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

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|---|---|---|
| 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.* | ) | |

**PLAINTIFF'S RULE 60(B) MOTION RESPONSE MEMORANDUM**

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 memorandum in response to the defendants' opposition 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:

**Memorandum**

1.The defendants' counsel have by their response to the Rule 60b motion unanimously elected to litigate the plaintiffs' state antitrust claims against the defendants and additional named Missouri hospital VHA and Novation, LLC co-conspirators in the 16th Circuit at Independence, Missouri action *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217.

2. The Missouri state law claims were expressly dismissed without prejudice by this court and not opposed by the defendants or counter appealed. *Lipari v. Novation LLC et al;* 0816-CV04217 also includes subsequent antitrust conduct by the defendants including acts as recently as February 2008.

3. This court's memorandum and order granted a dismissal the plaintiff opposed citing US Supreme Court authority in *Lawlor v. National Screen Service Corp*., 349 U.S. 322 75 S.Ct. 865, 99 L.Ed.

1122 supporting the plaintiff's right to bring new claims based on subsequent conduct of previous defendants:

> *"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).

4. This court's dismissal of the plaintiff's case contradicted the state of antitrust conspiracy pleading articulated by the US Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 U.S. 2197, 127 S. Ct. 1955 (2007) on May 21, 2007:

> "In *Twombly*, the Supreme Court held that the plaintiffs failed to state a claim under § 1 of the Sherman Antitrust Act. **The plaintiffs had alleged that defendants had engaged in parallel conduct, but had pleaded no set of facts making it plausible that such conduct was the product of a conspiracy**. In reaching this decision, the Supreme Court rejected language that long had formed part of the Rule 12(b)(6) standard, namely the statement *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. at 45-46." [emphasis added]

*Phillips v. County of Allegheny,* No. 06-2869 at page 7 (3rd Cir. 2/5/2008) (3rd Cir., 2008).

5. In an act of clear error by Hon. Judge Carlos Murguia's memorandum and order sanctioned the plaintiff for pleading the additional facts necessary to show the antitrust conspiracy was plausible.

6. The intervening change in controlling law for the Tenth Circuit and this court was *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007) and *Erickson* concerns the discussion of plausibility in *Twombly*:

> "What makes *Twombly's* impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new "plausibility" paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting Conley's "no set of facts" language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. Therefore, our review of how *Twombly* altered review of Rule 12(b)(6) cases must begin by recognizing the § 1 antitrust context in which it was decided. See e.g., *Twombly*, 127 S. Ct. at 1963 ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.")."

*Phillips v. County of Allegheny,* No. 06-2869 at page 7-8 (3rd Cir. 2/5/2008) (3rd Cir., 2008).

7. The Eight Circuit has adopted the plausibility change after Erickson as a necessity to plead the sufficient additional facts as the plaintiff's complaint was sanctioned for:

> "The plaintiffs need not provide specific facts in support of their allegations, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam), but they must include sufficient factual information to provide the "grounds" on which the claim rests, and to raise a right to relief above a speculative level. *Twombly*, 127 S. Ct. at 1964-65 & n.3."

*Schaaf v. Residential Funding Corporation*, No. 06-3694 at pg 5-6 (8th Cir. 2/22/2008) (8th Cir., 2008).

8. The Tenth Circuit described the effect of *Twombly* in *Ton Services*:

> "Prior to the Supreme Court's recent decision *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007), we reviewed the sufficiency of a complaint de novo and upheld dismissal only when it appeared the plaintiff could prove no set of facts in support of the claims that would entitle him to relief. *Coosewoon v. Meridian Oil Co*., 25 F.3d 920, 924 (10th Cir.1994). In *Bell Atlantic*, the Supreme Court articulated a new "plausibility" standard under which a complaint must include "enough facts to state a claim to relief that is plausible on its face." 127 S.Ct. at 194; *Alvarado v. KOB-TV, LLC*, ___ F.3d ___, ___, 2007 WL 2019752 at *3 (10th Cir. July 13, 2007) ("We look for plausibility in th[e] complaint.").13 Under either standard, all well-pleaded factual allegations are accepted as true and construed in the light most favorable to the plaintiff. *Alvarado*, 2007 WL 2019752 at *3."

