IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	
Plaintiff,	
v.	**CIVIL ACTION**
	No. 03-2324-CM
GENERAL ELECTRIC COMPANY, et al.,	
Defendants.	

MEMORANDUM AND ORDER

Plaintiff Medical Supply Chain (MSC) brings this action against defendants General Electric Company (GE), General Electric Capital Business Asset Funding Corporation (GE Capital), General Electric Transportation Systems Global Business Signaling (GETS), and Jeffrey R. Immelt, Chief Executive Officer of GE. Plaintiff alleges that GE, GE Capital, GETS, and Immelt violated federal antitrust laws and Missouri common law by refusing to sublease a building or provide financing to plaintiff. This matter is before the court on defendants' Motion to Dismiss Amended Complaint (Doc. 8), plaintiff's Request for Extension of Time Under Local Rule 6.1 (Doc. 10), and defendants' Motion for Rule 11 Sanctions (Doc. 13).

I. Plaintiff's Request for Extension of Time Under Local Rule 6.1

On August 21, 2003, defendants filed their Motion to Dismiss Amended Complaint (Doc. 8). On September 9, 2003, plaintiff requested an extension of time in which to answer defendants' motion. The

court hereby grants plaintiff's request for an extension of time. Accordingly, the court will consider plaintiff's response brief, which was filed on October 1, 2003.

II. Motion to Dismiss Amended Complaint

A. Standards

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive, *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff, *Witt v. Roadway Express*, 136 F.3d 1424, 1428 (10th Cir. 1998). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984).

B. Background Facts

1. The Parties

As alleged, plaintiff spent ten years developing technology and has spent the last three years completing the research and development for commercialization of an Internet-based service to manage strategic data and provide direct support to buyers and sellers that make up the healthcare supply chain. This service is designed to permit plaintiff to provide "hospital supplies through e-commerce."

Plaintiff alleges that defendant GE distributes equipment, parts, and credit services to hospitals. Plaintiff does not allege that GE provides any service (Internet-based or otherwise) relating to the healthcare supply chain or that it competes in the business of selling "hospital supplies through e-commerce." GE is a shareholder of Global Healthcare Exchange (GHX), which plaintiff alleges is an "electronic marketplace promising online distribution at lower prices to hospitals" that competes in the market to provide hospital supplies through e-commerce. GE's share of the ownership of GHX is not alleged, and GHX is not a named defendant in this action.

Defendant Immelt is currently the Chief Executive Officer of GE. Previously, as President of GE Medical Systems, defendant Immelt oversaw GE's capitalization of GHX in 2000. Plaintiff alleges that defendant Immelt allied GHX with the other Internet marketplace, Neoforma, Inc. (also not a party to this action), to control 80% of the existing hospital supply e-commerce market.

Defendant GE Capital is a GE subsidiary performing GE's commercial lending operations. GE Capital is not alleged to provide hospital supply chain services or compete in providing hospital supplies through e-commerce.

Defendant GETS, a GE subsidiary, is a global supplier of ground transportation products. GETS assumed a lease on a building at 1600 N.E. Coronado Drive, Blue Springs, Missouri (the "Blue Springs Building") when it bought Harmon Industries, Inc., a railroad signal company. Like GE and GE Capital, GETS is not alleged to provide hospital supply chain services or compete in hospital supplies through e-commerce.

2. The Dispute

On or about June 1, 2002, Samuel Lipari, Chief Executive Officer of plaintiff MSC, contacted a leasing agent regarding the Blue Springs Building. Lipari was interested in sub-leasing a portion of the building wherein plaintiff could conduct its hospital e-commerce business. The leasing agent indicated to Lapari that the building already was leased and that the existing lessee only would sub-lease the entire building. GETS was the existing lessee at the time.

Lipari contacted the building owner, who agreed to sell plaintiff the building for the remaining balance of GETS's seven-year lease ($5.4 million). The building owner provided Lipari with a letter of intent to sell the building to plaintiff.

As alleged, plaintiff was unable to obtain financing from a national bank to purchase the building. On or about May 15, 2003, plaintiff wrote a letter to George Fricke, a property manager at GE, offering to release GE from its remaining lease obligations on the building provided that GE pay plaintiff at closing for the remainder of the 2003 lease ($350,000). Pursuant to the terms of the offer, GE Capital would provide plaintiff a twenty-year mortgage ($6.4 million), with a moratorium on the first full year of mortgage payments. In closing the letter, plaintiff sought the name of a contact person at GE Capital.

