IN THE STATE OF MISSOURI
WESTERN DISTRICT COURT OF APPEALS
AT KANSAS CITY, MISSOURI

Case No. WD70832 (16th Cir. Case No. 0816-04217)

SAMUEL K. LIPARI
Appellant

vs.

NOVATION, LLC; NEOFORMA, INC; GHX, LLC; VOLUNTEER HOSPITAL ASSOCIATION; VHA MID-AMERICA, LLC; CURT NONOMAQUE; THOMAS F. SPINDLER; ROBERT H. BEZANSON; GARY DUNCAN; MAYNARD OLIVERIUS; SANDRA VAN TREASE; CHARLES V. ROBB; MICHEAL TERRY; UNIVERSITY HEALTHSYSTEM CONSORTIUM; ROBERT J. BAKER; JERRY A. GRUNDHOFER; RICHARD K. DAVIS; ANDREW CECERE; COX HEALTH CARE SERVICES OF THE OZARKS, INC.; SAINT LUKE'S HEALTH SYSTEM, INC.; STORMONT-VAIL HEALTHCARE, INC.; SHUGHART THOMSON & KILROY, P.C.; HUSCH BLACKWELL SANDERS LLP

REPLY BRIEF OF THE APPELLANT

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Table of Contents

Table of Authorities

Statues And Treatises

REPLY SUGGESTION OF THE APPELLANT

The appellant hereby replies to the briefs of the respondents Novation, LLC, VHA Inc., University Healthsystem Consortium, VHA Mid-America LLC, Curt Nonomaque, Robert J. Baker, Thomas Spindler, Robert Bezanson, Gary Duncan, Maynard Oliverius, Sandra Van Trease, Charles Robb, Micheal Terry, Cox Health Care Services Of The Ozarks Inc., Saint Luke's Health System Inc., Stormont-Vail Healthcare Inc., Robert J. Baker and Curt Nonomaque, (herein Novation LLC), the respondents Jerry Grundhofer, Andrew Cecere, Richard Davis, Andrew Duff, Piper Jaffray Companies, and Polsinelli Shughart PC (herein "Polsinelli"); Lathrop & Gage LLP (herein "Lathrop"); Husch Blackwell Sanders LLP (herein "Husch"); and Neoforma, Inc And GHX, LLC (herein "GHX").

Introduction

The Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees continue to intentionally mislead the court on the express language of the plaintiff's petition so that this appeals panel will violate the Missouri Supreme Court's requirement in *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993) to liberally construe a petition's allegations and reasonable inferences in favor of the plaintiff and to rule contrary to the controlling law of the Western District in *Jones v. Jackson County Circuit Court*, 162 S.W.3d 53 (Mo, 2005). See plaintiff's Suggestion In Opposition To Defendants' Motions To Dismiss (Lgl. file vol. 4 pg. 592).

The complaint at ¶ 27 on pg. 4 (Lgl. file vol. I pg. 1) expressly gave notice to the defendants and the trial court that substantial new antitrust violations subsequent to the termination of the prior litigation permitted under the US Supreme Court controlling decision *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 and *Engelhardt, v. Bell & Howell Co.,* 327 F.2d 30 at ¶ 42 (8th Cir, 1964) were charged. The petition stated claims against new violations the defendants were not entitled to repeat (see *Smith v. Potter*, 513 F.3d 781 (7th Cir., 2008) and *Sherrod v. School Board of Palm Beach County*, No. 07-13747 (11th Cir. 4/7/2008) cited in plaintiff's suggestion opposing dismissal (Lgl. file vol. 4 pg. 595) and is clearly not barred by previous adjudications. See 46 Am. Jur. 2d 841-42, Judgments § 567 (1994).

The repeated lie of the Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees to Missouri state judges that the plaintiff was only suing on claims made by his dissolved corporation back in 2002, like the Novation LLC cartel member's previous misrepresentations to federal courts by Missouri licensed attorneys and Missouri chartered law firms used to successfully cover spurious arguments misled the trial court judge. These spurious arguments, still appearing in the appellees' briefs include that the plaintiff's claims were barred by collateral estoppel when the claims and relevant markets were not ruled on or analyzed by the Kansas District court and were substantially changed to include further acts in later years of a materially different nature by the cartel members to restrain trade in the market for hospital supplies in Missouri.

