSCI and and SAMUEL LIPARI justifiably relied upon this fraudulent misrepresentation and did not seek a reversal of the decision from the St. Louis office of US BANK's Commercial Trust department and instead contacted US BANCORP NA's Andrew Cesere, to try and resolve the problem, unintentionally angering Lars Anderson and Susan Paine.

217. The defendants US BANCORP NA and US BANK caused this fraudulent misrepresentation to be communicated to MSCI with knowledge of its falsity or reckless disregard as to whether it was true or false to the point of not checking and realizing that the increased duties of the "know your customer" for new account holders had not been enacted.

218. Or, in the alternative the defendants caused this fraudulent misrepresentation to be communicated with reckless disregard as to whether it was true or false to

the point of not checking and realizing MSCI and Sam Lipari were established existing customers of US BANK the increased duties of the "know your customer" did not apply to.

219. US BANK and US BANCORP intentionally deceived MSCI and SAMUEL LIPARI over the pretext of the USA PATRIOT Act as a false reason to breach the contract to provide escrow accounts because the defendants knew or should have known that it is well established that a change in federal law does not excuse breach of a banking contract.

220. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage hospital suppliers US BANCORP PIPER JAFFRAY a wholly owned subsidiary of US BANCORP had invested in and underwritten.

221. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage US BANCORP PIPER JAFFRAY and US BANCORP relationships with the hospital Group Purchasing Organization ("GPO") Novation, LLC.

222. US BANK and US BANCORP had a bad faith motive and deceived MSCI and SAMUEL LIPARI to prevent MSCI from competing with or otherwise disadvantage US BANCORP PIPER JAFFRAY and US BANCORP relationships with the hospital

Group Purchasing Organization ("GPO") Neoforma, Inc. (now acquired by GHX, LLC an electronic healthcare marketplace created by The General Electric Company, "GE")

223. MSCI and SAMUEL LIPARI relied on the Defendants fraudulent misrepresentation to MSCI and SAMUEL LIPARI's detriment.

224. MSCI and SAMUEL LIPARI were harmed by the Defendants' actions, resulting in the immediate loss of from three hundred thousand to four hundred and fifty thousand dollars and the inability to act on the opportunity it had planned to realize with the funds, including the recruitment and training of a nationwide network of independent representatives and the revenue the representatives would create through MSCI's entry into commerce.

COUNT III
CAUSE OF ACTION FOR TRADE SECRET MISAPPROPRIATION UNDER
SECTION 417.450 RSMO OF THE UNIFORM TRADE SECRETS ACT

225. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

226. Plaintiff hereby re-alleges the averments of facts in the following counts and incorporates them herein.

227. The Defendants have misappropriated MSCI's business plan and associate program containing MSCI's trade secrets.

228. The Defendants have made use of MSCI's trade secrets through unauthorized copying and transmittal.

229. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make copies and or fax their contents in violation of SAMUEL LIPARI's oral instructions to Douglas Lewis and the notice of limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents.

230. US BANK exceeded its authorized use and copied and or transmitted the above documents to the defendant US BANCORP and its officers Lars Anderson, Susan Paine and Brian Kabbes.

231. The Defendants directed Douglas Lewis to disassemble MSCI's Business Plan and Associate Program and make a derivative analysis document containing MSCI's trade secret and or fax their contents in violation of Sam Lipari's oral instructions to Douglas Lewis and the notice of limitations of disclosure, use, transmittal and copying expressly stated on the covers and in the bodies of the above documents.

232. The defendant US BANCORP NA, its officers Lars Anderson, Susan Paine and Brian Kabbes and its subsidiary US BANCORP PIPER JAFFRAY acquired unconsented knowledge of MSCI's trade secrets and made use thereof.

233. The Defendants were at the time attempting to settle litigation through payment of several million dollars for theft of customer information in an unrelated class action lawsuit giving rise to MSCI's heightened fears of being materially injured if its trade secrets are not recovered and their dissemination is not disclosed.

COUNT IV
CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY

234. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

235. US BANCORP through its investment banking subsidiary US BANCORP PIPER JAFFRAY dominated the capitalization of health care technology companies.

236. US BANCORP through its relationship directly with Novation, LLC and through its subsidiary US BANCORP PIPER JAFFRAY's relationship with Novation, LLC dominated the access to the nationwide hospital supply market.

237. Until April 28, 2003 when US BANCORP PIPER JAFFRAY settled charges it was guilty of aiding and abetting efforts to defraud investors and manipulating investment research, US BANCORP through its investment banking subsidiary US BANCORP PIPER JAFFRAY was able to dominate investor research and exclude potential competitors to

Novation, LLC's control of the market for hospital supplies from having a market for securities.

238. SAMUEL LIPARI placed his trust in US BANK and US BANCORP to provide escrow services to MSCI in his plan to alternatively capitalize MSCI's entry into the market for hospital supplies through the participation of its certification candidates who would function as MSCI's marketing representatives.

239. US BANCORP's corporate trust division acting through US BANK was a trustee of the highest order to MSCI by virtue of US BANK's contract with SAMUEL LIPARI to provide MSCI escrow services.

240. In forming the trust relationship with MSCI, US BANK and US BANCORP asked for and obtained from SAMUEL LIPARI all of MSCI's confidential information relating to the escrow accounts and MSCI's certification candidates.

241. US BANK was a trustee of the highest order to MSCI by virtue of US BANK's officer Douglas Lewis' promise to SAMUEL LIPARI that US BANK would safeguard MSCI's confidential business plan.

242. US BANCORP and US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as an escrow services provider to MSCI when US BANCORP and US BANK improperly

used a change in federal law as a pretext to breach US BANCORP and US BANK's agreement to provide escrow services.

243. US BANCORP and US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as an escrow services provider to MSCI when US BANCORP and US BANK fraudulently claimed a change in federal law excused their breach US BANCORP and US BANK's agreement to provide escrow services, knowing the change did not render performance impossible and knowing that a change in law or regulations did not relieve the defendants of their duty to perform under the escrow contract.

244. US BANK violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as custodian of MSCI's confidential trade secrets contained in MSCI's business plan and MSCI's certification program when it reproduced the trade secrets and transmitted them to US BANCORP offices outside of the Independence, Missouri office of Douglas Lewis.

245. US BANCORP violated the high standard of conduct and loyalty owed to MSCI required by the defendants' fiduciary relationship as custodian of MSCI's confidential trade secrets contained in MSCI's business plan and MSCI's certification program when it received the MSCI trade

secrets transmitted to them by Douglas Lewis and disseminated them to hospital suppliers and GPO's competing with MSCI.

