IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE, MISSOURI

SAMUEL K. LIPARI (Assignee of Dissolved Medical Supply Chain, Inc.) *Plaintiff*	))))) **Case No. 0816-cv-04217**
vs.	))
Novation, LLC *et al*. , *Defendants*	))

PETITIONER'S OPPOSITION TO DEFENDANT
LATHROP & GAGE, L.C.'S MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now, the petitioner Samuel K. Lipari appearing *pro se* and respectfully opposes the defendant Lathrop & Gage, L.C.'s motion for judgment on the pleadings as an untimely motion to dismiss. Lathrop & Gage, L.C.'s dispositive motion is based on patently fraudulent misrepresentations of the express averments on the face of the petition in a participation of a scheme of repeated fraud on the courts by the hospital supply cartel for the purpose of keeping the petitioner out of the Missouri market for hospital supplies.

I. STATEMENT OF FACTS

The petitioner provides the following facts from the petition and subsequent pleadings with other documents in attachment, not to provide evidence in support of the petition but as an aid to resolving procedural disputes:

1. Lathrop & Gage L.C.'s motion for judgment entered on 11/12/08 is later than the Rule 55.27(a) limit of thirty days after the service of the summons and petition entered as completed on 4/14/08. See exb. 1 Appearance Docket for 16th Circuit.

2. Lathrop & Gage L.C.'s motion for judgment is before the close of pleadings specified in Rule 55.27(b).

3. The Motion was not filed until 11/12/08 after Lathrop & Gage L.C. was served the petitioner's request for production of documents on 10/23 /08. See exb. 2 Request for Production.

4. The request for production revealed the petitioner's specific knowledge of events witnesses and records (exb. 2 at pages 3-6) that contradict William G. Beck (Mo. Lic. # 26849); Peter F. Daniel (Mo.

Lic.# 33798); and J. Alison Auxter's (Mo. Lic. # 59079) answer to the petition on behalf of Lathrop & Gage L.C.. See exb. 3 Answer of Lathrop & Gage L.C.

5. The request for production revealed the petitioner's specific knowledge of events witnesses and records of material interest to US Attorney and Special Prosecutor Nora Dannehy's criminal investigation of the unlawful firings of former Western District of Missouri US Attorney Todd Graves and former US Attorney for Arkansas Bud Cummins regarding Lathrop & Gage L.C.'s role in obstructing the public corruption investigations of Missouri Governor Matt Blunt and Lathrop & Gage L.C.'s fee office corporations and the hospital supply cartel defendants. See exb. 4

6. The request for production revealed the petitioner's specific knowledge of events witnesses and records related to Lathrop & Gage L.C.'s participation in avoiding the prosecution of Republican Missouri Governor Matt Blunt while engaging in selective prosecution of former Democrat Alabama Governor Don E. Siegelman. See exb. 5 Time Magazine article dated 11/14/08 revealing USDOJ partisan targeting of Siegelman.

7. The November 14, 2008 Time Magazine article was based on a letter by Hon. Congressman John Conyers, Chairman of the House Judiciary Committee to Attorney General Michael B. Mukasey dated 11/07/08 describing US Attorney Leura Canary's partisan targeting of Democrat Alabama Governor Don E. Siegelman and her fraudulent recusal from the case. See exb. 6 Letter of Hon. Congressman John Conyers.

a. Allegations in the petition against Lathrop & Gage L.C.

8. At page 6 in ¶58 of the petition, Lathrop & Gage L.C. is averred to be in collusion with the other identified hospital supply cartel members monopolizing the relative markets the petitioner is anticompetively excluded from and the petition's subsequent antitrust averments expressly include Lathrop & Gage L.C. every time the petition refers to the cartel members as "defendants" and "hospital supply cartel members."

9. The petition establishes the antitrust allegations against Lathrop & Gage L.C. at ¶¶ 59-480, on pgs. 6-77; that Lathrop & Gage L.C. engaged in anticompetitive activity in specific Relative Markets, Harming Buyers In The Markets (pgs.7-45), through an Enterprise To Artificially Inflate Prices (pgs. 45-67)

10. The petition charges Lathrop & Gage L.C. under § 416.031.1 RSMo with Agreement pg. 94, Independent Interest in the monopoly pg. 97, Injury to the Market and the petitioner 97-98, Conspiracy 93-98, under § 416.031.2 RSMo with Monopoly 98-101, Attempted Monopoly 101-103, and Conspiracy to Violate § 416.031(2) on pg. 103.

