UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
(Through assignee Samuel K. Lipari)	)
SAMUEL K. LIPARI	)
Plaintiff,	)
v.	) Case No. 05-2299
NOVATION, LLC	)
NEOFORMA, INC.	)
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFER	)
ANDREW CECERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY, P.C.	)
Defendants.	)

RULE 60(B) MOTION

Comes now the plaintiff Samuel K. Lipari in his individual capacity and as an assignee of all rights of Medical Supply Chain, Inc. a dissolved Missouri corporation and respectfully submits this motion to reopen the present action under F.R.Civ. P. Rule 60(b). The plaintiff respectfully requests that this case be reopened for the following reasons:

Statement of Facts

1. The US Supreme Court over ruled this court's controlling circuit's sufficiency of pleading standard shortly after the present memorandum and order were issued *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007).

2. This court overruled its determination of the plaintiff Samuel K. Lipari's standing as an assignee of the dissolved Medical Supply Chain, Inc. appearing *pro se* in the same matter which continues under the styled *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW.

3. This court did not consider the timely motion for reconsideration brought by Samuel K. Lipari bringing attention to elements of each claim that the complaint sufficiently stated due to the now overruled determination Samuel K. Lipari did not have standing to appear *pro se*.

4. The elements of each claim and their place in the complaint are also identified in the plaintiff's appeal brief at pgs. 18-32. See Appeal Brief excerpt Statement of Facts incorporated herein as **Exb. 1**

5. The Tenth Circuit Court of Appeals declined to exercise jurisdiction over the plaintiff's appeal due to untimeliness.

6. The Memorandum & Order of this court expressly states the bias this court has against this plaintiff and his representatives for vindicating the policies of the US Congress and seeking relief from the Novation LLC hospital supply cartel.

7. The court through its order threatens to injure the plaintiff and his representation if he seeks to exercise his rights in this matter which has deprived the plaintiff of meaningful representation.

8. The court's bias against the plaintiff clearly results from the court's disbelief that the conduct complained of by the plaintiff occurred.

9. The New York Times on November 18, 2007 printed a feature story of a Novation manager who witnessed all the forms of conduct of the cartel alleged in the plaintiff's complaint. See **Exb 2.**

10. The plaintiff's Missouri state law antitrust claims will be filed in Independence, Missouri unnecessarily duplicating the present litigation if the present federal claims are not reopened.

Memorandum of Law

Rule 60(b)(6) of the Federal Rules of Civil Procedure permits a court to relieve a party from final judgment as justice demands, but such relief is limited to "extraordinary situations." See *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1533 (10th Cir. 1992). An intervening change in controlling law can provide the basis of an exception to the mandate rule. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1520 (10th Cir. 1997).

Here, the court of appeals declined to exercise jurisdiction over the appeal so the issues determined by the trial court have not been reviewed. Also this matter still is in the pretrial phase and styled as *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW. The mandate is not a bar to reopening the trial court's decision: ("the 'mandate rule,' provides that a district court must comply strictly with the mandate rendered by the reviewing court.") (quotations omitted), cert. denied, 118 S.Ct. 1034 (1998) specifically where the mandate applied to a matter *sub judice*. *Ute Indian Tribe*, 114 F.3d at 1521.

This action has never ended for *sub judice* purposes because the underlying state court claims over the same conduct have not been tried. For purposes of determining the finality of an order, it must dispose of all claims. (Ordinarily, a judgment is not final unless it disposes of all claims against all parties) *Avx Corp. v. Cabot Corp*., 424 F.3d 28 (Fed. 1st Cir., 2005).

The Supreme Court case most often cited for preclusion effect of a prior 12(b)(6) dismissal was a dismissal in entirety:

> "2. The Rule 12(b)(6) dismissal that was the source of the Supreme Court's oft-cited footnote in Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), stating that "[t]he dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a `judgment on the merits,'" id. at 399 n. 3, 101 S.Ct. 2424, was likewise a dismissal of "all of the actions `in their entirety,'" id. at 396, 101 S.Ct. 2424."

Avx Corp. v. Cabot Corp., 424 F.3d 28 at fn 2 (Fed. 1st Cir., 2005).

By dismissing Medical Supply's state claims without prejudice, a determination not opposed or appealed at the time by the defendants, the trial court elected not to make a preclusive final judgment: "A final judgment embodying the dismissal would eventually have been entered if the state claims had been later resolved by the court." *Avx Corp. v. Cabot Corp*., 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). As a non-final judgment, the Memorandum & Order granting dismissal was a mere interim order. *Id*.

The disbelief articulated by the court in its decision toward the plaintiff and his claims contradicts the publicly available securities filings on the sale of Neoforma, Inc, the repeated New York Time's articles on the national market power over hospital supplies exerted by Novation LLC and the entire monopolization of hospital supplies distributed through an electronic marketplace when during the litigation, Neoforma, Inc. was combined with General Electric's GHX, LLC. See **Exb. 3**

The disbelief articulated by the court also contradicts the testimony of Ms. Elizabeth A. Weatherman, managing director of Warburg Pincus LLC before the US Senate Judiciary Committee's Sub-committee on Antitrust (See **Exb. 4**) over the effect of Novation LLC's anticompetitive conduct in preventing healthcare technology companies from receiving venture capital, confirming the averments of the plaintiff's complaint.

The Tenth Circuit itself was overruled for imposing an impermissible heightened standard of pleading and for not treating the plaintiff's averments as truthful in the pre-discovery phase:

> "Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need

only "`give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U. S. ___, ___ (2007) (slip op., at 7-8) (quoting *Conley v. Gibson*, 355 U. S. 41, 47 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp*., supra, at ___ (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); *Neitzke v. Williams*, 490 U. S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974)).

Erickson v. Pardus, No. 06-7317 (U.S. 6/4/2007) (2007).

CONCLUSION

Whereas for the above reasons, the plaintiff respectfully requests that the court reopen its Memorandum and Order dismissing the plaintiff's claims, granting sanctions and reinstate the plaintiff's claims.

Respectfully Submitted,

S/ Samuel K. Lipari

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CERTIFICATE OF SERVICE

I certify I have sent a copy via electronic case filing to the undersigned opposing counsel and via email on 2/13/08.

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S/ Samuel K. Lipari
_____
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BRIEF OF THE APPELLANT

STATEMENT OF THE CASE

Medical Supply, having lost a prospective injunctive relief action against a subset of alleged hospital supply co-conspirators brought the present action for damages against the same and additional co-conspirators resulting from their subsequent conduct, including conduct to interfere with Medical Supply's litigation.

STATEMENT OF FACTS

Medical Supply's complaint begins with a three-page outline that states the specific numbered sections where averments of facts supporting the required elements of Medical Supply's claims are stated.

At ¶¶107-108 aplt. app. at pgs. 36-39 Medical Supply states the controlling case law giving legal jurisdiction for Medical Supply's current action for damages after earlier failing to obtain prospective relief.

Medical Supply's current action does not seek to undo orders made in *Medical Supply I*.

No final judgment on Medical Supply's claims was entered in *Medical*

Supply I, the earlier action for prospective relief. Pg. 1952.

The trial court in *Medical Supply I* expressly dismissed supplemental Medical Supply claims related to contract and theft of trade secrets without prejudice and those claims were brought in Missouri state court by Samuel Lipari pro se and were subsequently removed by the defendants to Western District of Missouri, the court where they were previously filed as part of the current claim or controversy. Aplt. App. at 2432.

Lipari is seeking remand based on the argument removal was improper. Aplt. App. at 2511.

The trial court dismissed Medical Supply's current federal claims for failing to sufficiently plead the elements. No discovery has been granted in this or the preceding actions.

The following is an incomplete set of averments from the complaint (Aplt. App. at 36-151) that are listed relative to the subheadings identified by controlling precedent as the elements for sufficiently pleading the underlined claims:

Sherman Act § 1:

(1) a contract, combination, or conspiracy among two or more indep. actors;

Medical Supply's complaint alleges with detailed facts the formation of a cartel in the combination of the former competitors Novation, LLC, Neoforma, Inc., Robert J. Zollars, Volunteer Hospital Association and University Healthsystem Consortium for the purpose of creating Exclusionary Contracts and Loyalty Agreements to restrain trade in ¶¶178-220 pgs. 86-95.

(2) that unreasonably restrains trade;

In ¶¶ 255 –309 pgs. 86-109 Medical Supply's complaint describes the defendants' concerted refusal to deal in denying the agreed escrow accounts Medical Supply and the Independence, Missouri US Bank branch had planned to capitalize Medical Supply's entry into the hospital supply market (alleged to be group boycott a *per se* unreasonable restraint of trade).

In ¶¶ 337-369 pgs. 98-107 Medical Supply's complaint describes the defendants' concerted refusal to deal in concerted effort with the non defendant alleged co-conspirators GE And GHX, LLC to act against their own short term profit interest and in knowing coordination with Neoforma, Inc. in an intentional effort to deprive Medical Supply in June 2003 of its contracted or bargained for capitalization of $350,000.00 to enter the market for hospital supplies (alleged to be group boycott a *per se* unreasonable restraint of trade).

In ¶¶ 203-210, pgs. 74-76 ¶¶ 386-396 pgs. 112-113 Medical Supply's complaint describes the defendants' product tying arrangements (alleged illegal product tying arrangements a *per se* unreasonable restraint of trade).

In ¶¶ 419-422 pgs. 118-119 Medical Supply's complaint describes the defendants' plans to merge the direct competitors Neoforma with GHX LLC to monopolize all of the product market for hospital supplies delivered though electronic supply chain systems in the nation (alleged to be combination to restrain trade horizontally a *per se* unreasonable restraint of trade).

(3) is in, or substantially affects, interstate commerce

Medical Supply's complaint alleges a substantial harm to consumers, hospitals, nursing homes, state governments, national health insurance plans and thousands of lost lives from decreased access to healthcare resulting from artificially inflated prices, ¶¶59-89 pgs. 46-51.

Sherman Act § 2: Monopolization

(1) the possession of monopoly power

Medical Supply Chain's complaint at ¶¶ 380, 438 pgs. 111, 122 alleged power over a controlling market share of hospital supplies, ¶ 455 pg. 127 power through long term exclusive dealing contracts to maintain higher prices.

Medical Supply Chain's complaint at ¶¶ 36, 50, 502 alleged power to dominate early stage capitalization.

Medical Supply Chain's complaint at ¶¶ 420, 467, 502 alleged power over 80% of hospital supplies through supply chain systems by merging Neoforma with GHX LLC.

a. ability to control prices

Medical Supply Chain's complaint at ¶¶ 122, 208, 216 alleged power to extract kickbacks.

Medical Supply Chain's complaint at ¶¶ 116, 120, 129, 137, 139, 149, 152, 161, 221, 365, 380, 438, 455 alleged power to maintain higher prices.

b. exclude competition

Medical Supply Chain's complaint at ¶¶ 56, 148, 181, 208 386, 387, 434 alleged power to exclude competition.

Medical Supply Chain's complaint at ¶207 alleged power to force tying arrangements .

(2) in the relevant market

Medical Supply Chain's complaint under heading # 2 "The Relative Markets" at pg. 41 identified two relevant product markets and the upstream capitalization services market:

i. relevant products

Medical Supply's complaint alleges the first relevant product market in ¶¶ 33-36 pg. 24 as goods in the 1.8 trillion dollar hospital supply market.

Medical Supply's complaint alleges the second relevant product market in ¶¶ 37-41 pg. 24 as hospital supply products distributed through artificial intelligence enhanced supply chain systems utilizing the internet.

Medical Supply's complaint alleges the third relevant product market in ¶¶ 42-46 pg. 43 as capitalization services for new technology companies seeking to finance entry into the hospital supply market.

ii. geographic markets

Medical Supply's complaint alleges all three relevant product markets to be national; sub heading a and ¶¶ 33, 36 on pg. 42 for the first relevant market of hospital supplies and sub headings b, c and ¶¶ 46 on pg. 43 for the second and

third relevant markets of hospital supplies through electronic supply chain management systems and new healthcare technology companies respectively.

(2) the willful acquisition or maintenance of that power

Medical Supply alleges ongoing conduct to acquire and maintain monopoly power through anticompetitive practices by the defendants nationwide in the three identified relevant product markets in ¶¶ 47-56 pgs. 43-45 through a scheme to falsely state price savings to member hospitals annually to conceal increased costs from kickbacks that originated October 24,1979 and continues to the present ¶¶ 109-133 pgs.55-60; through a marketing scheme by the named defendants using commercial bribes through remunerations to healthcare systems under contracts in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b ¶¶ 134-145; through combination and conspiracies among the defendants to exclude competitors from the market for hospital supplies and the market for hospital supplies through electronic supply chain systems; through using the data obtained to enforce the cartel's increased prices among suppliers allowed in to the cartel's distribution network ¶¶ 146-151; through syndicates to make markets in initial offerings to capitalize healthcare technology companies, control which firms would be allowed into the distribution network and consequently be attractive to stock investors, to extort equity from new firms entering the hospital supply market and to force the management of Neoforma to compromise the interests of its investors, violate its prospectus and not to compete with Novation, VHA and

UHC ¶¶ 151-161 pgs.45-47; and illegal tying arrangements ¶¶ 203-210, ¶¶ 386-396.

Sherman 2 Unilateral refusal to deal ¶¶ 492-495;

Sherman Act § 2: Conspiracy to Monopolize

(1) a combination or conspiracy to monopolize;

Medical Supply alleged specific agreements in paragraphs ¶¶ 178-218 to combine forces between competitors in a conspiracy to monopolize hospital supplies, hospital supplies delivered through electronic supply chain systems and the upstream capitalization of new technology suppliers entering the market for hospital supplies.

(2) overt acts done in furtherance of the combination or conspiracy;

Medical Supply alleged specific acts in paragraphs ¶¶ 455-465 to further the conspiracy or combination.

(3) an effect upon an appreciable amount of interstate commerce;

Medical Supply alleged a staggering effect on interstate commerce from the monopolization in paragraphs ¶¶ 47-94.

(4) a specific intent to monopolize

Medical Supply alleged a specific intent to monopolize in ¶¶ 419-422 describes the planned merger between Neoforma and GHX LLC to monopolize hospital supplies distributed through electronic supply chain systems.

Section 8 of the Clayton Act, 15 U.S.C. § 19

(1) one person serves as a director of two or more corporations;

Medical Supply alleged specific information about exchange of directors. Including the in ¶176 non defendant co-conspirator (defendant Novation subsidiary ¶378) Cardinal Health, Inc.'s Robert Zollars, and joined Neoforma, Inc as CEO (¶13). In ¶ 235 Medical Supply's complaint describes the defendants' placement of defendant VHA designees on two of the seven seats on the defendant Neoforma board of directors, ¶ 368 describes US Bancorp's interlocking directorships and an exchange of directors with the two dominant GPO founders of GHX LLC the Defendant Novation and Premier, ¶ 372 describes how the defendants through The Piper Jaffray Companies subsidiary Piper Jaffray Ventures actively participated in and held seats on the boards of directors of their client companies, facilitating the monopolization of the markets for hospital supplies and hospital supplies in e-commerce, ¶ 424 describes how The Piper Jaffray Companies exchanged directors with Novation.

(2) the combined capital of any corporation exceeds $1 million;

Medical Supply's complaint at ¶ 55 states that two of the companies the complaint alleges defendants exchanged directors with Premier and Novation negotiated contracts worth more than $30 billion, ¶376 states Novation does $36 billion dollars in sales annually, ¶372 states that Piper Jaffray Ventures had $225 million dollars under management, ¶377 states that Neoforma has $10 billion in sales and receives $ 62 Million a year from Novation. Subheading 11 states

Neoforma is worth $150 Million dollars. Subheading 11 states Piper Jaffray is worth $750 Million dollars.

(3) each corporation is engaged in whole or in part in interstate commerce;

Medical Supply's complaint alleges the defendants engage in interstate commerce ¶¶ 33, 36 and sub headings b, c and ¶ 46 sub heading f , ¶ 376.

(4) the corporations compete with one another

Medical Supply's complaint describes the defendants' elimination of competition amongst each other after exchanging directors in ¶¶ 40, 147, 378, 150, 181, 191, 376, 378, 455, 457, 458, 464, 466, 500.

18 U.S.C. § 1962(c) (RICO)

(1) participated in the conduct

Medical Supply's complaint alleges at ¶¶430, 488, 507, 573, 574, that specifically named defendants participated in the operation and management of the hospital group purchasing enterprise to artificially inflate prices paid by Medicare, Medicaid and Champus. The complaint alleges that the defendants created agreements through unlawful acts and that Shughart Thomson & Kilroy later became part of that enterprise ¶512.

(2) of an enterprise

Medical Supply's complaint alleges at ¶¶151-152, 159-161 that US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff took over Neoforma, Inc. and ran it counter to Neoforma's business plan and prospectus and against the interests of its investors for the purposes of

furthering the RICO enterpise scheme to overcharge government and private insurers for hospital supply costs.

(3) through a pattern

Medical Supply's complaint alleges more than two predicate acts in furtherance of the Defendants' enterprise. Over 14 acts are listed *infra*:

(4) of racketeering activity:

i. 18 U.S.C. § 1962(c) Hobbs Act Prohibited Extortion

Medical Supply's complaint alleges theft of trade secrets at ¶¶297, 316-322 theft of trade secrets to obstruct Medical Supply's entry into the hospital supply market in violation Hobbs Act.

Medical Supply's complaint alleges extortion at ¶¶171, 180, 198, 210, 211, 213, 215, 219, 368, 369, 399-406, 414, 416-418, 479-482-485, 488, 490.

i. 18 U.S.C. § 1962(c) Commercial Bribery

Medical Supply's complaint alleges commercial bribes ¶¶ 141-143 (HRDI scheme)184, 210, 211.

In ¶143 Medical Supply's complaint alleges 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 through Healthcare Research and Development Institute ("HRDI")

ii. 18 U.S.C. § 1962(c) Fraud based Allegations subject to Rule 9

Medical Supply pled fraudulent RICO predicate acts describing who, what, where and when misrepresentations were made and how they materially deceived to further the enterprise and injure Medical Supply in ¶ 268 Fraudulent failure to reveal US Bancorp's ownership of the treasury fund selected for escrow accounts, despite fiduciary relationship; ¶¶275, 278 Fraud pretext of USA PATRIOT ACT; and ¶¶392-396 Novation's creation and use of a fraudulent Surgical Instrument savings calculator software program, ¶ 126 Novation's inflated system wide savings report for 2005.

In ¶ 152 the complaint identified US Bancorp, US Bank, Andrew Cesere, Jerry Grundhoffer, Piper Jaffray and Andrew S. Duff benefit from Piper Jaffray's false recommendations on Neoforma that US Bancorp and Piper Jaffray were fined and paid $32.5 million fine to settle these securities fraud charges brought by with the SEC, NASD, NYSE, NASAA, and the New York Attorney General for the fraudulent research.

Association in Fact Enterprise

(1) union or group of individuals associated in fact although not a legal entity

The group purchasing enterprise alleged was different than the defendants' corporate and subsidiary relationships and included the companies Novation LLC, Neoforma, Inc. VHA and UHC that had partial ownership in each other, but also included US Bancorp, US Bank and the Piper Jaffray companies which were independent legally of the first set of companies. Medical Supply also alleged the enterprise to include General Electric, HRDI and Shughart Thomson & Kilroy

which had no common ownership with the other entities. See ¶¶ 141-143, 151-153, and 365-369.

(2) some type of organizational structure

Medical Supply at ¶¶147-153 describes the organizational structure of the group purchasing enterprise. Each defendant's role in the group purchasing enterprise is described throughout the complaint.

(3) operation and control of the Enterprise

Medical Supply's complaint alleges at ¶¶580-581 that Shughart Thomson & Kilroy created the plan to retaliate against Medical Supply outside of the courtroom and implemented the plan, carrying out operations to assist in accomplishing the group purchasing enterprise's objectives.

18 U.S.C. § 1962(d) (RICO) Conspiracy:

(1) independent violation of subsections (a), (b), or (c)

Medical Supply's complaint alleges the above independent violations of 18 U.S.C. § 1962(c) theft of trade secrets at ¶¶297, 316-322 theft of trade secrets to obstruct Medical Supply's entry into the hospital supply market in violation Hobbs Act. Medical Supply's complaint alleges extortion at ¶¶171, 180, 198, 210, 211, 213, 215, 219, 368, 369, 399-406, 414, 416-418, 479-482-485, 488, 490. Medical Supply's complaint alleges commercial bribes ¶¶ 141-143 (HRDI scheme)184, 210, 211.

(2) conspiracy to violate

Medical Supply's complaint alleges conspiracy to violate RICO at ¶¶ 347, 370, 374, 398, 404-407, 428, 430, 487, 549.

(3) knowing participation

Medical Supply's complaint alleges knowing participation at ¶¶ 410, 425, 427, 430, 488, and 549.

(4) at the direction of defendant co-conspirators:

Medical Supply's complaint alleges conduct directed by coconspirators at ¶¶ 405, 413, and 488.

(5) specificity what the agreement was,

Medical Supply's complaint alleges specifically the agreement or scheme- the over arching plan to illegally inflate hospital supply costs to overcharge government and private health insurers was at ¶¶ 109-130, 430, 573.

(6) who entered into the agreement,

Medical Supply's complaint alleges what persons and entities entered into the agreement at ¶¶ 141-143, 151-153, 365-369, and at ¶¶ 410, 425, 427, 430, 488, and 549.

(7) the agreement commenced,

Medical Supply's complaint alleges at ¶ 573 that "The Defendants targeted Medical Supply's founder in 1995 and targeted Medical Supply upon its incorporation in 2000" and that the coconspirators renewed their agreement commencing at ¶ 430 "…in the period from December 14, 2004 to February 3rd, 2005."

(8) what actions were taken in furtherance of it

Medical Supply's complaint alleges actions in furtherance of the conspiracy at ¶¶ 413-418, 580-592.

Medical Supply's supplemental state law claims against GE from Medical Supply II were improperly removed from Missouri 16th Circuit State Court at Independence, Missouri to the Western District of Missouri court of Hon. Judge Fernando J. Gaitan, Jr. whose disclosure stated was on the board of St. Luke's Healthcare System, a Lee's Summit Missouri hospital that co-owns the defendant VHA and the defendant Novation. See pg. 2523.

Hon. Senator Mike DeWine, the chair of the US Senate Judiciary Committee's Antitrust Subcommittee hearing that during the fourth year of antitrust hearings on the defendant Novation's anticompetitive conduct in the hospital supply market concluded Novation's abuses could be better corrected with private antitrust litigation than with new legislation ¶95 on pg.52. Senator Mike DeWine lost his re-election on November 4, 2006. The senator from Missouri, Hon. Jim Talent also lost his seat in part because of the healthcare issue. See KC Star Buzz Blog Sept 29, 2006 CAMPAIGN AD BUZZ | McCaskill criticizes Talent on Medicaid.

On December 12, 2006 Hon. Judge Fernando J. Gaitan, Jr. remanded the action back to state court for lack of federal jurisdiction. A jury trial is scheduled for October 29th, 2007.

President George Bush who has observed that there is an absence of competition in healthcare (¶47 on pg.43) came to St. Luke's Health System in Lee's Summit, Missouri with Secretary of Health and Human Services Michael Leavitt, two days after the State of the Union speech to personally initiate the administration's plan to make healthcare affordable. Office of the President, January 25, 2007 press release.

Governor Matt Blunt described in the complaint ¶85 at pg. 50 as having to cut Missouri citizens from Medicaid because of hospital supply cost increases, made healthcare the central priority of his State of the State speech but on January 25th chose to speak about healthcare at other Missouri communities rather than appear with President George Bush in Lee's Summit. Office of the President, January 25, 2007 press release Comments of Secretary Leavitt.

On the same day, the New York Times reported that the Attorney General for the State of Connecticut, Richard Blumenthal reached a settlement with H.R.D.I. that Medical Supply identified as a co-conspirator but did not name as a defendant over the commercial bribes given to hospital administrators ¶¶ 141-143 pg. 61. H.R.D.I. agreed to end operations as a for profit company. "Group Settles Health Sales Conflict Case", NY Times Jan. 25, 2007

US Bancorp and US Bank NA removed the supplemental state claims in the present action to the Western District of Missouri court of Hon. Judge Fernando J. Gaitan, Jr.. Medical Supply filed a timely motion for remand alleging improper removal which is awaiting a decision. See pg. 2511.

SUMMARY OF ARGUMENTS

Medical Supply and Samuel Lipari argue that earlier litigation prior to the breach of the contracts with US Bank had no claim preclusion effect on the current claims for damages under clearly established Tenth Circuit applications of Restatement (Second), Judgments § 24 Transactional Analysis to pre-breach litigation. Medical Supply and Samuel Lipari also argue each required element of each count was pled and that Samuel Lipari had standing to seek reconsideration pro se as the assignee of a dissolved Missouri corporation.

I. Whether The Trial Court Erred By Failing To Apply Transactional Analysis And Lawlor To Determine If Medical Supply And Lipari's Claims Were Precluded By *Medical Supply I*.

Standard of Review. "We apply a de novo standard of review to questions of res judicata." *May v. Parker-Abbott Transfer and Storage, Inc*., 899 F.2d 1007 (C.A.10 (Colo.), 1990).

At page 20 of the trial court Memorandum and Order pg. 1508, the trial court states Medical Supply's claims summarily as causes of action by statute number without examining the different transactions the claims are based on.

The clear error of the court is strikingly revealed in the court's concise recitation of ***causes of action*** the court had dismissed in the earlier *Medical Supply I* action simply because they are again ***causes of action*** in the present complaint. The court was mistaken over the third element of Claim Preclusion that while still using the language "cause of action" has been refined in the Tenth Circuit to reflect The Restatement (Second), Judgments § 24 and cannot be satisfied unless

The New York Times
nytimes.com

November 18, 2007

Blowing The Whistle, Many Times

By MARY WILLIAMS WALSH

WHEN Cynthia Fitzgerald started out in pharmaceutical sales 20 years ago, she received ample training on the right and wrong ways to sell medical products. Right was selling on the merits. Wrong was luring customers with perks and freebies. It was O.K. to buy doctors lunch or dinner, for example, but tempting them with lavish gifts was taboo.

"There were pretty stringent rules back then," recalls Ms. Fitzgerald, now 50 and a grandmother living in Dallas. "It was really clinically driven."

But she says those early lessons didn't serve her so well when she went to work on the other side of the table in 1998, in health care purchasing. Going by the book, and expecting her colleagues and employer to do the same, cost her a job, most of her friendships and several years of her life, she says.

Eventually, Ms. Fitzgerald decided to file what could become one of the largest whistle-blower lawsuits on record. And her case, which names more than a dozen companies as defendants -- some with well-known names like Johnson & Johnson, Becton Dickinson and Merck -- offers a window onto a little-known world, where billions of dollars' worth of medical products are sold each year to institutional buyers like hospitals.

The suit, filed in 2003 in federal court in Dallas, and unsealed this year, argues that improper sales practices, together with erroneous accounting, are invisibly draining millions of dollars out of vital public programs like Medicare through overcharges or unauthorized uses. While whistle-blower cases typically involve, at most, a handful of companies, Ms. Fitzgerald's alleges systemic fraud across a whole network of companies and more than 7,000 health care institutions.

Her contentions are set against a complex backdrop: spiraling health care costs and debates about Medicare. State and federal authorities in Texas are investigating Ms. Fitzgerald's allegations, and any decision by them to join her case may give the suit momentum in the courts. But her corporate adversaries dispute her accusations.

"Cynthia Fitzgerald is rehashing old rumors and suspicions," said Jody Hatcher, senior vice president of Novation, the company in Irving, Tex., at the heart of her lawsuit. "These allegations have been examined in depth by a variety of different authorities, and no one has proven any of them to be true. The simple fact is that Ms. Fitzgerald's allegations are false."

For her part, Ms. Fitzgerald bristles at the idea that her lawsuit is without merit or, in response to common critiques of whistle-blower cases, about easy money. "I thought they were really nice people," she says. "I was so grateful and thankful to have a steady income again. I wouldn't have rocked the boat for any small thing to save my life."

So why did she rock the boat?

"It was wrong," she says of the behavior she asserts she has witnessed. "And I knew it was wrong."

NINE years ago, while still recovering from a financially ruinous divorce, Ms. Fitzgerald decided to move to Dallas from her native Omaha. She knew almost no one in her new city. She graduated from the University of Nebraska 13 years earlier with a communications degree, then worked in sales and marketing in the food, pharmaceutical and insurance industries.

When she moved to Texas, she says, "It was pretty bleak." She adds, "I went from having Thanksgiving dinners in a house with my family to living in an apartment that was so small that every time I turned around I ran into myself."

More than anything, she said, she wanted stability -- a steady job at a company where she could climb the ladder and work until she retired. After months of looking, she joined Novation. The company helped thousands of hospitals, rehabilitation centers, home health agencies and doctors' offices nationwide negotiate

Exb

prices for medical supplies -- a wide range of items as diverse as saline solution and huge imaging machines.

Novation assigned her a portfolio of medical and surgical products for which its member hospitals were spending an estimated $240 million a year: rubber gloves, surgical tools and so forth. The company sent her to a training class where, among other things, she says she learned once again about ethical purchasing procedures.

"I cannot overemphasize in the beginning how excited I was and really feeling blessed," she says. "I felt like I got a second chance. Even though it was on the other side of sales, it was still sales."

But as she settled in, she says, not everything in her new workplace squared with what she had been told in training, a situation that came to a head one day in 1998, when she was still just a few months into the job. According to her complaint, she and her boss met with a Johnson & Johnson sales team that was vying for an exclusive, three-year contract to sell $130 million worth of IV equipment to Novation's clients. It was a valuable contract, and Ms. Fitzgerald had the power to decide who would get it.

The bids were already in. Ms. Fitzgerald understood this to be a mandatory "silent period," when she was not supposed to meet privately with any of the bidding companies. All communications with vendors were supposed to be in writing, and if Ms. Fitzgerald disclosed any information to any bidder, she was required to tell them all.

In a deposition in a separate lawsuit filed against Novation by a medical supplier, a former Novation executive, John M. Burks, did not dispute that the Johnson & Johnson meeting took place. But he said that Ms. Fitzgerald misunderstood the rules, and that Novation permitted such meetings at that point. (When reached for comment, Mr. Burks said his views haven't changed since his deposition.)

Ms. Fitzgerald says she had a very different understanding of the meeting. Discussions behind closed doors, tipping off a company on how to structure a winning bid, naming her price -- this could be a felony, she recalls thinking :bid-rigging.

"How much will it take to get the contract?" she says one of the salesmen asked her, according to her complaint. "Others before you have done it."

She says she chose not to do so. "Oh, no!" she recalls blurting out, bringing the meeting to a halt. "This is illegal, and I don't look good in orange."

A spokesman for Johnson & Johnson, Marc Monseau, said, "We vigorously deny the allegations and will defend ourselves against them in court."

Ms. Fitzgerald did not stop there. After the salesmen left, she says, she confronted her boss in the women's room. Shouldn't they report the incident to the legal department? Hadn't they just been told that someone at Novation had taken a bribe?

Her boss offered no satisfaction, Ms. Fitzgerald says in her complaint. Concerned about the integrity of a bidding process she was responsible for, she began pursuing the matter herself.

OVER the following weeks, she says, she scoured her portfolio for contracting anomalies. She told colleagues about what had happened; some confided that similar things had happened to them. Others left anonymous notes on her desk. She began to think that Johnson & Johnson should be excluded from the bidding as a penalty for what she considered a serious ethical breach.

She says she took her concerns to Novation's legal department, human resources and even the company's president. In his deposition, Mr. Burks confirmed her activities, but called her "an employee who doesn't simply understand that when a supplier asks an inappropriate question, you simply say no and move on."

Ms. Fitzgerald says she passed over Johnson & Johnson for the IV contract, awarding it instead to Becton Dickinson. She said Becton had a superior bid, which provided a number of opportunities for Novation and member hospitals to be rewarded with rebates and other payments.

Becton said it believes that Ms. Fitzgerald's accusations of improprieties in how contracts were awarded are baseless and that her complaint is "without merit."

She turned to the next contract, for trash bags -- and the same thing started to happen, according to her complaint. When Ms. Fitzgerald told representatives of one vendor, Heritage Bag, that she was planning to put that contract up for bid, she says, one representative told her at dinner with several people that he would

"take care of" her. Heritage Bag did not respond to repeated requests for an interview.

Ms. Fitzgerald asked her supervisor if she could be taken off the trash-bag contract. Her supervisor agreed, but then gave her a negative performance review. It said that among other things, she was rude, unable to meet deadlines and kept trying to "overhaul" parts of Novation that were outside her job description, according to a copy of the review. Ms. Fitzgerald refused to sign it. Relations deteriorated, and 15 days later, she was fired for "nonperformance of duties that were clearly identified as part of her job description," according to Mr. Burks's deposition.

Ms. Fitzgerald says she believes she was shown the door because she had stumbled onto illegal behavior involving hundreds of millions of dollars and had refused to look the other way.

"It's hilarious how stupid I was," she says. "I knew that it was wrong, but I thought that if I just went to the right people, they would correct it. I was very naïve. I didn't realize that it was systemic."

The False Claims Act is a federal law that allows private individuals to sue on behalf of the United States if they believe that they have inside knowledge of a fraud. Their lawsuits stay under court seal at first, to give federal and state investigators time to look into the accusations quietly and to decide whether to join the case. If the government recovers money, the whistle-blower gets 15 to 30 percent of the amount.

Though enacted to fight war profiteering, the False Claims Act has become a potent weapon in the battle against escalating health care costs. Of the 20 largest False Claims Act recoveries listed on the Web site of Taxpayers Against Fraud, a group that supports whistle-blowers and their lawyers, 19 involved health care companies. (The other involved municipal bonds.)

The size of recoveries has soared in recent years. All told, the government has recovered more than $20 billion since 1986, when the False Claims Act was last amended, with $5 billion of it in the last two years.

The biggest single whistle-blower settlement to date was the $900 million that Tenet Healthcare, a hospital company, paid last year to settle accusations of overbilling the Medicare program. That settlement is dwarfed by the $1.7 billion that HCA, another big hospital chain, paid between 2000 and 2003 to settle a number of fraud suits.

Companies and their lawyers say the growing caseload is a sign that the False Claims Act, with its promise of a payout for whistle-blowers, is motivating disgruntled employees to file nuisance suits that can tie up law-abiding companies for years.

Proponents of the law say that $20 billion of recoveries is proof that contracting fraud is real, and that offering whistle-blowers a percentage is a good way to compensate them for the near-certainty that they will be fired.

"Protection for people who are willing to risk their lives and livelihoods, their careers and reputations, is critical," said Richard Blumenthal, the attorney general of Connecticut, in Senate hearings last year.

As Ms. Fitzgerald sees it, Medicare's losses grow out of the way that Novation and the vendor companies negotiate contracts.

When companies submitted bids to Novation, she recalled, they did not typically quote a simple price. Rather, they proposed package deals with opportunities for rebates, frequent-buyer discounts, "loyalty" rewards and baskets of products tied together. They might throw in free training for hospital staff, chances to participate in clinical trials, shares of stock, project sponsorships, sometimes even cash. The vendors also paid Novation for administering their contracts and for other services.

Ms. Fitzgerald says her compensation rewarded her for closing deals that maximized these payments -- not for simply finding the lowest bid. Vendors preferred to combine higher upfront prices with rebates or other cash-back rewards, she says, because that obscured the net unit price of their products, making it harder for hospitals to comparison-shop.

But this also allowed millions of dollars to become "lost" in the system, she says. Novation passed on many of the payments to hospitals, she says, but not in a way that hospitals could accurately report them to the government. Thus they ended up overstating their supply costs, she says, and getting larger Medicare reimbursements than they were entitled to. The lawsuit does not contend that the hospitals did this deliberately, but that Novation knew it was happening.

A 2005 audit by Daniel R. Levinson, the inspector general of the federal Department of Health and Human Services, appears to bear her out. After studying the finances of three unnamed purchasing consortiums in

response to repeated questions from Congress, federal agencies and the news media about their business practices, Mr. Levinson reported that their member hospitals "did not fully account" for such flows of money. In just five years, the discrepancies ran into the hundreds of millions of dollars.

Novation said that there was no evidence that any underreporting was intentional. It cited the complexity of how hospitals are required to report costs and said it believed that hospitals met all legal requirements in how they reported Novation's distributions to them.

In the past, a prosecutor's decision whether or not to join a whistle-blower lawsuit could be a make-or-break moment. If the government became involved, defendants often settled right away. The announcement usually coincided with the unsealing of the whistle-blower's complaint.

But now that the lawsuits have become so complex, and investigations so slow, judges have become impatient with sealed lawsuits moldering in their courts. Some are ordering the complaints unsealed before investigators finish examining the claims.

That is what happened in Ms. Fitzgerald's case. Last May, a federal judge in Dallas unsealed her suit, which had languished for four years. The assistant United States attorney for the Northern District of Texas , Sean R. McKenna, and the Texas attorney general, Greg Abbott, notified the court that they were still investigating and would decide later whether to join the case.

THAT leaves Ms. Fitzgerald on her own for now. After Novation fired her, she was contractually forbidden from disclosing information about the company or filing lawsuits against it for three years, she says. Once that period lapsed, she gradually became aware she was eligible to file a suit under the False Claims Act. That led her to Phillips & Cohen, a law firm involved in whistle-blower cases.

Her firing, meanwhile, left her unable to get another job in her field; word of her demise at Novation seemed to precede her wherever she went. Former colleagues stopped speaking to her. "I was probably at one of the lowest points in my life," she says.

She eventually founded her own business, Dimension Medical Supply. But she regrets the contentious departure from Novation, a company that made her feel as if she "was coming home" when it hired her. Deciding to speak out about the company's dealings was difficult, she says.

"I warred with myself," she says. "There weren't any blacks in upper management. I knew that there were opportunities there, and I could rise to those opportunities."

She was tempted, she says, to follow the status quo at Novation. And a little voice in her head kept saying, "Why can't you just take the money and run? Buck up, girl, this is the system. You can take it and go places."

In the end, the place she decided to go was court.

Global Healthcare Exchange Completes Acquisition of Neoforma

WESTMINSTER, Colo. — March 6, 2006 — Global Healthcare Exchange, LLC (GHX) has completed the acquisition of Neoforma, Inc. (NASDAQ: NEOF), having satisfied all of the conditions outlined in the definitive merger agreement announced in October, 2005. The merger officially closed on March 3, 2006. Immediately prior to the merger, both VHA Inc. (VHA) and University HealthSystem Consortium (UHC), which collectively owned the majority of Neoforma's outstanding shares, exchanged a portion of their Neoforma shares for equity positions with GHX. This brings the number of owners of GHX to 20 and further expands the breadth and balance of the ownership base, which includes representatives of the entire healthcare supply chain.

GHX will immediately begin migrating Neoforma customers to the GHX exchange, while ensuring all customers of both exchanges continue to have access to existing functionality. The merger adds a significant number of new customers to GHX, bringing the total participants to approximately 2500 acute care hospitals, 800 non-acute facilities and 200 supplier organizations.

The merger is anticipated to drive opportunities for greater customer value by enhancing existing services. For example, combining Neoforma Data Management Solutions with GHX Content Center will create advanced data services expected to improve business processes, such as procurement and contracting. Additionally, GHX will continue to provide business intelligence services through Healthcare Products Information Services (HPIS). These include market share data, as well as contract management and sales analysis tools, for healthcare suppliers.

Prior to the merger, both GHX and Neoforma offered similar, yet complementary, products and services designed to improve efficiencies, accuracy and collaboration. "By combining the two companies, we will deliver a comprehensive suite of products and services to a greater percentage of the healthcare supply chain," says Michael Mahoney, chief executive officer of GHX. "Eliminating redundant operations will enable GHX to devote more resources to technology development and consultation that help our customers improve current business processes."

To meet the needs of its expanded customer base, GHX is hiring an additional 150 employees, including approximately 80 Neoforma employees who have accepted full-time positions with GHX.

GHX will continue to be headquartered in Westminster, Colo., with North American operations in Nashville, Tenn., San Jose, Calif., Ambler, Pa. and Toronto, Canada. Supply chain management services from GHX will be open to all participants in the healthcare supply chain, regardless of size, GPO affiliation or for-profit status.

GHX has also executed a separate outsourcing agreement with VHA, UHC and Novation, LLC to provide supply chain management products and services for VHA and UHC hospital members. Novation is the contracting arm of VHA and UHC.

About Global Healthcare Exchange
Global Healthcare Exchange (GHX) provides an open and neutral electronic trading exchange, as well as complementary products and services, designed to improve the procurement-to-payment process in the healthcare supply chain. Service offerings include:

- Exchange services that support trading partner connectivity and provide electronic transaction sets, order validation and reporting tools
- Content services which utilize the GHX AllSource® product content repository to build the foundation for data synchronization and advanced content services
- Contract services that allow users to maximize contract utilization
- Procurement services that enable automation of the requisitioning process
- Business Intelligence reports designed to provide strategic decision-making data

Through these services, healthcare providers and suppliers can improve efficiencies, automate processes and reduce operating expenses.

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Equity owners of GHX are Johnson & Johnson Health Care Systems Inc.; GE Healthcare; Baxter Healthcare Corp.; Medtronic USA, Inc.; Abbott Exchange, Inc.; Siemens; Becton, Dickinson & Co.; Boston Scientific Corp.; Tyco Healthcare Group, LP; Guidant Corp.; C.R. Bard, Inc.; AmerisourceBergen Corp.; Cardinal Health, Inc.; Fisher Scientific International, Inc.; McKesson Corp.; B Braun Medical Inc.; Premier, Inc.; HCA; VHA Inc. and University HealthSystem Consortium. For more information, visit www.ghx.com.

Posted on Monday, March 06, 2006
Posted by host

Return

Testimony of
Ms. Elizabeth A. Weatherman
Managing Director
Warburg Pincus, LLC

April 30, 2002

PRINTABLE VERSION

Good Morning. My name is Bess Weatherman and I am Vice Chair of the Medical Group of the National Venture Capital Association. I am here today on behalf of the more than 475 professional venture capital and private equity firms dedicated to stimulating the flow of equity capital to emerging growth and developing companies. Our members currently invest more than $36 billion per year in such companies and have invested nearly $210 billion in aggregate over the past 20 years, funding nearly all of the most important technological breakthroughs of that period. A substantial number of these firms invest heavily in the life sciences field that includes biotechnology, drug development, medical devices and therapeutics and health care services. In 2001, the venture capital community invested more than $4.2 billion, or more than 10% of all venture investing last year, in these medical industries.

Venture investment in the life sciences has given new hope to people who suffer maladies across virtually the entire spectrum of diseases and afflictions. In fact, without patient investment from venture capitalists, the biotechnology and medical technology industry, for example, would be virtually nonexistent. Almost every biotechnology product that has been approved for sale by the Food and Drug Administration has been financed by the venture capital community. The venture community also provided financing for many of the medical devices and therapeutics we take for granted today, including the entire interventional cardiology or stent industry. These now standard medical treatments allow patients to lead longer and healthier lives. The venture community's dedication to the medical technology industry exists despite heavy government regulation and the longer-term investing strategy required for successful development of new medical technology, even when compared to other emerging market investments.

Few can argue that what these companies do is critically important to the well being of the American public and the world at large. However, the results of the debate we are holding today on reforming group purchasing organizations to ensure a competitive and open market for all medical industry producers will directly affect the future of emerging life science companies and in turn impact the availability of the important medical products these companies are

Exb

developing.

Let me be clear, 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. Permitting this innovation stifling practice is unnecessary and counter to what we believe should be a fundamental role of the government: enhancing health by making new or improved products widely available as quickly and efficiently as possible.

THE ROLE OF VENTURE CAPITAL IN IMPROVING AMERICA'S HEALTH

Venture capital plays an integral, often-unsung role in the development of medical technology. In fact, venture capital is the single most important source of early stage financing to new and emerging health-focused companies. During the past 30 years, the venture community financed 1,324 innovative medical companies with more than $20 billion in start up capital. These companies now have sales of tens of billions of dollars, employ more than 2 million people and most importantly, have revolutionized medical care for nearly all Americans. It is fair to say that virtually every U.S. citizen born during the last thirty years has benefited or will benefit, in his or her lifetime, personally and significantly from one or more of the drugs or medical devices developed with U.S. venture capital. These include MR imaging, ultrasound, angioplasty / stents, implantable defibrillators, spinal implants, pulse oximetry and drugs for cancer, heart attacks, and anemia, to name a very few. It is also important to note that the real medical impact of venture investments is also significantly greater than even these numbers would suggest, since our investments are normally focused only on ground breaking or revolutionary technology by the very nature of our investment selection process. Many of these companies' names are now synonymous with progressive medical technology including Guidant, Amgen, and Genentech.

WHY MEDICAL DEVICE AND BIOTECHNOLOGY COMPANIES NEED VENTURE CAPITAL

Medical device and biotechnology companies need venture capital because their capital needs are so large, their time to market so long – due in large part to regulatory compliance—and their risks so high. There are enormous entrepreneurial risks in bringing medical products to market—risks that include proving product safety and efficacy, securing patent protection, securing a good distribution channel, facing entrenched competition, and possibly running out of money before the product can reach a significant portion of the market – to name just a few. Such characteristics make these young companies ineligible for bank financing or other sources of private capital.

It is important to note that venture capitalists will accept these legitimate risks

that traditional financial institutions and government supported programs cannot — it's part of our function. But, VCs do not, cannot, and will not accept unnecessary and unfair risks. We need to provide our investors with justification that substantial capital investment can result in successful product development and financial gain. Thus, we have no interest in products that can be blocked from fairly competing for a share of a market, even after a long, expensive and risky product development cycle. Simply put, venture capitalists will increasingly stay away from many investments in long-term, high-risk medical breakthroughs if the government continues to allow anticompetitive business practices to artificially limit access to medical market.

STANDARD BUSINESS PRATICES BY GROUP PURCHASING ORGANIZATIONS AFFECT VENTURE CAPITAL INVESTMENT EMERGING MEDICAL COMPANIES, AND PATIENT CARE

GPO roadblocks have greatly diminished the attractiveness of medical device and biotechnology investments because they reduce the confidence of venture capitalists that they will have fair access to medical markets and thereby will achieve a return on very risky investments. To put this in perspective, between 1990 and 1994 at least 22% of all companies financed by venture capitalists were medical device or biotechnology companies, with medical device companies accounting for approximately 9% and biotechnology companies accounting for 13% of the 22%. By comparison, during the period 1999 to 2001 these companies made up only 8.9% of all companies receiving venture capital financing. Of this 8.9%, device companies received 5.0% and biotechnology companies receive 3.9%.

These numbers dropped dramatically from 1999 – 2001 when 9.8%, 7.1% and 11% respectively of the companies funded were medical device or biotechnology companies. For these years, medical device companies dropped more, making up only 5.5%, 3.9% and 6.2% of the combined totals.

One of the reasons for this relative decline new investment is a lack of market access brought about by the business practices and the increasing power of GPOs. GPO practices such as contract exclusivity, substantial fee structures, and product bundling, if allowed to continue, will so constrict potential markets that product segments where these practices are widely adopted will simply not be considered for venture capital backing. This investment drain will result in a stagnation of product innovation and stymie improved patient care across these product sectors.

The arguments made by GPOs about the "administrative" savings they provide to members could be applied to every single sector of the economy and are virtually identical to the arguments made by the anticompetitive "trusts" of the early 1900s, which led to the landmark Sherman Antitrust laws. The idea that the GPOs "save" money for hospitals by extracting larger price discounts from producers than they could achieve by themselves, is unprovable and most likely wrong – unprovable because no one knows what the "real" market price would

be in a truly competitive market among producers (in the absence of GPO gatekeeping). In fact, in product areas where GPOs collude with producers who already have virtual monopolies, the "discounted" price that the GPOs claim to achieve is almost certainly well above what the market price would be in an open and competitive marketplace. The impact of the GPOs in healthcare is equally anticompetitive and stifling of innovation, and there is no special reason why the healthcare system should be the only sector of the economy where such practices are tolerated.

The venture capital industry exists, in part, because the antitrust philosophy of the United States prevents entrenched, unmoveable competitors from abusing their market power to unfairly restrain competition. By their very nature, virtually every company we finance is a "revolutionary" and a threat to the established order. The technological innovations they develop, whether in computers, electronics, software, telecommunications or medicine, are inevitably threats to some existing larger competitor who will use all means at its disposal to defend itself. It is hard enough to overcome that kind of power in an open and competitive market place. It is nearly impossible when monopolistic producers collude with monopsonistic buyers such as GPO to suppress competition. This is precisely what is now happening in healthcare.

As the GPOs become more powerful and add more technologically sophisticated products to their portfolios (instead of the more commodity-like products such as rubber gloves, syringes and cotton swabs that they originally focused on) the adverse impact on innovation will increase. There will be fewer and fewer areas in which venture capital will invest. The current trend is not encouraging.

The venture capital community believes that collusion between GPOs and providers of medical products to limit market access to competitors is extremely anticompetitive and not justified by any peculiarities of the medical sector. On the contrary, while the government would not tolerate such practices in any other sector of the economy, for it to tolerate (and even encourage) this situation in medicine is disturbing, because one of the clear effects of these practices is to impede innovation. In medicine, in contrast to any other sector, reduced innovation ultimately affects patients' lives and health. There is no doubt that patients' lives have been lost and other harm done as a result of GPO's activities. In light of this, the special exemptions from the normal operation of the antitrust laws granted to the GPOs should be viewed with even greater, not less skepticism.

Conclusion

The venture capital community believes that there are enormous opportunities to continue to improve the health of the American public through the development and application of new technology. These efforts are already very time consuming, expensive and risky, particularly given recent increases and uncertainties in the U.S. regulatory environment. Despite this, the venture

capital community is committed to further investment in U.S. healthcare technology. We welcome open and competitive marketplaces, and we believe that competition has served the American public well by stimulating fair prices and vast technological innovation. The increasing power of GPOs, and their collusive and anticompetitive activities with larger medical companies, threatens to undermine the open and competitive markets that have produced such obvious benefits for the American public, not only in healthcare, but also across the entire economy. We would strongly encourage the committee to consider legislation to correct these abuses and again open these markets to fair and vigorous competition. Thank you.

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