On May 15, 2003, Fricke left a voice mail message stating that "we will accept that transaction," and on the same day he followed up with an e-mail stating that "GE will accept your proposal to terminate the existing lease." Several days later, GETS representatives provided Lipari a walk-through of the property. Lipari also provided GE Capital representative Doug McKay with a loan package, which included plaintiff's financial information.

Ultimately, GE Capital chose not to finance plaintiff's purchase of the building and, as alleged by plaintiff, repudiated the parties' contract. As a consequence, plaintiff filed this suit for damages under the federal antitrust laws and state common law.

C. Discussion

1. Federal Antitrust Claims

Counts 1 through 4 of plaintiff's Amended Complaint are based on Section 1 of the Sherman Act, 15 U.S.C. § 1. In order to withstand a motion to dismiss a Section 1 claim, a plaintiff must allege an agreement between two separate entities. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984). Counts 5 through 9 allege violations of Section 2 of the Sherman Act, 15 U.S.C. § 2. A plaintiff is required to establish a relevant market to prevail on a monopolization or attempted monopolization claim under Section 2 of the Sherman Act. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002).

Defendants set forth a variety of arguments why this case should be dismissed. However, the court need not address each and every argument because, at the most fundamental level, plaintiff's antitrust claims fail.

"[A]ntitrust law is concerned with abuses of power by private actors in the marketplace. Therefore, before we can reach the larger question of whether [a defendant] violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market." *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991). "Markets are defined in terms of two separate dimensions: products and geography." *Id.* Plaintiff refers to a relevant market of "hospital supplies delivered through e-commerce in North America." (Am. Compl. ¶ 37.).

Plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America." The fact that defendant GE owns an interest in GHX, the percentage of which plaintiff does not allege, does not make defendant GE (let alone the other defendants) a competitor in the market in which GHX allegedly competes. For example, in *Spanish Broadcasting System, Inc. v. Clear Channel Communications, Inc.*, 242 F. Supp. 2d 1350 (S.D. Fla. 2003), the defendant did not compete in the alleged relevant market, but did own 26% of a firm that did compete. The court dismissed the plaintiff's antitrust claims, holding that this ownership interest did not convert the defendant into a competitor in the relevant market. *Id.* at 1363. *Accord Invamed, Inc. v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 219 (S.D.N.Y. 1998) ("that the [defendants] possess market power through their alleged ownership interests in [a market participant], standing alone, does not satisfy the pleading requirements of a monopolization or attempted monopolization claim.").

Because plaintiff does not allege that any of the named defendants compete in the market of "hospital supplies delivered through e-commerce in North America," the court turns to whether plaintiff has alleged an agreement with a market participant who does compete in that market.

In the Amended Complaint, plaintiff alludes to an agreement between defendants and "other healthcare suppliers" and agreements with "other suppliers and electronic marketplaces." (Am. Compl. ¶¶ 33, 36.) As such, even if the Amended Complaint adequately alleged an agreement between any defendant and GHX, or any defendant and Neoforma, Inc., it would be a vertical agreement, because no defendant is alleged to compete with either of these companies. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been

denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.").

With that in mind, a vertical agreement in which firms agree that they will deal only with each other (or not deal with each others' competitors) is considered an "exclusive dealing arrangement." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 473 n.2 (3rd Cir. 1992). Exclusive dealing arrangements, like other non-price vertical restraints, are analyzed under the rule of reason. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44-45 (1984).

Among other things, this means a plaintiff seeking to challenge an exclusive dealing arrangement must demonstrate the defendant possesses market power, as this is a prerequisite to being able to restrain trade unreasonably. *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 663 F. Supp. 1360, 1478 (D. Kan. 1987). In other words, the exclusive dealing arrangement is unlawful only if the defendants have market power, which is defined as "the power to control prices or the power to exclude competition." *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 n.3 (10th Cir. 1986).

As previously stated, plaintiff never alleges that any of the named defendants either possess or are attempting to possess market power in the relevant market of "hospital supplies delivered through e-commerce in North America." Rather, plaintiff's antitrust claims are based upon defendants' denial of corporate financing and its refusal to transfer real property to plaintiff. As such, the market that the court must consider in determining whether defendants engaged in anti-competitive conduct is the commercial real estate market and the related market of potential financiers.