11. The Tortious Interference with the Petitioner's Business Relations by Lathrop & Gage L.C. and through Lathrop & Gage L.C.'s employees Mark F. "Thor" Hearne, Kansas State Republican Senator John L. Vratil is averred in the petition at ¶¶ 481-502, on pgs. 77-79; ¶¶ 553-554, on pgs. 87-88; ¶¶ 560-562 on pgs. 88-89; ¶¶ 567,582, -562 on pgs. 88-89;

12. The petition charges Lathrop & Gage L.C. with Fraud and Deceit at pgs. 105-106.

13 The petition charges Lathrop & Gage L.C. with Prima Facie Tort at pgs. 106-107.

b. Existing Statue of Limitations Averments before November 6, 2008 implied amendment

14. Statute of limitations timing averments related to Lathrop & Gage L.C.'s antitrust allegations:

> "102. The defendants have repeatedly violated Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo during the period of March 25, 2004 through February 25, 2008 to deprive the petitioner of inputs required to enter the subject relevant Missouri markets including tortiously interfering with the petitioner's property rights to his claims against US Bank NA, US Bancorp, Inc. and the General Electric Company.
> .***
> 104. The conduct and transactions of the defendants in violation of Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo caused the foreseeable injury of the petitioner being forced to dissolve Medical Supply Chain, Inc. on January 27th, 2006"

Petition at ¶¶ 102, 104, on pgs. 12

15. Statute of limitations timing averments related to Lathrop & Gage L.C.'s tortious Interference with the Petitioner's Business Relations:

> "482. On or about April 11, 2005, the defendant Lathrop & Gage L.C. took advantage of its confidential attorney counsel relationship with McClatchey papers to advance Lathrop & Gage L.C.'s agenda of supporting Karl Rove's influence peddling scheme through the Republican National Committee that included the selling of USDOJ protection.
> 483. Lathrop & Gage L.C. caused the Independence Missouri newspaper the Examiner to confront its investigative reporter James Dornbrook over the first of a planned series of articles dealing with the state cuts in Medicaid brought by Governor Matt Blunt."

Petition at ¶¶ 482-483, on pg. 77

c. Allegations of Petitioner in His Individual Capacity as A Competitor

16. The petition expressly states that the claims are made against the defendants by the petitioner for the defendants' injuries to the petitioner as an individual including the deprivation of the right to be

incorporated that resulted in the petitioner having to dissolve his corporation and resulting in continued injury to the petitioner of being denied critical inputs required to enter the market for hospital supplies because of the defendants continued acts to deny the petitioner counsel:

> "103. The conduct of the defendants in obstructing the petitioner in his federal litigation to recover the market entry capitalization included separate Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo violations to deprive the petitioner of his corporate counsel, representation by Missouri and Kansas attorneys and therefore the enjoyment of the right for Medical Supply Chain, Inc. to be incorporated under the laws of the State of Missouri.
> 104. The conduct and transactions of the defendants in violation of Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo caused the foreseeable injury of the petitioner being forced to dissolve Medical Supply Chain, Inc. on January 27th, 2006
> 105. The conduct and transactions of the defendants to cause the petitioner to be forced to dissolve his Missouri corporation occured subsequent to the petitioner's filing of the federal antitrust action on March 9, 2005 styled *Medical Supply Chain, Inc. v. Novation LLC et al.* W.D. of MO Case No. 05-0210- CV-W-ODS.
> 106. The petitioner is obstructed from necessary inputs and critical facilities including capitalization for marketing as long as he is deprived of the right to be incorporated under the laws of the State of Missouri by the anticompetitive conduct of the defendants.
> 107. The defendants chose to injure the petitioner by depriving him of state and federal government related benefits and immunities constructively and through bribery and extortion instead of *Noerr-Pennington* Doctrine protected petitioning."

Petition at ¶¶ 103-107, on pgs. 12-13

17. The petition states expressly states what capacity the petitioner's individual injury, standing and capacity the causes of action are brought against the defendants in:

> "67. The petitioner also avers that **the petitioner has been injured** by conduct prohibited by the Missouri Antitrust Statutes §§ 416.011 to 416.161, RSMo and that **but for the actions of the defendants, the *petitioner* would be selling hospital supplies to hospitals and nursing homes in the State of Missouri**." [Emphasis added]

Petition at ¶67, on pg.8.

d. Rule 55.33(b) Amendment through implied consent of the parties

18. On November 6, 2008 William G. Beck (Mo. Lic. # 26849); Peter F. Daniel (Mo. Lic.# 33798); and J. Alison Auxter (Mo. Lic. # 59079) of Lathrop & Gage L.C. effected the amendment of the plaintiff's petition through Lathrop & Gage L.C.'s implied consent to include a later act to injure the petitioner by continuing the deprivation of the right to incorporate or to enforce his contractual agreements and to capitalize his entry into the market for hospital supplies. See exb. 7 Motion for Security Costs.

e. Dismissal of previous cartel members through extrajudicial influence

19. The previously dismissed cartel members falsely asserted a right to dismissal based on the petitioner's ongoing federal litigation that had not concluded, inviting Hon. Judge Michael Manners to

make his ruling on a prohibited extrajudicial basis. See exb. 8 Novation LLC Defendants' Motion to Dismiss (pgs. 1-2), exb. 9; Novation LLC Defendants' Suggestion in Support of Dismissal (pgs. 3-5, 7,9, 10, 11, 13, 14, 18); exb. 10 Shughart Thomson & Kilroy P.C. now being succeeded in interest by Polsinelli Shalton Flanigan Suelthaus P.C. (pg. 1) and repeatedly in their lengthy suggestion supporting dismissal.