The petition contains new claims that the plaintiff was compelled to raise covering intervening conduct since the filing of the federal antitrust actions or forfeit, just as the second proposed amended complaint had to include all interveing claims or they would be forfeited under Missouri's doctrine against splitting claims. See *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991).

Timeliness

Without the appellees' intentional deception, the complaint is timely under Mo. Rev. Stat. § 416.131. 2 having been commenced within four years after the relative antitrust causes of action against new defendants and **subsequent conduct of prior defendants** when accrued and under Mo. Rev. Stat. § 516.230 having been commenced within one year after dismissal of the action expressly without prejudice in federal court. See petition at ¶¶ 19, 20, on pg. 3 (Lgl. file vol. I pg. 3).

The complaint avers later conduct including materially different forms of restraint of trade to deprive the plaintiff of critical inputs and business functions such as the antitrust conspirators having "obstructed and interfered by depriving the petitioner of the representation of Stueve Siegel Hanson, LLP **during September to December of 2007**" (emphasis added) See petition at ¶ 526 on pg. 83 (Lgl. file vol. I pg. 83).

The complaint also avers the antitrust restraint of boycotting non Novation LLC cartel hospitals from the illegal input of higher Medicare reimbursement rates

than those legally allowed: "The hospital supply cartel defendants were still able to receive favorable treatment from Blue Cross Blue Shield Of Kansas, Inc. which resulted in approval of **inappropriate up-coding and elimination of audits until 2007** when the contract was awarded to Wisconsin Physicians Service Health Insurance Corp., of Madison, Wis. a legitimate Medicare Administrator" (emphasis added). See petition at ¶ 223 on pg. 83 (Lgl file vol. I pg. 29).

The plaintiff/appellants' petition was filed on February 25, 2008 clearly within the four year limitation under Mo. Rev. Stat. § 416.131. 2.

Collateral Estoppel

Collateral Estoppel cannot apply to the new claims or the language used to re-allege old state claims previously in federal court against defendants in the 16th Circuit petition because the four elements required for collateral estoppel under *Vinson v. Vinson*, 725 S.W.2d 121 at 124 (Mo.App., E.D.1987) are not present and simply because no court has heard the claims. See *Finley v. St. John's Mercy Medical Center,* 958 S.W.2d 593 cause no. 71634, both cited and argued in plaintiff suggestion opposing dismissal. See Lgl file vol. 4 pg. 598.

The appellees' arguments conflict with established antitrust case law that categorically refutes prior dismissals immunizing future antitrust violations. See *Eichman v. Fotomat Corp.* 759 F.2d 1434 at ¶¶14-15 "In this, the district court erred. The judgment in *Eichman I* does not immunize Fotomat from liability for all future conduct. *Eichman II*, 147 Cal.App.3d at 1177, 197 Cal.Rptr. at 616. See

also *Lawlor v. National Screen Service Corp*., 349 U.S. 322, 329, 75 S.Ct. 865, 869, 99 L.Ed. 1122 (1955)."

The problem for the appellees' false arguments the plaintiff/appellant's antitrust claims are subject to collateral estoppel is translating Kansas District Court Judge Hon. Carlos Murguia's sweeping condemnation of the plaintiff and the sanctioning of the plaintiff's counsel expressly for bringing damage claims in a new case after the failure of prospective injunctive relief against the cartel member US Bancorp in closest privity to the plaintiff to prevent the bank from acting for the cartel and to prevent economic harm is that the plaintiff's former counsel had the clearly established right to bring the damage claims after they accrued under the controlling law of the U.S. Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc*., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). But, this did not stop the defendants' Missouri chartered law firms from obtaining sanctions as the defendants' Missouri chartered law firms had previously done for including the heresy that the USA PATRIOT Act contained private rights of action in *Medical Supply Chain, Inc. v. US Bancorp, NA, et al,* 112 Fed. Appx. 730 (10th Cir. 2004) where Hon. Judge John C. Porfilio; Hon. Judge Michael W. McConnell; and Hon. Judge William J. Holloway sanctioned the plaintiff's counsel in an order signed by former Clerk of the Court Patrick J. Fisher, Jr. for double attorney's fees and costs ($23, 956.00) merely for asserting the existence of an express private right of action under the USA PATRIOT Act and asserting co-conspirators identified in the complaint need not be named defendants.