246. US BANCORP and US BANK violated their duty of undivided loyalty to MSCI and to the escrow beneficiaries thereof by engaging in self-dealing by requiring the escrow account funds to be invested in a fund owned by US BANCORP without disclosure of US BANCORP's interest.

COUNT V

CAUSE OF ACTION FOR PRIMA FACIE TORT

247. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

248. Plaintiff hereby re-alleges the preceding averments of facts and incorporates them herein.

249. US BANK and US BANCORP's Prima Facie Tort Part 1

1) Intentional lawful acts were committed by US BANK and US BANCORP including:

a refusing to provide escrow account services;

b. circulating derogatory financial information about MSCI.

c. placing warning notes against MSCI's officers on US BANK's computer system

d. disparaging MSCI's legal claims against US BANK and US BANCORP

e. causing a Kansas attorney disciplinary complaint to be filed against MSCI's counsel

f. preventing MSCI from obtaining a loan secured with escrow account funds as they were released to MSCI.

2) US BANK and US BANCORP's committed these lawful acts with intent to injure the MSCI;

3) US BANK and US BANCORP's acts caused injury to MSCI and SAMUEL LIPARI

4) There is an absence of justification and in the alternative insufficient justification for US BANK and US BANCORP's acts.

a. MSCI had good credit.

b. MSCI was a registered Missouri corporation in good standing.

c. MSCI was being kept out of the market for hospital supplies by the concerted action off its competitors and their publicized exclusive agreements over hospital supplies with US BANCORP and US BANCORP PIPER JAFFRAY.

e. The defendants' agent Shughart Thomson & Kilroy did not have good faith cause to make an ethics complaint against MSCI's counsel for appealing the Kansas District Court's clear error.

250. US BANK and US BANCORP's injury from US BANK and US BANCORP's Prima Facie Tort was great and contrary to public policy, causing injury to the state's social and economic interests.

1) the nature and seriousness of the harm to MSCI was great, the company could not afford to hire employees or enter the market after having \$350,000.00 to \$450,000.00 abruptly taken from it; MSCI could not realize the returns on over ten years of its founder's research and development. MSCI's stake holders were prevented from recovering their inputs.

2) the interests promoted by the US BANK and US BANCORP's conduct are the felonious manipulation of hospital supply prices at the foreseeable risk of permanent injury and death to healthcare consumers across the nation;

251. While the reconsideration of transfer motion was being argued in federal court, the first 65,000 Missouri residents were cut off of Medicaid benefits on July 1, 2005.

252. A July 2nd, 2005 Los Angeles Times article stated 1/3 of the Missourians losing insurance coverage are children: "An estimated 24,000 children are expected to lose their

benefits, dental coverage is being cut for adults, and disabled people are losing coverage for crutches and other aids." See Missouri's Sharp Cuts to Medicaid Called Severe-More than 68,000, a third of them children, may lose benefits in the move to avoid tax hikes. LA Times, July 1, 2005.

253. On June 29, 2005, David Moskowitz MD, was invited to testify before the Missouri Medicaid Reform Commission and in his released pretestimony stated for the 65,000 patients losing coverage; "Since oxygen tanks are among the items no longer covered, many patients will soon die"[emphasis added].

254. Patients are the consumers in the market for hospital supplies that is the primary relevant market of Medical Supply's antitrust claims against the defendants US BANK, US BANCORP and their coconspirators.

255. Doctor Moskowitz also stated; "The Missouri Legislature is wrestling with the most critical domestic issue of our time.

256. It is literally a life and death issue for tens of millions of Americans.

257. It seems to me profoundly un-American, on the eve of our nation's birthday, to have people die simply because Medicaid is still paying retail for drugs."

3) the character of the means used by US BANK and US BANCORP were in bad faith and deceptive; and
4) US BANK and US BANCORP's motive was to take advantage of confidential information and power it had acquired over MSCI to keep MSCI from displacing relationships and income US BANCORP had obtained through its subsidiary US BANCORP PIPER JAFFRAY's manipulation of healthcare technology stocks and exclusive dealing with Novation, LLC.

VIII. Prayer for relief

258. Under *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910 (Mo App 1994) US Bank and US BANCORP are responsible for the expectation damages of the forward projections that it had accepted at the time it entered into contract with Medical Supply. The plaintiff is able to prove Medical Supply Chain Inc.'s projected profits with reasonable certainty.

259. Lost future profits may be used as a method of calculating damage where no other reliable method of valuing the business is available, see *Albrecht v. The Herald Co.*, 452 F.2d 124 at 129 (8th Cir. 1971).

Expectation Damages

260. The monetary relief sought is the contract expectation damages as determined by the business plan and forward

financials in possession of US BANK and US BANCORP at the time the escrow was accepted and the contract was formed from the US BANK and US BANCORP defendants.

Punitive Damages For Misappropriation of Trade Secrets

261. MSCI's business plan and associate program are trade secrets and will be made available to the court and defendants for in camera inspection.

262. Mr. LIPARI seeks the lost profits that can be determined with reasonable certainty that MSCI would have made for the next four years of operations, had it been allowed to enter the market for hospital supplies from the US BANK and US BANCORP defendants.

263. The total damages from US BANCORP and US BANK Defendants sought by the plaintiff Mr. LIPARI is four hundred and fifty million dollars (\$450,000,000).

264. The plaintiff seeks any other relief the court believes is just.

Respectfully Submitted,

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

Attachments: Exhibit 1 Executive summary of Medical Supply Business Plan

REQUEST FOR JURY

The plaintiff respectfully requests a jury decide all questions of fact.

Samuel K. Lipari

Plaintiff has served a copy of this complaint upon the

Office of the Comptroller of the Currency
1301 McKinney Street, Suite 3450
Houston, TX 77010-9050

VERIFICATION

State of Missouri)
) SS
County of Jackson)

I Samuel K. Lipari being of lawful age and being first duly sworn upon my oath, state that I have read the above and foregoing petition and attachments and find the statements therein to be true and correct to the best of my information, knowledge and belief.

Samuel K. Lipari

Subscribed and sworn to before me on this _____ day of November, 2006

Notary

Commission expires:

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Western District of Missouri.