20. The previously dismissed cartel members disparaged the petitioner for adverse outcomes in Kansas District court and the Tenth Circuit Court of Appeals that the previously dismissed cartel members were obtained by the repeated extrinsic frauds of John K. Power, Olthoff (Mo lic. #70448) the attorney employed by Husch Blackwell Sanders LLP to represent the Novation LLC, General Electric and GHX, LLC defendant members of the hospital supply cartel in the concurrent federal litigation and Mark A. Olthoff (Mo lic. #38572) of Shughart Thomson & Kilroy, P.C. who represented the US Bancorp defendant members of the hospital supply cartel.

21. The Hon. Judge Michael Manners and William G. Beck (Mo. Lic. # 26849); Peter F. Daniel (Mo. Lic.# 33798); and J. Alison Auxter (Mo. Lic. # 59079) of Lathrop & Gage L.C. had notice of the ongoing federal proceedings and contrary to controlling law interim rulings in Appendix One of the petition (apdx. pgs. 1-6) delineating the procedural history of the petitioner's litigation.

22. The Hon. Judge Michael Manners and William G. Beck (Mo. Lic. # 26849); Peter F. Daniel (Mo. Lic.# 33798); and J. Alison Auxter (Mo. Lic. # 59079) of Lathrop & Gage L.C. had notice of the extrinsic frauds by John K. Power, Olthoff (Mo lic. #70448) and Mark A. Olthoff (Mo lic. #38572) in the petitioner's opposition to dismissal (exb. 11) and its attached answer to former US Attorney Bradley Schlozman's motion to dismiss from the concurrent Western District of Missouri federal litigation where many of the same defenses were raised:

> "2. The defendants are incorrect over the styling of the concurrent Missouri federal case *Lipari, et al. v. General Electric, et al*. Circuit Court of Jackson County, Missouri, Case No. 0616-CV07421 is now styled *Lipari, et al. v. General Electric, et al*. Western District of Missouri Case No. 07-0849-CV-W-FJG previously the same case or controversy was in this court and styled as *Medical Supply Chain, Inc. v. General Electric Company, et al*., case no. 03-2324-CM.
> 3. An interim order merely dismissing the original federal claims was fraudulently procured in *Medical Supply Chain, Inc. v. General Electric Company, et al*., case no. 03-2324-CM by the GE defendants with the help of US Bank and US Bancorp through their agent Shughart Thomson & Kilroy as revealed in attorney billing records filed with this court and sought in discovery by the plaintiff.
> 4. The federal antitrust claims in *Medical Supply Chain, Inc. v. General Electric Company, et al*., case no. 03-2324-CM were dismissed by misrepresenting to this court that the plaintiff had not pled a conspiracy between two legally separate actors when the plaintiff had pled a conspiracy and agreement between the GE defendants and GHX LLC and the US Bank and US Bancorp partner

Neoforma LLC and had cited the controlling legal authority that the plaintiff was not required to name as defendants the other co-conspirators identified in the complaint. See Exb. 1 GE Amended Complaint.
GE agreement with GHX and Novation assigning hospital market share ¶10 pg. 6, Novation acquiring control over Neoforma and partnering it with its hospital supply competitor GHX creating a monopoly of 80% of the hospital supply market ¶ 15 at pg. 9; GE and "cartel members including Premier, Inc. and Novation, Inc." conspired to increase hospital supply prices in the North American Hospital Supply market injuring US hospitals ¶36 pg. 19. See Exb. 1 GE Amended Complaint.
5. The GE complaint in 03-2324-CM stated at ¶37 pg. 20 and 21 that the GE defendants in a cartel with Novation "… preserve their inflated cost structures (the cartel has prevented the annual $23 billion dollar savings identified by US Bancorp Piper Jaffray's 2001 study by maintaining prices regardless of internal efficiencies) and by preventing the entry of competitors to the relevant market. The defendants willfully acquired and maintained that power by forming the cartel GHX, Inc. to buy an inferior electronic marketplace and exchanging ownership interests with suppliers and distributors that previously were competitors. The defendants further acted to maintain that monopoly by repudiating Medical Supply's financing and lease buy out agreement with full knowledge that Medical Supply had been previously
prevented from entering the hospital supply e-commerce market by other cartel members of GHX, Inc." See Exb. 1, ¶37 pg. 20 and 21 GE Amended Complaint
6. The GE complaint in 03-2324-CM describes the conduct of US Bank and US Bancorp breaching the presently litigated contracts with the plaintiff and stated at ¶3 pg. 4 that:
"GE appeared to be acting independently of Neoforma, when it accepted Medical Supply's proposal for a lease buy out and financing, but similarly repudiated a contract for essential facilities, preventing entry into the hospital supply market at great sacrifice when Medical Supply was not in a position to find an alternative. (Neoforma's financial partner, **US Bancorp** Piper Jaffray, has attested to a threat of filing a Suspicious Activity Report or "SAR," against Medical Supply under the USA PATRIOT Act, which would destroy Medical Supply's ability to process hospital and supplier purchasing transactions. In an affidavit by Piper Jaffray Vice President and Chief Counsel submitted in Medical Supply vs. **US Bancorp** et al No. 02-3443 (10th Cir.), Piper Jaffray argues to file a "SAR" at any time it sees fit. Medical Supply is seeking to be protected from Piper Jaffray's extortion and any malicious use of the USA PATRIOT Act. The October 2002 and June 2003, distinct antitrust injuries to Medical Supply prevented it from beginning its operations each time and realizing the expectations of its investors and stakeholders." [Emphasis added]
7. The GE complaint in 03-2324-CM stated at ¶15 pg. 9
"**US Bancorp helped Novation acquire control of Neoforma and partner it with GHX, L.L.C. creating a monopoly of over 80% of healthcare e-commerce market).** GE repudiated a contract, sacrificing $15 million dollars on June 15th, 2003 to keep Medical Supply from being able to compete against GHX, L.L.C. and Neoforma. The healthcare market is worth 1.3 trillion dollars. GE acted on the tremendous windfall to preserve its monopoly." [Emphasis added]"

