UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
KANSAS CITY, KANSAS

MEDICAL SUPPLY CHAIN, INC.,	)
Plaintiff,	)
v.	) Case No. 05-2299-KHV
NOVATION, LLC	) Formerly W.D. MO. Case No. 05-0210
NEOFORMA, INC.	) Attorney Lien
ROBERT J. ZOLLARS	)
VOLUNTEER HOSPITAL ASSOCIATION	)
CURT NONOMAQUE	)
UNIVERSITY HEALTHSYSTEM CONSORTIUM	)
ROBERT J. BAKER	)
US BANCORP, NA	)
US BANK	)
JERRY A. GRUNDHOFFER	)
ANDREW CESERE	)
THE PIPER JAFFRAY COMPANIES	)
ANDREW S. DUFF	)
SHUGHART THOMSON & KILROY	)
WATKINS BOULWARE, P.C.	)
Defendants.	)

ANSWER TO NOVATION DEFENDANTS' MOTION FOR SANCTIONS

Comes now the plaintiff Medical Supply Chain, Inc. and makes the present reply to the Novation defendants' motion to sanction Medical Supply or its counsel for correctly stating civil claims against the defendants.

The defendants in their multiple dismissals and baseless sanction motions are violating 28 U.S.C. Sec. 1927.

> "Section 1927 provides that "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct." Sanctions under Sec. 1927 are appropriate "for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir.1987)."

Resolution Trust Corp. v. Dabney, 73 F.3d 262 at 265 (C.A.10 (Okla.), 1995).

This is a case where the conspiracy evidence is exclusively in the hands of the defendants. Even if the plaintiff's claims were inaccurate, neither Medical Supply or its counsel could be sanctioned.

> "4 This is not, of course, a claim **the details of which were uniquely and exclusively in the control of the defendant. Were that the case, we would not find plaintiffs' conduct sanctionable**. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 896 (D.C.Cir.1989), aff'd in part, rev'd in part sub nom. *Cooter & Gell v. Hartmarx Corp.*, --- U.S. ----, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). "[Emphasis added]

White v. General Motors Corp., Inc., 908 F.2d 675 at fn 4 (C.A.10 (Kan.), 1990).

The Tenth's remand for sanctioning in the unpublished GE case is not a directive to this court to sanction Medical Supply or its counsel. It is also unlawful. See Exb. 1. In *Burkhart Through Meeks v. Kinsley Bank*, 852 F.2d 512 (C.A.10 (Kan.), 1988), the trial court again refused to sanction the plaintiff even after the case was remanded with instructions to do so: "On remand, the district court, after hearing, again denied the Bank's motion for sanctions, and the present appeal is from that order." *Id* at 513. The Tenth Circuit upheld the trial court's continued denial of sanctions:

> "In the instant case, we do not believe that the district court abused its discretion in denying the Bank's motion for sanctions. As the district judge noted, several rulings by a bankruptcy judge in Kansas did support the Burkharts' theory of the case. Also, Burkharts' counsel apparently conferred with the bankruptcy judge about the matter, and counsel communicated with the Bank about the possibility of litigation before the action was filed."

Burkhart Through Meeks v. Kinsley Bank, 852 F.2d 512 (C.A.10 (Kan.), 1988). The startling difference between the *Burkhart* plaintiff's position and Medical Supply's is that the plaintiff's counsel in *Burkhart* was wrong about the applicable law and was still not sanctioned. Here Medical Supply was right in its USA PATRIOT Act and antitrust claims against US Bancorp and right in its claims against the General Electric defendants including most especially Jeffrey Immelt.

Starting with Hon. Judge Murguia's review evading flourish falsely stating that Medical Supply's counsel had not researched the facts applicable to its claims against the US Bank defendants and repeating the same misrepresentation in his GE decision, the court has been in error. The record and the discoverable facts clearly show Medical Supply's antitrust claims were valid. The decisions evidence that the trial court and appellate panels understood them to be so because the memorandums do not make necessary findings of fact or law and when they do, they misstate the pled facts and demonstrate a complete renouncing of US Supreme Court pleading standards. Much of this is excusable however because of the spurious and unresearched legal arguments of Mr. Olthoff and Mr. Powers in which this action continues to suffer.

The defense counsel has demonstrated an inability to research the appropriate law of either circuit regarding the plaintiff's claims. In the two previous actions, this district was forced to make shaky *sua sponte* decisions to uphold a healthy free market skepticism toward Sherman Act claims that is required to protect the powerful statutes from being used to thwart competitive capitalism. One can only wonder at the career cost to various counsel, law clerks and judges associated with these actions where the defense is unwilling to exercise the most basic research and scholarship and the resulting decisions are clearly

erroneous on many issues. The complaint itself alleges that the defendants were forced to rely on the *ex parte* advocacy of Magistrate James P. O'Hara. Neither group of defendants bothered to research the case law giving a federal cause of action against misconduct in an earlier federal court. Similarly, all defense counsel were unaware that law firms are properly RICO defendants in the wake of such misconduct.