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Plaintiff
(s): **Samuel K. Lipari**

County of Residence: Jackson

Plaintiff's Atty(s):

**Pro Se (Samuel K. Lipari)
Missouri**

Defendant
(s): **US Bancorp, NA ; US Bank, NA**

County of Residence: Outside State of Missouri

Defendant's Atty(s):

**Mark A. Olthoff (US Bancorp, NA ; US Bank, NA)
Shughart Thomson & Kilroy, P.C.
120 W. 12th St., Suite 1700
Kansas City, Missouri 64105
816-421-3355**

REMOVAL FROM JACKSON COUNTY, CASE #0616-CV32307

II. Basis of Jurisdiction: **4. Diversity (complete item III)**

III. Citizenship of Principal Parties
(Diversity Cases Only)

Plaintiff:- **1 Citizen of This State**
Defendant:- **5 Non MO corp and Principal place of Business outside MO**

IV. Origin : **2. Removed From State Court**

V. Nature of Suit: **190 Other Contract**

VI.Cause of Action: **This case is being removed pursuant to 28 U.S.C. Section 1332. Plaintiff asserts claims for, among other things, breach of contract, fraud, breach of fiduciary duty, and prima facie tort.**

VII. Requested in Complaint
Class Action:

Dollar Demand:

Jury Demand: **Yes**

VIII. This case **IS RELATED** to Case Number **05-0210-CV-W-ODS** assigned to Judge **Ortrie D. Smith**

Signature: /s/ Mark A. Olthoff

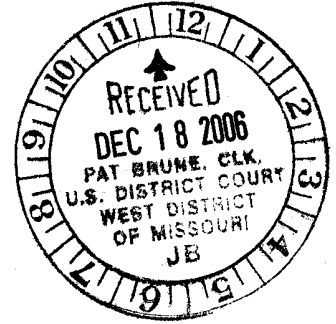
Date: 12/13/06

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Revised: 05/09/06

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



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

vs.

US BANCORP, NA
US BANK, NA
Defendants

)
)
)
) Case No. 06-1012-CV-W-FJG
) State Court No. 0616-CV32307
)
) (Properly Case No. 05-0210-
) CV-W-ODS)
)
)
)

**REPLY TO NOTICE OF REMOVAL AND MOTION
TO REMAND THE MATTER TO STATE COURT ON GROUNDS THAT
THE REMOVAL LACKED JURISDICTION UNDER SECTION 1441 et seq**

Comes now the plaintiff Samuel K. Lipari, the assignee of the dissolved Missouri corporation Medical Supply Chain, Inc., appearing *pro se* and makes the following reply to the defendants US Bancorp NA and US Bank, NA's notice of removal in a timely motion for remand under 28 U.S.C. Sec. 1447(c).

SUMMARY OF REASON FOR REMAND

The plaintiff respectfully calls attention to the court that the plaintiff's claims removed from Missouri State Court by defendants US Bancorp, NA and US Bank, NA are supplemental state law based claims originally filed in this court as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS, now Kansas District Court Case No. 05-2299-CM. The Kansas District Court has continuing supplemental jurisdiction under 28 U.S.C. § 1367(a) and the court's current order (Doc 78 Filed 03/07/2006) declining federal jurisdiction was not objected to or appealed by the defendants.

STATEMENT OF FACTS

1. The state law claims that comprise the current state action were the supplemental state law claims (¶¶252-329 including Trade Secret Relief at ¶¶325,325, ¶448, ¶454, ¶¶479-482, ¶¶488-494, Count XI, Damages For Breach Of Contract ¶¶538-543, Count XII Damages For Breach Of Fiduciary Duty ¶¶544-553) in the complaint filed as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS. The controversy was transferred to Kansas District court upon the contested motion of the defendants and currently exists as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Kansas District Court Case No. 05-2299-CM.

2. The order of the Kansas District court dismissing the plaintiff's federal claims and request to amend is currently on appeal to the Tenth Circuit US Court of Appeals as *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331. See **Exb. 1.** Tenth Circuit Docket

3. The defendants in *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM include the Voluntary Hospital Association ("VHA") and Novation, LLC. See **Exb. 2.** Original Complaint cover page.

4. The appellees in *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331 include VHA and Novation, LLC, *id.*

5. The state contract and fiduciary duty complaint removed from state court describes VHA and Novation LLC as coconspirators of US Bank NA and US Bancorp NA in ¶¶ 12, 13, 34, 43, 44, 222, 223, 236, 237, 257.

6. The plaintiff brought to the court's attention in the related action *Lipari v. General Electric Company, et al* Case No. 06-0573-CV-W-FJG that Hon. Judge Feranado J. Gaitan has a fiduciary interest in VHA and Novation, LLC (See **Exb. 3** Motion for Recusal)by virtue of his declared position as a Director of St. Luke's Health System, an owning member of Novation LLC's parent company VHA. See **Exb. 4.** St. Luke's Baldrige Award Application at pg. 7.

7. The plaintiff in the related case *General Electric* asserted that in the year 2002 alone, St. Luke's Health System (SLHS) did ninety seven million dollars of hospital supply business with Novation LLC and received a 2% rebate for every dollar spent.¹

8. The plaintiff alleges in his state complaint that the defendants US Bancorp and US Bank broke a contract to provide escrow accounts to keep the plaintiff out of the national market for hospital supplies once US Bancorp and US Bank discovered the plaintiff was a threat to their interests in Novation LLC through their investment banking subsidiary US Bancorp Piper Jaffray.

¹ "SLHS is a shareholder and owner of VHA/Novation, the largest Group Purchasing Organization (GPO) in the nation. SLHS accessed 885 VHA/Novation contracts with a total spending of \$97 million in 2002. VHA/Novation validates the quality, market share, and availability of the various vendors, and provides SLHS as much as a 6% increase in discounts plus an average 2% rebate for every contract dollar spent, thereby supporting the achievement of SLH objectives. Most key suppliers are accessed through VHA/Novation."

http://baldrige.nist.gov/PDF_files/Saint_Lukes_Application_Summary.pdf at page 7

9. The defendants US Bank and US Bancorp's exercise of removal for diversity jurisdiction from state court contradicts the Kansas trial court's decision in *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM to dismiss the supplemental claims from federal jurisdiction, continuing the action in federal court:

"f. State Law Claims

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). Having dismissed each of plaintiff's federal claims, this court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice."

Exb. 5 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19.

10. The defendants did not object to or appeal Judge Carlos Murguia's decision dismissing the plaintiff's state claims.

11. Diversity Jurisdiction does not exist in the federal action having original jurisdiction over the present supplemental state law claims because the defendant Shughart Thomson & Kilroy Watkins Boulware, P.C is incorporated in and has its principal place of business in Missouri, the state where Samuel Lipari resides and where his predecessor in interest (the now dissolved Medical Supply Chain, Inc.) was incorporated.

