

CASE NO. 06-3331

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

MEDICAL SUPPLY CHAIN, INC,

Plaintiff - Appellant,

v.

**NEOFORMA, INC., ROBERT J. ZOLLARS, VOLUNTEER HOSPITAL
ASSOCIATION, CURT NONOMAQUE, UNIVERSITY HEALTH SYSTEM
CONSORTIUM, ROBERT J. BAKER, US BANCORP N.A., U.S. BANK
NATIONAL ASSOCIATION, JERRY A. GRUNDHOFER, ANDREW
CECERE,
PIPER JAFFRAY COMPANIES, ANDREW S. DUFF,
SHUGHART THOMSON & KILROY, WATKINS BOULWARE, P.C.,
and NOVATION, LLC**

Defendants - Appellees,

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

**APPELLEES' REPLY TO APPELLANT'S RESPONSE TO
APPELLEES' MOTION TO DISMISS UNTIMELY APPEAL**

**TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT:**

Pursuant to Fed. R. App. P. 27, Appellees Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association, Curt Nonomaque, University Health System Consortium, Robert J. Baker, US Bancorp N.A., U.S. Bank National

Association, Jerry A. Grundhofer, Andrew Cecere, Piper Jaffray Companies, Andrew S. Duff, Shughart Thomson & Kilroy, Watkins Boulware, P.C., and Novation, LLC (hereinafter, collectively, “Appellees”) file this Reply to Appellant’s Response to Appellees’ Motion to Dismiss Untimely Appeal. Appellees would respectfully show this Court as follows:

1. It is undisputed that Appellants’ September 8, 2006 Notice of Appeal was filed more than 180 days after the U.S. District Court for the District of Kansas entered its March 7, 2006 Order dismissing the claims of Appellant Medical Supply Chain, Inc. and granting Motions for Sanctions filed by several of the Appellees.

2. It is also undisputed that Appellant’s Notice of Appeal was filed more than 30 days after the District Court struck Appellant’s Motion for Reconsideration of that dismissal and sanctions Order (which occurred on August 7, 2006).

3. In its Response to Appellees’ Motion to Dismiss, Appellant (1) denies that it is appealing the March 7, 2006 Order and instead claims that it is appealing the order striking its Motion for Reconsideration; and, (2) argues that it has until the expiration of 180 days after the date of the order striking its Motion for Reconsideration was entered on the District Court’s docket.

4. Appellant's claim that it is not appealing the March 7, 2006 Order is flatly contradicted by its own Notice of Appeal which complains of the relief granted in the "trial court's order granting dismissal." See Notice of Appeal at 1. In addition, Appellant's own docketing statement identifies March 7, 2006 as the "[d]ate final judgment or order to be reviewed was entered on the district court docket." See Docketing Statement at 2. The docketing statement makes no mention of the August 7, 2006 Order striking the Motion for Reconsideration that Appellant now claims is the basis for this appeal (Appellant's confusion as to its previous Notice of Appeal and docketing statement is likely due to Appellant's concession that its post-dismissal pleadings were improperly filed by Samuel Lipari, an individual who is neither an attorney, nor a party to this proceeding).

5. Even if Appellant was correct that it is appealing the August 7, 2006 Order, however, ***the appeal is still untimely.*** That is because Appellant gets the law wrong when it attempts to rely on Federal Rule of Civil Procedure 58 to add 150 days to its time to appeal the order striking its Motion for Reconsideration. It is true that some judgments must be set forth on a separate document pursuant to Federal Rule of Civil Procedure 58 and that, if there is no such separate document issued, the judgment is deemed entered 150 days after the entry in the civil docket of the order.

See FED. R. CIV. P. 58(a) & (b). However, Rule 58 expressly provides that no separate judgment is required for an order disposing of a motion to alter or amend the judgment under Rule 59. See *id.* at 58(a)(1)(D). Section 58(b)(1), therefore, controls and provides that the Order is “entered” for purposes of calculating the appeal date on the date it is entered in the civil docket. *Id.* at 58(b)(1).