When the Tenth Circuit panel was forced to evade making independent findings of fact or law in order to uphold the clearly erroneous dismissal of the US Bancorp action, Medical Supply in its first en banc motion dated November 24, 2004 cautioned the Tenth Circuit that if left unchanged, the inaccurate and clearly erroneous decision on a critical national issue, the anticompetitive effects of GPO's which was the subject of US Senate Judiciary Committee hearings would become part of the policy dialogue on the appointment of judges.:

> "The conflict of the trial court with US Supreme Court authority (and the controlling cases of this circuit) on the requirements of initial pleadings raise extremely important questions of law. Medical Supply's brief identified these errors. **The fact that this appellate decision was released shortly after the third committee hearing on the GPO monopoly conduct and its costs to our nation certainly means that this decision left unchanged will become part of the coming judicial appointment policy debates in addition to the continuing search for a solution to the GPO monopoly**, which will now unfortunately discredit antitrust enforcement in favor of increased regulation. If a rehearing is granted, addressing the above cited mistaken points of law, debate on this important national policy issue will be aided."[Emphasis added]

Medical Supply En Banc Hearing Motion, pg 15-16. The panel and the entire court declined to rehear the matter and Medical Supply's brief went unread.

Soon thereafter, because of the defendants' scheme to deprive medical Supply of counsel described in Medical Supply's claims against the defendants, Chief Judge Deanell Reece Tacha was forced to choose between investigating how Magistrate James P. O'Hara influenced a Kansas District court case where Magistrate James P. O'Hara was not even assigned to honor Chief Justice William H. Rehnquist's commitment[1] to the US Congress on judicial complaints or sweeping Medical Supply's judicial complaint under the rug in an effort to save what was left of the honor of the Kansas District Court. Chief Judge Deanell Reece Tacha did not even wait for the transcripts before dismissing the plaintiff's complaint against Magistrate James P. O'Hara.

On Friday, July 1, 2005, Justice Sandra Day O'Connor announced she was retiring. Slate Magazine, an online publication of the Washington Post Newsweek company published on Wednesday,

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[1] *Rehnquist's Olive Branch Too Late?* Tony Mauro Legal Times 06-01-2004

July 6, 2005 an article entitled "A Different Shortlist How about an old-style conservative Supreme Court nominee?"By Emily Bazelon and David Newman. The article suggested Chief Judge Deanell Reece Tacha as an appropriate nominee to replace Justice Sandra Day O'Connor as a conservative in the traditional sense of the word, a distinguished jurist who believes in moderation, judicial restraint, and deference to Congress.

The defense counsels' lack of scholarship and continued unwillingness to address fundamental issues like the current US Supreme Court rulings regarding notice pleading or the Tenth Circuit's transaction and privity requirements for claim and issue preclusion fails to aid this Kansas District court and the Tenth Circuit in competently resolving this complex litigation addressing an important nationwide crisis. See Exb. 2 generally. The defense counsels' continuing *sub rosa* efforts to throw the outcome of this litigation have made it incredibly difficult to lobby political interest groups for Chief Judge Deanell Reece Tacha's nomination. It is deeply important to Kansas and the Tenth Circuit that she have the opportunity to advance and take with her much of the law we as practitioners have developed in this circuit.

After Medical Supply filed the present complaint, Novation, UHC and VHA disclosed to Neoforma, Inc. that their long term (10 year) exclusive contract for Neoforma's web based hospital supply distribution was keeping the price of that service much higher than it would be in a competitive market. Bob Zollars and Neoforma, Inc. was forced to publicize that disclosure because it is a publicly traded company. This publicized restraint of trade completes Medical Supply's Sherman 1 proof. ,Novation, UHC, VHA, Neoforma, Inc. and their named coconspirators are liable to Medical Supply Chain, Inc. for three times what Medical Supply would have made had it been allowed to enter the market for hospital supplies.

Jeffrey Immelt and General Electric which itself is in a consent decree with the US Justice Department over monopolization of the market for hospital supplies have helped to publicize that over 50,000 people a year die from the lack of efficient hospital supply chain systems:

> "Hospitals need to be efficient just as much as factories or supply chains--but they're not. The results are expensive, accounting for one-third of $1.3 trillion in U.S. medical spending in 2000, and perhaps deadly: It is estimated that medical errors lead to 50,000 deaths per year…GE Medical Systems, the $8 billion division that was once headed by GE Chief Executive Jeffrey Immelt, actually teaches Six Sigma as part of its consulting business. It now has Six Sigma projects at more than 3,000 health care providers, and gets dozens of new health care requests a month. The consulting business, known as GE Medical Services, is the fastest-growing unit of the medical systems division and should account for 50% of its business by the end of next year."

GE Helps Hospitals To Help Themselves Matthew Herper, Forbes.com, 02.01.02, 8:00 AM ET.

If Bruce Blefeld, Esq. Kathleen Bone Spangler, Esq of Vinson & Elkins L.L.P. and John K. Power, Esq. Husch & Eppenberger, LLC have no means to overcome their clients' guilt defend their clients if discovery is allowed, one has to ask who Blefeld, Spangler and Power expect to be indicted or impeached as a sacrifice to protect Novation, LLC, VHA Inc.,University Healthcare Consortium, Robert Baker And Curt Nonomaque's criminal conspiracy to artificially inflate healthcare costs though restraint of trade and racketeering.

CONCLUSION

Whereas for above stated reasons, the plaintiff Medical Supply respectfully requests that the court reject the defendants request to sanction Medical Supply or its counsel.

Respectfully Submitted

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Certificate of Service

I certify that on August 30th, 2005 I have served 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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