The problem with Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees continuing to participate in these outcomes obtained through extrinsic fraud in the federal courts and employing them to mislead State of Missouri judges is that it is readily determinable on its face that Congress expressly created and expanded private rights of action with the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (The USA PATRIOT Act) Pub. L. No. 107-56 (2001), 115 Stat. 272.

In addition to the provision of Section 355 of The USA PATRIOT Act amending Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) under subsection w to state: "(3) MALICIOUS INTENT.—Notwithstanding any other provision of this subsection, voluntary disclosure made by an insured depository institution, and any director, officer, employee, or agent of such institution under this subsection concerning potentially unlawful activity that is made with malicious intent, **shall not be shielded from liability from the person identified in the disclosure**." (emphasis added); the USA PATRIOT Act was amended to provide liability of the US Government for the misuse of warrantless wiretaps under Section 223 which created a new 18 USC 2712 exclusive private right of action for any person aggrieved by the willful violations of sections 106(a), 305(a), or 405(a) of FISA (50 USC 1806(a), 1825(a), 1845(a) respectively to be brought against the United States in U.S. district court to recover money damages.

As Judge Mansfield's dissent opposing inferred private rights of action in *Leist v. Simplot* stated:"… **to create such an important right as that to bring a**

private suit by an express grant, which would take but one sentence,…" [emphasis added] *Leist v. Simplot*, 638 F.2d 283 Dissent of Judge Mansfield at 327-328 (C.A.2 (N.Y.), 1981).

Neither Patrick J. Fisher or Hon. Judge Michael W. McConnell are still part of the Tenth Circuit Court of Appeals in the wake of the Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees' continued use of these decisions to smear the plaintiff/appellant and obstruct justice.

The plaintiff's past litigation experience is not proof that a monopoly in Missouri's markets for hospital supplies in later years does not exist. The use of the smearing shows the appellees' Missouri law firms even after reconstituting themselves as new insurable entities merely continue their participation in reprehensible misconduct.

Along with the plaintiff's litigation related to the USA PATRIOT Act's safe harbor conditions for suspicious activity reports ("SARS"), other courts have recognized liability for SARS in the absence of good faith, including *Lopez v. First Union Nat. Bank of Florida*, 129 F.3d 1186 (C.A.11 (Fla.), 1997) and *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003).

The argument that the plaintiff/appellant's former counsel raised regarding the imposition of an impermissible heightened pleading standard for antitrust which was also used to justify the extraordinarily severe sanctions in the Tenth Circuit was subsequently adopted by the Second Circuit in *Twombly v. Bell Atlantic Corporation* 425 F.3d 99 (2nd. Cir. 2005) by United States Circuit Judges

Hon. Robert D. Sack; Hon. Reena Raggi; and Hon. Peter W. Hall citing the same two key precedents used by the plaintiff's former counsel: *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). However the plaintiff/appellant's complaint alleged and named agreements to restrain trade and was not the parallel action conspiracy claim later challenged in the US Supreme Court resulting in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

The Tenth Circuit itself was later reversed by the US Supreme Court for imposing impermissible heightened pleading standards. See *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007).

Finally, the sanctions against the plaintiff/appellant's former counsel violated the controlling case law of the Tenth circuit regarding the prohibition of dismissal when there is a discoverable unknown defendant *(Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993) and plurality of actors through expressly identified but unnamed coconspirators (*Olsen v. Progressive Music Supply, Inc*., 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983).

When the Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees use this history which the appellant is not seeking to reverse in Missouri state court, they are participating in conduct to deprive the plaintiff/appellant of Equal Protection under the Law and the most basic Due Process rights in addition to acting in contradiction to their legal training and professional responsibility. The

Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees are also injuring the reputation of the Missouri Bar.