From exb. 11 attached suggestion opposing Schlozman's Motion to dismiss (pgs. 3-4).

f. Temporal Relationship of Hon. Judge Michael Manners's Dismissal with other courts

23. The Hon. Judge Michael Manners's adoption of the previously dismissed cartel members' motions for dismissal violated the controlling law of this jurisdiction on claim and issue preclusion and the other legal basis advocated by the defendants including *Noerr-Pennington* based Immunity (exb. 11 pgs. 8-9) and the statute of limitations (exb. 11 pgs. 7).

24. The Hon. Judge Michael Manners's Order dismissing with prejudice the previously dismissed cartel members was temporally related to similar decisions contradicting the controlling precedent of the

respective jurisdictions by the Hon. Judge Carlos Murguia and the Hon. Magistrate David Waxse of Kansas District Court and the Hon. Fernando J. Gaitan, Jr. of the Western District of Missouri. See exb. 12 KS. Dist. Court case No. 2007cv02146; exb. 12 KS. Dist. Court case No. 2005cv02299 and W.D. of MO. Dist. Court case No. 2007cv00849.

g. Hon. Fernando J. Gaitan, Jr. and St. Luke's Health System, Novation LLC

25. Before being appointed the federal bench by President George H.W. Bush, the Hon. Fernando J. Gaitan, Jr. was on the bench of the 16th Circuit Court.

26. The appearance of a fiduciary interest of the Hon. Fernando J. Gaitan, Jr. in the defendants St. Luke's Health System and Novation LLC as a director or corporate officer of St. Luke's Health System is given by the Hon. Fernando J. Gaitan, Jr.'s disclosure to the Judicial Conference. See exb. 15.

27. The defendant St. Luke's Health System asserts it is an owner of the defendant Novation LLC and does over $90,000,000.00 (ninety million dollars) of purchases exclusively through Novation LLC each year. See exb. 16.

28. The Hon. Fernando J. Gaitan, Jr. also presided over the controversial trial of an ACORN voter registration fraud case (see exb. 17) and the prosecution of a Missouri attorney Phillip A. Cardarella and his wife Katheryn Shield a strong Democratic Party candidate for mayor of Kansas City, Missouri. See exb. 18.

II. SUGGESTION AT LAW

The petitioner Samuel K. Lipari gives the following suggestions of law revealing the frivolousness of Lathrop & Gage, L.C.'s supporting arguments:

a. Defendant's Request for Judgment is an Untimely Rule 55.27 (6) Motion to Dismiss

Lathrop & Gage, L.C.'s motion for judgment on the pleadings is a motion under Missouri Rules of Civil Procedure Rule 55.27 (6) seeking dismissal because Lathrop & Gage, L.C. claims the petitioner failed to state a claim upon which relief can be granted. Any of the eleven defenses enumerated in Rule 55.27 may be raised by way of responsive pleading or motion. *State ex rel. Metal Serv. Ctr. v. Gaertner*, 677 S.W.2d 325, 327 (Mo. banc 1984) (stating that the defenses enumerated in Rule 55.27 may be raised by answer or by motion at the option of the pleader).

The court in *Romero v. Kansas City Station Corp*., 98 S.W.3d 129 at 137 (Mo. App., 2003) after lengthy analysis treated a motion for summary judgment over lack of subject matter jurisdiction as a motion to dismiss. However the *Romero* court observed that subject matter jurisdiction under Rule 55.27(a)(1), is a question of fact for the trial court, requiring the court to consider and weigh the evidence, including disputed evidence, in deciding whether facts exist supporting subject matter jurisdiction (*id*. at 134) and found that evidence had not been presented.