12. The defendants' counsel Mark A. Olthoff's (Mo. Lic #38572) Notice of Removal does not disclose that the plaintiff's complaint is comprised of the claims in *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS now under the jurisdiction of Hon. Judge Carlos Murguia in *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM.

13. The defendants' counsel Mark A. Olthoff (Mo. Lic #38572) omitted from its *ex parte* removal the court order of Hon. Judge Carlos Murguia dismissing the supplemental state claims from federal jurisdiction, which neither Mark A. Olthoff (Mo. Lic #38572) or the defendants objected to and which was not appealed by the defendants.

SUGGESTION IN SUPPORT

The removal is improper for lack of jurisdiction in this US District Court and case, federal Diversity does not exist, and removal violates federal comity and the "first to file" rule as recognized by the Eight Circuit. The plaintiff has made a timely motion for remand. Section 1447(c) provides in relevant part

that "[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under [28 U.S.C.] Sec. 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1441 does not prescribe separate rules of subject matter jurisdiction. Rather, § 1441 merely provides a procedural mechanism for a party to remove a qualifying case to federal court. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1543-46 (5th Cir.1991) (distinguishing improper removal from lack of subject matter jurisdiction).

I. Kansas District Court Still Has Federal Jurisdiction Over the State Claims

Here the defendants' removal suffers from a jurisdictional defect. This is not a qualifying action because of the continuing jurisdiction of *Medical Supply Chain, Inc. v. Neoforma, et al.*, KS Dist. Case No. 05-2299-CM over these state law claims under 28 U.S.C. § 1367 is well established:

"Upon the dismissal of the Magnuson-Moss claims, this court continued to have subject matter jurisdiction under 28 U.S.C. § 1367, because we had not yet "decline[d] to exercise supplemental jurisdiction" under 28 U.S.C. § 1367(c). That this court has throughout also had supplemental jurisdiction over the pendent state law claims pursuant to 28 U.S.C. § 1367 is, furthermore, reflected in the plain language of § 1367(a), which states that **"in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy"** (emphasis added). Thus this court has always had subject matter jurisdiction over all the claims in this case, initially through original jurisdiction, and later through supplemental jurisdiction, which continues to the present time." [Emphasis added]

In re Ford Motor Company Ignition Switch Products Liability Litigation, MDL No. 1112 at pg. 1(D. N.J. 8/27/1998) (D.N.J., 1998).

The Eight Circuit has acknowledged that there are circumstances in which a District court could continue to assert jurisdiction over supplemental claims after the federal claims are dismissed:

"At any rate, KPERS cannot prevail even if we limit our analysis to supplemental jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349, 108 S.Ct. 614, 618, 98 L.Ed.2d 720 (1988), the Supreme Court distinguished between the power to exercise jurisdiction over pendent (or supplemental) claims and the advisability of exercising such jurisdiction. Under the familiar test, **"a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'"** *Cohill*, 484 U.S. at 349, 108 S.Ct. at 618 (quoting *Gibbs*, 383 U.S. at 725, 86 S.Ct. at 1138). The existence of this jurisdiction is determined at the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction was predicated. *Bank One Texas Nat'l Ass'n v. Morrison*, 26 F.3d 544, 547 (5th Cir.1994); see KPERS I, 4 F.3d at 622.

On the other hand, **the decision of whether to exercise supplemental jurisdiction after dismissal of the federal claim is discretionary.** *Cohill*, 484 U.S. at 349, 108 S.Ct. at 618 ("*Gibbs* drew a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power.") It is the district court's decision to retain jurisdiction, not the existence of jurisdiction in the first place, which KPERS contends was improper. In fact, we decided the first question, the existence of jurisdiction, in KPERS I, 4 F.3d at 622. Even if the district court abused its discretion in retaining the case, the court would not be without jurisdiction. *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir.1990), we held that **"it would have been more appropriate for the federal district court, once rejecting the federal claims, to have exercised its discretion and not passed on the pendent claim."** *Id.* at 220. However, the district court had in fact retained and decided the pendent claim. Despite our conclusion that the district court should not have decided the pendent claim, on appeal we proceeded to review the state claim on the merits. *Id.* at 220-21. **We could not have done so if the district court had lacked subject-matter jurisdiction.** Therefore, we need not review the propriety of the district court's decision to retain supplemental jurisdiction in order to decide this appeal." [Emphasis added]

Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc., 77 F.3d 1063 at 1067-68 (C.A.8 (Mo.), 1996).

The Eight Circuit has also recognized that under controlling US Supreme Court precedent the decision of the trial court to retain jurisdiction over supplemental claims is open throughout the litigation and subject to change:

"While the district court's power to exercise jurisdiction under the 'same case or controversy' requirement in 28 U.S.C. § 1367(a) is one ordinarily resolved on the pleadings, the court's decision to exercise that jurisdiction **"is one which remains open throughout the litigation."** *United Mine Workers v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139-40, 16 L.Ed.2d 218 (1966) (discussion of pendent jurisdiction and discretionary power of federal trial court to refuse to hear state law claims, now codified by 28 U.S.C. § 1367).

Assuming the defendants' state law indemnification counterclaims were sufficiently related to the plaintiffs' jurisdictionally sufficient claims such that all claims could fairly be characterized as part of the "same case or controversy" pursuant to 28 U.S.C. § 1367(a), the district court had the discretion to decline to retain jurisdiction under section 1367(c)(3) (dismissal of all claims over which it had original jurisdiction) and 1367(c)(1) (complex issue of state law) at any time in the litigation. Further, because the timely filing of the Rule 59(e) motion tolled the appeal time in order to provide the district court with jurisdiction to resolve the motion, the district court's decision to relinquish supplemental jurisdiction was made before the case was "final" for appeal purposes.

Defendants Kirsch and Redden contend the district court's reversal of its decision to retain supplemental jurisdiction violates the law-of-the-case doctrine. However, none of the cases on which Kirsch and Redden rely involve a district court's decision to relinquish supplemental jurisdiction pursuant to 28 U.S.C. § 1367 in the context of resolving a Fed.R.Civ.P. 59(e) motion. *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C.Cir.1996); *Starks v. Rent-A-Center*, 58 F.3d 358 (8th Cir.1995); *Lovett v. General Motors Corp.*, 975 F.2d 518 (8th Cir.1992), cert. denied, 510 U.S. 1113, 114 S.Ct. 1058, 127 L.Ed.2d 378 (1994). In any event, a court has the power to revisit its prior decisions when "the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Starks*, 58 F.3d at 364 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988)). As determined above, this is such a case." [Emphasis added]

Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284 at 1287-88 (C.A.8 (S.D.), 1998).

II. US Bank NA and US Bancorp NA Failed to Appeal the Dismissal

In the Tenth Circuit where the defendants US Bank NA and US Bancorp NA represented there as here by Mark A. Olthoff (MO #38572) were presented with the order by Judge Carlos Murguia permitting the plaintiff to file his contract and fiduciary claims in state court (See Exb. 1 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19). The defendants were required to appeal the decision to retain the state claims in federal court:

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

Amazon Inc. v. Dirt Camp Inc., 273 F.3d 1271 at 1276 (10th Cir., 2001), The necessity of appeal to thwart a follow on state court action has been established in the Tenth Circuit since 1992:

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

BUI v. IBP Inc. at fn 1 (2002). The plaintiff appealed, suspending the effect of Judge Murguia's dismissal of federal claims, which the defendants contest and the Tenth Circuit action is captioned *Medical Supply Chain, Inc. and Samuel Lipari v. Neoforma, et al.*, Case No. 06-3331. Only upon the success of the plaintiff's appeal can the defendants return these state claims to federal court. Possibly, the defendants can obtain relief from neglect or inadvertence from Judge Murguia and be permitted to file an untimely Rule 59(e) motion if they can demonstrate good cause.

III. Diversity Does Not Exist

The plaintiff concedes that the US Supreme Court has just determined that national associations are to be treated as residents of the state in which they have a principal place of business but that does not

save the defendants' removal from being frivolous. Diversity jurisdiction still does not exist, despite the movement of pendant (supplemental) claims to state court:

"It is a well-settled rule that diversity of citizenship is determined as of the date the action is commenced. *Fidelity & Deposit Co. of Maryland v. City of Sheboygan Falls*, 713 F.2d 1261, 1266 (7th Cir.1983); *Benskin v. Addison Township*, 635 F.Supp. 1014, 1017 (N.D.Ill.1986); C.A. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3608 (2d ed. 1984). At the time plaintiff commenced this suit, there was no diversity of citizenship between the parties and therefore no basis for diversity jurisdiction. It does not matter that plaintiff amended his complaint after he moved to Ohio. The amendment relates back to the date the lawsuit was commenced. See Fed.R.Civ.P. 15(c). There still was no diversity jurisdiction. *Oliney v. Gardner*, 771 F.2d 856, 858-59 (5th Cir.1985); Wright, Miller, & Cooper, § 3608 at 458-59. There is no diversity jurisdiction over Disher's state law claims; there is only pendent jurisdiction over those claims."

Disher v. Information Resources, Inc., 691 F.Supp. 75 at 81. (N.D. Ill., 1988). Here, the claims were filed with the Missouri domiciled defendant Shughart, Thomson & Kilroy as a defendant. Diversity did not exist. Nor does it exist at the time of removal of the concurrent state case because the US District Court still has original federal question jurisdiction over all supplemental claims under 28 U.S.C. § 1367(a). Alternatively the Missouri domiciled defendant Shughart, Thomson & Kilroy is in Privity with the state law claim defendants and by virtue of Mark A. Olthoff's (Mo. Lic #38572) entry of appearance, directly represented in state court.

IV. Comity

The defendants are attempting to have the "Judges of the Western District of Missouri" violate the time honored principal of Federal Comity in usurping the Kansas District Court's original federal question jurisdiction and continuing supplemental jurisdiction over all claims arising from the same controversy under 28 U.S.C. § 1367(a):

"Principles of comity come into play when separate courts are presented with the same lawsuit. When faced with such a dilemma, one court must yield its jurisdiction to the other, unless one court has exclusive jurisdiction over a portion of the subject matter in dispute. Principles of comity suggest that a court having jurisdiction over all matters in dispute should have jurisdiction of the case. Otherwise, the fractioned dispute would have to be resolved in two courts."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 at 1173 (C.A.11 (Fla.), 1982). The Tenth Circuit in which this action currently has its federal existence and this court's Eight Circuit both adhere to the "first to file" rule giving jurisdiction to *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS, now Kansas District Court Case No. 05-2299-CM:

"As detailed above, nearly two years have gone by while this case has proceeded on identical complaints in two jurisdictions. Generally, the doctrine of federal comity permits a court to decline jurisdiction over an action when a complaint involving the same parties and issues has

already been filed in another district. *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-5 (9th Cir.1982). Hence, courts follow a "first to file" rule that where two courts have concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case. *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1163 (10th Cir.), cert. denied, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982). The Eleventh Circuit has similarly stated that "[i]n the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case." *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 675 F.2d 1169, 1174 (11th Cir.1982). The purpose of this rule is to promote efficient use of judicial resources. The rule is not intended to be rigid, mechanical, or inflexible, but should be applied in a manner serving sound judicial administration. *Pacesetter Systems, Inc.*, 678 F.2d at 95.

We conclude that the federal comity doctrine is best served in this case by dismissing Orthmann's action in Minnesota district court. Although he filed his action first in Minnesota, the decision by the Seventh Circuit means that the controversy is now further developed in the Wisconsin district court."

Orthmann v. Apple River Campground, Inc., 765 F.2d 119 at 121 (C.A.8 (Minn.), 1985).

And as the *Orthmann* court shows, the exception proves the rule. The Kansas District court now being appealed in the Tenth Circuit has developed the case further than the Western District of Missouri.

In a possible future contest between state court and the District of Kansas, the state court would likely then lose:

"In absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case. *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971). It should make no difference whether the competing courts are both federal courts or a state and federal court with undisputed concurrent jurisdiction. There are no reasons compelling the federal court, last into this case, which remanded after removal proceedings, to decide the case."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 at 1174 (C.A.11 (Fla.), 1982).

CONCLUSION

This court is required to remand this case to state court. The Western District of Missouri has no jurisdiction to overturn Judge Murguia's order on 03/07/2006 over the claims now captioned *Samuel K. Lipari v US Bank NA, et al* Missouri 16th Cir. State Court Case No. 0616-CV32307 which are concurrent in jurisdiction with and part of the same case or controversy as the federal court case *Medical Supply Chain, Inc. v Neoforma et al*, Case No. 05-2299-CM under 28 U.S.C. § 1367(a). Diversity jurisdiction removal under 28 U.S.C. § 1441 *et seq* is inapplicable where a US District Court in the District of Kansas is already exercising original federal question jurisdiction over the parties and diversity did not exist at the time the action was filed originally as *Medical Supply Chain, Inc. v. Neoforma, et al.*, Case No. 05-0210-CV-W-ODS.