Considering the inescapable result that the plaintiff has been prevented from vindicating the laws of the Missouri State Legislature and Congress that would have protected the lives of thousands of consumers in the monopolized healthcare markets (see "Accusation of Conflicts at a Supplier to Hospitals" By Mary Williams Walsh NYTimes; Aug.1 2002; "Firm handed £4bn NHS contract was investigated for overcharging" By Nigel Hawkes London Times; Jul. 31, 2006; and "Missouri's Sharp Cuts to Medicaid Called Severe-More than 68,000, a third of them children, may lose benefits in the move to avoid tax hikes." LA Times, July 1, 2005 all cited in Lgl file vol. 1 pg. 9-10); the appellees' continuing conduct misrepresenting the express language of the petition and impugning the reputation of the plaintiff's litigation efforts is every bit as reprehensible as the federal government's manufacturing evidence of a terrorist train bombing in Spain against the Washburn Law School graduate Brandon Mayfield for assisting an African American in an Oregon parental rights termination proceeding. See *Brandon Mayfield v. USA*, Oregon Dist. Case No. 04-1427-AA (2007).

Constitutional Claim

As a direct result of the Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees' continuing misconduct which appears even to have prevented the trial court from reading the plaintiff/appellant's suggestions and petitions, and because

of the example of state discipline being openly used by associates of the Novation LLC cartel to extort licensed attorneys as in the case of the state attorney Scott Eckersley (see *Scott Eckersley v Matthew Roy Blunt et al,* 16th Cir. Case no. 0816-CV00118), the plaintiff/appellant was forced to add the Missouri Board of Bar Governors as a defendant in proposed amended petitions to obtain prospective injunctive relief based on the Missouri Constitution to try to prevent the cartel from extorting the appellant's future legal representation. The Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees have not refuted that the proposed amended petitions fail to state a claim for prospective injunctive relief under the Missouri Constitution.

Relevant Markets

The collateral estoppel argument needed by the appellees is preposterous. Hon. Judge Carlos Murguia in 2003 or even in 2005 could not have predetermined the sufficiency of the plaintiff/appellant's State of Missouri allegations concerning a relative market for antitrust purposes in 2008. The Kansas District Court in 2002 and 2003 was only evaluating whether a quickly written emergency injunction petition adequately described a national market for hospital supplies.

The plaintiff/appellant in the state action was instead forced to describe additional conduct and restraints of trade that materially effected inputs required for competition and withheld or suppressed competition in new ways during the intervening years or forfeit his redress for the new injuries under the doctrine

against splitting claims in *King General Contractors, Inc.,* 821 S.W.2d 495, 501 (Mo. banc 1991).

The Federal Circuit in *Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, 375 F.3d 1341 (rev'd on other grounds)(Fed. Cir., 2004) found that relevant market and injury are "intensely factual determinations". Since allegations of a relevant market are fact dependant, it is inappropriate to grant dismissal at the pleading stage.

Another big problem with the appellees' collateral estoppel through insufficient allegations of relevant markets argument is the petition clearly and repeatedly alleges the plaintiff/appellant was *excluded* from competition. It is established antitrust law that monopoly power "may be proven directly by evidence of control of prices or the **exclusion of competition**" (emphasis added). See *Conwood Co. L.P. v. U.S. Tobacco Co*. 290 F. 3d 768, 783, n. 2. In *PepsiCo Inc. v. Coco-Cola Co*. 315 F. 3d 101, 107-108 (2nd. Cir. 2002), the court even found that "a relevant market definition is not a necessary component of a monopolization claim."

Stating Claims

The petition clearly alleges two or more actors with market power combining through agreement to exclude competition which resulted in increased hospital supply prices and injury to the market and the plaintiff/appellant's business and therefore states a *per se* claim under § 416.031.1 RSMo. An agreement between

horizontal competitors not to compete with each other for customers is the type of restraint that is so likely to have anticompetitive effects that it is deemed to be *per se* illegal under the antitrust laws. See, e.g., *Palmer v. BRG of Georgia, Inc*., 498 U.S. 46 (1990) (*per curiam*).