Here the defendant Lathrop & Gage, L.C. and indeed William G. Beck (Mo. Lic. # 26849); Peter F. Daniel (Mo. Lic.# 33798); and J. Alison Auxter (Mo. Lic. # 59079) all of Lathrop & Gage L.C. have pursued no formal discovery and give every appearance of having failed to make the required diligence to support their answer to the petition. However the controlling precedent of the Western District of Missouri contained in *Pennell v. Polen*, 611 S.W.2d 323 (Mo.App. W.D.1980) is that Lathrop & Gage, L.C.'s motion cannot be treated as a motion for summary judgment without Rule 74.04's notice, particularity, and discovery required by a plaintiff to adequately answer:

> "Moreover, under Rule 55.27(b), if the trial court is going to treat a motion for judgment on the pleadings as a summary judgment motion, the motion should be "disposed of as provided in rule 74.04." Thus, in such a situation, it would appear that the requirements contained in Rule 74.04 for the motion, response, and ruling would be applicable. See *Lawson v. St. Louis-San Francisco Ry. Co.*, 629 S.W.2d 648, 649-50 (Mo.App. E.D.1982).
>
> Our western district colleagues considered a somewhat similar factual situation in *Pennell v. Polen*, 611 S.W.2d 323 (Mo.App. W.D.1980). There, on the morning of trial, the defendant filed a motion to dismiss for failure to state a cause of action or, alternatively, for summary judgment. Id. at 323. There, as here, the trial court engaged counsel in discussion on the motion and then entered summary judgment. The court reversed, saying, "a summary judgment made and entered on the very day of trial, without other notice to the adversary, or acquiescence, undermines the probity of the procedure and prejudices fairness." *Id*. at 324."

Keim v. Big Bass, Inc., 949 S.W.2d 122 at 124 (Mo. App. E.D., 1997).

Lathrop & Gage, L.C.'s motion is untimely because the petition was entered as served upon Lathrop & Gage, L.C. on 4/14/08 and a motion for dismissal was due thirty days later. See **exb. 1** appearance docket. Instead Lathrop & Gage L.C. filed an answer to the petition on 5/09/08. The present motion was filed on 11/12/08 and is solely a response to the plaintiff's petition which has not been amended since filing on 2/25/08. Lathrop & Gage, L.C. has violated the time limit of Rule 55.27(a):

> "A motion making any of these defenses **shall be made within the time allowed for responding to the opposing party's pleading**, or, if no responsive pleading is permitted, within thirty days after the service of the last pleading." [Emphasis added]

Rule 55.27 Defenses And Objections How Presented By Pleading Or Motion For Judgment On The Pleadings. Under the rules of statutory construction, this court is required to make a literal, liberal, and fair reading and interpretation of the thirty day requirement in Rule 55.27(a) and deny the defendant's motion as untimely. See *State ex rel. Ott v. Bonacker*, 791 S.W.2d 494 at 497 (Mo. App. S.D., 1990).

b. Defendant' Request for Judgment is an Untimely Rule 55.27(b)

The dwarfing frivolity of Lathrop & Gage, L.C.'s motion is belied by the first words of Rule 55.27(b) and the simple observation that the pleadings have not yet closed: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." [Emphasis added] *Keim v. Big Bass, Inc*., 949 S.W.2d 122 (Mo. App. E.D., 1997). This court is in a district that under *Pennell v. Polen*, 611 S.W.2d 323 (Mo. App.W.D., 1980) appears to reject the timeliness of a motion for judgment on the pleadings at the beginning of a trial:

> "We question that the trial court procedure sufficed even as an unadorned motion for judgment on the pleadings under Rule 55.27(b). That rule allows the court to act only within such time as not to delay the trial."

Pennell v. Polen, 611 S.W.2d 323 at fn 2 (Mo. App.W.D., 1980).

c. Defendant' Request for Judgment is Prohibited by Law

William G. Beck (Mo. Lic. # 26849); Peter F. Daniel (Mo. Lic.# 33798); and J. Alison Auxter (Mo. Lic. # 59079) all of Lathrop & Gage L.C. have frivolously neglected to research the applicable law or exercise even a modicum of professional responsibility, much less the diligence required by RMSo. 55.03(b). Lathrop & Gage L.C.'s answer entered on 5/09/08 disputes many material facts of the plaintiff's petition.

The court may not grant a judgment on the pleadings unless there are no material facts in dispute: "*Main v. Skaggs Community Hosp*., 812 S.W.2d 185, 186 (Mo.App. 1991). Before a motion for judgment on the pleadings may be granted, all averments in all pleadings must show no material issue of fact exists; that all that exists is a question of law." *RGB2, Inc. v. Chestnut Plaza, Inc*., 103 S.W.3d 420 at pg. 424 (Mo. App., 2003).

d. Lathrop & Gage L.C.'s Misrepresentation of Antitrust Law

The petition clearly avers that Lathrop & Gage is a conspirator in the underlying claims of antitrust including § 416.031.1 RSMo; § 416.031.2 RSMo; Conspiracy to Violate § 416.031(2); Tortious Interference with Business Relations; Fraud and Deceit; and Prima Facie Tort.

> "To state a claim for civil conspiracy, a party must allege (1) an agreement or understanding; (2) between two or more persons; (3) to do an unlawful act or to do a lawful act by unlawful means. *Macke Laundry Serv. Ltd. v. Jetz Serv. Co*., 931 S.W.2d 166, 175 (Mo.App.1996). Civil conspiracy is not actionable by itself because "some wrongful act must have been done by one or more of the alleged conspirators and the fact of a conspiracy merely bears on the liability of the various defendants and joint tortfeasors." Id. (quoting *Bockover v. Stemmerman*, 708 S.W.2d 179, 182 (Mo.App.1986)). If the underlying claim does not state a cause of action, there can be no claim for civil conspiracy. *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. banc 1996). As the underlying claim for their civil conspiracy theory, Appellants argue that Respondents violated Missouri's Antitrust Law, §§ 416.011 to 416.161, RSMo 1994, and tortiously interfered with Dr. Zipper's contractual expectancy created by the hospital bylaws."

Zipper v. Health Midwest, 978 S.W.2d 398 (Mo. App.W.D., 1998).

Lathrop & Gage L.C. has taken up the misrepresentation by other members of the hospital supply cartel that the petitioner has failed to make allegations of conduct by Lathrop & Gage L.C. or its employees that led to the injury of the petitioner. At law however even as a latecomer Lathrop & Gage L.C. is liable for the preceding acts of the other identified hospital supply cartel members including the other remaining defendant in this action Robert Zollars , some who are now dismissed defendants in this action, some of whom are defendants in the petitioner's federal litigation and some who are not named as defendants:

> "In non-class actions, late-comers to antitrust conspiracies, who, while knowing of the prior existence of the conspiracy, join it in order to promote the unlawful object for which it was organized, are liable for everything done during the period of the conspiracy's existence. *Dextone Co. v. Building Trades Council of Westchester County*, 60 F.2d 47 (2d Cir. 1932). This means that proof of the unlawful affiliation is sufficient to render a co-conspirator liable for all damages that the conspiracy caused, regardless of the exact time defendant became a member or the extent of its participation. *Dextone*, supra, at 48. "A person or corporation joining a conspiracy after it is formed and thereafter aiding in its execution, becomes from the time of joining as much a conspirator as if he originally designed and put it into operation." 1 Tuolmin's Antitrust Laws, § 22.14, at 404 (1949). "To establish a combination or conspiracy in restraint of trade, it is not necessary to prove that all of the participants formed or joined the combination simultaneously. A person may be found to have joined a combination or conspiracy which is already in existence. Such a person, by knowingly becoming a party to the combination or conspiracy, becomes liable and responsible in law for those acts of the members of the combination or conspiracy which were performed prior to the time that the new participant joined in it." Antitrust Civil Jury Instructions, A.B.A. Section of Antitrust Law, at 53 (1972), citing *Pacific Lanes, Inc. v. Washington State Bowling Proprietors Assn*., Civil No. 5381 (W.D.Wash.1965)."

In re Nissan Motor Corp. Antitrust Litigation, 430 F.Supp. 231 at 232 (S.D. Fla., 1977)

Lathrop & Gage L.C. is confused about its liability from the acts of Lathrop & Gage L.C.'s employees including both Mark F. "Thor" Hearne, and Kansas State Republican Senator John L. Vratil. Each Defendant is liable for the acts of its officers, employees, and agents. Because a corporation can act only through its agents, it may be held liable for the acts of its officers, employees, and other agents in certain circumstances. *Meyer v. Holley*, 537 U.S. 280, 285, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

Lathrop & Gage L.C. has vicarious liability for Hearne and Vratil's conduct:

> "As Judge Lowe pointed out *Northwestern Nat. Bank of Minneapolis v. Fox & Co.,* 102 F.R.D. 507, 512 (S.D.N.Y.1984), "in the partnership context, the scienter requirement is satisfied as long as the partner or partners actually involved in the wrongdoing[] acted with scienter." One must distinguish the idea of the mens rea of a crime from the idea of the category of persons who are to be held liable for the crime. It should also be noted that courts have upheld vicarious liability in two areas of the law in which intent must usually be proven in order to establish a primary violation: antitrust, see ASME, 456 U.S. 556, 102 S.Ct. 1935, and securities, see, e.g., *In re Atlantic Financial Management, Inc.*, 784 F.2d 29 (1st Cir.1986) (Breyer, J.), cert. denied, 481 U.S. 1072, 107 S.Ct. 2469, 95 L.Ed.2d 877 (1987)."