The plaintiff respectfully requests that this action be remanded to Missouri state court from whence it was removed.

Respectfully submitted,



Samuel K. Lipari
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Pro se

Certificate of Service

I certify that on December 18th, 2006 I have served the opposing counsel with a copy of the foregoing notice using the CM/ECF system which will send a notice of electronic filing to the following:

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U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION



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Exhibits

- Exb. 1. Tenth Circuit Docket
- Exb. 2. Original Complaint cover page.
- Exb. 3 Motion for Recusal
- Exb. 4. St. Luke's Baldrige Award Application at pg. 7.
- Exb. 5 Case 05-cv-02299-CM-GLR Doc. 78 Filed 03/07/2006 at page 19.

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United States Court of Appeals for the Tenth Circuit

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United States Court of Appeals for the 10th Circuit Case Summary

Court of Appeals Docket #: 06-3331

Filed: 9/15/06

Nsuit: 3410

Medical Supply Chain v. Neoforma, Inc., et al

Appeal from: United States District Court for the District of Kansas

Lower court information:

District: 1083-2 : 05-CV-2299-CM

Ordering Judge: Carlos Murguia, District Judge

10/4/06 [1961739] Notice of appearance filed by Mark A. Olthoff, Andrew M. DeMarea as attorneys for US Bancorp NA, US Bank NA, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray, Andrew S. Duff. CERT. OF INTERESTED PARTIES (y/n): n. (na)

10/6/06 [1962677] Fee paid. Date paid in District Court on 10/3/06. (lab)

10/6/06 [1962731] Notice of appearance filed by Robert A. Henderson and Kathleen A. Hardee as attorney for Shugart Thomson. CERT. OF INTERESTED PARTIES (y/n): n. (kf)

10/6/06 [1962734] Appellees' Rule 26.1 Disclosure Statement filed by Appellee Shugart Thomson. Original and 3 copies. c/s: y. (kf)

10/10/06 [1962951] Order filed by Clerk - Docketing statement and transcript order form due 10/24/06 for counsel for appellants Samuel K. Lipari and Medical Supply Chain. Parties served by mail. (kf)

10/16/06 [1965283] Notice of appearance filed by Ira Dennis Hawver as attorney for Medical Supply Chain and Samuel K. Lipari. CERT. OF INTERESTED PARTIES (y/n): y. (at)

10/16/06 [1965290] Docketing statement filed by Medical Supply Chain and Samuel K. Lipari. Original and 4 copies c/s: y. (at)

10/16/06 [1965297] Notice received from Appellants Medical Supply Chain and Samuel K. Lipari that a transcript is not necessary for this appeal. Notice due that record is complete 10/27/06 for Ralph L. DeLoach. (at)

10/25/06 [1968198] Filed notice record is complete 10/23/06.

Appellant's brief and appendix due 12/4/06 for Samuel K. Lipari and Medical Supply Chain. (lab)

11/21/06



[1977110] E-Motion Appellees' motion to dismiss untimely appeal received from appellees Neoforma, Inc., et al. Submission type: email (kf)

11/22/06

[1977513] "Appellees' Motion to Dismiss Untimely Appeal" [06-3331] filed by Neoforma, Inc., Robert J. Zollars, Volunteer Hospital, Curt Nonomaque, University Health, Robert J. Baker, US Bancorp NA, US Bank NA, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray, Andrew S. Duff, Shugart Thomson, Watkins Boulware, PC and Novation LLC. Original and 7 copies. c/s: y. (kf)

11/28/06



[1979292] Other E-document received from Medical Supply Chain, Samuel K. Lipari. Pleading type: Response to Appellees' motion to dismiss for timeliness of Appellant's notice of appeal. Submission type: email (kf)

12/5/06



[1981838] Other E-document received from Neoforma, Inc., Robert J. Zollars, Volunteer Hospital, Curt Nonomaque, University Health, Robert J. Baker, US Bancorp NA, US Bank NA, Jerry A. Grundhoffer, Andrew Cesere, Piper Jaffray, Andrew S. Duff, Shugart Thomson, Watkins Boulware, PC, and Novation LLC. Pleading type: Appellees' Reply to Appellant's Response to Appellees' Motion to Dismiss Untimely Appeal. Submission type: email (kf)

12/6/06

[1982068] Reply to Response to Motion to Dismiss filed by Neoforma, Inc., et al (appellees), Original and 3 copies. c/s: y (na)

12/7/06

[1982579] Response to Appellee's Motion to Dismiss for Timeliness of Appellants' Notice of Appeal filed by Medical Supply Chain and Samuel K. Lipari. Original and 7 copies. c/s: y. (at)

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

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

COMPLAINT

Comes now the plaintiff Medical Supply Chain, Inc., through its counsel, Bret D. Landrith and makes the following complaint for federal antitrust and state contract related claims.

Outline of Petition

Jurisdiction

1. Subject Matter Jurisdiction
2. Personal Jurisdiction
3. Venue
4. Governing Law

Facts

1. Parties
 - a. Plaintiff
 - b. Defendants
 - c. Coconspirators Not Named As Defendants In This Action
2. The Relative Markets
 - a. The Nationwide Hospital Supply Market
 - b. The Nationwide e-commerce Hospital Supply Market
 - c. The Upstream Healthcare technology Company Capitalization Nationwide Market
3. Anticompetitive Activity in the Subject Relevant Markets
 - a. The Harm To Buyers In The Market
 - i. The Harm to Hospitals
 - ii. The Harm To Healthcare Services Consumers
 - iii. Loss of Healthcare Insurance
 - iv. The Injury To Healthcare Insurance Plans
 - v. The Loss Of Life From Decreased Access To Healthcare
 - b. The Harm to Medical Supply
 - c. The Need For Private Antitrust Enforcement
 - i. The Limited Resources Of The US Department Of Justice

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

SAMUEL K. LIPARI	)	
	)	
<i>Plaintiff,</i>	)	
v.	)	Case No. 06-0573-CV-W-FJG
	)	
GENERAL ELECTRIC COMPANY	)	
GENERAL ELECTRIC CAPITAL BUSINESS	)	
ASSET FUNDING CORPORATION,	)	
GE TRANSPORTATION SYSTEMS GLOBAL	)	
SIGNALLING, LLC.	)	
<i>Defendants.</i>	)	

MOTION FOR RECUSAL UNDER 28 U.S.C. § 455(a) and (b)(4)

Comes Now the plaintiff Samuel K. Lipari appearing *pro se* and respectfully requests recusal of the trial judge in this matter.

STATEMENT OF FACTS

1. Hon. Judge Gaitan is a Director of St. Luke's Health System, Inc. in Shawnee, Kansas

<http://www.judicialwatch.org/judges/2005/gaitanfj.pdf> at page 1 See Attachment 1

2. St. Lukes Health System is an owner of VHA/Novation and does over \$97 million dollars of business with them.

“SLHS is a shareholder and owner of VHA/Novation, the largest Group Purchasing Organization (GPO) in the nation. SLHS accessed 885 VHA/Novation contracts with a total spending of \$97 million in 2002. VHA/Novation validates the quality, market share, and availability of the various vendors, and provides SLHS as much as a 6% increase in discounts plus an average 2% rebate for every contract dollar spent, thereby supporting the achievement of SLH objectives. Most key suppliers are accessed through VHA/Novation.”

http://baldridge.nist.gov/PDF_files/Saint_Lukes_Application_Summary.pdf at page 7 See Attachment 2

3. The plaintiff's complaint at ¶¶ 78-80 identifies Neoforma, Inc. a direct competitor of the plaintiff's owned by VHA and Novation and therefore St. Luke's Health System, Inc.

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

79. 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.

80. “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.”

4. VHA and Novation's sale of Neoforma was required because Novation was having to support

Neoforma losses with \$61.0 million dollars a year:

“Independent Consultants Engaged to Assess Neoforma’s Offering to Novation

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

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

5. The plaintiff is in litigation against VHA and Novation, both owned by Hon. Judge Gaitan’s hospital in a related case first filed in Missouri District court , then transferred to Kansas District court and now on appeal in the Tenth Circuit. *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210 KS Dist. Court case no.:05-2299, 10th Cir. case No. 06- 3331.

6. The plaintiff’s antitrust lawsuit against VHA and Novation alleges that the cartel secures anticompetitive long term exclusive contracts with hospitals through kickbacks to hospital boards of directors and the award of lucrative personal consulting agreements in a conflict of interest with their respective institutions.

“a. The defendants’ hospital group purchasing enterprise

134. Robert J. Baker, UHC, Curt Nonomaque and VHA distribute hospital supplies by corrupting administrators in health systems (hospitals, hospital groups and independent distribution networks) that support the provision of services or provide services to Medicare, Medicaid and Champus funded patients. UHC and VHA employ marketing schemes that provide remunerations to healthcare systems under contracts in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b.

135. Robert J. Baker, UHC, Curt Nonomaque and VHA encourage health systems to violate § 1320a-7b(b)(1) by receiving unlawful remunerations which are labeled as “rebates” and are paid periodically based on the products used by the health system and its loyalty to the terms of the anticompetitive exclusive agreement with the group purchasing organization, UHC, VHA or Premier which control 70% of the hospital supply market.

136. Robert J. Baker, UHC, Curt Nonomaque and VHA encourage their member hospitals to believe the group purchasing organizations are saving money by communicating the “value” of the rebates they are receiving as contrasted against the constantly increasing prices of hospital supplies allowed into UHC, VHA’s distribution system.

137. The corrupting subtext of Robert J. Baker, UHC, Curt Nonomaque and VHA’s marketing scheme is knowingly encouraging that third party payers, chiefly Medicare, Medicaid and Champus are billed for the artificially inflated list price, not the actual cost to the health system once the cash and cash substitute remunerations are factored in.

138. Robert J. Baker, UHC, Curt Nonomaque and VHA violate § 1320a-7b(b)(2) because they knowingly and willfully pay and offer to pay the unlawful remunerations. To provide cover for the spiraling prices in the product lists of chosen hospital suppliers who are protected from competition in UHC and VHA’s captive market, Robert J. Baker, UHC, Curt Nonomaque and VHA generate flawed studies that extol the discount in the form of rebates as a savings over the monopoly “list” price for healthcare supplies.

139. The constant threat to the corrupt marketing scheme employed by UHC and VHA is access to real data from which to evaluate the actual costs imposed upon member hospitals by the artificially inflated distribution system, which would be destabilized by independent actions of participating hospitals and suppliers.

140. Robert J. Baker, UHC, Curt Nonomaque and VHA have protected against this destabilizing by forcing hospitals and suppliers into long-term anticompetitive exclusive dealing contracts that harshly penalize every violation. Out of a misguided fear of antitrust liability, the contracts typically assign market share limiting each health system to 95% of its purchasing through the dominant group purchasing organization and require a token share of products to be purchased through a “competing” group purchasing organization.

141. Robert J. Baker, UHC, Curt Nonomaque and VHA have also commanded loyalty among member health systems by making cash and cash substitute payments to health system board members and chief administrators in return for participation in the cost inflation scheme.

142. Many forms of the Defendants’ cash and cash substitute payments to hospital administrators are concealed as “consulting contracts” and are not reported to Medicare, Medicaid or Champus or subtracted from the costs of hospital supplies transferred to third party payers.

143. Robert J. Baker, UHC, Curt Nonomaque, VHA and Novation LLC have made use of payments to a third party in which hospital CEO’s are stakeholders in order to conceal the commercial bribe nature of the payments. An organization called the Healthcare Research and Development Institute (www.hrdi.com) has existed since the late 1990s. HRDI has approximately 35 members who are hospital CEOs (many are heavily involved in supporting GPOs). The Institute’s clients are large manufacturers, publishers, and large consulting firms. Each client pays the Institute and the members of the Institute, who are also its shareholders, are paid out of the profits of the organization. For hospital CEOs to personally receive payments from companies that they do business with is a serious conflict of interest and a failure to fulfill their fiduciary responsibility.”

¶¶ 134-143 of plaintiff’s action *Medical Supply Chain, Inc. v. Novation, et al*, W.D. MO case no. 05-0210.

MEMORANDUM OF LAW

The federal recusal statute, 28 U.S.C. § 455(a), requires that “any justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The appearance of partiality – and not actual bias – is the test for recusal under Section 455(a): “In applying § 455(a), the judge’s actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue.” *United States v. Cooley*, 1

F.3d 985, 993 (10th Cir. 1993).

Congress established the “appearance of impartiality” standard “to promote public confidence in the integrity of the judicial process.” *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). The legislative history of § 455(a) is clear:

This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge’s impartiality, he should disqualify himself and let another judge preside over the case.