The petition also clearly alleges attempted monopolization in violation of § 416.031.2 RSMo through unlawful diversions of federal cancer research funds and Medicaid tax money to the Novation LLC cartel hospitals. "Attempted monopoly claims are aimed at `the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it.'" *Gen. Indus. Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 806-807 (8th Cir.1987).

Conspiracy

The Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees argue the plaintiff/appellant failed to state a claim for antitrust conspiracy, however the appellees do not argue with law and references to the petition or amended petitions that *no* conspiracy was adequately alleged. The petition identifies Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees as conspirators in specific agreements to artificially inflate hospital supplies and engage in commercial bribery or kickbacks to control the hospital supply market in Missouri as a monopoly. The petition also details numerous anticompetitive acts committed in the conspiracy.

A combination to monopolize does not require a specific intent to monopolize by every party to the combination. To prove a combination to monopolize under Section 2 of the Sherman Act, the plaintiff need only show a "[s]pecific intent to monopolize and anticompetitive acts designed to effect that intent." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1491 (9th Cir. 1991); *MCM Partners Inc. v. Andrews-Bartlett & Assocs., Inc*., 62 F.3d 967, 973 (7th Cir. 1995) A Section 1 conspiracy "is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion").

The conspirators identified in the petition were alleged to be acting with market participants in agreements to obtain the benefits of the artificially inflated hospital supply costs. *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc*., No. 03-14588 (Fed. 11th Cir. 6/30/2004). "The fact that Davmor's co-conspirators competed in markets different from Davmor's market does not preclude finding a conspiracy to monopolize Davmor's market." *Perington Wholesale, Inc. v. Burger King Corp*., 631 F.2d 1369 at 1377 (C.A.10 (Colo.), 1980).

Hewlett-Packard Co. v. Arch Assoc. Corp., 908 F. Supp. 265, 269 (E.D. Pa. 1995)(complaint adequately alleged conspiracy where alleged unnamed co-conspirators were a finite number of companies within the defendant's own distribution network and had all entered into a particular type of contract with the defendant); *Virgin Atlantic Airways Ltd. v. British AirwaysPLC,* 872 F. Supp. 52,

65-66 (S.D.N.Y. 1994) (where plaintiff plainly based conspiracy claim on defendant's contracts with its own clients and travel agents, and defendant had exclusive knowledge of the identity of those individuals and entities, complaint would not be dismissed for failure to name the alleged co-conspirators); *Interstate Circuit, Inc. v. United States Paramount Pictures Distrib. Co.,* 306 U.S. 208, 226-27 (1939) (affirming judgment for plaintiffs based on evidence that defendants were invited to conspire, agreed to do so, and did conspire, though participants joined the conspiracy at different times).

It is clearly established Missouri controlling law that having entered into agreements to monopolize and attempt to monopolize Missouri's hospital supply markets, the co-conspirators are liable if only for the acts of other members of the conspiracy. See *Royster* v. *Baker,* 365 S. W. 2d 496, 499, 500 (Mo. 1963) ("[A]n alleged conspiracy by or agreement between the defendants is not of itself actionable. Some wrongful act to the plaintiff 's damage must have been **done by one or more of the defendants**, and the fact of a conspiracy merely bears on the liability of the various defendants as joint tort-feasors (emphasis added)"). The tortuous acts of the conspirators need not even be unlawful on their face. See *Fischer v. Brancato*, 147 S.W.3d 794 (Mo.App. E.D. 2004).

Standing

The Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees' standing arguments are grossly misinformed or intentionally misleading. The federal

antitrust statutes define standing to raise a claim is derived from Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides that "(a)ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor" and recover treble damages and costs and a reasonable attorneys' fee. As a sole proprietor continuing to be injured in his business as a hospital supplier in the target area of the cartel's ongoing monopolization of the Missouri hospital supply markets alleged in the complaint, the appellant clearly has standing to bring his Missouri state law claims. The plaintiff/appellant was not only "hit", but also "aimed at." *Karseal v. Richfield Oil Corp*., 221 F.2d 358, 362 (9th Cir.1955).

The Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees cannot challenge the petition by arguing some antitrust claims arose while the plaintiff/appellant was incorporated and therefore the appellee conspiracy's repeated unlawful acts to successfully deprive the appellant of Missouri legal representation now defeat all his claims including those new and separate antitrust acts accruing while the plaintiff/appellant was a sole proprietor.