131 Main Street Associates v. Manko, 897 F.Supp. 1507 at 1534 (S.D.N.Y., 1995). The petition avers knowledge of each of the defendants over critical parts of the monopolization scheme, the general conspiratorial objective of excluding hospital supply competitors and consolidating the cartel's control of the State of Missouri market under Insure Missouri while replacing Neoforma Inc.'s money laundering of member hospital funds with the National Cancer Center designation of the Novation LLC hospital St. Luke's Health System:

> "A plaintiff seeking redress need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all participants therein." *Hoffman-LaRoche, Inc*., supra, 447 F.2d at 875. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was "a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences." *Id*."

Coon v. Froehlich, 573 F.Supp. 918 at 922 (S.D. Ohio, 1983)

Lathrop & Gage L.C. is in error to criticize the complexity of the complaint. See *Schwartz v. Broadcast Music, Inc., supra*, 180 F.Supp. at 335, recognizing that an antitrust conspiracy may have more than one object directed at one or more victims. Also *Preferred Physicians Mut. Management Group v. Preferred Physicians Mut. Risk Retention*, 918 S.W.2d 805, 815 (Mo.App.1996) is instructive on why the

petitioner was forced to describe in detail so many wrongful acts by different conspirators. The conspiracy is not what is actionable. *Id*. An unlawful act done in furtherance of a conspiracy is what is actionable. *Id*. "[T]he conspiracy has to do only with the joint and several liability of the co-conspirators." *Id*.

> "The gist of the action is not the conspiracy, but the wrong done by acts in furtherance of the conspiracy or concerted design resulting in damage to plaintiff. *Shaltupsky v. Brown Shoe Co., supra; Medich* v. *Stippec*, 335 Mo. 796, 73 S.W.2d 998; *Seegers v. Marx & Haas Clothing Co*., supra; *Kansas City v. Rathford*, 353 Mo. 1130, 186 S.W.2d 570."
>
> *Gruenewaelder v. Wintermann*, 360 S.W.2d 678 at 687-688 (Mo., 1962).

e. Tortious Interference with Business Relations or Expectancy

The petition is not dissimilar from early allegations of conspiracy to tortiously interfere with a business expectancy by other Missouri litigants in *Thomas v. Sterling Finance Co*., 180 S.W.2d 788 and *Stewart Land Co. v. Perkins*, 290 Mo. 194:

> "Unquestionably the petition alleged a conspiracy to do an unlawful act — the injury and ruining of plaintiff's business — so that, in the final analysis, the only question is whether it also alleged, in sufficient form for a pleading of such character, that some wrongful act was done in pursuance of the conspiracy with resulting damage to plaintiff.
>
> ***
>
> A conspiracy to injure another's business, as by preventing him from obtaining a loan, is actionable when executed to such other person's damage; and while the form of plaintiff's original petition might well have been improved upon, the ultimate charge of collusion and conspiracy was not a mere gratuitous averment, but instead was sufficiently connected with the previous allegations for the whole to state a cause of action."
>
> *Thomas v. Sterling Finance Co*., 180 S.W.2d 788 (Mo. App., 1944).

The Nebraska court has similarly followed *Stewart Land Co. v. Perkins*, 290 Mo. 194:

> "Of interest in this connection is *Stewart Land Co. v. Perkins*, 290 Mo. 194, 234 S.W. 653 (1921), wherein the court held that a petition alleging that plaintiff was engaged in a lawful business and that defendant without cause or excuse, and actuated alone by malice, conspired with others to interfere with and destroy plaintiff's business, and in pursuance of such conspiracy has actually interfered with and damaged the business, sufficiently stated a cause of action on the case for unlawful conspiracy."

Dixon v. Reconciliation, Inc., 206 Neb. 45 at 49-50, 291 N.W.2d 230 at 233 (Neb., 1980). The elements of tortuous interference are of course pled in the petition at pgs. 103-104 and charged as a count against the defendants including Lathrop & Gage L.C. See exb. 11.

f. Fraud and Deceit

Lathrop & Gage L.C. is liable for fraud and deceit, not only for William G. Beck (Mo. Lic. # 26849); Peter F. Daniel (Mo. Lic.# 33798); and J. Alison Auxter's (Mo. Lic. # 59079) misrepresentation to this court that the petition did not aver injury and claims of the petitioner as an unincorporated individual in

Lathrop & Gage L.C.'s present motion in support of judgment on the pleadings; The petition describes many misrepresentations related to the Insure Missouri scheme to first cut off Medicaid to what became 90,000 Missouri citizens then to supply the Missouri hospitals through electronic marketplace for hospital supplies, furnishing the "who where and what" of each misrepresentation that resulted in injury to the petitioner and which are also pled as the required elements in the petition at pgs. 104-106.

g. Prima facie tort

Lathrop & Gage L.C. is liable for Prima facie tort as a result of being a co-conspirator with other hospital supply cartel member co-conspirators and the acts specifically identified in the petition:

> "A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties `to inflict a wrong against or injury upon another,' and `an overt act that results in damage.'" *Rotermund v. United States Steel Corp*., 474 F.2d 1139 (8th Cir.1973) (citation omitted)."