6. Thus, the order denying Appellant’s Motion for Reconsideration is deemed entered on August 7, 2006 and Appellant failed to file its Notice of Appeal within 30 days of that date. The appeal should be dismissed because it is untimely and, as a result, this Court lacks jurisdiction over this case.

WHEREFORE, PREMISES CONSIDERED, Appellees pray that this Court dismiss this appeal and order all costs to be borne by the party incurring those costs. Appellees also pray that this Court grant such other and further relief to which Appellees may be justly entitled.

Respectfully Submitted,

s/ John K. Power

John K. Power, # 70448
HUSCH & EPPENBERGER, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596
John.Power@Husch.com
Attorneys for Appellees Novation, LLC,
Volunteer Hospital Association, Curt
Nonomaque, University Healthsystem
Consortium, Robert J. Baker

s/ Stephen N. Roberts

Stephen N. Roberts
Janice Vaughn Mock
NOSSAMAN, GUTHNER, KNOX &
ELLIOTT, LLP
50 California Street, 34th Floor
San Francisco, CA 94111
(415) 398-3600
(415) 398-2438 (Fax)
SRoberts@Nossaman.com
JVaughnMock@Nossaman.com
Attorneys for Appellees Neoforma, Inc.
and Robert Zollars

s/ Mark A. Olthoff

Mark A. Olthoff
SHUGHART THOMSON & KILROY, PC
1700 Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (Fax)
molthoff@stklaw.com

Andrew M. DeMarea
SHUGHART THOMSON & KILROY, PC
32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway
Overland Park, KS 66210
(913) 451-3355
(913) 451-3361 (Fax)
ademarea@stklaw.com
Attorneys for Appellees Us Bancorp,
U.S. Bank National Association and
Piper Jaffray Companies

s/ Kathleen A. Hardee

Kathleen A. Hardee
SHUGHART THOMSON & KILROY, PC
1700 Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, Missouri 64105-1929
(816) 421-3355
(816) 374-0509 (Fax)
khardee@stklaw.com
Attorneys for Appellee Shughart
Thomson & Kilroy, P.C.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that: (1) this Motion was submitted electronically to the Clerk at the e-mail address esubmission@ca10.uscourts.gov on December 5, 2006; (2) no privacy redactions were necessary and every document submitted in Digital Form or scanned PDF is an exact copy of the written document being filed with the Clerk; and (3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (specifically, Norton AntiVirus Corporate Edition, Program Version 7.61.939, Scan Engine Version 4.1.0.22, Virus Definition File 10/25/2006 rev. 39) and, according to the program, are free of viruses.

s/ John K. Power

John K. Power, # 70448
HUSCH & EPPENBERGER, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596
John.Power@Husch.com
Attorneys for Appellees Novation, LLC,
Volunteer Hospital Association, Curt
Nonomaque, University Healthsystem
Consortium, Robert J. Baker

CERTIFICATE OF SERVICE

I certify that in addition to the service requirements of the Federal Rules of Appellate Procedure and Tenth Circuit Rules, identical copies of the materials submitted to the Clerk in Digital Form were simultaneously provided to counsel for all other parties hereto by e-mail on December 5, 2006.

In addition to e-mail, copies were mailed by first class U.S. Mail, postage prepaid, this same date to:

Ira Dennis Hawver, Esq.
6993 Highway 92
Ozawkie, KS 66070
hawverlaw@hughes.net

s/ John K. Power

John K. Power, # 70448
HUSCH & EPPENBERGER, LLC
1200 Main Street, Suite 1700
Kansas City, MO 64105
Telephone: (816) 421-4800
Facsimile: (816) 421-0596
John.Power@Husch.com
Attorneys for Appellees Novation, LLC,
Volunteer Hospital Association, Curt
Nonomaque, University Healthsystem
Consortium, Robert J. Baker