H. Rep. No. 93-1453, p. 5 (1974), U.S. Code Cong. & Admin. News 1974, p. 6355. In the words of the Seventh Circuit, “Once a judge whose impartiality toward a particular case may reasonably be questioned presides over that case, the damage to the integrity of the system is done.” *Durhan v. Neopolitan*, 875 F.2d 91, 97 (1989).

The facts of Hon. Judge Gaitan’s fiduciary interest in St. Luke’s Health System, Inc. and its ownership interest in VHA/Novation, alleged by the plaintiff’s complaint to be acting in concert with the defendants over the sale of the plaintiff’s competitor Neoforma to prevent the plaintiff from entering the hospital supply marketplace more than satisfy Section 455(a), which mandates recusal merely when a Justice’s impartiality “might reasonably be questioned.” Independently, the plaintiff’s ongoing litigation against VHA and Novation also mandates recusal under Section 455(a).

It is beyond contest that Hon. Judge Gaitan as a fiduciary through being a Director of St. Luke’s Health System, Inc. with an ownership interest in VHA/Novation which the plaintiff is suing in a related action requires Hon. Judge Gaitan’s recusal under 28 U.S.C. § 455(b)(4).

Whereas for the above mentioned reasons, the plaintiff who has not forfeited his right to remand this action back to state court now respectfully requests that the judge hearing this matter recuse himself.

Respectfully submitted,

Samuel K. Lipari *Pro se*

Certificate of Service

This is to certify that a copy of the foregoing notice was mailed postage pre-paid along with a copy of the Proposed Order, this 8th day of November, 2006, to the following:

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

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

impact the quality of care and the effectiveness of care delivery, and second, non-labor expenses are a significant component of SLH costs. Suppliers are categorized as follows:

- **Partners** – those organizations or individuals that directly support care delivery and for which there are reciprocating relationships, or dual requirements. Physicians, our most important partner, are managed through a Physician Partnering Process.
- **Key Suppliers** – those suppliers that represent the highest volume of purchasing combined with the criticality of items purchased. It is imperative that SLH have access to the highest quality products and services matched with the most reasonable cost. To achieve that objective, SLH has implemented a Supplier Management Process that includes sub-processes to certify and select suppliers, negotiate contracts, procure supplies, manage receipt and delivery, evaluate supplier performance, and manage supplier communications. SLH maintains ongoing communications with all key supplier and partner groups. Representatives of SLH meet with these groups monthly to discuss supplier performance, improvement opportunities, SLH requirements, issues regarding the supplier's products and services, and to obtain feedback on SLH performance in meeting supplier needs. In addition, more frequent communication is conducted via telephone, e-mail and mail, and partners have access to the SLH intranet.

Figure OP-3 identifies SLH partners and key suppliers and their key requirements. As indicated above, the partner groups have dual requirements. Physician requirements of SLH include reliability, access, responsiveness, competency, and high patient satisfaction; Johnson Controls' requirements of SLH include timely payment of bills and communications. Both of these partner groups are integrated into SLH key processes, including leadership, strategic planning, patient focus, measurement, staff focus, and process management. SLHS is a shareholder and owner of VHA/Novation, the largest Group Purchasing

Key Supplier/Partner	Items Procured	Key Requirements
Partners		
• Physicians	• Care Delivery	• Patient Admissions • Patient Referrals • Competency • High Patient Sat • Resource Mgmt
• Johnson Controls	• Facilities Maintenance	• Timeliness • Accuracy • Process Integration
Key Suppliers		
• Burrows	• Med/Surg supplies	• Reasonable Cost
• Amerisource Bergen	• Pharmaceuticals	• Timely Delivery
• Sysco	• Food and Nutrition	• Accuracy of Receipt
• Cardinal	• Lab products	• Product/Svc Quality
• Source One	• Radiology products	
• Medtronics	• Cardiovascular Svcs	
• McKesson	• IT Products & Svcs	

Figure OP-3 SLH Partners and Key Suppliers

Organization (GPO) in the nation. SLHS accessed VHA/Novation contracts with a total spending of \$97 million in 2002. VHA/Novation validates the quality, market share, availability of the various vendors, and provides SLHS as a 6% increase in discounts plus an average 2% rebate every contract dollar spent, thereby supporting the achievement of SLH objectives. Most key suppliers are accessed through VHA/Novation.

P.2 Organizational Challenges

P.2a Competitive Environment

P.2a (1) SLH competes in a dynamic, ever-changing health care market. The greater Kansas City health care market is currently dividing into large "systems of care" that compete for patients by providing a broad continuum of services such as primary care, inpatient hospitalization, rehabilitation, home care and end-of-life care. Two major systems of care have evolved in the Kansas City area: SLHS and HCA. SLHS has 3 hospitals located in the metropolitan Kansas City market and HCA has 4 hospitals in the metropolitan area. In total, there are 23 medical surgical acute care hospitals within the greater Kansas City metropolitan area. Locally, SLH competes for tertiary patients with Research Medical Center (RMC), Kansas University Medical Center (KUMC), Shawnee Mission Medical Center (SMMC), Independence Regional Medical Center (IRMC), Providence Medical Center (PMC), and North Kansas City Hospital (NKCH).

Even though SLH must compete for patients and caregivers, it recognizes that collaborations are a vital component for success. Therefore, in 1999 SLH partnered (minority ownership) with Johnson County, Kansas, the Kansas City Orthopedic Institute (KCOI), thus allowing SLH to retain the best orthopedic surgeons in Kansas City on its staff. In addition, in 2001 SLH partnered with HCA's predecessor to establish The Cancer Institute (TCI), a comprehensive oncology, diagnostic and treatment hospital within the confines of SLH and RMC in order to attract regional cancer patients to Kansas City, obtain National Cancer Institute designation, and provide a comprehensive cancer care that was previously provided by competing cancer facilities in the Midwest region.

P.2a (2) SLH believes that there are a number of principal factors that have helped it achieve success as a market leader and will serve to ensure this success continues in the future. These factors are shown in Figure OP-4.

P.2a (3) SLH key sources of comparative data are shown in Figure OP-5. These data sources provide comparisons with the health care industry to similar types of hospitals across the country, within Missouri, and in some cases, local market hospitals. Comparisons are generally in the form of industry averages or quartile level performance. While these data are readily available, there is less ability to gather direct comparative performance data other than financial information, and the

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, 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)

Plaintiff alleges that all defendants, through defendants US 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

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.*

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 (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).