Defendants are by no means the only holders of commercial real estate in Blue Springs, Missouri, and in no way control the commercial real-estate financing market. Even more importantly, plaintiff does not

allege such facts. It appears from the Amended Complaint that plaintiff sought and was denied financing from other financial institutions. However, plaintiff cannot sustain an antitrust claim against defendants – the final party to deny financing – absent an allegation that defendants possessed market power such that defendants' denial of financing left plaintiff with no alternative and kept plaintiff from entering the e-commerce hospital supply market. Plaintiff's inability to obtain financing could be due to a variety of factors and does not, in itself, give rise to an antitrust claim against a potential investor who may have decided to either avoid risk or to expend its resources elsewhere. Defendant GE Capital's refusal to extend credit on terms that plaintiff itself alleges to be "unusual," which included a below-market interest rate, an unusually lengthy term, and forbearance on interest payments for one year, does not constitute anti-competitive conduct.

There simply exists no allegation that defendants had the ability, through their denial of financing or the lease of office space, to lessen or destroy competition in the market of hospital supplies through e-commerce. *Coastal Fuels v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1st Cir. 1996) ("To determine whether a party has or could acquire monopoly power in a market, 'courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.'") (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)). Accordingly, even assuming as true the facts alleged in the Amended Complaint, the court concludes that defendants' conduct was not unlawful under the federal antitrust laws.

3. Robinson-Patman Act Claim

Count 10 of the Amended Complaint alleges that defendants have violated Section 2(e) of the Robinson-Patman Act. Section 2(e) makes it unlawful for a seller to:

> Discriminate in favor of one purchaser against another purchaser or purchasers of a *commodity bought for resale* . . . by . . . furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such *commodity* so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e) (emphasis added).

As a threshold matter, the Robinson-Patman Act only bars price discrimination in the sale of commodities. *See, e.g.*, *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 355-57 (1968). Plaintiff asserts that defendants have discriminated in the supply of a real estate lease or financing, but neither is a "commodity" within the ambit of Section 2(e). *See Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1328 (6th Cir. 1983) ("[D]iscriminatory practices in the extension of credit . . . are beyond the scope of either § 2(d) or § 2(e)); *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970) (lease is not a commodity); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 652 (C.D. Cal. 1978) ("It suffices to say that real estate and intangibles are not commodities within the meaning of the Act."). As such, the court dismisses plaintiff claim under the Robinson-Patman Act

4. State Law Claims

Federal district courts have supplemental jurisdiction over state law claims that are part of the "same case or controversy" as federal claims. 28 U.S.C. § 1367(a). "[W]hen a district court dismisses the federal claims, leaving only the supplemental state claims, the most common response has been to dismiss the state claim or claims without prejudice." *United States v. Botefuhr*, 309 F.3d 1263, 1273 (10th Cir. 2002) (quotation marks, alterations, and citation omitted). If the parties have already expended "'a great deal of time and energy on the state law claims,' it is appropriate for the district court to retain supplemented state claims after dismissing all federal questions." *Villalpando v. Denver Health & Hosp. Auth.*, 2003 WL

1870993, at *5 (10th Cir. 2003) (citing *Botefuhr*, 309 F.3d at 1273). This court finds no compelling reason to retain jurisdiction over the state law claims and dismisses them without prejudice.

III. Motion for Rule 11 Sanctions

Defendants move for sanctions under Federal Rule of Civil Procedure 11, based on their contentions that plaintiff filed its Amended Complaint for purposes of harassment and that plaintiff's claims were frivolous and based on neither law nor fact.

The court recognizes that in a related case entitled *Medical Supply Chain, Inc. v. US Bancorp, NA*, this court reminded plaintiff's counsel, Bret Landrith, of his obligations under Fed. R. Civ. P. 11 and cautioned him "to take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." No. Civ. A. 02-2539-CM, 2003 WL 21479192, at *6 (D. Kan. June 16, 2003). Notwithstanding, the court is unwilling at this juncture to conclude that plaintiff's Amended Complaint was so meritless or otherwise frivolous that sanctions are warranted. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, (1978) (district court must resist the "understandable temptation" of concluding that the action was unreasonable or without foundation simply because the plaintiff did not ultimately prevail). Moreover, the court dismissed plaintiff's state law claims, thereby leaving open the question of whether or not those claims have a basis in law or fact. The court denies defendants' motion for sanctions.

IT IS THEREFORE ORDERED that plaintiff's Request for Extension of Time Under Local Rule 6.1 (Doc. 10) is granted; defendants' Motion to Dismiss Amended Complaint (Doc. 8) is granted, and defendants' Motion for Rule 11 Sanctions (Doc. 13) is denied. This case is hereby dismissed.

Dated this 29 day of January 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge