

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

|                                    |   |                                      |
|------------------------------------|---|--------------------------------------|
| <b>MEDICAL SUPPLY CHAIN, INC.,</b> | ) |                                      |
|                                    | ) |                                      |
| <b>Plaintiff,</b>                  | ) |                                      |
|                                    | ) |                                      |
| <b>v.</b>                          | ) | <b>Case No. 2:05-cv-2299-KHV-GLR</b> |
|                                    | ) |                                      |
| <b>NOVATION, LLC, et al.,</b>      | ) |                                      |
|                                    | ) |                                      |
| <b>Defendants.</b>                 | ) |                                      |

**NOVATION, LLC, VHA INC.,  
UNIVERSITY HEALTHSYSTEM CONSORTIUM  
ROBERT BAKER AND CURT NONOMAQUE'S  
MOTION TO SET ORAL HEARING ON MOTION TO DISMISS**

Defendants Novation, LLC ("Novation"), VHA Inc. ("VHA"), University Healthsystem Consortium ("UHC"), Robert Baker, and Curt Nonomaque (collectively, "Defendants") respectfully request that the Court set an oral hearing on Defendants' Motion to Dismiss for Failure to State a Claim.

1. Prior to the transfer of this case to this Court, this case was pending in the United States District Court for the Western District of Missouri. On April 4, 2005, while the case was in the prior court, Defendants sought dismissal of the lawsuit under Rule 12(b)(6) because Plaintiff failed to state a claim upon which relief can be granted. *See* Novation, LLC, VHA, Inc., and University Healthsystem Consortium's Motion To Transfer Venue or, Alternatively, Motion to Dismiss Complaint For Failure To State A Claim (Exhibit A) and the Suggestions in Support of that Motion (Exhibit B). (Defendants also requested oral argument on their Motion to Dismiss.) The Missouri court transferred the lawsuit to this Court without reaching the merits of the Motion to Dismiss. Accordingly, Defendants renewed their Motion to Dismiss after the case

was venued in this Court. *See* Novation, LLC, VHA Inc., University Healthsystem Consortium, Robert Baker And Curt Nonomaque's Renewed Motion To Dismiss Complaint For Failure To State a Claim (Exhibit C). Defendants' Motion to Dismiss has been fully briefed and is ripe for decision.

2. As set forth more fully in Defendants' Motion to Dismiss and supporting brief, Plaintiff's Complaint should be dismissed because, *inter alia*, (1) Plaintiff's claims are barred by collateral estoppel; (2) Plaintiff fails to allege concerted action in support of its conspiracy claims; (3) Plaintiff fails to sufficiently allege monopoly power or the elements of attempt to monopolize; (4) Plaintiff fails to adequately allege harm to competition; (5) Plaintiff lacks standing; (6) Plaintiff fails to plead any of the required elements for an antitrust claim based on interlocking directors; (7) Plaintiff attempts to plead fraud without identifying a single misleading statement or omission; (8) Plaintiff pleads tortious interference without pleading that Defendants knew about or intentionally interfered with any contract; (9) Plaintiff attempts to plead a claim for prima facie tort, but fails to plead the requisite intentional lawful act that injured plaintiff (indeed, Plaintiff specifically pleads that Defendants' conduct was *unlawful*); (10) Plaintiff attempts to assert a RICO claim, but fails to allege a racketeering act, a pattern of racketeering, or a RICO injury; and, (11) Plaintiff's USA Patriot Act claim is legally defective because there is no private cause of action under that Act as a matter of law. These multiple, independent, fundamental legal defects compel dismissal of this lawsuit. Defendants respectfully request that the Court set an oral hearing on Defendants' motion to dismiss.

3. Moreover, Plaintiff's recent procedural machinations have further demonstrated that this case has been brought in bad faith. As set forth in a pleading styled Ordered Withdrawal of Plaintiff's Counsel, Medical Supply Chain was dissolved on January 17, 2006.

(Exhibit D). Samuel K. Lipari, CEO of the former corporate entity, asked that Medical Supply Chain be dropped from the lawsuit and that Mr. Lipari, individually, be substituted in as party plaintiff. *See* February 2, 2006 Order. (Exhibit E) (noting that “Lipari wishes to proceed pro se as the substituted plaintiff.”). However, the Court ruled that Mr. Lipari’s attempt to substitute in as party plaintiff was defective and that a formal motion to substitute party would need to be filed. *Id.* However, Plaintiff has yet to file a motion to substitute a party. Thus, this frivolous lawsuit is currently brought by a plaintiff that has filed pleadings indicating that it no longer wishes to proceed as plaintiff, and no adequate motion to substitute has been filed. It is time to dismiss this case. Furthermore, even if Mr. Lipari does eventually move to be substituted in as party plaintiff, that procedural gambit will not salvage this lawsuit. As Defendants demonstrated in their Memorandum in Opposition to Plaintiff’s Motion to Substitute Plaintiff (Exhibit F), Mr. Lipari lacks standing to assert any of the claims asserted in this lawsuit (even if the claims were otherwise legally viable—which they are not). Plaintiff’s last-ditch attempt to prolong this fundamentally defective lawsuit should be rejected. Defendants respectfully request that the Court set Defendants’ Motion to Dismiss for hearing and dismiss this case.

### **PRAYER**

WHEREFORE, for all of these reasons, Defendants request that the Court set an oral hearing on Defendants’ Motion to Dismiss and, after such hearing, dismiss Plaintiff’s case with prejudice and grant Defendants all other relief to which they are entitled.

HUSCH & EPPENBERGER, LLC

By: /s/ John K. Power

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BAKER

**CERTIFICATE OF SERVICE**

I hereby certify that on February 21, 2006, I electronically filed 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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