The required attorney diligence is violated by such arguments, not only by the clearly established liability for subsequent antitrust acts under *Zenith Radio Corp. v. Hazeltine Research, Inc*., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) (see Aplt Br. At pgs. 16, 43, and 45) but also by the clearly established rule that Medical Supply Chain Inc.'s antitrust claims were assignable:

"For example, courts have held that assignees of antitrust claims that accrue under the Clayton Antitrust Act, 15 U.S.C. § 15, have standing to sue for antitrust violations. The act provides that "any person who shall be injured" can sue and yet courts have interpreted the statute to confer standing on assignees of antitrust claims. See, e.g., *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425, 438-40 (3d Cir.1993) (Though the Clayton Antitrust Act, 15 U.S.C. § 15, provides that "any person who shall be injured" can sue, antitrust claims are assignable)."

Nancey Silvers v. Sony Pictures Entertainment, Inc. 402 F.3d 881 at ¶ 144 *en banc* (9th Cir. 2005).

The Gulfstream court stated the rule definitively: "Under controlling federal law, as the district court recognized, antitrust claims are assignable. *In re Fine Paper Litig*., 632 F.2d 1081, 1090 (3rd Cir.1980). See *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425 at ¶26 (3d Cir.1993).

The Polsinelli standing arguments beginning on pg. 25 of Polsinelli's brief grossly misrepresent the nature of Sherman Act prohibited antitrust conduct which includes the group boycott where the economic impact of the illegal conduct alleged by Lipari is immediately obvious. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959). Under antitrust law the defendant cartel's conduct is egregious and is actionable *per se*. In *FTC v. Indiana Federation of Dentists*, the Court, citing *Northwest*, observed: "the *per se*

approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor. . . ."476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). The complaint describes numerous restraints including exclusionary contracts enforced against hospitals with retaliation and obtained through kickbacks and commercial bribes to their administrators against the interest of their own institutions. Furthermore the Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees were alleged to be directly involved in causing the boycott of inputs to Lipari including capital from enforcement of contract rights, enjoyment of expectations from business relationships and even caused the boycott of Lipari's legal representation through extrinsic fraud and extortion through the threat of disbarment.

The procurement of outcomes through extrinsic fraud in court and the use of state attorney disciplinary extortion in furtherance of the Novation LLC cartel, like the corrupt diversion of federal cancer research and state administered Medicaid tax money as an input to the Novation LLC cartel hospitals are not exempt from the Sherman Act. See the *Noerr-Pennington* analysis *infra*. It is beyond credulity to argue that because Lipari is not a hospital he cannot bring refusal to deal and group boycott claims against competitors who have conspired to monopolize the sale of supplies to Missouri hospitals.

The severity of the Polsinelli misrepresentation of law to this court is that Polsinelli is responsible for knowing that the hospitals are expressly alleged to be

Lipari's consumers in addition to indirect consumers of supplies sold through the Novation LLC cartel and therefore if Lipari was a hospital he would have no standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Noerr-Pennington **Immunity**

The Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees continue to misrepresent to this court the established law of the *Noerr-Pennington Immunity* Doctrine despite the notice repeatedly given by the plaintiff of case citations to the "sham exception" voiding immunity which the appellees do not refute or differentiate. See Appellant's Reply Suggestion In Support Of Remanding The Premature Appeal before this court in Case No. WD70534 at pages 3-7 and served on the Novation LLC, Polsinelli, Lathrop, Husch, and GHX appellees February 6, 2009.

The Missouri Antitrust Act expressly directs that its provisions "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." § 416.141 RSMo 1978. *Fischer, Etc. v. Forrest T. Jones & Co*., 586 S.W.2d 310, 313 (Mo. banc 1979).

Federal courts recognize sham litigation including defenses to antitrust claims and filings by Lathrop & Gage LLP and the other defendant/appellees can be chargeable antitrust conduct:

> "*Noerr-Pennington immunity*, and the sham exception, **also apply to defensive pleadings**, *In re Burlington N., Inc.*, 822 F.2d 518, 532-33 (5th

Cir.1987), because asking a court to deny one's opponent's petition is also a form of petition; thus, we may speak of a "sham defense" as well as a "sham lawsuit." [Emphasis added]

Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180 (Fed. 9th Cir., 2005).

The antitrust liability of the defendant/appellees can also be recognized in sham petitioning that takes the form of unlawful conduct to influence government entities including disparaging the plaintiff/appellant with judges and their clerks or by making fraudulent representations to government agencies:

"In Re IBP Confidential Business Documents Litigation, 755 F.2d 1300, 1313 (8th Cir.1985) (*Noerr-Pennington* doctrine cannot be extended to "activities which, although 'ostensibly directed toward governmental action,' are actually nothing more than an attempt to harm another" or to "false communications" or to tortious, violent, **defamatory or other illegal acts** [citations omitted].)"[Emphasis added]

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 at 724 (C.A.8 (Mo.), 1986).

"[T]he "sham exception" is applicable when the activity in question corrupts governmental processes to such an extent that it constitutes access-barring conduct of the sort described in California Motor. *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985).

The *Razorback* court also found that "…where a defendant's resort to the courts is accompanied or characterized by illegal and reprehensible practices such

as perjury, fraud, conspiracy with or bribery of government decision makers, or misrepresentation, or is so clearly baseless as to amount to an abuse of process, that the *Noerr-Pennington* cloak of immunity provides no protection." *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985).

Amendment

The appellees arguments assert that the amendment was properly rejected by the trial court for failing to comply with an order made by Hon. Judge Manners when jurisdiction over the matter was exclusively before this court and before the mandate had returned jurisdiction to the 16th Circuit. As a consequence of the absence of jurisdiction, the trial court order limiting the proposed amended complaint (in a way that would have unconstitutionally forfeited the plaintiff's right to redress for intervening antitrust acts under *King General Contractors, Inc.*, 821 S.W.2d 495, 501 (Mo. banc 1991)) had no effect under the controlling law of this court and the State of Missouri.

The invocation of appellate review (intended to be Missouri Supreme Court review) was not frivolous. In the prior appeal from the dismissal, Case No. WD70001, the appellant requested transfer of his case on September 11, 2008 to the Missouri Supreme Court prior to disposition by the Western District Court of Appeals under rule 83.01. The appellant sought transfer while his appeal was pending because the Western District Appellate Court had *sua sponte* sought relief

that would require altering or reversing the Missouri Supreme Court's ruling in *Committee for Educational Equality v. State*, 878S.W.2d 446 (Mo., 1994).

However that transfer request was not heard (in part because of the communication of the nonparty to the appeal, Lathrop Lgl. file vol. 4 pg. 678) until after the appeal had been decided in this appellate court.

The appellant had a good faith belief that the Western District of Missouri Court was unable to rule on the Court's *sua sponte* motion for relief (Lgl. file vol. 4 pg. 679) contradicting *Committee for Educational Equality v. State*, 878 S.W.2d 446 (Mo., 1994) and that if the relief from the Supreme Court's *stare decisis* ruling on the point of law regarding the trial court's discretion to dismiss with prejudice or otherwise make final judgments on complete judicial units is warranted or that the inherent determination indicated by the Western District in its *sua sponte* order that the Missouri State Legislature's provision for providing an early resolution to litigation under Rule 74.01(b) is not a constitutionally valid public policy, jurisdiction over the appeal was solely within the Missouri Supreme Court. However, the constitutionality or effect of under Rule 74.01(b) is not an issue in the present appeal because jurisdiction was absent in the trial court from the moment of the notice of appeal until this court issued its mandate restoring jurisdiction to the trial court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify this brief starting at the title on page one to the end of the suggestion of law contains 454 mono space lines and 5029 words as counted by the Microsoft Word for Mac 2008 software. The appellant hereby certifies his reply brief complies with Western District Local Rule XLI (A)(3). Limitations on Length of Briefs and does not exceed 5115 words complying with Rule 84.06(b)(1) and the information required under Rule 55.03.

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Certificate of Service

I certify that on November 4th, 2009 I have served the opposing counsel with a copy of the foregoing notice by email:

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