Coon v. Froehlich, 573 F.Supp. 918 at 922 (S.D. Ohio, 1983).

h. Accrual of petitioner's claims

The petition itself expressly states the basis allowing subsequent claims when they accrue to the petitioner:

> "27. The petitioner's right to bring new claims based on subsequent conduct of previous defendants is governed by *Lawlor v. National Screen Service Corp.*, 349 U.S. 322:
> "*Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122,. In *Lawlor* five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged."
> *Engelhardt, v.Bell & Howell Co*., 327 F.2d 30 at ¶ 42 (8th Cir, 1964)."

Petition at ¶ 27 on page 4.

Generally, the four-year period begins when the injurious act is committed. *Zenith Radio Corp. v. Hazeltine Research, Inc*., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp*., 546 F.2d 570, 572 (4th Cir.1976) (same).

> "Where a continuing violation of antitrust laws occurs, "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again." *Klehr v. A.O. Smith Corp*., 521 U.S. 179, 189, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997) (internal citations omitted). The plaintiff may then recover for injuries suffered after the overt act, if the injuries occur within the statutory period prior to the date the complaint was filed. See, e.g., *Zenith*, 401 U.S. at 338, 91 S.Ct. 795 (explaining that for a continuing violation, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act"); *Charlotte Telecasters*, 546 F.2d at 572 (explaining that "each refusal to deal gives rise to a claim under the antitrust laws" and that "the statute of limitations commences to run from the last overt act causing injury to the plaintiffs business")."

Go Computer, Inc. v. Microsoft Corp., 437 F.Supp.2d 497 at 504 (D. Md., 2006).

Lathrop & Gage L.C. attempts to misrepresent the statute of limitations for the petition's claims as expired, despite being served notice in exb. 11 at page 7 and on November 6, 2008 Lathrop & Gage L.C.'s implied consent in exb. 7 Motion for Security Costs to include a later act to injure the petitioner by continuing the deprivation of the right to incorporate or to enforce his contractual agreements and to capitalize his entry into the market for hospital supplies:

> "A conspiracy cause of action is governed by the five year statute of limitations of § 516.120. *Rippe v. Sutter*, 292 S.W.2d 86, 90 (Mo.1956). The five year limitation period in a conspiracy action **begins to run upon the occurrence of the last overt act charged resulting in damage to the plaintiff**. Id. "When the act which gives the cause of action is not legally injurious until certain consequences occur then the period of limitation will date from the consequential injury ... and ... the resulting damage is sustained and is capable of ascertainment within the contemplation of the statute [516.100] 4 whenever it is such that it can be discovered or made known." *Id*." [Emphasis added]

Kansas City v. W.R. Grace & Co., 778 S.W.2d 264 at 273-274 (Mo. App.W.D., 1989)

f. Temporal Relationship of the Clearly Erroneous Dismissals

The Hon. Judge Michael Manners's was not free to adopt the previously dismissed cartel members' motions for dismissal. *Greene County v. Pennel*, 992 S.W.2d 258, 264-65 (Mo.App.1999) (stating that the lower courts are constitutionally bound to follow the controlling decisions of the Supreme Court of Missouri).

The temporal relationship of this court's order with the defendants conduct procuring interim dismissals in the Western District of Missouri racketeering action against the defendants' hospital supply cartel and a show cause order designed to effect a dismissal of the plaintiff's contract claims against the defendants' cartel members US Bank and US Bancorp in Kansas District court exceeds that rejected in *Glass v. Pfeffer*, 849 F.2d 1261 at 1268 (C.A.10 (Kan.), 1988) and gives rise to the appearance of a lack of independence or extra judicial bias and prejudice by this court.

CONCLUSION

Whereas for the above reasons, the petitioner Samuel K. Lipari respectfully requests this court deny the defendant Lathrop & Gage L.C.'s request for a judgment on the pleadings.

Respectfully submitted

S/Samuel K. Lipari
Samuel K. Lipari
3520 NE Akin Apt. 918
Lee's Summit, MO 64064
816-365-1306
saml@medicalsupplychain.com
Petitioner *pro se*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 17th day of November, 2008, via email to:

John K. Power, Esq. Husch Blackwell Sanders LLP, 1200 Main Street, Suite 2300
Kansas City , MO 64105

Jay E. Heidrick, Shughart Thomson & Kilroy, P.C. 32 Corporate Woods, Suite 1100
9225 Indian Creek Parkway Overland Park, Kansas 66210

William G. Beck, Peter F. Daniel, J. Alison Auxter, Lathrop & Gage LC, 2345 Grand Boulevard, Suite 2800, Kansas City, MO 64108

S/Samuel K. Lipari
_____
Samuel K. Lipari