*Ton Services, Inc. v. Qwest Corp*., 493 F.3d 1225 at 1235-1236 (10th Cir., 2007).

9. The court also described the effect of Twombly and Erickson in more detail along with the decision by this circuit to change its Rule 12 b6 pleading standard in footnote 2 to *Alvarado v. Kob-Tv, L.L.C*., 493 F.3d 1210 (10th Cir., 2007).

> "2. In *Bell Atlantic*, the Supreme Court stated that the old standard, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" is "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atlantic Corp*., 127 S.Ct. at 1968-69. Although the Supreme Court was not clear on the articulation of the proper standard for a Rule 12(b)(6) dismissal, its opinion in Bell Atlantic and its subsequent opinion in *Erickson v. Pardus*, ___ U.S. ___, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007), suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief. See *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir.2007) (considering Bell Atlantic and Erickson and concluding that a "plausibility" standard was what the Supreme Court intended).
>
> Although we now restate our Rule 12(b)(6) standard in order to bring it into compliance with Bell Atlantic, we emphasize that in this case our decision would be the same regardless of whether we used the old "no set of facts" standard, see, e.g., *David*, 101 F.3d at 1352, or adopt either a plausibility standard or a requirement that the complaint include factual allegations sufficient to "raise a right to relief above the speculative level." Bell Atlantic Corp., 127 S.Ct. at 1965."

*Alvarado v. Kob-Tv, L.L.C*., 493 F.3d 1210 (10th Cir., 2007).

10. The new Rule12(b)(6) standard which this court's memorandum and order conflicts with is precisely this plausibility. The memorandum and order faults the plaintiff's complaint as unbelievable and frivolous. The plaintiff's claims against new defendants and co-conspirators of US Bank and US Bancorp were based on subsequent conduct and separate and later transactions and therefore were plausible under *Lawlor v. National Screen Service Corp*., 349 U.S. 322 75 S.Ct. 865, 99 L.Ed. 1122. This court's memorandum and order has been contradicted by the intervening change of law in *Erickson v. Pardus*, No. 06-7317 (U.S. 6/4/2007) (2007), fleshing out the plausibility standard of *Bell Atlantic Corp. v. Twombly*,

127 U.S. 2197, 127 S. Ct. 1955 (2007) decided two weeks earlier on May 21, 2007 and directly over ruling this Circuit.

11. The plaintiff's action continues in the form of contract claims against US Bank and US Bancorp in this court as *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW and continues in the form of state law antitrust claims in 16th Circuit at Independence, Missouri action *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217. There has not been a dismissal of actions in their entirety as pointed out in *Avx Corp. v. Cabot Corp*., 424 F.3d 28 at pg 32 (Fed. 1st Cir., 2005). Therefore the matter *sub judice* has not reached finality permitting relief due to intervening change in controlling law. *Ute Indian Tribe v. Utah*, 114 F.3d 1513, 1521 (10th Cir. 1997).

12. The plaintiff appears for himself as assignee, the Tenth Circuit order declining jurisdiction for lack of timeliness stated the plaintiff who is not an attorney does not have to make a separate entry of appearance, *Lipari v. US Bancorp et al.* Case no. 07-cv-02146-CM-DJW and *Samuel K Lipari v. Novation LLC et al;* 0816-CV04217 will likely result in discovery and a jury determining what the defendants did to deprive the petitioner of his original attorney and to deprive the plaintiff of unimpeded representation by other attorneys.

13. A determination to deny this motion to reopen based on failing to recognize the plaintiff's pro se appearance as assignee would instantly result in a cause of action to accrue to the plaintiff for the value of the federal claims against the defendants in this action.

**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 caused a copy to be sent via electronic case filing to the undersigned opposing counsel on 2/26/08.

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S/ Samuel K. Lipari
_____
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